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EJS

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Roseway Transportation, Inc.**

Serial No. 74/592,435

Jayne Conway Hunter of W. Thad Adams, III, P.A. for Roseway
Transportation, Inc.

Leigh Case, Trademark Examining Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney)

Before Simms, Seeherman and Hairston, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Roseway Transportation Inc. has appealed from the
Examining Attorney's refusal to register ROSE WAY and
design, as shown below, for "freight transportation by truck
and other intermodal means."¹



¹ Application Serial No. 74/592,435, filed October 31, 1994,
and asserting first use and first use in commerce as of July 1,
1994.

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark, as used on its identified services, so resembles the mark ROSE TRANSPORT and design, shown below, registered, with a disclaimer of the word "Transport" for "transportation of goods by truck," as to be likely to cause confusion or mistake or to deceive.



Applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested.

In any likelihood of confusion analysis, two key factors are the similarities of the marks and the similarity of the services.

With respect to the services, we find that they are in part identical, applicant's identification including "freight transportation by truck" and the registrant's being for "transportation of goods by truck." There is no dispute that the registrant's identification would encompass the transportation of freight.²

² We also take judicial notice of the dictionary definitions of "freight": "goods carried by a vessel or vehicle; lading;"

Because these services are legally identical, we must assume that they are offered to the same classes of customers through the same channels of trade. We note that applicant has submitted a Dun & Bradstreet report which states that the registrant "sells to Mulch Manufacturing and some industrial concerns," and that it is related, through common principals, with this company. Applicant also asserts that an employee of registrant stated to applicant that the majority of its transportation services was for Mulch Manufacturing.³ As a result, applicant argues that applicant's and registrant's services are offered in different channels of trade, and that such channels of trade are likely to continue.

The problem with applicant's position is that the question of likelihood of confusion must be determined on the basis of the identification of goods or services set forth in the subject application and the cited registration. See **In re William Hodges & Co., Inc.**, 190 USPQ 47 (TTAB 1976). Thus, for purposes of our analysis, we must consider that registrant's services are offered to all customers, and through all channels of trade, which are appropriate for such services. We would also point out that neither the Dun & Bradstreet report, nor the statement of registrant's

"goods transported as cargo by a commercial carrier, as distinguished from baggage, mail, and express." The American Heritage Dictionary of the English Language, New Coll. ed. (1976).

³ The Examining Attorney has not raised any evidentiary objections to these submissions, and we will therefore deem any objections to have been waived.

employee reported by applicant, show that registrant's services are offered exclusively to Mulch Manufacturing. Thus, even based on the evidence of record, we must conclude that registrant's services are offered to the relevant public.

We turn now to a consideration of the marks, keeping in mind that "when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." **Century 21 Real Estate Corp. v. Century Life of America**, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Applicant has provided a detailed analysis of their differences, pointing out, for example, that in the cited mark the rose appears in place of the letter "O" in ROSE, while in applicant's mark the rose is to the right of ROSE WAY. And, obviously, one mark has the word TRANSPORT while the other has the word WAY. Despite, these differences, however, we find that the marks convey the same commercial impression. ROSE is the first word of both marks, and the importance of this word is reinforced in both marks by the rose designs. The additional words TRANSPORT and WAY have less source-indicating significance. TRANSPORT is clearly descriptive of the registrant's transportation services, as evidenced by the fact that it has been disclaimed. WAY has a suggestive significance with respect to applicant's transportation services, meaning "a course affording passage from one place to another; a road, path, or highway"; "a course that is or

may be used in going from one place to another"; and "progress or travel along a certain route or in a specific direction." It may also indicate "the manner of doing something or a course of action."⁴

Thus, while we have compared both marks in their entireties, the word ROSE and the reinforcing rose design must be considered the dominant parts of both marks. Further, because ROSE is an arbitrary term for freight transportation services,⁵ even if consumers realize that applicant's mark has the term WAY, while registrant's mark has the term TRANSPORT, they are likely to assume that they are variant marks which both indicate services emanating from a single source. As for the differences in the location of the rose design, or the slight differences in typescript used in the two marks, such differences are not likely to be remembered by consumers, who do not, under actual marketing conditions, have the luxury to make side-by-side comparisons between marks, and instead must rely on hazy past recollections. See **Dassler KG v. Roller Derby Skate Corp.**, 206 USPQ 255 (TTAB 1980). Again, even if these

⁴ The American Heritage Dictionary of the English Language, New Coll. ed. (1976). The Board may take judicial notice of dictionary definitions. **University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.**, 213 USPQ 594 (TTAB 1982), *aff'd*. 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁵ Applicant has asserted that there is no evidence that ROSE TRANSPORT and design is a famous mark, and we agree with this position. However, a mark may be considered to be "strong" even if it is not famous. Thus, it is well-established that invented words and arbitrary marks are given a broader scope of protection without proof of fame.

minor differences were noticed, consumers are likely to assume that the marks are variants of each other, but that both identify a single source for the services.

Applicant has argued that the services of freight transportation by truck and other intermodal means are not impulse purchases, but are chosen with careful consideration. We do not disagree with this statement. However, even careful purchasers are not immune from confusion when very similar marks are used on identical services. Thus, one who has heard good reports of ROSE TRANSPORT for transportation of goods by truck is likely, for the reasons stated above, to assume, upon seeing an advertisement for ROSE WAY and design for freight transportation by truck services, that these services emanate from the same source.

Finally, applicant asserts that there has been no evidence presented of actual confusion. However, the absence of such evidence is not probative the confusion is not likely to occur, particularly in this case where applicant has used its mark only since July 1994, and where we have no information as to the extent of applicant's use, whether it is operating in the same trading areas as registrant, and so on. We also point out that we have had no opportunity to hear from the registrant as to whether it has experienced any instances of confusion.

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Decision: The refusal of registration is affirmed.

R. L. Simms

E. J. Seeherman

P. T. Hairston
Administrative Trademark Judges
Trademark Trial and Appeal Board