ALJ/JCG/rmn

Decision 90 01 045 JAN 24 1990

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

TOM HORSLEY, Complainant, vs. PACIFIC BELL (U 1001 C), Defendant.	Case 88-05-055 (Filed May 31, 1988)

Tom Horsley, for himself, complainant.
Bonnie Packer, Attorney at Law, for Pacific Bell, defendant.

O P I N I O N

Complainant Tom Horsley alleged that defendant Pacific Bell (PacBell) had refused to communicate with him except in writing. He alleges that this refusal began without warning and has caused him emotional distress. He also asserted that PacBell has threatened to discontinue his service. He further alleged that operators have hung up on him, placed him on hold, used offensive tones of voice, and transferred him to non-existent persons. He alleges that operators have refused to give him an operator number. He seeks:

> "[A] determination of whether the utility violated its own tariffs."
>
> "[An] interpretation of Rule 11." (The relevant tariff item is Part 10.a. through c. of Rule 11, hereinafter Part 10.)
>
> "[An] explanation of utility's actions."

PacBell moved to dismiss and answered. Its pleading alleged that complainant has made hundreds of often lengthy telephone calls to PacBell employees. It alleged that these calls have involved many trivial issues, and that he was abusive, annoying, and used obscene language.

PacBell argued that it did not violate its tariff by requiring complainant to communicate with it in writing. The tariff rule provides:

"RULE NO. 11 - DISCONTINUANCE AND RESTORATION OF SERVICE (Cont'd)

"A. REASONS FOR DISCONTINUANCE OF SERVICE (Cont'd)

"10. Telephone Calls with Intent to Annoy

"a. The Utility may discontinue service of any customer who, with intent to annoy, telephones another and addresses to or about such other person any obscene language or addresses to such other person any threat to inflict injury to the person or property of the person addressed or any family member.

"b. The Utility may discontinue service of any customer who, with intent to annoy, repeatedly telephones another without disclosing his true identity to the person answering the telephone, whether or not conversation ensues during the telephone calls.

"c. If the telephone calls described in Part 10.a. and b. preceding are placed to the Utility, the Utility shall not discontinue service, but shall make reasonable efforts to persuade the customer not to place such calls, including refusal to transact business with the customer except by written communications."

PacBell argued that it could not tell precisely what it was accused of and that this defect should justify dismissal under

the Commission's Rules of Procedure. It also pointed out that complainant failed to allege that he has sought the assistance of our Staff to resolve the dispute informally.

In order to limit the effect of ambiguity in the pleadings, the Administrative Law Judge (ALJ) ruled that the scope of issues did not include a possible discontinuation of service under Tariff Part 10.a. or 10.b. The Ruling, which also dealt with discovery issues, was issued November 16, 1988.

Hearing

The matter was set for evidentiary hearing on March 23, 1989 before ALJ Gilman. Complainant Horsley testified on his own behalf. PacBell called two of its employees as witnesses, a business office manager and a customer relations manager.

Because both parties had prepared evidence which could not be presented without setting an additional day of hearing, the ALJ permitted late-filing of exhibits, giving each party time to object to the offers. Both exhibits were admitted over objection.

Both parties filed concurrent briefs on May 22, 1989 whereupon the matter was taken under submission. Complainant's brief included claims for additional relief not previously sought. There was an exchange of correspondence, culminating in a letter from complainant dated August 8, 1989 arguing that the Commission's Rules did not preclude consideration of relief not sought in the complaint.

In response to this letter, PacBell filed a Motion to Strike on September 8, 1989. The ALJ issued a Ruling on October 5, 1989, holding that the matters submitted did not include claims for relief not specified in the complaint.

On September 26, 1989, complainant tendered a Response to PacBell's Motion to Strike. This pleading was rejected because it was filed too late. On October 10, 1989, applicant filed a Motion to permit the Response to be filed. The motion claimed that he was late in filing because he was employed full time during the period

in question, leaving him only weekends and evenings to work on the the Response. He was also looking for another tenant during the period in question.

Scope of Proceeding

Complainant's proposed Response, with one significant exception, repeated arguments already raised in his letter of August 8. Those arguments were considered and rejected in the ALJ Ruling.

