

Decision No. 85344

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

SAN MATEO SPORTS CENTER,  
a California Corporation,

Complainant,

vs.

PACIFIC TELEPHONE AND  
TELEGRAPH COMPANY, a  
Corporation,

Defendant.

Case No. 9955  
(Filed August 8, 1975)

L. M. Hammer, for San Mateo Sports Center,  
a California corporation, complainant.  
Michael M. Ritter, Attorney at Law, for  
The Pacific Telephone and Telegraph  
Company, defendant.

O P I N I O N

This is a complaint by San Mateo Sports Center (San Mateo), a California corporation, against the Pacific Telephone and Telegraph Company (PT&T) for a full credit allowance for an incorrect yellow pages ad in the 1975 yellow pages directory. This matter was heard and submitted before Examiner Phillip E. Blecher on November 12, 1975.

The contract between the parties was for a two-inch in-line ad at the rate of \$22.05 per month for 12 months, a total of \$264.60.

The essential facts are undisputed,<sup>1/</sup> and are as follows:

San Mateo began business December 8, 1973, and placed a one-inch in-line yellow pages ad which contained three brand names of sporting goods and equipment and some services performed by San Mateo for the sum of \$11.25 per month for 12 months (the life of the directory) in the directory to be published in April 1974. In the

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<sup>1/</sup> Some conflict in the evidence will be discussed later.

fall of 1974 San Mateo purchased about \$2,500 worth of Easton aluminum baseball bats. San Mateo's president testified that he wanted to include these in the new yellow pages ad, as he was to get an advertising allowance from the manufacturer. (The amount of this allowance, five percent of the purchase price, or about \$125.00, was not determined before the ad was placed.) San Mateo also wanted to delete some copy from the earlier ad and insert about ten more brand names. Because the directory salesman advised that the ad would look crowded and because of the Easton advertising allowance, San Mateo doubled the size of the ad, and added four more brand names to help fill the space.

San Mateo's main purpose was to sell the Easton bats for the coming baseball season. Baseball equipment begins selling in February and is slow after May. The yellow pages directory is not published until the end of March.

The ad was published with two admitted errors:

1. The name Easton was misspelled Gaston.
2. A hyphen was omitted between two of the brand names in one line.

In all other respects the ad was as ordered. San Mateo maintains that it expected to sell 40 to 80 percent of the bats as a result of the ad, but only ten percent were sold, which San Mateo attributes to the error in the ad. San Mateo admits that it should have sold more of the other brands advertised, but is unable to quantify this in any manner. Its sales volume had increased from \$113,000 in its first fiscal year to a rate of about \$180,000 per year.

The following facts were disputed:

1. Was a proof of the ad requested?  
PT&T denies that it was, indicating that proofs are not normally furnished on an in-line ad, but would be furnished if requested on order form, but the box providing for the request was blank (Exhibit 2).

2. Were the words "aluminum bats" to be inserted in the ad after Easton, as San Mateo contends?
3. Was the copy sheet (Exhibit 2) signed in blank, as San Mateo contends?

The resolution of these questions are not necessary for the determination of this matter because of our views in this regard.

San Mateo contends that as a result of the admitted errors, the ad had no monetary value and a 100 percent allowance should be ordered. We believe this is a frivolous, untenable, and unproved position. Assuming everything alleged by San Mateo to be true, we cannot see how an ad, twice as large as the prior ad, with 13 additional properly spelled brand names, most of which were included at San Mateo's request, could have no value whatsoever, even with two admitted errors (one of which is insignificant).

After the error was discovered, PT&T had offered San Mateo a 50 percent allowance. After this complaint was filed, the offer was increased to 75 percent. Both offers were refused, as San Mateo's president indicated he wanted a full 100 percent credit, because it would cost PT&T more to bear the expense of going to hearing than giving San Mateo a full 100 percent allowance. This is true, but is no justification for attempting what amounts to a form of legal extortion, in lieu of a reasonable settlement. PT&T's indication at the hearing that a five percent credit was apropos for the diminution of value was equally unreasonable.

San Mateo is attempting to obtain damages for breach of its contract with PT&T, because it asserts that its loss of profits due to the ad's error far exceeded the total value of the ad. If this is true (and it was not proven here), the remedy lies in the courts, because this Commission has no jurisdiction to award damages for breach

of contract or tortious conduct (Mak v PT&T (1971) 72 CPUC 735). This Commission has the right to award reparations under Sections 734 et seq. of the Public Utilities Code. Pursuant thereto, we have previously held that where an error diminishes the value of the service for which the customer has contracted, a credit allowance may be granted for an amount not to exceed the total amount of such service (Limitation of Liability Case (1970) 71 CPUC 229, 247; Shumate v PT&T D.84634 dated July 7, 1975 in C.9729). PT&T has embodied this rule, as required, in its Tariff No. 36T, Rule 14. We believe this rule is fully applicable to the facts here. The ad contained an error which diminished its value. We reject complainant's claim of total diminution, since the overwhelming portion of the ad was correct, and we cannot measure San Mateo's subjective motivations in placing the ad. Nor can we accept PT&T's claim of five percent diminution. We believe that a fair measure of diminution here is that amount by which the cost of the improper ad exceeded the prior year's ad, since we fail to see how the value of an ad twice as large with 13 additional brands listed could be any less than the prior year's ad. This is computed as follows:

Defective ad	= \$22.05 per month
Prior ad	= <u>\$11.25 per month</u>
Difference	= \$10.80 per month
Annual Difference	\$10.80 x 12 = \$129.60

We shall order reparations in the sum of \$129.60 in the form of a credit allowance against any sums due from San Mateo to PT&T, or by way of refund, if no such sums are presently due.

### Findings

1. San Mateo ordered a two-inch in-line ad in the 1975 yellow pages directory which contained 17 brand names, one of which (Easton) was misspelled. The omission of a hyphen between two other brand names was insignificant. This ad cost \$22.05 per month for 12 months.
2. San Mateo ordered a one-inch in-line ad in the 1974 yellow pages directory which contained three brand names, other copy, no errors, and cost \$11.25 per month for 12 months.
3. The error in the 1975 ad did not totally diminish its value.
4. The error in the 1975 ad diminished its value more than five percent.
5. The spelling error in the 1975 ad reasonably diminished its value to a sum not less than the value of the prior year's ad. The missing hyphen did not further diminish its value.
6. San Mateo should be awarded reparations in the sum of \$129.60 for the defective 1975 ad. This sum is the annualized difference between the cost of the 1974 and 1975 ads.
7. No discrimination will result from the award of such reparations.

### Conclusions

1. PT&T should be ordered to pay San Mateo reparations in the sum of \$129.60, without interest due to the 1975 yellow pages ad discussed above.
2. This sum should be credited against the balance owing PT&T from San Mateo, if any. If no balance exists, PT&T should refund the sum of \$129.60 forthwith.
3. San Mateo is not entitled to any other relief herein.

O R D E R

IT IS ORDERED that:

1. The Pacific Telephone and Telegraph Company pay reparations of \$129.60 to San Mateo Sports Center forthwith as follows:

- a. As a credit allowance against the balance due and owing from San Mateo Sports Center to PT&T, if any;
- b. If no such balance exists, then by cash refund.

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

Dated at San Francisco, California, this 13<sup>th</sup> day of JANUARY, 1976.

William J. Lyons, Jr. President  
Verne L. Sturgeon  
Alon  
Robert S. Fennell Commissioners