

Decision No. 80450**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

MORRES F. MADSEN, dba NOMAD
FASTENER COMPANY,

Complainant,

vs.

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY,

Defendant.

Case No. 9272
(Filed September 17, 1971)Morres F. Madsen, in propria persona,
complainant.Richard Siegfried, Attorney at Law, for
The Pacific Telephone and Telegraph
Company, defendant.T. I. Tozauer, for the Commission staff.O P I N I O N

Complainant, Morres F. Madsen, dba Nomad Fastener Company, hereinafter called Madsen, in his complaint against The Pacific Telephone and Telegraph Company, hereinafter called Pacific, alleges that:

1. Pacific through one of its agents entered into a contract with Madsen for an advertisement in Pacific's 1969 Los Angeles Classified Directory.

2. In accepting the contract the agent for Pacific stated there was a time submission consideration for accepting the artwork for the advertisement, but upon receipt of the proof from Pacific, line copy changes could be made by Madsen which would appear as part of the advertisement in the 1969 directory.

3. Upon receipt of the proof of the advertisement, copy changes were made and submitted by Madsen to Pacific, which then stated that no changes could be made in the proof submitted by Pacific to Madsen as such proofs were final copies only.

4. The advertisement of Madsen printed in the 1969 Los Angeles Classified Directory of Pacific had little or no value to Madsen as an intended sales aid by reason of the failure of Pacific to comply with its agreement to permit changes to be made in the proof copy of the advertisement.

5. Prior to the publication of the 1969 directory Pacific was informed of the contract stipulation and when asked what remedy was available stated that an agent would contact Madsen. No agent appeared and no remedy was offered to Madsen by Pacific.

6. Numerous subsequent calls and contacts made by Madsen with Pacific resulted in the same indifference and evasion by Pacific.

Madsen requests that the Commission issue an order requiring Pacific to refund to Madsen the \$2,160 charges paid by Madsen to Pacific for said advertisement and in addition to pay to Madsen damages in the amount of \$10,000.

Pacific filed its answer to the complainant on November 19, 1971. In its answer Pacific admitted that:

1. Its corporate name is The Pacific Telephone and Telegraph Company and its principal place of business is 140 Montgomery Street, San Francisco, California 94105.

2. Madsen signed a contract for advertising in Pacific's August 1969 Los Angeles Classified Directory on April 17, 1969.

3. Upon receipt of the proof of the advertisement copy changes were made and submitted by Madsen to Pacific, which then stated that no changes could be made in the proof submitted by Pacific to Madsen as such proofs were final copies only.

Pacific denied the other allegations of the complainant.

As a first separate and affirmative defense Pacific alleges that:

1. Assuming solely for the purposes of argument that complainant has a cause of action, that cause of action relies on facts which occurred early in 1969.
2. Any cause of action which complainant may have had would have arisen no later than the time the directory in question was issued; namely, August 1, 1969.
3. As the complaint was filed with the Commission on September 17, 1971 which is more than two years after August 1, 1969, the complaint is barred by Section 735 of the Public Utilities Code which provides in pertinent part as follows:

" . . . All complaints for damages resulting from a violation of any of the provisions of this part, except Sections 494 and 532, shall either be filed with the Commission, or where concurrent jurisdiction of the cause of action is vested by the Constitution and laws of this State in the courts, in any court of competent jurisdiction, within two years from the time the cause of action accrues, and not after."

Sections 494 and 532 of the Public Utilities Code deal with a common carrier or public utility charging or receiving compensation different than that provided in its tariff.

As a second separate and affirmative defense Pacific alleges as follows:

1. Madsen seeks \$10,000 in damages in addition to a refund of the charges for the advertisement in question. The Commission has repeatedly held that it has no jurisdiction to award damages.
2. Pacific denies that Madsen is entitled to any relief and prays that the complaint be dismissed.

Public hearing on the complaint was held before Examiner Cline in Los Angeles on March 10, 1972. The matter was taken under submission upon the filing of the transcript on April 14, 1972.

Section 532 of the Public Utilities Code provides in part as follows:

"532. Except as in this article otherwise provided, no public utility shall charge, or receive a different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates, tolls, rentals, and charges applicable thereto as specified in its schedules on file and in effect at the time, ..."

Section 736 of the Public Utilities Code provides as follows:

"736. All complaints for damages resulting from the violation of any of the provisions of Sections 494 or 532 shall either be filed with the Commission, or, where concurrent jurisdiction of the cause of action is vested in the courts of this State, in any court of competent jurisdiction within three years from the time the cause of action accrues, and not after. If claim for the asserted damages has been presented in writing to the public utility concerned within such period of three years, such period shall be extended to include six months from the date notice in writing is given by the public utility to the claimant of the disallowance of the claim, or of any part or parts thereof specified in the notice."

The applicable tariff provisions of Pacific's Rule No. 14 in Schedule Cal. P.U.C. No. 36-T read as follows:

"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 shall 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...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.

"(4) * * *

"(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 listings, additional lines of information and advertisements in alphabetical and classified directories furnished as set forth in Schedule Cal. P.U.C. Nos. 39-T, 40-T and 106-T, an amount based upon pro rata abatement of the charge in such degree as the error or omission affected the listing, additional line of information or advertisement."