The new argument raised by the proposed Response was a recommendation that consumer complaints should be considered on a two-phase basis. The first phase would allow full evidentiary hearing, but would be limited to a determination of whether the utility's conduct was lawful. The second phase would deal with the remedy; it would be conducted without hearing. Complainant proposes that the Commission receive evidence on penalties, apparently without affording any party the right to cross-examine.

As the Ruling indicated, considering the additional issues raised by complainant's brief would almost certainly require a new and greatly expanded hearing involving additional parties. His proposal to limit the scope of the additional hearing by preventing cross-examination is so unrealistic that we will reject it without requiring PacBell to respond.

We have ratified the Ruling limiting the scope of relief considered to that sought in the complaint and, therefore, will not consider the following:

- Whether to order that complainant should be able to make future complaints in an atmosphere free of recrimination.
- Whether to adopt new rules for operator selection, training, or monitoring.
- Whether the Commission should require that all refusals under Rule 10.c. be approved in advance by the Commission.

- Whether complainant is entitled to a refund on his bill for Sprint service.
- Whether complainant should receive a refund of PacBell late charges.

Evidence

Complainant's evidence was offered to support his claim that PacBell's employees were so incompetent and unresponsive in handling his problems that he has been provoked into the behavior which PacBell describes as "intended to annoy". He believes that his conduct was a reasonable, or at least an understandable, response to the substandard conduct of PacBell employees.

He testified that PacBell took months to respond to letters and that he left many call-back messages before actually talking to the officials responsible for handling specific problems. He noted that it took almost a year and many contacts with the company to have his name removed from the list of persons who receive unsolicited promotional material from PacBell. Even so, he still receives some mail which he regards as promotional. He also has received incorrect information concerning the amount of his bill for toll calls.

He further testified that operators were rude and frequently refused to give their operator number after he criticized their job performance. Several of these incidents occurred when he was unable to obtain correct information from 411 operators.

PacBell's evidence was offered to demonstrate that its employees tried to handle complainant's problems with patience, courtesy, and understanding, and that complainant's responses were not reasonable. It argues that his conduct in handling disputes supports an inference that his telephone conversations with PacBell employees were "intended to annoy".

PacBell's witnesses stated that complainant initiated an unusual number of complaints concerning both operators and business

office representatives. They noted that he was rarely satisfied with the way that his problems were handled. Instead, he frequently appealed transactions to the supervisory level, often with strong criticism of the conduct of the employee first contacted. The witnesses claimed that his complaints often concerned trivial matters, and that his calls to supervisors frequently lasted an hour or more. They stated that he frequently became abusive.

In one instance, the business office supervisor told complainant that the utility could provide him with certain billing information in ten days. The supervisor then found a way to provide the information sooner. Assertedly, complainant then became very angry because the ten-day estimate was too conservative.

In late 1986, complainant asked PacBell to resolve a problem. He then forgot the topic of the dispute. Nevertheless, he repeatedly insisted that PacBell should tell him what the topic of his complaint was so that it could be resolved. PacBell's testimony claimed that the utility had twice searched its records to see if there were any records of the dispute, and found none. PacBell's witness estimated that this dispute generated some 15-20 calls, as well as several letters.

Yet another dispute concerned Sprint billings. PacBell is unable to provide him with the details of the calls in question. It has explained that it is required under federal law to present and collect bills for long-distance carriers such as Sprint, but cannot itself obtain information on the details of such calls. It suggested that he ask Sprint for the details. Complainant has not pointed to any defect in PacBell's reasoning. He nevertheless continued to insist that PacBell has no right to collect for Sprint calls unless it can honor his demands for a list of the parties called.

PacBell's management on November 30, 1987 issued an internal directive to all employees that they were no longer to conduct any business with complainant except in writing. On December 15, 1987, PacBell advised complainant that all further complaints should be in writing. The responsible company official believed these actions were justified, since she had received reports that complainant had used obscene language to operators and service representatives. In addition, she was informed that he was frequently abusive. She had also received reports that complainant had generated an unusual number of complaints, often about trivial subjects, and that he was uncooperative in attempting to resolve them.

