JR/HJH

ORIGINAL

Decision No. 79124

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

LEONA F. HORWITZ, dba UNKEL AGENCY,
Complainant,
vs.
PACIFIC TELEPHONE COMPANY,
Defendant.

Case No. 9155
(Filed November 30, 1970)

George G. Grover, Attorney at Law,
for complainant.
Richard Siegfried, Attorney at Law,
for defendant.

O P I N I O N

Background

Complainant commenced business as an employment agency in the year 1964 specializing in placing domestic help on a long term basis primarily serving the Orange County area. In 1966, she placed her first advertisement in the classified directory. Her gross income more than doubled, from $4,837 in 1966 to $10,311 in 1967. In 1968 she had a larger advertisement in the directory,[1] and her gross income jumped to $15,276. With similar advertising in 1969,[2] it was $16,842. In the twelve month period beginning November 1, 1969 her gross income increased to $28,615. She depends primarily upon yellow-page advertising to obtain prospective customers for her business.

Mr. Horwitz was formerly employed as an aerospace engineer but lost that employment as a result of the recent contraction of

1/ Directory published October - November, 1967.
2/ Directory published October - November, 1968.

the aerospace industry. He decided to begin a related employment agency business of a general type. Unlike Mrs. Horwitz's domestic business, his activities were and are designed to make placements in professional and other fields. However, it was decided to use the established fictitious name previously employed by his wife.

There is a significant marketing difference between the two classes of business. The employers with whom Mr. Horwitz deals are easily identifiable, and it is entirely feasible for him to contact them to determine when they need employees. Mrs. Horwitz's customers on the other hand cannot be pre-identified and she must wait for them to find her.

In order to promote Mr. Horwitz's new enterprise, complainants sought to place an additional advertisement in the "Employment Agencies" classification. The advertising representative indicated that under certain conditions the old and new advertisements could both be published in conformity with defendant's unpublished rule which generally prohibits a single business from having more than one advertisement in a single category. One of the conditions involved a separate telephone number for each division. Contracts were entered into between complainant and her husband and defendant for the two advertisements. The Horwitz's and the company entered in contracts for both advertisements.

During the process of making up the 1971 Orange County classified directory, to be issued in November, 1970, defendant's employees came to the conclusion that complainant and her husband were not entitled to two advertisements under the multiple display rule, and unilaterally canceled one of the advertisements. Because the advertisement for the general agency had already been finalized, complainant's advertisement for the established business was the one omitted. Complainant was given no effective opportunity to select the advertisement to be omitted, or to otherwise bring the advertisements into conformity with defendant's rule. Complainant

did not know of the omission until after the classified directory was distributed. The directory was issued on November 1, 1970.

Since that directory was issued, complainant's business has allegedly fallen off to a marked extent despite expensive and largely unavailing efforts to obtain a substitute means of reaching prospective customers.

The complaint seeks to have defendant required to publish an addendum to the directory in question plus damages in the sum of $2,000 per month for the interim period. Alternatively, complainant prays for monetary damages in the sum of $24,000 in compensation for the lost business and for expenses of attempting to provide a substitute for the omitted advertisement. Complainant's brief seeks reparations as an element in recovery.

Defendant contends the Commission has no jurisdiction to award damages (Glynn v. Pacific Telephone, 62 Cal. P.U.C. 511, Robert Bruce Walker v. Pacific Telephone, Decision No. 78215). Defendant further contends that its new tariffs, made effective November 23, 1970,[3/] which provide for higher recovery for gross negligence are not applicable to an omission in a directory issued prior to that date. It further asserts that the omission was accomplished "inadvertently". It contends that no addendum should be issued, based on the conclusions reached in a previous statewide investigation (P.T.&T. Rules, 65 Cal. P.U.C. 103 at 123-124).

Defendant concedes that its employees, if unable to contact complainant to obtain her consent to a change in the contracted-for advertising, should have allowed publication of both advertisements.

In essence, defendant contends that it should not be compelled to publish any form of substitute advertisement and that if complainant has any right to monetary recovery it must be asserted in the courts rather than before this Commission.

3/ Decisions Nos. 77406 and 77640 in Case No. 8593.

Hearing and oral argument was held before Examiner Gilman in Santa Ana on February 23 and 24, 1971. At the time of hearing, complainant had not filed or served an alternative action in any court.

Tariff Provisions

The tariff provisions of defendant cited in this decision are as follows:

"SCHEDULE CAL. P.U.C. NO. 36-T
RULES

RULE NO. 14

"Limitation of Liability

"(1) The provisions of this rule do not apply to errors and omissions caused by willful misconduct, fraudulent conduct or violations of law.

