

Complaint

41 F. T. C.

IN THE MATTER OF
BENJAMIN L. FRY TRADING AS
ANTI-CO-RODE LABORATORIES

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5286. Complaint, Mar. 2, 1945—Decision, Oct. 8, 1945

Where an individual engaged in the interstate sale and distribution of a treatment or conditioner for automotive storage batteries, sold under the trade name "Anti-Co-Rode"—

- (a) Falsely represented through statements in advertisements in trade journals and on labels, and in other advertising matter, directly or by implication, that his preparation prevented and stopped the formation of sulphate of lead corrosion on battery plates; insured more power, easier starting, brighter lights, and longer life in batteries; dissolved sulphate of lead corrosion on the plates and restored the acid solution of the batteries; and was an anti-corrosive;

The facts being that said preparation contained copper and iron, which tend to increase the spontaneous discharge of a lead acid storage battery, result in the formation of lead sulphate, and in fact aggravate the conditions which it was represented as improving;

- (b) Represented falsely through use of the word "Laboratories" as part of the trade name under which he conducted his business, that he actually owned or controlled a laboratory or place devoted to the application of scientific principles in the preparation of his chemical compound; and
- (c) Falsely represented, through use of the term "Anti-Co-Rode" as a part of his trade name and as a trade designation for said product, that said preparation was anti-corrosive;

With effect of misleading and deceiving a substantial portion of the purchasing public into the erroneous belief that such representations were true, and with tendency and capacity so to do and to induce the public to purchase substantial quantities of his product as a result thereof:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Randolph Preston*, trial examiner.

Mr. Jesse D. Kash for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Benjamin L. Fry, an individual, trading as Anti-Co-Rode Laboratories, hereinafter referred to as respondent, has violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect

thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. The respondent Benjamin L. Fry is an individual trading and doing business as Anti-Co-Rode Laboratories. Respondent formerly had his office and principal place of business at 711-715 North Taylor Ave., St. Louis, Mo. His present address is 5858 Delmar Boulevard, St. Louis, Mo.

PAR. 2. The respondent for more than two years last past has been engaged in the sale and distribution of a preparation as a treatment or conditioner for automotive storage batteries. This preparation is sold under the trade name "Anti-Co-Rode." Respondent causes said preparation when sold by him to be transported from his aforesaid place of business, in the State of Missouri, to purchasers located in various other States of the United States and in the District of Columbia. The respondent maintains, and at all times mentioned herein has maintained a course of trade in said preparation in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of his aforesaid business and for the purpose of inducing the purchase of said preparation, the respondent has circulated among prospective purchasers throughout the United States, by United States mails, advertisements and trade journals, labels, and other advertising material, all of general circulation, many false statements and representations concerning his said preparation. Among and typical of such false statements and representations are the following:

SAVE YOUR BATTERY with Anti-Co-Rode. For Use in New and Used Batteries. Prevents and Stops Corrosion on Battery Plates. Insures More Power, Easy Starting, Brighter Lights and Longer Life.

It dissolves Corrosion on the Plates; Restores the Acid Solution; Insures Greater Power and Much Longer Life.

A treatment with Anti-Co-Rode will dissolve quickly the corrosion on the plates and restore the original acid solution.

Run the car with the generator charging 10 amperes or more and this will restore the charge. The further you drive your car, the greater the charge will become.

PAR. 4. Through the use of the foregoing statements and representations hereinabove set forth and others similar thereto, not specifically set out herein, the respondent represents directly or by implication that his preparation prevents and stops the formation of sulphate of lead corrosion on battery plates; that its use insures more power, easier starting, brighter lights and longer life in batteries in which it is used; that its use dissolves sulphate of lead corrosion on the plates and restores the acid solution of the batteries;

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that a treatment with said preparation will dissolve quickly the corrosive deposit of sulphate of lead on the plates and restore the original acid solution; that said preparation is an anti-corrosive.

PAR. 5. The foregoing claims, statements and representations are false, misleading, and deceptive. In truth and in fact, the use of said preparation in a storage battery will not prevent or stop sulphate of lead corrosion on battery plates. Its use does not create more power or cause easier starting, brighter lights or prolong the life of the battery. Its use does not dissolve sulphate of lead corrosion on the plates, nor restore the acid solution in the battery. A treatment of Anti-Co-Rode will not dissolve quickly the sulphate of lead corrosion on the plates, and will not restore the original acid strength of solution. Said preparation contains copper and iron and said metals tend to increase the spontaneous discharge of a lead acid storage battery, resulting in the formation of lead sulphate, and the use of said preparation aggravates the conditions which it is represented as improving.

PAR. 6. In the course of use, an automotive storage battery develops on the plates a coat of lead sulphate which is formed from a mixture of lead and acid in the battery which hinders and retards the circulation of the electric current through the battery. This condition is commonly known as corrosion.