She intended that complainant should be required to make complaints in writing, but that employees should continue to conduct other types of business orally. The directive did not communicate her true intent. An employee, relying on the directive, orally advised complainant on December 16, 1987 that all communications should be written, and refused to respond to a request for information. This mistake was finally corrected in a discussion between utility and customer on December 23, 1987. On that date, the internal directive to all employees was also corrected. From then until the end of January 1988, PacBell kept its corrected directive in effect.

On January 26, 1988 PacBell further modified its position, offering to handle complaints as well as other business over the telephone. However, if complainant was dissatisfied with the first response to an oral complaint, any appeals to PacBell's management level were to be in writing. In addition, service representatives were authorized to require that oral communications of any type be terminated, if applicant became abusive or uncooperative.

Aside from the single admitted incident on December 16, 1987, PacBell's employees have at all times handled all types of business with complainant on the telephone.

Discussion

Interpretation of Tariff

The "Including" Clause

As complainant reads the tariff, PacBell must take other unspecified steps to discourage obscene/threatening calls to it, before it can insist on written communications. He argues that the "including refusal to transact business" clause is a "dangling phrase." Because of this supposed grammatical defect, he claims that such a refusal must be a last resort, to be used only after the utility has unsuccessfully tried other measures.

The utility responds that the tariff expressly authorizes it to refuse to transact business orally as one alternative means to discourage annoying calls. It argues that, therefore, it has the discretion to decide which alternative to use first.

The utility's interpretation is consistent with the plain language of the tariff. Complainant's is not.

When called upon to interpret any document, our function is to find and apply the intent which underlies the language (Code of Civil Procedure § 1859). We, therefore, conclude that under the tariff, a refusal to transact business over the phone is one reasonable means to deter abusive calls. We also conclude that the tariff does not require PacBell to try any other means first.

"Service" Discontinuance

Complainant claims that refusing to transact business orally is a discontinuance of service and is, consequently, specifically prohibited by Tariff Part 10.c. He argues that we must adopt his definition of the term "discontinue service", because the tariff item does not define the term.

We decline to adopt complainant's definition since it conflicts with the plain meaning of the tariff. Under his

definition, Part 10.c. would be self-cancelling. The clause which allows the utility to refuse to transact oral business would be nullified by another which would prohibit such a tactic as a partial discontinuance of service. Such an outcome would violate one of the most basic rules for interpreting a document, i.e., to give effect to all provisions wherever possible. (Code of Civil Procedure § 1858.)

We will instead define the term "discontinue service" to mean utility service. As long as complainant can use his telephone to dial PacBell offices and other subscribers, he is receiving service. He is not denied service if the called party decides not carry on a conversation, regardless of whether the call is to the utility or to another subscriber. With this interpretation, Part 10.c. is not self-cancelling.

Timing of "Intent to Annoy"

Finally, complainant argues that Part 10.c. should apply only when a subscriber forms the requisite intent to annoy before initiating a call to PacBell. In effect, he contends that he is privileged to spontaneously adopt annoying tactics in response to employee incompetence or malfeasance.

Once again, we find nothing in the language to suggest that the tariff is limited to situations in which the subscriber's annoying conduct was deliberate, willful, or premeditated.

Interpretations Summarized

As requested by complainant, we have interpreted the tariff as follows:

- Whenever a subscriber makes obscene or threatening calls to the utility but not to other subscribers, the utility may refuse to deal with the customer except in writing.

- There is no requirement that the utility first attempt other alternative means to persuade.

- Before Part 10.c. is invoked, the subscriber must have made annoying calls to the utility, but there is no requirement that the intent be formed before the call is begun.

- A refusal to transact business orally is not a discontinuance of service within the meaning of Part 10.c.

Intent

Complainant asserts that he did not intend to annoy PacBell's employees. He was, he claims, merely attempting to obtain satisfaction in his various disputes with the utility. He may even believe that he intended to do the utility a favor by uncovering substandard conduct on the part of its employees.

