

Decision

93839

DEC 15 1981

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Air Transport Employees, )  
 )  
 Complainant, )  
 )  
 v )  
 )  
 The Pacific Telephone and )  
 Telegraph Company, )  
 )  
 Defendant. )

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Case 10894  
 (Filed July 25, 1980;  
 amended December 4, 1980)

ORDER OF DISMISSAL

Air Transport Employees, complainant,<sup>1/</sup> is a labor union acting as the collective bargaining representative for all reservations clerks employed by Western Airlines, Inc. (Western) at its facilities at Los Angeles International Airport and San Francisco International Airport. Defendant, The Pacific Telephone and Telegraph Company (Pacific), is a public utility telephone corporation furnishing telephone service to those locations.

Complainant seeks relief from certain monitoring practices which are alleged to be unlawful and contrary to Commission decisions on the subject. We find that the complaint should be dismissed because our rules and decisions, as written, do not specifically prohibit the practices of which complaint is made. We conclude, however, that we should issue an Order Instituting Investigation by rulemaking (OII) to determine whether we should revise our General Order (G.O.) 138 on the subject.

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<sup>1/</sup> The complaint was originally titled "System Board 451 of Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO (BRAC) v. Pacific Telephone and Telegraph Company." The present complainant was substituted because of a change in union representation.

Allegations and Argument  
Of Complaint

Paragraph 3 of the complaint states:

"[Pacific] has for many years provided telephone service to Western... Until approximately November of 1978, Western...engaged in a practice termed 'service observing' of telephone communications between its reservations agents and various members of the public using automatic call distribution equipment supplied by Pacific... In July 1979, Western ceased using equipment supplied by the defendant purchasing instead automatic call distribution equipment from Collins Communications Switchings Systems Division of Rockwell International. From that date to the present, Western began a program of random monitoring of telephone calls to its reservations agents from members of the public without the use of an automatic tone warning device which would alert all parties to the conversation of the fact of monitoring. The only indication of such monitoring practice to employees of Western is the presence of a sign announcing the conduct of such practice which remains at the front of the reservations location at all times. There is no notification of any kind provided the general public."

In summary, the complaint then alleges:

1. That pursuant to our investigative duties on this subject (Public Utilities (PU) Code §§ 7905 and 7906) we have previously reviewed the subject of monitoring at length and have determined that certain types of notice should be given to the public if monitoring takes place (e.g. beep tone, zip tone, or "open transmitter");

2. That while our decisions on the subject<sup>2/</sup> make an exception for supervisory and administrative monitoring by telephone utilities, there is no corresponding exception for private corporations such as airlines; and
3. That G.O. 138, concerning connection of customer-provided equipment to telephone utility systems, provides that its rules apply to "interconnected parties within the State of California" (§ 1.2) and that § 1.4 states "Customer-provided equipment shall not...infringe on privacy of communications, or otherwise injure the public in its use of the utility's services."

The complaint seeks an order which will require Pacific to cease interconnecting with Western "until Western provides evidence to this Commission" that communications over Pacific's lines meet our standards of privacy. The complaint further requests an order requiring Pacific to "make an immediate inquiry of all corporations" with which it maintains an interconnection with customer-provided equipment "to determine existing monitoring practices employed by such private corporations" and to report to us on the subject within three months of the date of our order.

#### Pacific's Responses

For purposes of this order, the significant allegations of the answer may be summarized as follows:

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<sup>2/</sup> A lengthy investigation was held on the subject in 1965, which was reopened in 1967. For the types of warning allowable and a general description of the problems see Decision (D.) 69447 (64 CPUC 526) and D.73146 (67 CPUC 528). Certain aspects of monitoring were presented again to the Commission in Pacific Tel. and Tel. Co. (1977) 83 CPUC 149 as a result of which we required telephone utilities to print notices in their telephone books concerning administrative and supervisory monitoring, and periodically educate the public on the subject.

1. Nowhere in the complaint is it alleged that Pacific, as distinguished from Western, is engaged in any illegal practice. All the activities mentioned are those of Western.
2. Pacific has no duty under law or under the Commission's general orders or decisions to inspect equipment owned by a customer for purposes of assuring privacy.
3. Complainant has filed a lawsuit in the Superior Court of San Mateo County naming Pacific and Western and seeking similar relief.

Discussion

We believe that the complaint fails to state a cause of action against Pacific. Complainant is essentially using the complaint format to petition the Commission for an investigation. ✓

We agree with Pacific that no acts of Pacific, as distinguished from those of Western, are the subject of the complaint. Western contracted with an independent telecommunications supplier for its equipment. Under current law, Western is entitled to do just this. Pacific has no physical control over Western's equipment past the point of interconnection.

