

Decision No. 88461 FEB 7 1978

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
LATIN AMERICAN HEATING AND AIR, INC.)
(AKA) BAY PLUMBING & HEATING,)

Complainant,

Case No. 10337-5
(Filed May 25, 1977)

PACIFIC TELEPHONE & TELEGRAPH COMPANY,

Defendant.

Miguel D. Gadda, Attorney at Law, for Latin American Heating and Air, Inc., dba Bay Plumbing & Heating, complainant.

Norah S. Freitas, Attorney at Law, for The Pacific Telephone and Telegraph Company, defendant.

O.P.I.N.O.N.
Latin American Heating and Air, Inc., a San Francisco-based contractor, (complainant), seeks an order from the Commission to rescind a contract for directory advertising and that complainant be absolved from payment, that complainant be awarded \$60,000 compensatory damages for lost business because of defendant's willful and/or fraudulent misconduct, and that complainant be awarded exemplary damages for defendant's misconduct and for costs.

The complaint alleges that on January 15, 1976 a contract was entered into with The Pacific Telephone and Telegraph Company (Pacific) for a yellow page advertisement to appear in Pacific's 1976 San Mateo County telephone directory. It is further alleged that

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the contract was entered into, on the representations of Pacific's sales personnel that there would be no reference in the ad to complainant's San Francisco location, that a proof copy did show the San Francisco street address, but not the city, and that complainant requested the address be removed as previously agreed upon. Finally, it is alleged that the ad was run with the street address removed but referred to complainant's San Francisco locale in large bold type.

In its answer, Pacific admits accepting an order on or about January 15, 1976 from complainant for directory advertising. The answer states that the advertising closing date for the 1976 directory was January 15, 1976, that a proof of the ad was sent to complainant, which indicated that the Granada Avenue address was to be omitted, and that on February 25, 1976 the approved proof was signed by complainant's Mr. Baldwin and returned to Pacific. Further, Pacific alleges that on or about March 1, 1976 complainant was notified that the street address could be deleted but that the community of San Francisco must be shown, that on or about March 5, 1976 Pacific received a telephone call from complainant requesting that the firm name and telephone number in the ad be changed or in the alternative to cancel the ad. A Pacific representative

explained at that time that it was too late to make the requested changes or to cancel the ad. Finally, Pacific states that complainant was notified that complainant would be held responsible for advertising charges associated with publication of said advertising and that a letter dated March 19, 1976 was received from complainant stating payment of all charges associated with the San Mateo directory advertising was going to be withheld.

Hearing was held on October 13, 1977 at San Francisco at which time the matter was submitted.

With respect to complainant's prayer for damages for lost business and for punitive damages, we have repeatedly held that the Commission is without jurisdiction to award such relief. (Schumacher v Pacific Telephone and Telegraph Co. (1965) 64 CPUC 295; Edward L. Blincoe, et al. v Pacific Telephone and Telegraph Co. (1962) 62 CPUC 511.) There is no need to discuss this issue.

At the hearing complainant presented two witnesses. Mr. Wallace C. Baldwin, vice president, testified that he negotiated the style and type of advertisement that was to appear in the yellow pages of defendant's San Francisco and San Mateo County telephone directories. He stated that defendant's representative did not explain that it was contrary to Pacific's policy to place ads in a foreign directory without identifying the community location of the business and that he therefore accepted the order as prepared on January 15, 1977. Mr. Baldwin stated that when the proof copy was received with a request for approval, he noticed that the San Francisco street address had been added.

He signed the proof on February 26, 1976 and returned it to Pacific with the request that the street address be deleted. Finally, after pointing out to complainant's president Mr. Mojica that the proof contained the city of San Francisco, Mr. Baldwin stated that all further negotiations were conducted by Mr. Mojica.

On cross-examination Mr. Baldwin admitted that he signed the proof on February 25, 1976 without reading any of the contract.

Mr. George R. Mojica testified that after the ad proof was approved and returned he called Pacific on February 26 to make sure the ad would appear without the San Francisco address. He stated that the reason he did not want the address and city to appear in the ad was because prospective San Mateo County customers in need of a plumber or heating repairman would not call a San Francisco contractor for fear that they would be charged at a higher rate. Mr. Mojica stated he again telephoned Pacific on March 5 and was assured that the ad would appear as had been discussed on February 26. Subsequently, he placed another call to assure that the ad would be correct. On March 13 he was informed that the ad could not be changed but would have to be run as described over the telephone. Mr. Mojica alleges he then wrote Pacific and requested that he not be charged for the ad but did not receive a reply. Finally, he stated he believed there was a breakdown of communication.

On cross-examination Mr. Mojica stated that if he called a number from a yellow page ad and found out that the number was in a foreign exchange, he would be disillusioned and frustrated.

Fred Abbott, yellow page sales representative, testified for Pacific. He stated that at the time he sold Mr. Baldwin the ad for both the San Francisco and San Mateo County directories, he explained it was necessary to show the community when a person advertises out of his local directory.

On cross-examination Mr. Abbott explained that he prepared one ad that was to appear in the San Francisco directory. This ad contained the San Francisco street address and was photocopied and submitted for placement in the San Mateo directory. Mr. Abbott admitted that when he submitted the San Mateo ad he neglected to pencil out the San Francisco street address and add the city of San Francisco. This was the ad proof submitted to complainant for approval.

