

ORIGINAL

Decision No. 79324

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

MELVIN MENDENCE,
dba/ALLIED APPLIANCE,

Complainant,

vs.

PACIFIC TELEPHONE AND
TELEGRAPH COMPANY,

Defendant.

Case No. 9145
(Filed November 9, 1970;
Amended November 23, 1970)

Richard N. Salle, Attorney at Law, for Allied
Appliance, complainant.

Robert E. Michalski, Attorney at Law, for The
Pacific Telephone and Telegraph Company,
defendant.

O P I N I O N

This is a complaint by Melvin Mendence, doing business as Allied Appliance (hereinafter referred to as Mendence) against The Pacific Telephone and Telegraph Company (hereinafter referred to as PT&T).

A duly noticed public hearing was held in this matter before Examiner Jarvis in San Francisco on February 10, 1971 and the matter was submitted on March 24, 1971.

Mendence is in the appliance business in San Jose, Santa Clara County. Among the product lines which he handles is Eureka brand vacuum cleaners and parts therefor. At all times herein mentioned, Mendence was the only factory authorized warranty service representative for Eureka in Santa Clara County. In 1969, Mendence

placed various advertisements in the yellow pages of PT&T's San Jose Directory.^{1/} There were no errors in the listings requested by Mendence. His complaint is that PT&T erroneously included under the Eureka trademark listing in the 1969 San Jose Directory yellow pages the name of a competitor and that this error was perpetuated, over his objection, in the 1970 directory. He seeks credit allowances for 1969 and 1970.

"Eureka" is a trademark of the Eureka Williams Company. PT&T's rules provide that the owner of a trademark has the right to specify the captions which appear thereunder in the yellow pages and those who may be listed under the captions. Where the trademark owner provides no instructions to PT&T, it permits any businessman to select a caption under the trademark, subject to a perfunctory determination that the advertiser has trademark merchandise on his premises.

Prior to November of 1969, the Eureka Williams Company had given PT&T no instructions with respect to the use of the Eureka trademark in the San Jose Directory. The 1969 Directory contained 4 captions under the Eureka trademark: "Factory Branch", "Factory Authorized Sales & Service", "Factory Authorized Warranty Service" and "Authorized Sales". Mendence was listed under Factory Authorized Sales & Service and Factory Authorized Warranty Service. He complains that a competitor, Moonlight Vacuum & Sewing Center (hereinafter called Moonlight) was erroneously listed under the caption Factory Authorized Sales & Service, that he was damaged as a result thereof and that this diminished the value of his advertising. Mendence notified PT&T of the alleged error immediately after he perused the Directory when it was issued in 1969.

^{1/} Mendence placed yellow page advertising in other PT&T directories in Santa Clara County. The only issues raised herein deal with the San Jose Directory (R.T.69.) All directory references hereafter are to the San Jose Directory.

There is a dispute between the parties, and conflicting evidence with respect thereto, as to whether representatives of PT&T indicated to Mendence that he would be given a credit allowance for his 1969 advertising because of the alleged error or whether he was told that he would be separately billed for the advertising because a dispute had arisen in connection therewith. It is not necessary to resolve the dispute. Even if it be assumed, for the sake of discussion only, that PT&T representatives told Mendence that he would be granted a credit allowance it would have no effect on the application of the tariff rules here in question. The normal rules of contracts and agency do not apply to a public utility in connection with the collection of its tariff charges. (Johnson v. PT&T Co., 66 Cal. P.U.C. 290, 295-96.) Since PT&T cannot directly or indirectly change its tariff provisions by contract, conduct, estoppel or waiver, statements by its employees which would provide such a result have no effect in this proceeding. (Johnson v. PT&T Co., supra; Transmix Corp. v. Southern Pacific Co., 187 Cal. App. 2d 257, 264-66.) In considering whether or not Mendence is entitled to any relief for 1969, we look to the pertinent facts in the light of PT&T's tariff provisions in effect at that time.

