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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Trafalgar Holdings, Inc.

Serial No. 75/673,468

Jeffrey I. Costellia of Nixon Peabody LLP for Trafalgar Holdings, Inc.

Allison Hall, Trademark Examining Attorney, Law Office 103 (Dan Vavonese, Acting Managing Attorney).

Before Cissel, Seeherman and Chapman, Administrative Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On April 2, 1999, ADGC Holdings, Inc., a Delaware corporation with its principal place of business in Washington, D.C., filed the above-referenced application to register the mark SUN AIRWAYS on the Principal Register for "transportation of persons, mail and property by air; bonus programs for frequent air travelers, namely, priority boarding check-in, seating and reservation services, ticket upgrades, and augmented frequent flyer mileage; business

management consultation services in the field of aircraft and airport operations; ticket jackets; corporate documents; and identification tags for luggage." The basis for filing the application was applicant's claim that it had used the mark in connection with the specified goods and services since September 1998, and in interstate commerce in connection with these goods and services since October 1998.

By subsequent amendment, applicant deleted reference to any goods and recited its services as follows:

"transportation of persons, mail and freight by air on regularly scheduled flights over defined routes; air transportation services featuring bonus programs for frequent air travelers, namely, priority boarding, check-in, seating and reservation services, ticket upgrades, and augmented frequent flyer mileage, in International Class 39." Applicant also amended the application to disclaim the descriptive word "AIRWAYS" apart from the mark as shown. The application was assigned to Trafalgar Holdings, Inc. and the assignment was recorded in the United States Patent and Trademark Office.¹

Following the resolution of a number of other issues,

¹ At Reel 1997, Frame 0407.

this application is now before the Board on appeal from the Examining Attorney's final refusal to register the mark under Section 2(d) the Lanham Act on the ground that applicant's mark so resembles the mark shown below,



which is registered² for "airplane and helicopter charter services, namely, providing air transportation for government and industrial personnel and equipment, air shuttle transportation for executives, and flightseeing excursions; flight instruction and training" in International Class 39, that confusion is likely.

Both applicant and the Examining Attorney filed appeal briefs, but applicant did not request an oral hearing before the Board. Accordingly, we have resolved this appeal based on consideration of the application file, the

² Reg. No. 2,316,290, issued to Air Aviation Corporation California on February 8, 2000 with a disclaimer of the word "AIR" apart from a mark as shown.

written arguments of applicant and the Examining Attorney and the relevant legal precedents.

The record includes the declaration, with exhibits, of Bruce M. Caner, applicant's Chairman. In his declaration, he contends that in the airline and aviation industry, the term "AIRWAYS" connotes conventional commercial airlines offering regularly scheduled flights over defined routes. He included a copy of dictionary definitions of the word "airway" as any "company, etc. operating an aircraft, an airline"; and as "the specially marked way or route along which aircraft fly from airport to airport; airline." Also included as an exhibit to his declaration was a copy of an article from the November 13, 1996 edition of The Washington Post. In it, the newspaper discusses USAir's change of its name to "US AIRWAYS." Still other exhibits to his declaration are copies of pages printed from the website of the owner of the cited registration. Based on his experience in the industry and consultation with aviation regulation counsel, Mr. Casner concludes that the light aircraft used for ad hoc charters and the commercial aircraft used for regularly scheduled air transportation are subject to substantially different federal licensing and regulatory requirements; and that based on these facts

and the differences between the marks at issue, as well as differences between the services offered thereunder and the consumers and channels of trade for such services, there is no likelihood of confusion between applicant's mark and the cited registered mark.

The Examining Attorney made of record third-party registrations for the marks "KOREAN AIR," "AIR FRANCE," "AIR-INDIA," and "JAPAN AIR SYSTEM," along with advertising materials which show each such mark used to identify the services offered by these airlines; a copy of a page from the website of Air-India indicating that it partners with a number of other air carriers which use the terms "AIR," "AIRWAYS" and "AIRLINES" without any apparent distinctions relative to their air transportation services (these airlines include Swiss Air, Austrian Airlines, Air France, Kuwait Airways, and Air Mauritius); a dictionary definition of the term "air" as a reference to "aircraft"; a definition of the word "airway" as an "airline"; a number of additional third-party registrations for marks which include the words "Airways" or "Airlines"; and materials retrieved from Internet websites showing that some airlines, such as Delta and Northwest, also provide charter flight services and shuttle flight services. The Examining Attorney also submitted additional third-party

registrations showing that some marks are registered for both air transportation services and various types of bonus programs for frequent flyers.

