

Complaint.

FEDERAL TRADE COMMISSION

v.

THE BARRETT COMPANY.

COMPLAINT, FINDINGS AND ORDER IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914.

Docket 485—January 10, 1924.

SYLLABUS.

Where a corporation engaged in the manufacture and sale of a prepared roofing resembling rubber in appearance and made in varying thicknesses, but containing no rubber and consisting of only one-ply or layer; respectively designated, labeled, advertised and sold the same as "rubber" roofing and as one-ply, two-ply and three-ply, as the case might be, in competition with concerns which refrained from, or had discontinued, so designating and marketing similar products and in competition with concerns engaged in the manufacture and sale of other kinds of roofing, not misleadingly described in reference to composition and manufacture; with the effect of deceiving and misleading a substantial part of the general purchasing public and trade in reference to the composition and manufacture of such roofing and into believing that in purchasing the aforesaid roofing it was in fact purchasing a product composed wholly or partly of rubber and consisting of two or three plies, layers or thicknesses, respectively:

Held, That such practices, under the circumstances set forth, constituted unfair methods of competition.

Mr. John R. Dowlan for the Commission.

Miller & Otis of New York City (*Clark McKercher* and *H. Bar-tow Farr*, both of New York City, of counsel), for respondent.

COMPLAINT.

The Federal Trade Commission having reason to believe from a preliminary investigation made by it that The Barrett Company, hereinafter referred to as respondent, has been and now is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect on information and belief as follows:

PARAGRAPH 1. That the respondent, The Barrett Company, is and at all times hereinafter mentioned was a corporation organized, existing and doing business under and by virtue of the laws of the State

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of New Jersey, having its principal office and place of business in the City of New York, in the State of New York, now and for more than two years last past engaged in the manufacture and sale of a composition felt-base roofing material and in the shipment thereof from its place of manufacture to purchasers thereof in other States of the United States, and the District of Columbia, in direct competition with numerous other persons, copartnerships, and corporations similarly engaged.

PAR. 2. That for a period of more than two years last past the respondent, in the conduct of its business of manufacturing, selling and shipping composition felt-base roofing material in interstate commerce as aforesaid, has used the word "rubber" in its labels, advertising and other printed matter to characterize and describe its said product; that said characterization or description is false and misleading in that said product contains no rubber in its composition, and has the effect of creating an impression and belief among the trade and general public that respondent's said product is composed wholly or partly of rubber and the further effect of inducing purchasers to give to said product an undue preference over similar products of competitors that are not so characterized and described.

PAR. 3. That for a period of more than two years last past the respondent, in the conduct of its business of manufacturing, selling and shipping composition felt-base roofing material in interstate commerce as aforesaid, has used the terms "one-ply," "two-ply," and "three-ply" to designate and describe the different degrees of thickness of its said product; that said designation or description is false and misleading in that said product in its different degrees of thickness consists of but one layer of ply, and has the effect of creating an impression and belief among the trade and general public that respondent's said product consists of so many separate layers of felt, and the further effect of inducing purchasers to give the said product an undue preference over similar products of competitors that are not so designated and described.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER.

Pursuant to the provisions of an Act of Congress approved September 26, 1914, the Federal Trade Commission issued and served a complaint upon the respondent, The Barrett Company, charging it with the use of unfair methods of competition in commerce, in violation of the provisions of said act.

The respondent having entered its appearance by its attorney and filed its answer herein, hearings were had, and evidence was thereupon introduced in support of the allegations of said complaint

and on behalf of the respondent before an examiner of the Federal Trade Commission, theretofore duly appointed.

And thereupon this proceeding came on for final hearing, and the Commission having heard argument of counsel and duly considered the record and being now fully advised in the premises, makes this its findings as to the facts and conclusion:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. The respondent, The Barrett Company, is now, and for many years last past has been, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having its principal office in the City of New York, State of New York, numerous branch offices in cities throughout the United States, and manufacturing establishments in several of said States. During all of the times herein mentioned respondent has been engaged in the manufacture and sale of numerous commodities made from coal tar and asphalt, such as paving material, wood preservatives, roofing material, and prepared roofing. Respondent, in connection with its sales causes its commodities to be transported from its manufacturing plants, through and into various other States of the United States and the District of Columbia, to purchasers located in the said States and District of Columbia. There are and have been for many years numerous other persons, firms, and corporations engaged in the manufacture and in the sale of similar prepared roofing, and still others engaged in the manufacture and in the sale of other kinds of roofing, who likewise cause their roofing to be transported from the State where manufactured, through and into said States of the United States and District of Columbia, to purchasers therein located; and respondent is in active and direct competition, in interstate commerce, with such persons, firms and corporations.