As indicated, the trademark holder had given PT&T no instructions prior to the issuance of the 1969 Directory. On November 4, 1968, Moonlight entered into a directory advertising agreement with PT&T for the 1969 Directory which included the advertisement complained of herein. The agreement contained the following provision:

"Advertiser warrants that he is authorized and entitled to advertise the business or product represented in the advertising and agrees to and hereby does indemnify and hold Company harmless of and from any and all claims, damages, demands or liability whatsoever arising out of or in any way caused by or connected with the printing or publication of the advertising."

PT&T had no knowledge which would indicate that Moonlight was not an "authorized" Eureka service agency until Mendence complained after the 1969 Directory was issued. Mendence concedes that the only theory upon which PT&T can be said to have committed an error or omission with respect to the 1969 Directory is one of absolute liability. This theory, however, is not the law. PT&T is not the guarantor of the truth of the advertisements appearing in its yellow pages. Its duty is to use reasonable care to prevent the publication of misleading advertising. (Viviano v. PT&T Co., 69 Cal. P.U.C. 159, 167-68.) There is nothing in the record which would justify a finding that PT&T did not use reasonable care with respect to the 1969 Directory. Mendence is entitled to no relief with respect thereto.

The 1970 Directory presents a different situation. It has already been established that Mendence complained to PT&T about the Moonlight advertisement immediately after the issuance of the 1969 Directory, which was around the first of February of that year. Mendence had numerous conversations with PT&T personnel complaining about the Moonlight 1969 Directory advertisement. He had discussions with a directory sales representative about rectifying the situation. As a result of these conversations, Mendence arranged for the trademark owner, Eureka Williams Company, to transmit to PT&T the following letter on November 3, 1969:

"This letter is to advise you to remove the caption of 'Factory Authorized Sales and Service' in the San Jose, Campbell and Los Altos directories from the Eureka TM & TN listings under the classification of vacuum cleaner dealers. The only caption available for our dealers to use in these phone books is 'Authorized Sales', with the exception of Allied Appliance 1228 A Lincoln Avenue San Jose Telephone number 293-3739. This firm is the only one authorized to use the caption of 'Factory Authorized Warranty Service'."

The PT&T witness claimed lack of knowledge of the letter by the company. However, we find the letter was transmitted to PT&T.

The 1970 Directory repeated under the Eureka trademark the same captions which appeared in the 1969 Directory. Mendence was listed under Factory Authorized Warranty Service and Moonlight was listed under Factory Authorized Sales & Service. The Commission finds that the repetition of the 1969 Directory captions in the 1970 Directory, in the light of the facts heretofore set forth, indicates that PT&T failed to use reasonable care in connection therewith. This was an error or omission for which a credit allowance may be ordered. (B.U. Beckman v. PT&T Co., 63 Cal. P.U.C. 305.)

We now consider the quantum of the credit allowance. PT&T contends that the Commission cannot consider the extent to which a customer has been injured or damaged in determining the credit allowance. There is no merit in this contention. The fact that PT&T has committed an error or omission does not, ipso facto, mean that a customer is entitled to a credit allowance. It must also be established that the customer has suffered some injury or damage as a result of the error or omission. Determining the extent of the injury or damage suffered is not the award of civil damages (see, Product Research Associates v. Pacific Telephone & Telegraph Co., 94 Cal. Rptr. 216) but a method of determining the amount of the credit allowance. (Faia v. PT&T Co., Decision No. 75397 in Case No. 8647; Frost v. PT&T Co., 63 Cal. P.U.C. 801, 806 (see Finding No. 6).)

Mendence's sales can be gauged by his parts and equipment purchases. In 1968 his purchases from Eureka were as follows: parts, \$6,157.37; vacuums, \$8,080.66. In 1969: parts, \$3,268.80; vacuums, \$5,719.77. In 1970: parts, \$3,218.12; vacuums, \$4,820.40. During this period of time his gross sales were as follows: 1968, \$33,563.79; 1969, \$36,446.44 and 1970, \$46,289.85. The record also indicates that Mendence is located in the central part of San Jose and Moonlight is located in the northern part of that city, which is closer to the city of Santa Clara and the northern portion of Santa Clara County. After 1969, Mendence's Eureka business from customers in the city of Santa Clara decreased.