"(2) In the event an error or omission is caused by the gross negligence of the Utility, the liability of the Utility shall be limited to and in no event exceed the sum of $10,000.

"(3) Except as provided in Sections (1) and (2) of this rule, the liability of the Utility for damages arising out of mistakes, omissions, interruptions, delays, errors or defects in any of the services or facilities furnished by the Utility (including exchange, toll, private line, supplemental equipment, TWX, directory and all other services) shall in no event exceed an amount equal to the pro rata charges to the customer for the period during which the services or facilities are affected by the mistake, omission, interruption, delay, error or defect, provided, however, that where any mistake, omission, interruption, delay, error or defect in any one service or facility affects or diminishes the value of any other service said liability shall include such diminution, but in no event shall the liability exceed the total amount of the charges to the customer for all services or facilities for the period affected by the mistake, omission, interruption, delay, error or defect."

* * *

"(5) Subject to the provisions of Section (3) of this rule the Utility shall allow for errors or omissions in telephone directories an amount within the following limits:"

* * *

"c. For ... advertisements ... an amount based upon pro rata abatement of the charge in such degree as the error or omission affected the ... advertisement."

"SCHEDULE CAL. P.U.C. NO. 40-T
CLASSIFIED TELEPHONE DIRECTORY ADVERTISING
SOUTHERN CALIFORNIA

SPECIAL CONDITIONS"

* * *

"3. The Utility reserves the right to cancel any contract for advertising at the expiration of any issue ..." (Emphasis added.)

* * *

"9. The Utility reserves the right to accept or refuse any advertising when such action will not result in unlawful discrimination. Such acceptance or refusal is subject to the review of The Public Utilities Commission of The State of California."

Prior to the adoption of the previously cited Rule 14, 40-T also contained the following special condition:

"10. In case of the omission of a part of or other error in an advertisement, the extent of the Utility's credit allowance shall be a pro rata abatement of the charge in such a degree as the error or omission shall affect the entire advertisement which may amount to the abatement of the entire charge and in case of the omission of an entire advertisement, the extent of the Utility's credit allowance shall be an abatement of the entire charge." (Cancelled and superseded by Advice Letter No. 10332.)

Relief in Kind

The record discloses some confusion between the parties caused by the use of the word "addendum". Complainant's evidence was directed toward a mail-distributed advertisement for its service.

Complainant attempted to demonstrate that defendant could inexpensively and practicably make such an advertisement a bill insert. Complainant suggested that the advertisement should be designed with an adhesive strip with instructions to affix it to the front cover of the directory.

Whatever our views of the appropriateness of such distribution to ameliorate the alleged damage to complainant, such an order would be in excess of our jurisdiction. Defendant has not dedicated itself to providing a mail advertising service. Consequently, we could not justify such procedure as an order to perform utility service. Alternatively such an order might be considered to constitute equitable relief; however, we can find no statutory authority for the proposition that we have authority to require non-utility service as a remedy for defective utility service.

Defendant's presentation on the other hand apparently was based on the assumption that an "addendum" meant a publication and distribution of an amendment of the directory. An order to that effect would plainly be within our jurisdiction (Decision No. 62722, Case No. 7160) and would be within the scope of defendant's dedication to the extent that advertising was open to the public or a portion thereof. However, we have previously considered the general proposition of directory addenda in PT&T Rules (supra) and determined among other things that there was little probability that a prospective customer for a listed class of business would consult an addendum as well as the original directory.

Nothing in this record seriously challenges that conclusion. While we are not fully persuaded by defendant's showing as to the expenses of publication and distribution, we could not find such costs minimal.

Complainant's evidence is not sufficient to convince us that an addendum of this type would produce any significant amount of additional revenue. Absent such a showing, an order requiring an addendum would be, in all likelihood, more punitive than remedial.

Jurisdiction To Award Damages

This Commission has uniformly held that it has no jurisdiction to award damages as opposed to reparations (Jones v. P.T.& T., 61 Cal. P.U.C. 674). This holding can be made consistent with the use of the word "damages" in Sections 735, 736 and 737 of the Public Utilities Code by concluding that that word is an equivalent for a recovery in reparation. We are not persuaded that the definition of that word in the Civil Code (Civ. Code §§ 3300, 3333) should control our interpretation of this word as found in the Public Utilities Code. One of the corollaries of this interpretation is that Sections 735 through 737 create no additional remedies, but leave untouched the exclusive jurisdiction of the courts to award consequential damages, i.e., those damages within the Civil Code definition. This interpretation is not inconsistent with Section 738 which refers to Sections 734 to 737 as containing "remedies"; both Sections 734 and 737 clearly create remedies.