PAR. 2. The prepared roofing so manufactured by respondent consists of various types. Some of these, which are surfaced with ground slate or other mineral, have a rough surface. Another type which will hereinafter be referred to as smooth-surface roofing, has a smooth surface. In manufacturing its smooth surface roofing, respondent takes a sheet of the desired thickness and length of rag felt and passes it through a saturating tank or bath where it absorbs asphaltic base oils, after which it is coated on both sides with a high-melting-point asphalt. Before shipping or causing such smooth surface roofing to be transported, as above described, respondent puts it up in rolls containing approximately 108 square feet; nails and cement for use in laying such roofing are placed in the center of each

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roll; each roll is wrapped in a paper cover, and two labels, one larger than the other, are attached to such paper cover.

PAR. 3. For a number of years prior to the issuance of the complaint herein, respondent extensively advertised its roofing by samples enclosed in cardboard covers and by pamphlets, circulars and other printed matter, which it distributed direct to ultimate consumers upon request and to its various customers, who, in turn, displayed and distributed such printed matter to ultimate consumers. Respondent also extensively advertised such roofing in magazines and farm papers having a national circulation.

PAR. 4. Practically all of the various types of pamphlets, circulars, and other printed matter distributed by respondent designated its smooth surface roofing as: Everlastic "Rubber" Roofing, and by the use of the term "ply" in some cases designating it as: 1 ply, 2 ply and 3 ply, and in others as: Light (1-ply) 35 pounds, Medium (2-ply) 45 pounds, and Heavy (3-ply) 55 pounds per roll; and practically all of the advertisements placed by respondent in magazines and farm papers designated its smooth surface roofing as: Everlastic "Rubber" Roofing, and for a time such advertisements also designated it as: one, two and three ply. A number of the cardboard sample covers distributed by respondent designated its smooth surface roofing as: Everlastic "Rubber" Roofing, and the others designated it as: 1 ply, 2 ply, and 3 ply.

PAR. 5. For a number of years prior to the issuance of the complaint herein, the larger of the two labels attached by respondent to its smooth surface roofing in some cases designated its roofing as "Rubber Roofing," and in other cases as "Everlastic Roofing," and in still other cases by the use of fanciful names such as "Mexoid Roofing"; the smaller of the two labels attached by respondent to its smooth surface roofing in some cases designated it as "1 ply," "2 ply," and "3 ply," and in other cases as "(1 ply) Light Weight," "(2 ply) Medium Weight," and "(3 ply) Heavy Weight"; and such roofing was offered, exposed for sale, and sold by respondent to roofing contractors and wholesalers and retailers of roofing and was offered, exposed for sale to the general public, and sold to ultimate consumers by such retailers and roofing contractors, as "Rubber" Roofing and "1 ply," "2 ply," and "3 ply" roofing, with said labels so applied by respondent still attached thereto.

PAR. 6. The roofing so sold, labeled, advertised, and marketed by respondent does not consist of more than one ply or layer, and does not contain any rubber in its composition, though it does resemble rubber in appearance and is made in thicknesses which vary according to weight.

PAR. 7. The wrappers or paper covers enclosing the respondent's smooth surface roofing and the labels, sample covers, pamphlets, circulars, magazine, and farm paper advertisements, and other printed matter used in connection therewith, with the exception of one type of pamphlet, were not marked or labeled or branded with any word or words to indicate the fact that such roofing did not contain rubber; and respondent did not indicate through any of these media the nature or character of the water-proofing materials used to saturate, coat and surface its smooth surface so-called Everlastic "Rubber" Roofing, or that such roofing was not constructed of more than one layer or piece of felt.

PAR. 8. The word "rubber" when used as a noun means primarily and popularly caoutchouc or India-rubber or something made partly or wholly of caoutchouc or India-rubber, and when used as an adjective means made of caoutchouc or India-rubber or having caoutchouc as the principal component. The word "ply" when used as a noun means primarily and popularly a layer or thickness; and when used as an adjective means the number of thickness of which anything is made.

PAR. 9. A substantial part of the consuming public and some retailers of roofing and roofing contractors understand the word "rubber" when applied to prepared roofing of the kind described in paragraph 2 hereof and the words "1 ply," "2 ply," and "3 ply" when applied to said roofings and to tar and gravel, or built up roofings to mean that such roofing is composed partly of rubber and consists of one, two, and three plies, layers or thicknesses, respectively.