At the time the events here under consideration occurred Rule 17(B)(3) of PT&T's Tariff (Cal. P.U.C. No. 36T) provided in part as follows:

"In case of the omission of a part of or other error in an advertisement, the extent of the Company'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 abatement of the entire charge and in case of the omission of an entire advertisement, the extent of the Company's credit allowance shall be an abatement of the entire charge."

The Commission has interpreted that provision as applying not only to the specific service involved but to any other services affected during the period under consideration. (Investigation of Liability of Telephone Corporations, Decision No. 77460 in Case No. 8593, at pp. 15-16.)

Mendence claims that he is entitled to a credit allowance for all of his 1970 Directory yellow page advertising, which amounted to \$90.75 per month. This is not in accord with the rules heretofore set forth. The record indicates that included in the yellow page advertising were ads for product lines other than Eureka (e.g., General Electric, Hoover, Sunbeam, etc.) and for services not connected with Eureka. It is clear that the error in the Eureka trademark section did not affect the other advertisements and no credit allowance should be allowed therefor. Two of Mendence's listings under the Eureka trademark were paid for by Eureka Williams Company. Mendence paid for one advertisement under the trademark listing at the rate of \$2.75 per month. This listing was affected by PT&T's error. In addition, the Commission finds that a portion of Mendence's basic service was affected by the error. We find this to be 45 percent, which is derived by comparing the percentage of Mendence's Eureka sales to his gross volume in 1968, prior to the 1969 Moonlight listing which was perpetuated in 1970. Mendence's basic rate in 1970 was \$16.75.

The value of the total amount of services affected by PT&T's error is \$123.48, which is computed as follows: $12 \times \$2.75 = \33.00 plus $45\% \times \$16.75 = \$7.54 \times 12 = \$90.48$ for a total of \$123.48. As indicated, the amount of damage suffered by Mendence is at least equal to the amounts subject to credit allowance and he should be granted one in the amount of \$123.48. No other points require discussion. The Commission makes the following findings and conclusions.

Findings of Fact

1. Mendence is in the appliance business in San Jose, Santa Clara County. Among the product lines which he handles is Eureka brand vacuum cleaners and parts therefor.
2. "Eureka" is a trademark of the Eureka Williams Company.
3. At all times herein mentioned, Mendence was the only factory authorized service representative for Eureka in Santa Clara County.
4. Prior to November of 1969, the Eureka Williams Company had given PT&T no instructions with respect to the use of the Eureka trademark in the San Jose Directory.
5. The 1969 Directory was issued about the first of February of that year. It contained 4 captions under the Eureka trademark in the yellow pages, namely: "Factory Branch", "Factory Authorized Sales & Service", "Factory Authorized Warranty Service" and "Authorized Sales". Mendence was listed under Factory Authorized Sales & Service and Factory Authorized Service.
6. Moonlight was listed under the Eureka trademark in the 1969 Directory under the caption of Factory Authorized Sales & Service.
7. On November 4, 1968, Moonlight entered into a directory advertising agreement which, among other things, provided for the aforesaid advertisement under the Eureka trademark in the 1969 Directory. Said agreement provided in part that:

"Advertiser warrants that he is authorized and entitled to advertise the business or product represented in the advertising and agrees to and hereby does indemnify and hold Company harmless of and from any and all claims, damages, demands or liability whatsoever arising out of or in any way caused by or connected with the printing or publication of the advertising."

8. PT&T used reasonable care in connection with accepting and publishing the Moonlight advertisement under the Eureka trademark in the 1969 Directory.

9. Immediately after the 1969 Directory was distributed, Mendence complained to PT&T about the Moonlight advertisement under the caption of Factory Authorized Sales & Service. This was the first time PT&T had any knowledge of the claim that a listing of Moonlight under the caption of Factory Authorized Sales & Service might be erroneous.