Complainant admits to approving the proof on or about February 25, 1976 stating that Pacific advised on or about March 1, 1976 of the requirement of showing the community.

Late-filed Exhibit 4 is a copy of the contract signed by Mr. Baldwin and accepted by Mr. Abbott on January 15, 1976. The contract provides in large bold type that "The closing date to advertising for the forthcoming issues is January 15, 1976 after which requests for new, additional, or cancellation of advertising will not be accepted." Mr. Abbott's signature appears directly below this provision. The reverse side of the contract under Terms and Conditions, Advertising in Classified Telephone Directory, provides:

"Advertising copy furnished by Advertiser must be approved by Company and the printing thereof will constitute such approval."

Exhibit 3 introduced by witness Abbott on re-direct is Pacific's standards for yellow pages advertising content. It provides:

I. FOREIGN TELEPHONE NUMBER IDENTIFICATION
All telephone numbers appearing in Display Advertisements or Informational Listings that

are served from an exchange outside the local classified directory area shall be identified with the location of the serving exchange in order that the calling person may know the destination of his call. The identification of these "foreign" numbers by address and community name or community name only, shall be in sufficient size type as to prevent being overlooked. In addition, Area Codes are required if the foreign telephone number is in a different numbering plan area.

The record herein is clear. The contract is for yellow page advertising in Pacific's 1976 San Mateo County directory, signed by Mr. Baldwin for complainant and accepted by Mr. Abbott for Pacific on January 15, 1976. The contract clearly provides that the last day to alter, amend, or cancel an ad for the 1976 directory was January 15, 1976, the day the contract was consummated. The controversy is whether the complainant was apprised of Pacific's foreign telephone number identification requirement.

From the testimony it appears that complainant would not have accepted the San Mateo directory ad had Pacific's foreign telephone identification requirement been known. Mr. Baldwin stated that he was not made aware of the requirement when he signed the contract but upon learning of the requirement immediately advised Mr. Mojica. Upon his learning of the requirement, Mr. Mojica, in turn, made repeated attempts to make sure the ad would appear as requested or in the alternative cancelled.

We agree there was a breakdown in communication. Since January 15, 1976 was the last day ads could be accepted for the 1976 directory, it is reasonable to assume that the parties were more intent on the design of the ad than on the formal identification requirements and contrary to Mr. Abbott's testimony, the foreign telephone identification requirement was not mentioned to Mr. Baldwin.

Notwithstanding any alleged breakdown in communication and our determination that complainant was not aware of the foreign telephone identification requirement, the complainant did accept the contract. In addition, both Mr. Baldwin and Mrs. Mojica testified that the reason for not wanting the community of San Francisco identified was so a San Mateo County caller would be unaware that he was calling a San Francisco number. The foreign telephone identification requirement is to aid the caller in identifying the destination of his call and thereby not incur a toll call without his knowledge. However, under the circumstances we have determined that the inclusion of the San Francisco location diminished the per value of the display ad by 25%. We will, therefore, order reparations in the amount of 25% of the charges for the display ad.

Findings

1. Complainant is a plumbing and heating contractor located in San Francisco.

2. Complainant negotiated a contract on January 15, 1976 for with defendant for yellow page advertisements to appear in defendant's San Francisco and San Mateo County directories.

3. The advertising proof submitted to complainant indicating the San Francisco address was to be omitted was accepted and returned to defendant on or about February 25, 1976.

4. Complainant was notified by defendant on March 1, 1976 that the San Francisco street address could be omitted but that the community of San Francisco had to be shown.

5. The closing date for placing or cancelling advertising in

the 1976 directory was January 15, 1976, the date complainant placed the order with defendant's representative.

6. Complainant's ad appeared in defendant's San Mateo county directory listing the community of San Francisco.

7. There is disagreement between the parties as to whether complainant was apprised of Pacific's requirement that foreign telephone numbers must be identified by address and community or by community name.

8. Complainant would not have agreed to place the ad in the San Mateo directory had the foreign telephone identification requirement been known.

9. Complainant attempted to cancel the ad upon learning of the foreign telephone identification requirement.

10. Defendant's requirement that foreign telephone numbers appearing in yellow page advertisements be identified by address and community or by community only is reasonable and necessary to protect the public from the unwitting incurrence of toll charges.

11. Complainant acknowledges that any reference to San Francisco in the San Mateo directory was undesirable because prospective customers would not call a San Francisco contractor if they lived on the peninsula.

12. The reference to San Francisco diminished the value of the display ad by 25%.

13. The complainant has been charged \$1,252.51 by Pacific for the advertisement. A reasonable amount of reparation to be awarded complainant in this proceeding is 25% of that amount, \$313.13.

The Commission concludes that the relief requested should be granted to the extent of a billing adjustment in the amount of \$313.13.

ORDER

IT IS ORDERED that The Pacific Telephone and Telegraph Company shall credit the Latin American Heating and Air, Inc. account for \$313.13 for yellow page advertising in the 1976 San Mateo County directory and that in all other respects the complaint is denied.

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

Dated at San Francisco, California, this 7th day of FEBRUARY, 1978..

I dissent.
William Synovis, Jr.

Robert Bateman
President

James L. Sturgeon
Charles R. Howell
Clair J. DeBrie
Commissioners