Additionally, as the law and as our general orders are presently constituted, Pacific has no duty to inspect, supervise, or regulate the installation of customer-owned terminal equipment to assure that monitoring is performed only with proper warning to the public.

While a cursory reading of the exact provisions quoted from G.O. 138 might lead to the assumption that such duty exists, a review of the entire order shows that its subject was a certification program under which minimum performance standards for customer-owned terminal equipment had to be met before we would certify the equipment for connection to the telephone network. (See, generally, § 1.1 of G.O. 138.)

G.O. 138 was issued in 1975. In 1978 the Federal Communications Commission (FCC) adopted its Third Report and Order in Docket 19528. This order broadened the FCC's customer-provided equipment certification program, making ours superfluous. We therefore suspended our own program under G.O. 138 (Resolution T-9826, dated June 27, 1978).

G.O. 107-A is actually our order on privacy of communications (together with the orders in the decisions mentioned in footnote 2). Neither that general order nor those decisions cover this problem.

Nor can either PU Code § 7905 or § 7906<sup>3/</sup> reasonably be construed as directly conferring on Pacific (or other telephone corporations) the duty to inspect terminal equipment not belonging to it, or the legal right to enter upon any premises to make such an inspection. In our opinion, however, § 7906 confers on this Commission the power to formulate rules to protect the users of the telephone network from monitoring without proper notice. Obviously, the facts brought to light in the complaint warrant our attention. We should promptly decide, in an appropriate proceeding, whether leaving matters in this

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3/ "§ 7905. The Public Utilities Commission shall issue regulations requiring every telephone corporation subject to its jurisdiction to maintain complete records of all instances in which its employees discover any device installed for the purpose of overhearing communications over the lines of such corporation and all instances in which such employees reasonably believe and report to the corporation their belief that such device is installed or has been installed but has since been removed.

"§ 7906. The Public Utilities Commission shall regularly make inquiry of every telephone corporation under its jurisdiction to determine whether or not such corporation is taking adequate steps to insure the privacy of communications over such corporation's telephone communication system."

State permanently is in the public interest, or whether we should take action on the subject.

Through attending training programs, employees are normally made aware of the monitoring practices of the employer, but the customer is not. The customer is, of course, calling from outside the employer's premises and the call is transmitted over the lines of the public utility telephone corporation under our regulatory jurisdiction. Under §§ 701 and 7906, we may make rules to govern this situation or require each telephone corporation to adopt tariffs binding on its customers, in order to protect the proper use of the network. (Cf. California Hotel and Motel Ass'n v Pacific Tel & Tel. Co. (1978) 84 CPUC 352; Ambassador, Inc. v United States (1944) 325 US 317, 323; reh. den. 325 US 896.)

This complaint, involving one employer and one telephone corporation, is, however, not a proper format for us to engage in rulemaking. We shall deal with this matter in a rulemaking OII. Since under existing statutes and rules, the complaint fails to state a cause of action against Western, it will be dismissed.

The importance of this subject matter convinces us that the effective date of this order should be the date it is signed, so that we may promptly commence the rulemaking process.

#### Findings of Fact

1. Western currently engages in a program of random (remote) monitoring of calls between customers and employees at its facilities located at San Francisco International Airport and Los Angeles International Airport.
2. No beep tone or other Commission-approved method of indicating that monitoring is taking place is used (e.g. an open transmitter).
3. Western provides its own terminal communications equipment at the locations mentioned.

Conclusions of Law

1. The affirmative acts which are the subject of the complaint are Western's and not Pacific's.
2. At present, Pacific does not have a duty to inspect terminal communications equipment owned by the customers to determine whether notice of monitoring is being given.
3. The complaint fails to state a cause of action against Pacific, and should be dismissed.

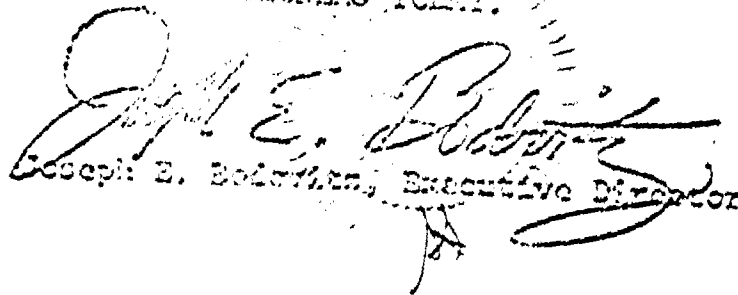
IT IS ORDERED that the complaint is dismissed.

This order is effective today.

Dated DEC 15 1981, at San Francisco, California.

JOHN E. BRYSON  
President  
RICHARD D. GRAVELLE  
LEONARD M. GRIMES, JR.  
VICTOR CALVO  
PRISCILLA C. CREW  
Commissioners

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

  
Joseph E. Boland, Executive Director