

Decision 90 11 008 November 9, 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Angelina Baxter,)
)
 Complainant,)
)
 vs.)
)
 Pacific Bell (U 1001 C),)
)
 Defendant.)

ORIGINAL
 Case 90-07-070
 (Filed July 11, 1990)

ORDER OF DISMISSAL

Angelina Baxter, Auburn Area Director for the Communications Workers of America (CWA), AFL-CIO Local 9431 (Complainant), filed this complaint on July 11, 1990, against Pacific Bell (Pacific). The complaint alleges that Pacific failed to follow the requirements of General Order (GO) 107-B and the requirements of Commission decisions dealing with monitoring by Pacific of telephone calls between Pacific employees and the public. Specifically, the complaint challenges the telephone monitoring conducted by an industrial psychologist retained by Pacific to evaluate the position of service representative and to recommend appropriate testing for applicants for that position.

Pacific on September 4, 1990, filed its motion to dismiss and its answer to the complaint¹. The motion to dismiss asserts that the complaint states no cause of action for which relief can be granted under Public Utilities (PU) Code § 1702. Pacific's answer describes in detail the telephone monitoring conducted by an

¹ The Commission's records show that the complaint was served upon Pacific on August 3, 1990. Pacific's response was timely filed within 30 days thereafter. (Rules of Practice and Procedure, Rule 13.)

industrial psychologist in connection with the evaluation of the position of service representative.

After due deliberation, we have decided to dismiss this complaint. For the reasons discussed more fully below, we find that the complaint challenges a practice that has been examined and approved by the Commission, and complainant alleges no fact or circumstance requiring reexamination of the practice.

Discussion

The gravamen of the complaint is that Pacific retained a consultant who monitored calls handled by certain service representatives, and that this procedure violated the right of privacy of the monitored customer and service representative.

Pacific acknowledges that such monitoring has taken place. It states, however, that the monitoring has been designed and carried out in compliance with the Commission's regulations that govern monitoring, set forth in GO 107-B, and in compliance with Commission decisions that have addressed this practice.

Factual Background

In early 1989, Pacific began a project to analyze the position of service representative and, as necessary, to revise employment tests for that job. The test currently used was created in 1978. Under federal anti-discrimination law, Pacific is required to conform employment tests to the Uniform Guidelines on Employee Selection Procedures². Accordingly, Pacific in September 1989 contracted with Dr. Cristina G. Banks, an industrial psychologist with Human Resource Solutions (HRS), to conduct the analysis of the service representative job and to recommend any revisions in employment tests for that position.

² See 43 FR 38290, et seq. (Aug. 25, 1978) and 43 FR 40223, et seq. (Sept. 11, 1978), as codified at 29 CFR Part 1607.

Initially, HRS was to identify the skills, knowledge, and abilities necessary to perform the job of service representative. Employees in that job category were briefed on the project, and those taking part in the study were selected from among volunteers. As part of the evaluation, HRS proposed to monitor the manner in which service representatives handled customer calls. The service representatives were advised that the monitoring would not be evaluative, and that any notes taken by Dr. Banks would be task-oriented³.

Pacific in December 1989 sent letters to its unions, the CWA and the Telecommunications International Union, advising them of the HRS project. Neither union objected. However, on March 9, 1990, complainant filed a union grievance objecting to the telephone monitoring of the service representative in the Auburn office that had taken place on February 27, 1990⁴. Complainant's supervisor investigated the grievance and met with complainant. On April 5, 1990, complainant asked that her grievance be held in abeyance. This complaint followed.

Discussion

The Commission in 1964 considered the practice of telephone monitoring for the purpose of training and employee observation. In Decision (D.) 69447, the Commission required that

3 Pacific has submitted as an exhibit to its answer a sample of notes taken by HRS in monitoring a service representative's call. The notes are task-oriented, describing briefly the types of information the service representative is required to possess or be able to find in order to respond to caller questions.

4 The complaint alleges that Pacific's letter to the CWA did not specifically state that telephone monitoring would be part of the study. Whether the company's notice to the union was sufficient to put union members on notice of particulars of the project is more properly a subject of grievance under the collective bargaining agreement.

telephone utilities modify their tariffs to provide for notice to all parties to a telephone conversation before employee monitoring equipment could be used. (Service Observation Investigation, 64 CPUC 526, 536-37 (1965).) Notice of the use of monitoring or service observation and training equipment was to be given either by an automatic tone warning device or by permanently marking each telephone instrument capable of being monitored. In 1966, this proceeding was reopened for further investigation. After 27 days of hearing involving utilities, airlines, public agencies and others, the Commission issued D.73146 prohibiting monitoring of telephone calls without notice. (Monitoring Investigation, 67 CPUC 528, 551-54 (1967).)

The Commission's order in D.73146 prohibited monitoring of telephone calls without notice to and consent by the parties. For recorded calls, notice was to be given by an automatic tone warning device or by permanently marking each instrument subject to such monitoring. For nonrecorded calls, notice was to be provided by an automatic tone warning device, permanent marking of each instrument, an operator announcement at the commencement of a conversation, or through use of an open transmitter that had not been modified to eliminate background noise. The order excepted from these requirements "administrative monitoring" by telephone corporations where such monitoring was done to provide the utility with an evaluation of service without reference to the performance of individual employees and without note-taking except as specifically required for general evaluation purposes.