10. Mendence demanded that PT&T give him a credit allowance because of the Moonlight advertisement. He had numerous conferences with PT&T representatives in connection with his demand.

11. In February of 1969, PT&T was aware of Mendence's contention that Moonlight was erroneously listed under the Eureka trademark under the caption Factory Authorized Sales & Service.

12. On November 3, 1969, the Eureka Williams Company transmitted to PT&T a letter which stated:

"This letter is to advise you to remove the caption of 'Factory Authorized Sales and Service' in the San Jose, Campbell and Los Altos directories from the Eureka TM & TN listings under the classification of vacuum cleaner dealers. The only caption available for our dealers to use in these phone books is 'Authorized Sales', with the exception of Allied Appliance 1228 a Lincoln Avenue San Jose Telephone number 293-3739. This firm is the only one authorized to use the caption of 'Factory Authorized Warranty Service'."

13. The 1970 Directory repeated under the Eureka trademark the same captions which appeared in the 1969 Directory. Moonlight was again listed under Factory Authorized Sales & Service.

14. PT&T did not use reasonable care when it listed Moonlight in the 1970 Directory under the Eureka trademark under the caption of Factory Authorized Sales & Service. Said listing was an error within the purview of PT&T's tariff (Cal. P.U.C. No. 36T).

15. Mendence's sales can be measured by his parts and equipment purchases. In 1968 his purchases from Eureka were as follows: parts, \$6,157.37; vacuums, \$8,080.66. In 1969: parts, \$3,268.80; vacuums, \$5,719.77. In 1970: parts, \$3,218.12; vacuums, \$4,820.40. During this period Mendence's gross sales were as follows: 1968, \$33,563.79; 1969, \$36,446.44 and 1970, \$46,289.85.

16. Mendence is located in the central part of San Jose and Moonlight is located in the northern part of that city and closer to the City of Santa Clara. Mendence's Eureka business from customers in the City of Santa Clara declined after the Moonlight advertisement appeared in the 1969 Directory. The decline was perpetuated by the advertisement being repeated in the 1970 Directory.

17. During the life of the 1970 Directory, Mendence's monthly yellow page advertising charges amounted to \$90.75. These charges were for advertising Eureka and other product lines. Eureka Williams Company paid for certain of Mendence's listings under the Eureka trademark. Mendence paid for one listing under the Eureka trademark at the rate of \$2.75 per month.

18. The basic rate for Mendence's telephone service in 1970 was \$16.75 per month.

19. The 1970 advertising for product lines other than Eureka was not affected by PT&T's error in the Eureka listing.

20. PT&T's error in listing Moonlight in the 1970 Directory under the caption of Factory Authorized Sales & Service under the Eureka trademark adversely affected and impaired the advertisement for which Mendence paid \$2.75 per month and 45 percent of Mendence's basic telephone service.

21. Mendence suffered injury or damage as the result of PT&T's aforesaid conduct of at least \$123.48.

22. Mendence should have received a credit allowance from PT&T of \$10.29 per month for the year in which the 1970 Directory was in effect. No discrimination will result from the payment of interest on reparations for said amount.

Conclusions of Law

1. Mendence is not entitled to any credit allowance for the year 1969.

2. PT&T should be ordered to pay Mendence reparations for the 12 months the 1970 Directory was in effect calculated at \$10.29 per month with interest at 7 percent calculated from the last day of the month for which the reparation is allowed for a total of \$123.48 plus interest.

O R D E R

IT IS ORDERED that The Pacific Telephone and Telegraph Company shall pay to Melvin Mendence reparations for the 12 months PT&T's 1970 San Jose Directory was in effect calculated at the rate of \$10.29 per month, with interest on each \$10.29 at the rate of 7 percent per annum until paid, calculated from the last day of the month for which the reparation is allowed, for a total of \$123.48 plus interest.

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

Dated at San Francisco, California, this 16th day of NOVEMBER, 1971.

[Signature]
Chairman
[Signature]
[Signature]
[Signature]
Commissioners