Based upon a consideration of the record herein the Commission finds as follows:

1. On April 17, 1969, Madsen placed and Pacific accepted an advertising order for a Bolts and Nuts advertisement in the next issue of Pacific's Los Angeles Classified Directory.
2. Said order provided for a bold type listing at \$3.25 per month as well as a double half column display advertisement (the advertisement in question) at \$180 per month.

3. On June 17, 1969 a proof sheet of the double half column display advertisement was mailed to Madsen. On the proof sheet the name, address, and telephone number of Nomad Fastener Company. correctly appeared in distinctive type and size at the bottom of the ad. The artwork picture of the bolt was given attention right in the middle of the ad. The headline copy "Bolts and Nuts" was in extremely large type and the copy underneath it stated that Nomad had the most effective timesaving and efficient inventory equipment available on the market. The ad design was correct, the artwork was correct, the copy was correct and the entire advertisement was shown as given to Pacific by Madsen's advertising agent with the exception that the incorrect telephone number furnished by Madsen's advertising agent was corrected from 688-0857 to 686-0857.

4. The following language appeared on said proof which was mailed by Pacific to Madsen on June 17, 1969:

"If corrections are necessary please print change in margin, sign and return proof within 5 days."

5. A proof of the advertisement with the copy underneath "Bolts and Nuts" changed to read "We have the most effective time-saving fastener inventory equipment available on the market." and with the following phrases added beside the picture of the bolt was returned to Pacific by Madsen's General Manager 16 days later on July 3, 1969:

| | | |
|--|-------------------------|---|
| "hose and fittings solderless terms. threaded rod set screws tube fittings | [Picture of Bolt] | socket cap screws machine screws sheet metal screws copper tubing brass fittings" |
|--|-------------------------|---|

6. On July 3, 1969, when the proof was returned by Madsen's General Manager, Pacific was in the third day of printing its classified directory and well past the "B's" for Bolts and Nuts, and so it was too late to make changes in the advertisement.

Mr. Lawyer, the advertising salesman for Pacific who had solicited the advertising from Madsen, thereupon called Mr. Madsen at his office. When Mr. Lawyer was told that Mr. Madsen was out of

town, Mr. Lawyer spoke to Mr. Gary Hanak, Mr. Madsen's General Manager, who had signed and returned the proof to Pacific and explained that the proof had been returned to Pacific too late to make the changes in copy that had been requested.

7. Had Madsen or his General Manager returned the proof to Pacific on or before June 30, 1969 or within thirteen days after June 17, 1969, the change and additions requested by Madsen's General Manager could have been made by Pacific.

8. The advertisement of Madsen was printed in the Los Angeles classified telephone directory of Pacific as shown on the proof mailed to Madsen by Pacific on June 17, 1969, and without the change and the additions made on the proof by Madsen's General Manager.

9. The omissions from the advertisement were caused by Madsen's failure to return the proof with the change and additions he desired within thirteen days after said proof was mailed to him and not by reason of any failure or negligence of Pacific to include such change and additions at a time Pacific could reasonably have done so.

10. The Los Angeles Classified Telephone Directory in which the subject advertisement was published was distributed to Pacific's subscribers on August 1, 1969.

11. Subsequent to the distribution of the directory Madsen telephoned to Pacific representatives and sought an adjustment by reason of the omissions from Madsen's advertisement which appeared therein.

12. In response to Madsen's claim for an adjustment Pacific responded by letter to Madsen dated September 25, 1970 as follows:

"You questioned the advertising appearing in the Los Angeles August 1969 Yellow Pages Directory. The contract was signed on April 1[7], 1969 which included a double 1/2" ad under 'Bolts and Nuts'.

"A proof was mailed to you on June 17, 1969 and was returned on July 3, 1969 with copy changes. When the proof was received in our office you

were contacted and advised that it was too late for changes; therefore, the ad appears as it was set on the original proof. Advertising is not sold contingent upon receipt of a proof.

"In reviewing your inquiry, I am unfortunately not able to make any adjustments."

13. The complaint herein was filed on September 17, 1971.

The Commission concludes as follows:

1. Under Section 736 of the Public Utilities Code, Madsen made a timely filing of the complaint herein for damages pursuant to the tariff provisions of Pacific's Rule No. 14 in Schedule Cal. P.U.C. No. 36-T.

2. As no error or omission was made in the subject advertisement by reason of any negligence of Pacific, Madsen is not entitled to a refund of \$2,160 or any other sum paid to Pacific, or any other relief pursuant to the tariff provisions of Pacific's Rule No. 14 in Schedule Cal. P.U.C. No. 36-T, or any provision of law.

3. The Commission does not have authority to award legal damages, as such (Glynn v. PT&T 62 CPUC 511 (1962), Schumacher v. PT&T 64 CPUC 295 (1965)).

4. The complaint herein should be dismissed.

O R D E R

IT IS ORDERED that the complaint herein is dismissed.

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

Dated at San Francisco, California, this 31st day of AUGUST, 1972.

James L. Ferguson
President
William Sproul
[Signature]
[Signature]
Commissioners

-3- Commissioner J. P. Vukasin, Jr., being necessarily absent, did not participate in the disposition of this proceeding.