D.73146 remains the Commission's basic order concerning monitoring. However, in 1976 and 1977, the Commission in D.88232 revisited the issue of telephone utility "business office monitoring" as part of a ratemaking investigation involving Pacific Telephone and Telegraph Co. (PT&T Co. Ratemaking Application, 83 CPUC 149 (1977).) In that decision, the Commission focused, in part, on the practice of telephone utilities that conducted

monitoring at the employee's station (i.e., with notice to the employee) by plugging in at the station and keeping the transmitter open, thus assuring the customer of at least some notice (because of background noise audible through the open transmitter). The Commission declined to eliminate this practice of business office monitoring, stating, in part:

"There is...no purpose in terminating or further restricting the 'on-station' monitoring for the simple reason that, unlike a traffic office, a business or repair office must keep written records of the calls in order to serve the customers (the customer need not be directly quoted, of course). Thus no particular 'privacy' would be achieved by terminating business or repair office monitoring."
(83 CPUC at 169.)

As a result of these decisions, the Commission in 1983 issued GO 107-B, dealing with "Rules and Regulations Concerning the Privacy of Telephone Communications."⁵ The GO provides an exception for "'(a)ministrative monitoring' or 'service observing' performed by telephone utilities for training and quality control purposes, when performed as authorized by our decisions." (GO 107-B, II.A.d.) In its requirement for notice to all parties with respect to monitoring (nonrecorded), the GO provides:

"Notice of monitoring shall be given either:

- "a. By a tone warning device which automatically produces a distinct signal audible to all parties to a telephone conversation. The signal shall have those

⁵ See D.83-06-021. The authority of the Commission in issuing GO 107-B and the validity of the General Order under federal law was affirmed by the United States Court of Appeals for the Ninth Circuit in Air Transport Association of America, et al., v. Public Utilities Commission of the State of California, et al., 833 F2d 200 (9th Cir.), cert. denied 487 U.S. 1236, 108 S.Ct 2904 (1988).

characteristics specified by the Federal Communications Commission, or by this order; or

- "b. By verbal announcement by the operator of monitoring equipment to the parties to a communication that their communication is being monitored; or
- "c. By a telephone instrument transmitter which is operationally connected to the communication circuit being monitored and which acoustically, mechanically, electrically or otherwise has not been designed, modified, desensitized or located with the intent of eliminating notice or monitoring or interception, with the exception that minimization of transmission losses will be permitted." (G.O. 107-B, II.A.6.)

Whether the HRS monitoring here is deemed to be "service observing" for quality control purposes (and thus exempt from the requirements of GO 107-B) or the type of observation monitoring conducted by the telephone corporation through use of an open transmitter at the employee's station, Pacific has complied with GO 107-B and the Commission's decisions that address telephone monitoring. Indeed, as Pacific points out, and as complainant does not dispute, Pacific has exceeded the requirements by performing its observation only on calls by service representatives who have volunteered to be part of this job evaluation project.

The complaint acknowledges that telephone observation, properly conducted, serves training needs and ultimately benefits the customer by assuring "skilled and professional performance." (Complaint, Paragraph 1.) The complaint also acknowledges that the specific practice complained of was conducted by an industrial psychologist and was intended to update testing and interviewing procedures for the service representative job. (Complaint, Paragraph 4.) The complaint asks generally whether this type of monitoring should continue to be valid, but the complaint raises no

fact and makes no allegation that the service representative monitoring was conducted in a manner that violates the Commission's orders or decisions on telephone monitoring. It follows, therefore, that, without more, further investigation and hearing with respect to the particular call monitoring at issue here would be duplicative of investigations already conducted and concluded, and would serve no useful purpose.

Findings of Fact

1. Pacific in 1989 began a project to analyze the position of service representative in order to revise employment tests for that position.
2. As part of the evaluation, Pacific's agent, an industrial psychologist, conducted monitoring of a service representative's calls by plugging in at the station and using an open transmitter.
3. The monitoring was task-oriented and was directed at identifying elements of the service representative position.
4. Monitoring, properly conducted, serves customers by providing management insight into the skills required to select and train applicants for the position of service representative.

Conclusions of Law

1. Telephone monitoring by Pacific is subject to GO 107-B and Commission decisions, including D.73146 and D.69447, related to telephone monitoring.
2. Monitoring of an employee's calls, when conducted for task-oriented job evaluation purposes at the employee's work station through use of an open transmitter, is in compliance with GO 107-B and D.73146.
3. Monitoring of the service representative position, conducted in accordance with the Commission's orders and rules requiring notice and consent, serves the public by contributing to efficient service.
4. Complainant raises no fact and makes no allegation that the specific monitoring of a service representative was conducted

in a manner contravening GO 107-B or Commission decisions related to monitoring.

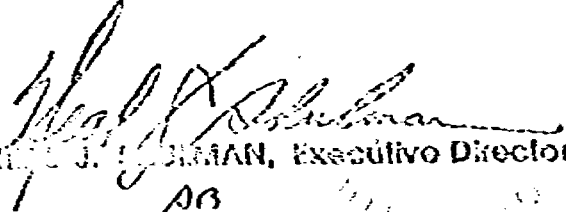
IT IS THEREFORE ORDERED that this complaint is dismissed.
This order is effective today.

Dated NOV 03 1990, at San Francisco, California.

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

Commissioner Stanley W. Hulett,
being necessarily absent, did
not participate.

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


NEIL J. GOLDMAN, Executive Director
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