

ORIGINAL

RF/km

Decision No. 87543 July 6, 1977

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Creighton J. Jones,

Complainant,

vs.

The Pacific Telephone Co.,  
a corporation,

Defendant.

Case No. 10139  
(Filed July 12, 1976)

Creighton James Jones, for complainant.  
Clay C. Burton, Attorney at Law, for  
defendant.

O P I N I O N

The complainant alleges that he is an employee of the defendant, The Pacific Telephone and Telegraph Company, at its office in El Monte, California; that the defendant and its officers and managers have violated the order of the Commission as set forth in Decision No. 69447 dated July 27, 1965 (64 CPUC 526) in that since September 9, 1975 while using the telephone at the place of his employment, his conversation was monitored by an officer or manager of the defendant on September 11 and 24, 1975, May 28, June 17, 28, and 30, 1976; and that as a result thereof he has been coerced, restrained, intimidated, and harassed because of the monitoring on personal and union calls and has been threatened with dismissal as a result of the monitoring by the defendant's managers.

The complainant also alleges that the information received by service observers (administrative monitoring) is required to be strictly confidential but that on one occasion on September 16, 1975 and on two occasions on October 8, 1975, such information which service observers had previously received and recorded was not kept confidential but was permitted to be observed by other employees of the defendant.

The complainant requests an order that the monitoring system now in use by the defendant at its El Monte office at 3639 Tyler Street be investigated and removed and that all documentation resulting in any way as a result of, from, or due to monitoring done by the managers of the defendant be stopped immediately at that location.

In its answer the defendant denies that the complainant was monitored during any of the times alleged except on Wednesday, June 30, 1976 at which time the defendant contends that the complainant was subject to supervisory monitoring which the defendant contends is not contrary to any rule or regulation of the Commission or in violation of any law.

The defendant contends that the complainant is a deskman and that "...deskmen...are subject to 'supervisory monitoring' by management...." and that "supervisory monitoring" of telephone traffic and plant operations is not prohibited when performed without the making of any written notation or any record of the contents, substance, purport, effect, or meaning of any conversation which may have been heard during such supervisory monitoring. (Decision No. 73146 (1967) 67 CPUC 528, 542, 553.)

An advice of participation dated September 1, 1976 from the Communications Branch of the Commission staff states: "Due to the regulatory lag problem, the Commission has assigned the priority to work on rate proceedings. Under the circumstances, it is not feasible for the Communications Branch to participate in formal complaint proceedings such as C.10139."

A hearing was held in Los Angeles on November 8, 1976 and the matter was submitted on that date.

The defendant made a motion that the complaint be dismissed because it did not state facts sufficient to constitute a cause of action as required by Rule 9 of the Commission's Rules of Practice and Procedure. The allegations in the complaint are uncertain and ambiguous but in applying the rule of liberal construction of pleadings with a view to substantial justice between the parties, (Packard v Pacific Tel. & Tel. Co. (1970) 71 CPUC 469) an inference may be drawn that there is an allegation that the defendant has violated an order of the Commission and the motion to dismiss was properly denied.

The complainant did not testify. Ten witnesses, seven of whom were union stewards and all of whom were employees of the defendant, testified at the request of the complainant. The defendant did not cross-examine any of the witnesses and presented no witnesses on its behalf.

The complainant presented evidence that Hank Page, who was not at the hearing, was a supervisory employee of the defendant; on June 30, 1976 the complainant engaged in a telephone conversation at his place of employment during working hours with Bob Reynolds, a union steward, concerning union business; and Hank Page asked the complainant who it was he had talked to and the complainant stated

that he would not answer as that was privileged information. On August 27, 1975 the complainant had a telephone conversation with Len Hutchins; Hank Page asked the complainant if he had such a conversation and the complainant stated that he had; and Hank Page stated that he had heard the conversation while monitoring the conversation. A union grievance was filed by the complainant and there was no evidence that any writing had been made of the conversation; and Hank Page was asked to remove the documentation from the complainant's personnel file and he replied, "No". Hank Page had stated on several occasions that he had monitored telephone conversations of the complainant to determine how the complainant was performing his work; and he had said that he monitored the complainant more often than other employees because the complainant needed training more than the other employees.

One of the union stewards testified that Hank Page said that he had trouble with the complainant making non-business phone calls during working hours and had documented that the complainant had wasted company time talking to Bob Reynolds. Another witness testified that on July 20, 1976 Hank Page stated that he only documented that the complainant had received personal telephone calls at work. A witness testified that Hank Page had said that complainant was threatened with dismissal for conducting union business on company time.

There was testimony that in October 1975 one of the managers of the defendant stated that the complainant had made a personal phone call of 13 to 15 minutes' duration during his hours of employment and that the complainant had been monitored, the monitoring had been documented, and that the complainant had to be watched more than other employees.

A reasonable meaning to be given to the word "documented" as used in this case is "made a written record of".

Decision No. 69447, supra, provides that public utility telephone facilities monitoring or service observing and training equipment may be used under certain circumstances only when notice of the monitoring is given to the parties to each monitored conversation, and prescribes the type of notice to be given.

Decision No. 73146 dated October 3, 1967 (67 CPUC 528) and Decision No. 78442 dated March 23, 1971 (72 CPUC 78) provide that the notice requirement is not applicable to administrative monitoring under certain defined conditions and not applicable to supervisory monitoring of telephone traffic and plant operations when performed without the making of any written notation or any record of the contents, substance, purport, effect, or meaning of any conversation which may have been heard during said supervisory monitoring.