PAR. 10. For a period of several years preceding December, 1919, a number of respondent's competitors for a time also labeled and advertised their smooth surface roofing as "Rubber Roofing" and "1 ply," "2 ply," and "3 ply," and, believing that these terms when so used were misnomers and misleading, abandoned and discontinued such use thereof. Other competitors of respondent refrained from using these terms and marketed their smooth surface roofing under labels and by means of advertisements which describe in whole or in part the composition of such roofing or refer to it by some nondescriptive words, fanciful trade names or brands, or when designating the weight or thickness thereof use the words "light," "medium," and "heavy," and in some cases also state the number of pounds which such roofing weighs. Some of the said competitors of respondent on numerous occasions printed and distributed the statement that there was no rubber in so-called rubber roofing and that it consisted of only one layer.

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PAR. 11. Other types of roofing, such as wooden shingles, asphalt-saturated shingles, tarred roofing, galvanized iron roofing, copper roofing, slate roofing, and tile roofing, are marketed by some of respondent's said competitors, and by still other competitors of respondent under labels and by means of advertisements which describe in whole or in part the materials of which such roofing is composed. Some of respondent's said competitors market roofings which are called asbestos, tar and tarred felt and gravel roofings, and which are constructed of separate layers or plies, under labels and by means of advertisements which describe such roofing as "1 ply," "2 ply," "3 ply," "4 ply," and "5 ply."

PAR. 12. It was the sense of the prepared roofing manufacturing industry as expressed by a resolution adopted in March, 1919, by the Prepared Roofing Association, an organization comprising among its members at the time of the adoption of said resolution, the respondent and thirty-one of the approximate total number, ranging from thirty-five to forty-five manufacturers of prepared roofing in the United States, that the trade should be educated "to use the terms 'light,' 'medium,' and 'heavy' in place of '1 ply,' '2 ply,' and '3 ply,' and that, as expressed by another resolution adopted by the Association in March, 1920, "rubber deteriorates on exposure to the weather, as is known to everyone, and to represent that the roofing contained rubber would not only be untrue but would also injure the reputation of the roofing." It was also the sense of the industry, as expressed in March, 1920, by said last mentioned resolution, that the use of the terms "1 ply," "2 ply," and "3 ply" had "been gradually given up, so that they are today obsolete," and, as expressed at the same time by the Secretary of said Association, that the use of the term "Rubber" had been "abandoned." It was the sense of a number of roofing manufacturers, retail roofing dealers and roofing contractors that the terms "1 ply," "2 ply," and "3 ply" and "Rubber" misled and deceived a substantial portion of the public into believing that there was some rubber in the roofing and that it was constructed of more than one layer.

PAR. 13. A substantial number of consumers have a preference for roll roofing which is described as "Rubber," "1 ply," "2 ply," and "3 ply," because they believe that such roofing has rubber in it and is constructed of more than one layer or ply; and a substantial number of said consumers purchased this type of roofing, which contained no rubber and consisted of only one ply or layer, under such erroneous belief.

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PAR. 14. Respondent's designation and description of its smooth surface roofing as "Rubber Roofing," and "2 ply" and "3 ply," in such labels and advertisements, is a false and misleading description and designation of the roofing so labeled and advertised; does create, and is calculated and has the capacity and tendency to create a false impression and belief among a substantial part of the roofing trade and general public, that the roofing so labeled and advertised, and other roofing of the same type, is composed wholly or partly of rubber and consists of two and three plies, layers or thicknesses, respectively, and to deceive and mislead a substantial part of the general purchasing public and roofing trade into the belief that in purchasing such roofing it is in fact purchasing roofing which is composed wholly or partly of rubber and consists of two and three plies, layers or thicknesses, respectively.

CONCLUSION.

The practices of respondent, The Barrett Company, under the conditions and circumstances described in the foregoing findings, are unfair methods of competition in interstate commerce and constitute a violation of the Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes."

MODIFIED ORDER TO CEASE AND DESIST.¹

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, the testimony and evidence, and the argument of counsel, and the Commission having made its findings as to the facts with its conclusion that the respondent has violated the provisions of the Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,"

It is now ordered, That the respondent, The Barrett Company, its agents, servants, employees and representatives do cease and desist—

From employing or using in connection with the sale of roofing material not composed of rubber the word "Rubber," alone or in combination with any other word or words to describe its product: (a) in circulars, booklets or other advertising matter; or (b) as, or in connection with, or as part of, a trade name or brand for such roofing; or (c) on labels, covers or wrappers for, or on rolls of, such roofing; and

¹ Made as of June 16, 1924.

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From employing or using in connection with the sale of roofing material not composed of two or more plies, layers or thicknesses the words or terms "two-ply" or "three-ply" alone or in combination with any other word or words to describe its product; (a) in circulars, booklets or other advertising matter; or (b) as, or in connection with, or as part of, a trade name or brand for such roofing; or (c) on labels, covers or wrappers for, or on rolls of, such roofing.

It is further ordered, That the respondent, within thirty (30) days from notice hereof, file with the Commission a report in writing stating in detail the manner in which this order has been complied with.

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