PAR. 7. The use by the respondent of the word "Laboratories" as part of the trade name under which he conducts his business is misleading and deceptive, as it conveys or tends to convey to the public the belief that respondent actually owns and operates, or directly and absolutely controls a laboratory, or place devoted to experimental study in a branch of natural science and the application of scientific principles in the preparation of his chemical compound. In truth and in fact, the respondent does not own, operate, or control a laboratory devoted to experimental study in a branch of natural science, and the application of scientific principles and application in the preparation of his chemical compound.

PAR. 8. The use of the term "Anti-Co-Rode" as a trade designation for said product is misleading and deceptive, as it conveys or tends to convey to the public the belief that said preparation is anti-corrosive. In truth and in fact, said preparation is not an anti-corrosive.

PAR. 9. The use by the respondent of the foregoing false and misleading statements and representations disseminated as aforesaid has a tendency and capacity to, and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are

true, and to induce the public to purchase substantial quantities of respondent's product as a result of such belief.

PAR. 10. The aforesaid acts and practices of the respondent herein alleged are all to the injury and prejudice of the public, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on March 2, 1945, issued and subsequently served its complaint in this proceeding on the respondent, Benjamin L. Fry, an individual, trading as Anti-Co-Rode Laboratories, charging him with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said act. An answer was filed by the respondent on March 27, 1945. Thereafter, a hearing was held before a trial examiner of the Commission theretofore duly designated by it, at which hearing a stipulation as to the facts was entered into by and between the attorney for the Commission and the respondent, who was not represented by counsel, and read into the record. This stipulation provides that the facts therein set forth shall be taken as the facts in this proceeding and in lieu of testimony in support of the allegations of the complaint or in opposition thereto, and that the Commission may proceed upon said complaint and said statement of facts to make its report stating its findings as to the facts (including inferences which it may draw from said stipulated facts) and its conclusion based thereon, and enter its order disposing of the proceeding without the presentation of argument or the filing of briefs. The respondent expressly waived the filing by the trial examiner of a report upon the evidence.

Thereafter, the proceeding regularly came on for final hearing before the Commission on the complaint and stipulation as to the facts (such stipulation having been accepted and approved by the Commission); and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Benjamin L. Fry, is an individual trading and doing business as Anti-Co-Rode Laboratories. Respondent formerly had his office and principal place of business at 711-715

North Taylor Ave., St. Louis, Mo. His present address is 5858 Delmar Boulevard, St. Louis, Mo.

PAR. 2. The respondent, for more than two years prior to March 1943, was engaged in the sale and distribution of a preparation known as a treatment or conditioner for automotive storage batteries. This preparation was sold under the trade name "Anti-Co-Rode." Respondent caused said preparation, when sold by him, to be transported from his aforesaid place of business in the State of Missouri to purchasers located in various other States of the United States and in the District of Columbia. The respondent maintained a course of trade in said preparation in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of his aforesaid business and for the purpose of inducing the purchase of said preparation, the respondent has made many statements and representations concerning his said preparation to purchasers located throughout the United States. These statements appeared in advertisements in trade journals, on labels, and in other advertising material. Among and typical of such statements and representations are the following:

SAVE YOUR BATTERY with Anti-Co-Rode. For Use in New and Used Batteries. Prevents and Stops Corrosion on Battery Plates. Insures More Power, Easy Starting, Brighter Lights and Longer Life.

* * * * *

It Dissolves Corrosion on the Plates; Restores The Acid Solution; Insures Greater Power and Much Longer Life.

* * * * *

A treatment with Anti-Co-Rode will dissolve quickly the corrosion on the Plates and restore the original acid solution.

* * * * *

Run the car with the generator charging 10 amperes or more and this will restore the charge. The further you drive your car, the greater the charge will become.

PAR. 4. Through the use of the foregoing statements and representations, and others similar thereto not specifically set out herein, the respondent has represented, directly or by implication, that his preparation prevents and stops the formation of sulphate of lead corrosion on battery plates; that its use insures more power, easier starting, brighter lights, and longer life in batteries in which it is used; that its use dissolves sulphate of lead corrosion on the plates and restores the acid solution of the batteries; that said preparation is an anti-corrosive.

PAR. 5. The foregoing claims, statements, and representations are false, misleading, and deceptive. In truth and in fact, the use

of said preparation in a storage battery will not prevent or stop sulphate of lead corrosion on battery plates. Its use does not create more power, cause easier starting, produce brighter lights, or prolong the life of the battery. Its use does not dissolve sulphate of lead corrosion on the plates, nor restore the acid solution in the battery. Said preparation contains copper and iron, and said metals tend to increase the spontaneous discharge of a lead acid storage battery, resulting in the formation of lead sulphate, and the use of said preparation aggravates the conditions which it is represented as improving.