The decisions provide in part:

- (1) Administrative monitoring is "official" or "administrative service observing" performed by utility employees with the job classification of "Service Observer" who provide the utility with an overall evaluation or index of the quality of telephone service furnished subscribers without reference to the performance of an individual employee or identifying employees or subscribers; and without the making of any notation or any written record of the contents, substance, purport, effect, or meaning of any conversation except as specifically required for administrative monitoring.

- (2) "Supervisory monitoring" or "service observing" is used by telephone utilities to train and supervise individual employees in their performance of telephone service assignments.
- (3) No telephone corporation shall permit any officer, employee, or agent thereof to divulge to any person or to publish the existence, contents, substance, purport, effect, or meaning of any communication, or part thereof, which was monitored, recorded, or otherwise intercepted; or to use for his benefit, for the benefit of the telephone corporation, or for the benefit of another not entitled thereto, any communication or the information therein contained which was monitored, recorded, or otherwise intercepted.

No evidence was presented of any violation of a Commission order pertaining to administrative monitoring.

The complainant has alleged and offered evidence only that his conversations were monitored and as a result thereof he has been subjected to disciplinary action by his employer. The monitoring was not contrary to any provision of law or any order or rule of the Commission and the dispute between the complainant and the defendant was one between an employee and an employer.

There was evidence that the complainant's telephone conversations had been properly subjected to supervisory monitoring; that the fact that the conversations had been monitored had been recorded; and that written notations were made that the complainant had personal telephone conversations during working hours in violation of the defendant's rules and contrary to the instructions of his supervisor. But there was not sufficient evidence to show that the written notations were made as a result of information obtained by monitoring.

The complainant has not presented evidence to entitle him to or to justify the order he requested or the time, effort, and expense of an investigation.

Findings

1. During the period August 27, 1975 to June 30, 1976, the complainant was employed by the defendant as a deskman.
2. As a deskman the complainant was subject to supervisory monitoring without notice by the defendant when performed without the making of any written notation or any record of the contents, substance, purport, effect, or meaning of any conversation which may have been heard during said supervisory monitoring.
3. During the period August 27, 1975 to June 30, 1976, the complainant's telephone conversations were monitored by the defendant without notice on many occasions.
4. The monitoring of the complainant's conversations constituted proper supervisory monitoring for purposes of training, assistance, and supervision; for individual criticism and commendation; and to improve training techniques and office practices.
5. On two occasions during August 27, 1975 to June 30, 1976, the fact that the complainant's conversation had been monitored was recorded.
6. On at least one occasion a written notation was made of the fact that the complainant had engaged in non-business or personal calls during working hours in violation of his employer's policy, but there was insufficient evidence to establish that the information was obtained as a result of monitoring.

The Commission concludes that during the period August 25, 1975 to June 30, 1976, the defendant has not violated any Commission order relating to administrative or supervisory monitoring as alleged by the complainant and the relief sought by the complainant should be denied.

O R D E R

IT IS ORDERED that the relief sought by the complainant is denied.

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

Dated at San Francisco, California, this 16<sup>th</sup> day of JULY, 1977.

Robert Bafman  
President  
William J. ...  
Vernon L. ...  
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Commissioners

*I will file a written dissent.*

*Richard D. ...*

*I abstain  
Walter J. ...*



C.10139

I dissent.

A review of the evidentiary record in this proceeding shows that an unsophisticated complainant proceeded against a large utility. The pertinent facts were not adequately developed as a result. For example, Pacific's supervisory employee whose testimony is critical did not testify. The complainant apparently did not properly effect service of a subpoena on that employee. This matter should have been reopened for further hearing with participation by Staff Counsel and the Communications Division.

Alleged monitoring rule violations brought before us in complaint proceedings where there is a great disparity in sophistication and legal talent between the complainant and a utility concerns me. It should concern this Commission.

Pacific's employees subject to monitoring have essentially three forums in which to seek redress for violations of our monitoring regulations:

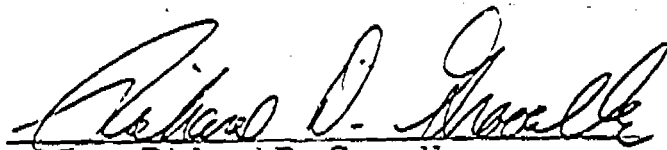
- (1) They may institute a grievance proceeding with their particular union;
- (2) They may come before us and allege that their employer has, through its agents, violated our monitoring rules and request appropriate relief, and
- (3) They may institute an action in the proper court pursuant to Section 2106 of the Public Utilities Code, alleging a utility violation of Commission rules, and seek appropriate relief.

When aggrieved employees choose this forum we should afford them every opportunity to present their case. In this proceeding Examiner Tante liberally construed a poorly drafted complaint; in the interest of insuring we had an evidentiary record he allowed the complainant to present a good deal of hearsay testimony and otherwise assisted the complainant in his effort

to present facts. However, here there was such disparity in legal resources and sophistication that the complainant did not do a thorough enough job of developing the evidentiary record to enable me to make definitive findings of fact.

Some may consider it frivolous for the Commission to involve itself in a dispute between a utility and one of the employees. However, we are charged by Section 7906 of the Public Utilities Code with the responsibility of insuring the privacy of telephone communications. The Commission has adopted very specific rules dealing with the monitoring of telephone conversations, including conversations where one participant is an employee of a telephone utility. We should take our obligation as mandated by the Legislature and our rules adopted pursuant to that obligation seriously.

For the above reasons, I must dissent with the determination reached by the majority. I would reopen the record to see that it is completed to an extent that a proper decision could be reached.



Richard D. Gravelle  
Commissioner