We again hold that only a court and not the Commission has the power to award consequential damages as opposed to reparations. Reparatory relief is limited to a refund or adjustment of part or all of the utility charge for a service or group of related services. Consequential damages on the other hand is an amount of money sufficient to compensate an injured party for all the injury proximately caused by a tortious act, or to replace the value of performance of a breached obligation. (Civil Code §§ 3300, 3333.)

REPARATIONS

Defendant has not attempted to collect for the service directly affected by the act complained of, i.e. the domestic division advertisement.

Thus, the only question concerning reparations is whether the value of any other of the services provided by defendant to complainant has been diminished (Faia v. PT&T, Decision No. 75379, Case No. 8647).

The record demonstrates a substantial reduction in incoming calls from potential customers attributable to the omission. While complainant's telephone is still useful for maintaining contacts with established customers and for other general business purposes, we estimate that the value has been diminished by at least two-thirds. Therefore, we will order a refund of such proportion of the base charges collected for the business telephone for number 714 541-3323 for the period between the date of publication of the present directory and the publication of the next directory.

Complainant's claim for reparations for the advertisement which was printed is not well founded, that publication has served its intended function undiminished in any way by defendant's omission. Likewise there is no showing that any of the other services, including toll service, and the listings and service attributable to the general division number are directly diminished in value by the omission.

Complainant incurred extra telephone expenses in her efforts to mitigate the injury incurred. While these expenses were proximately related to defendant's omission, they properly form an element of complainant's cause of action for damages, which must be tried in another forum, and so cannot support an award of additional reparations.

Complainant's brief has convinced us that our action in awarding reparations herein will not be an impediment to a full trial on the merits of her claim for damages arising out of the same transaction in another tribunal.

Retroactivity

Both parties urge varying interpretations of the nonretroactivity provisions of Decision No. 77406.[4/] Defendant urges that the November 23 date of tariff filing should control. Complainant urges that the injury should be looked at as a continuing offense or alternatively that the effective date of Decision No. 77406 should control.

Since we have determined that the issue of damages should be tried in court we express no opinion on this point. The opinion in Product Research Associates v. P.T.&T. (94 Cal. Rptr. 216) suggests that the courts will decide this question for themselves.

Findings

1. Defendant had provided yellow page advertising for complainant's domestic employment agency in 1967, 1968, 1969 and 1970. Yellow page advertising is the primary means by which complainant acquires customers.

2. Complainant and her husband were informed by an employee of defendant that defendant would print advertisements for both the existing domestic and the new general employment divisions of the employment agency.

3. Defendant contracted to provide two advertisements for complainant and her husband.

4. Defendant's employees subsequently determined that two advertisements should not be printed. The employees chose to eliminate the domestic division advertisement rather than that for the general division, without consulting complainant.

4/ Decision No. 77406 in Case No. 8593 originally required tariff filing 80 days after June 30, 1970. Decision No. 77640 in that same proceeding, based on an informal communication from the California Independent Telephone Association, extended the effective date of the required tariffs to November 23, 1970. There is no indication that this communication was served on defendant (Cf. § 1708, Pub. Util. Code).

5. Complainant was injured by the omission of the domestic division advertisement.

6. It has not been shown that an addendum to the directory in question would generate a significant amount of revenue for complainant.

7. Defendant has not dedicated itself to provide direct-mail advertising for the public or a portion thereof.

8. The value of complainant's basic business service on telephone number 714 541-3323 was diminished by two-thirds by defendant's omission of complainant's advertisement in the Orange County Classified Directory.

9. No other telephone service rendered to complainant has been diminished in value by such omission. No unreasonable discrimination will occur if reparation is made to complainant.

Conclusions

1. By entering into a contract to print, defendant waived any subsequent right or privilege to omit complainant's advertisement, and was thereafter obligated as a public utility to print complainant's domestic division advertisement.

2. An order for a publicly offered addendum is not justified.

3. An order for a mail-distributed advertisement would be in excess of our jurisdiction.

4. Complainant is entitled to abatement or rebate of two-thirds of the amounts collected or to be charged for basic business service on telephone number 714 541-3323 for the period between the publication of defendant's 1971 Orange County Directory and the publication of its 1972 Orange County Directory.

O R D E R

IT IS HEREBY ORDERED that:

1. Defendant shall rebate two-thirds of the charges collected for basic service for telephone number 714 541-3323 from November 1, 1970 to the effective date of this order or the publication of defendant's 1971 Orange County Directory, whichever is earlier.

2. Defendant shall abate two-thirds of the charges accruing for said service up to and including the date of publication of the 1972 Orange County Classified Directory.

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

Dated at San Francisco, California, this 8th day of SEPTEMBER, 1971.

William Symons, Jr.
Chairman

Commissioners