The predecessor to our primary reviewing court set forth the principal factors to be considered in determining whether confusion is likely in the case of *In re E. I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Chief among these factors are the similarity of the marks as to appearance, sound, meaning and commercial impression and the relatedness of the goods or services on or in connection with which they are used. Confusion is likely in the case before us because, when considered in their entireties, these marks create similar commercial impressions and the services set forth in the cited registration are closely related to the goods and services specified in the application.

Turning first to the marks, we note that while they must be considered in their entireties, nevertheless, one feature or part of a mark may be recognized as having a more significant role in creating the commercial impression of the mark, and we may give greater weight to that part or feature in determining whether confusion is likely. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Typically, when a mark consists of a word portion

and a design element, the word portion is more likely to be impressed upon the memory of a prospective purchaser and to be recalled and used in calling for or recommending the goods or services. In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987). For this reason, we may give "SUN AIR," the word portion of the cited registered mark, more weight in determining whether confusion is likely.

In the instant case, these two marks create very similar commercial impressions because each contains the same word, "SUN," combined with either the descriptive word "AIR" or the similarly descriptive word "AIRWAYS," both of which are disclaimed in the cited registration and the application, respectively. Not only are these two words merely descriptive of the services, they are also similar in appearance and pronunciation, and they have virtually identical meanings in connection with these services.

The words "SUN AIR" in the cited registered mark clearly play the dominant role in creating the commercial impression that the mark engenders. As is often the case, it is the literal portion of the mark, rather than the design component, which is more likely to be recalled by purchasers of the services and used in ordering or recommending them in the future. The design element in the registered mark is plainly a graphic representation of the

sun. This redundancy or emphasis on the word "SUN" does little to change the overall commercial impression of the mark as a whole.

Applicant argues that the design element in the cited registered mark allows customers to distinguish easily between the two marks; and that in any event, the connotations and hence the commercial impressions engendered by these marks differ by virtue of the different appearances, pronunciations and connotations of the words "AIR" and "AIRWAYS." Applicant maintains that "AIRWAYS" is used in connection with conventional commercial airlines offering regularly scheduled flights over defined routes, whereas "AIR," when used in connection with air transportation services, implies a small provider of charter flights, flight schools, or a small regional private air carrier, which are apt descriptions of the registrant, according to applicant.

As noted above, both applicant and the Examining Attorney have made of record evidence in support of their respective positions on this issue. The Examining Attorney has shown that the meanings of these terms are virtually synonymous, and that various airlines appear to use the terms "AIR," "AIRWAYS" and "AIRLINES" interchangeably. Applicant has introduced evidence tending to show that in

at least one instance, "AIR" was intended to create a slightly different connotation from that of "AIRWAYS."

On balance, however, we are not persuaded that purchasers of either applicant's air transportation services or the air transportation services specified in the cited registration would necessarily be aware of the subtle distinctions argued by applicant. When considered in their entirety, these marks are similar in appearance, pronunciation, connotation and commercial impression.

We thus turn to consideration of the relationship between the services set forth in the application and the registration, respectively. We find that they are closely related. Contrary to applicant's contention, the customers for these services and the channels of trade through which they are rendered are not necessarily different, nor has applicant established that customers for registrant's air transportation services are sophisticated or knowledgeable enough to be able to distinguish between these similar marks in connection with such closely related services. Applicant's "air transportation services featuring bonus programs for frequent air travelers" appear to be provided to ordinary consumers who travel by air, which class of purchasers would necessarily include executives and government and industrial personnel. These are the same

types of people specified in the registration as customers for registrant's air charter services. Further, registrant's "flightseeing excursions" are not limited or restricted in such a way as to exclude ordinary consumers. These services, as identified in the registration, are rendered to the same class of purchasers as applicant's air transportation services, through the same channels of trade.

Moreover, the evidence the Examining Attorney made of record shows that airlines transporting people on regularly scheduled flights over defined routes also provide air charter services and air shuttle services, so the purchasing public for these services would reasonably expect a single entity to render both types of air transportation services. Plainly, when these closely related services are rendered under marks such as these, which create very similar commercial impressions, confusion is likely within the meaning of Section 2(d) the Lanham Act.

In any event, any doubt as to the likelihood of confusion must be resolved in favor of the registrant and prior user. *Lone Star Mfg. Co. v. Bill Beasley, Inc.*, 498 F.2d 906, 182 USPQ 368 (CCPA 1974).

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DECISION: The refusal to register under Section 2(d) of the Lanham Act is affirmed.