PAR. 6 In the course of use, an automotive storage battery develops on the plates a coat of lead sulphate which is formed from a mixture of lead and acid in the battery which hinders and retards the circulation of the electric current through the battery. This condition is commonly known as corrosion.

PAR. 7. The use by the respondent of the word "Laboratories" as part of the trade name under which he conducts his business is misleading and deceptive, as it causes or tends to cause the public to believe that respondent actually owns and operates or directly and absolutely controls a laboratory or place devoted to experimental study in a branch of natural science and the application of scientific principles in the preparation of his chemical compound.

PAR. 8. The use of the term "Anti-Co-Rode" as a part of respondent's trade name or as a trade designation for said product is misleading and deceptive, as it causes or tends to cause the public to believe that said preparation is anti-corrosive. In truth and in fact, said preparation is not an anti-corrosive.

PAR. 9. The use by respondent of the foregoing false and misleading statements and representations had the tendency and capacity to, and did, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were true, and to induce the public to purchase substantial quantities of respondent's product as a result of such belief.

PAR. 10. The Commission further finds that the respondent ceased the advertising representations contained herein after he had been approached by a representative of the Commission.

CONCLUSION

The acts and practices of the respondent as herein found are all to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

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ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and a stipulation as to the facts entered into by and between counsel for the Commission and the respondent upon the record, and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Benjamin L. Fry, individually and trading as Anti-Co-Rode Laboratories, or trading under any other name, and his agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondent's chemical product now designated "Anti-Co-Rode," or any other product of substantially similar composition or possessing substantially similar properties, do forthwith cease and desist from:

1. Representing, directly or by implication, that respondent's product prevents, stops, or dissolves sulphate of lead corrosion on automotive battery plates, or that it restores the acid solution of such batteries.

2. Representing, directly or by implication, that said product increases the power or prolongs the life of automotive batteries, or that the use of said product results in easier starting or brighter lights for automotive vehicles.

3. Using the term "Anti-Co-Rode," or any other term of similar import, as a part of respondent's trade name or to designate, describe, or refer to respondent's product; or otherwise representing, directly or by implication, that said product is an anti-corrosive.

4. Using the word "Laboratories," or any other word of similar import, as a part of respondent's trade name; or otherwise representing, directly or by implication, that respondent owns or operates a laboratory.

It is further ordered, That the respondent shall, within 60 days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

Syllabus

IN THE MATTER OF
STANDARD OIL COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF
SUBSEC. (a) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED
BY AN ACT APPROVED JUNE 19 1936

Docket 4389. Complaint, Apr. 23, 1941¹—Decision, Oct. 9, 1945

As respects the proviso in Section 2 of the Clayton Act, prior to its amendment by the Robinson-Patman Act, which permitted discriminations in price "in the same or different communities made in good faith to meet competition," Congress, in framing the latter act, discarded said proviso as an indefinite and weakening factor and made price differences due to differences in cost, market changes and marketability of the goods the only absolute justifications now available to a respondent charged with unlawful price discrimination thereunder.

A *prima facie* case of a violation of Section 2(a) of the Clayton Act, as amended, may be established by proving (1) jurisdiction, (2) goods of like grade and quality, and (3) discrimination in prices. Based upon such a case the Commission may draw a rebuttable presumption that the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly or to injure, destroy or prevent competition, in which event the burden of proof shifts to the respondent, who, in rebuttal of such a *prima facie* case, may show, under Section 2 (b), that the respondent's lower price was made in good faith to meet an equally low price of a competitor, following which the Commission could no longer rely upon its *prima facie* case, but would need to show by additional and affirmative evidence that the effect of the discrimination might be to substantially lessen competition or tend to create a monopoly or to injure, destroy or prevent competition between respondent and its competitors or between customers of the respondent or with the customers of such customers

A showing, under Sec. 2 (b) of the Clayton Act, that respondent's lower price was made in good faith to meet an equally low price of a competitor, is not an absolute defense to a charge of unlawful discrimination and can be availed of only to the extent it may rebut a *prima facie* case under Sec. 2 (a) as above set out. The meeting of an equally low price of a competitor in good faith is not a defense to a charge of price discrimination where competitive injury is affirmatively shown and so replaces the rebuttable presumption of the *prima facie* case. This results from the difference between such a case and the *prima facie* case referred to in Section 2 (b). Section 2 (b) defines a *prima facie* case as " * * * proof * * * that there has been discrimination in price . . ." which must be compared with the prohibitions of Section 2 (a) which make such a discrimination unlawful only in the event it injuriously affects competition.

To hold that the provision for showing of good faith to meet an equally low price of a competitor can be construed as a *carte blanche* exemption to a respondent to engage in discriminations in price which have the adverse effects on competition proscribed under Section 2 (a), would constitute recognition of the soundness of the principle that one competitor's violation of law justifies its violation by another; would also justify discrimination by a chain organization to meet the equally low

¹ Amended.