As in most cases where intent is at issue, we must judge from an external, objective viewpoint. We must construe an individual's intent from the natural and probable consequences of his actions. (Evidence Code § 665.) From an objective viewpoint, complainant's tactics in dealing with disputes are not reasonable to achieve quick, reasonable solutions to significant problems. Instead, the evidence supports the inference that his objective was to provoke ill-considered actions by utility employees. Therefore, despite complainant's claim that he was merely pursuing objectives which seemed reasonable to him, and reacting reasonably to utility incompetence, the natural and probable consequence of his conduct was to be annoying to the utility and its employees.

Complainant argues that the utility must have intended to punish him for having uncovered incompetence. We note, however, that its action followed on the heels of complainant's threat to litigate. When litigation becomes likely, both sides have a strong motivation to conduct their business in writing. In such a circumstance, the effect of a decision to do business only in writing is not necessarily punitive. In fact, both parties can

benefit by avoiding unnecessary controversies over what was or was not said.

Complainant's Special Needs

Complainant operates a boarding house and provides a telephone for the use of boarders. When one of his boarders decides to move out he needs information on toll calls, frequently well before the end of the billing period. If there is any dispute as to which boarder is responsible for a particular call, he may also need to identify the called party. If he cannot receive such information quickly, he cannot render a timely final bill to the departing boarder. He may even have to absorb the charges for a disputed call himself. He argues that a requirement that such inquiries and responses be in writing interferes intolerably with his business needs.

We note that PacBell does not refuse to handle oral requests for information about toll calls. While it might have refused during a short period in 1988, it has long since retreated from a position taken by mistake. We see no reason to anticipate that PacBell will ever refuse to conduct such business orally in the future, unless complainant again couples obscenities with annoying calls.

Obscenity

Complainant's use of obscenity is not an issue of fact. He has not rebutted PacBell's evidence[1] on the point. During his testimony, he challenged defendant to prove that he "frequently"

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1 PacBell has long-standing instructions that its employees should not record details of obscene conversations in its computerized system which records abbreviated, coded notes of certain oral transactions with customers. This explains why PacBell could not provide details of any obscenities used by complainant. In future cases, if this tariff item is not amended, PacBell should consider recording details about threats or obscenities before it decides to invoke Part 10.c.

used obscenity. He also conceded that he may have resorted to obscenity, but only when he felt provoked.

Findings of Fact

1. PacBell will now receive all types of oral communications from applicant, excluding internal appeals of adverse initial decisions by employees. It reserves to the employees the right to terminate a conversation if complainant becomes abusive.

2. PacBell has not threatened to terminate complainant's telephone service.

3. Complainant's calls were intended to annoy PacBell's employees.

4. PacBell's decision to limit oral communication with complainant was not proven to be retaliatory.

5. Complainant has not stated adequate grounds to justify further consideration of the arguments in his Response to PacBell's Motion to Strike.

Conclusions of Law

1. The Commission should not consider in this proceeding:

   a. Whether to order that complainant should be able to make future complaints in an atmosphere free of recrimination.

   b. Whether to adopt new rules for operator selection, training, or monitoring.

   c. Whether the Commission should require that all refusals under Rule 10.c. be approved in advance by the Commission.

   d. Whether complainant is entitled to a refund on his bill for Sprint service.

   e. Whether complainant should receive a refund of PacBell late charges.

2. PacBell cannot discontinue communications service to subscribers as a result of calls intended to annoy its employees, regardless of whether such calls are threatening or obscene.

3. The right to deal with PacBell's business office other than in writing is not "service" within the meaning of Tariff Rule 11.

4. Insisting on written rather than telephonic communications is a reasonable effort to deter annoying calls to PacBell's officers and employees within the meaning of Tariff Rule 11.

5. PacBell's Tariff Rule 11 does not require it to take other reasonable steps before requiring communication in writing.

6. A call is "with intent to annoy" regardless of whether the intent to annoy arises before or during a conversation.

7. Refusing to transact business except in writing is not a discontinuance of service.

8. What a person intends should be determined objectively from the normal consequences of his actions.

9. PacBell did not violate its tariff.

10. The complaint should be denied.

O R D E R

IT IS ORDERED that the complaint in this proceeding is denied.

This order becomes effective 30 days from today.

Dated JAN 24 1990, at San Francisco, California.

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Wesley Franklin

WESLEY FRANKLIN, Acting Executive Director

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners