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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Burns Philip Food Inc.

Serial No. 75874861

Michael J. Hughes of IPLO Intellectual Property Law Offices
for Burns Philip Food Inc.

Andy Corea, Trademark Examining Attorney, Law Office 112
(Janice O'Lear, Managing Attorney).

Before Simms, Cissel and Hairston, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Burns Philip Food
Inc. to register the mark RAPIDRISE in the form shown below
for as a trademark for "yeast."¹



¹ Serial No. 75874861, alleging first use and first use in
commerce at least as early as August 31, 1983.

Applicant asserts that the mark it seeks to register is inherently distinctive but, in the alternative, claims pursuant to Section 2(f) of the Trademark Act, that the mark has acquired distinctiveness.

The Examining Attorney has refused registration under Section 2(e)(1) of the Act on the ground that the mark, when used in connection with applicant's goods, is merely descriptive of them. The Examining Attorney further contends that the evidence of acquired distinctiveness is insufficient to support registration on the Principal Register.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney submitted briefs. An oral hearing was not requested.

It is the Examining Attorney's position that the term "rapid rise" is highly descriptive or generic of the identified goods because it identifies a type of yeast; that combining the words "rapid" and "rise" to form the term RAPIDRISE does not change the merely descriptive connotation of the two terms; and that the display of the mark is not sufficiently distinctive to create a commercial impression apart from the term RAPIDRISE. Thus, the Examining Attorney maintains that applicant's mark is merely descriptive of applicant's goods.

Applicant contends that its mark is not highly descriptive or generic, but rather, is inherently distinctive. According to applicant, the term "rapid rise" is neither descriptive nor generic, but rather suggestive of yeast; that the common designation for yeast which rises quickly or rapidly is "quick rising"; that there is no evidence that competitors use the term "rapid rise" to describe a type of yeast; and that the majority of the excerpts submitted by the Examining Attorney are recipes derived from applicant's own website. Without conceding that the mark is descriptive, applicant submitted an alternative claim of acquired distinctiveness.

The Record

The Examining Attorney has submitted over 100 excerpts retrieved from the NEXIS data base which the Examining Attorney maintains show use of "rapid(-)rise" to identify a type of yeast. These excerpts consist of recipes and articles about baking.² The following are representative examples:

Yeast conversion
When substituting **rapid-rise** yeast for granular yeast, use 25 percent less.
(The Commercial Appeal; July 24, 2002);

² We note that several of the excerpts are duplicates in the sense that they appear in more than one newspaper.

Bread machine yeast is a highly active yeast
Recommended for all bread machine cycles. It
also can be used interchangeably in conventional
baking with **rapid-rise** or fast-acting yeast.
(The Oregonian; March 26, 2002);

Basic pizza dough
Makes 4 individual pizzas
1 teaspoon **rapid-rise** yeast
2 cups bread flour, plus more as needed
...
(San Jose Mercury News; February 6, 2002);

"You want a long, slow rise, which is why I
don't advocate the use of **rapid-rise** yeast.
It defeats the purpose."
(The Pantagraph; January 9, 2002);

This is an important consideration in December,
so this recipe uses a batter method - - no
kneading required --- in addition to the time-
saving advantages of **rapid rise** yeast.
(Topeka Capital Journal; December 15, 2001);

Southwest Braided Bread Wreath
1 package **rapid-rise** yeast
3 ½ cups flour
...
(Austin American Statesman; November 28, 2001);

Active dry yeast comes in two forms: regular and
quick. Sometimes called quick rising or **rapid rise**,
quick active dry yeast is less common and more
difficult to find but can be worth the effort
because it leavens bread in about half the time
as its standard counterpart.
(The Times Union; November 18, 2001);

Egg Casserole Bread
This recipe is relatively fast and easy with
fluffy texture.
6 cups all-purpose flour
3 tablespoons sugar
2 envelopes **rapid-rise** yeast
2 teaspoons salt
...
(Telegraph Herald; May 30, 2001);

Q. What's the difference between **rapid-rise** and regular yeast sold in small packages labeled "active dry"?
(Chicago Tribune, December 13, 2000);

Cake Mix Sweet Rolls
4-5 cups flour
1 (9 ounce) white cake mix (Jiffy)
2 packages **rapid-rise** yeast
1 teaspoon salt
... .
(The Bismark Tribune; December 7, 2000);

From scratch: This sounds daunting, but actually is very easy, especially if you use a recipe for a quick-rising crust made with **rapid-rise** yeast.
(Chicago Tribune; August 16, 2000);

Best-Ever Cinnamon Rolls
For rolls:
2 (1/4-ounce) envelopes **rapid-rise** or active dry yeast
2 ½ half cups lukewarm water
... .
(St. Louis Post-Dispatch; May 29, 2000);

There are several genetic strains of the yeast species used in baking: compressed fresh yeast, active dry yeast, **rapid-rise** yeast and instant yeast; each has different characteristics and uses.
(The Deseret News; December 14, 1999); and

Making the dough from scratch may sound daunting, but actually is easy, especially if you use a recipe for quick-rising crust made with **rapid-rise** yeast.
(Milwaukee Journal Sentinel; September 29, 1999).

In addition, the Examining Attorney submitted a printout from a website (<http://allrecipes.com>) that

contains information about yeast and reads in pertinent part:

Rapid Rise Yeast, Bread Machine Yeast, and Instant Yeast are strains of dormant yeast whose main attribute is the production of lots and lots of carbon dioxide gas very quickly. (emphasis in original).

In support of its Section 2(f) claim, applicant submitted the declaration of George Petty, its Assistant Secretary, along with exhibits. According to Mr. Petty, applicant has used the applied-for mark since January 31, 1983; applicant's yeast is aimed at the general consumer market and is sold primarily in retail stores; from 1988 to 2000 "consumer loaves of bread baked using RapidRise brand yeast averaged 62 to 72 million per year, based on industry estimates"; this represents a growing market share for the brand from 25% in 1988 to 34% in 2000; applicant has used the mark in print and television advertising; newspaper and magazine circulation averaged 27 million per publication, reaching an estimated 80 to 100 million readers per publication; applicant has spent approximately \$50 million in advertising and promoting its yeast products over the past 17 years; and at least one third to one half of this amount is attributable to advertising related to the RapidRise brand yeast product. Further, Mr. Petty states

that applicant has made "extensive efforts to educate consumers that RapidRise's yeast product originates only with [applicant]." Accompanying Mr. Petty's declaration are advertising and promotional materials, including copies of manufacturer's coupons, magazine and newspaper advertisements, and newspaper inserts.

Mere Descriptiveness

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. See *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. See *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *In re MBA Associates*, 180 USPQ 338 (TTAB 1973). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being

used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979).

Contrary to applicant's contention that the term "rapid rise" is inherently distinctive, the term immediately conveys that the yeast is a type which causes dough to rise rapidly or quickly. The evidence of record clearly shows that "rapid rise" has a specific and commonly understood meaning when used in connection with yeast. It describes a type of yeast, and if not generic, is at least highly descriptive of applicant's goods. That applicant's yeast is the type that causes dough to rise rapidly is not in dispute. In this regard, we note that the package specimens submitted by applicant include the wording "FASTER RISING" on the back thereof, and a number of applicant's advertisements tout the product as being "50% FASTER!"

We recognize that there is no evidence which shows that competitors, in particular, are using the term "rapid rise" to describe their yeast. Although the presence or absence of evidence that competitors are using a term in a descriptive manner is a factor in determining the issue of

mere descriptiveness, the absence of such evidence is not determinative in this case. There is a substantial amount of evidence which shows that cooks, food editors and columnists use and are exposed to the use of the term "rapid rise" to describe a type of yeast. Such individuals are clearly part of the relevant purchasing public. Moreover, the excerpts are from such newspapers as the Chicago Tribune, Milwaukee Journal Sentinel, and the St. Louis Post-Dispatch. Inasmuch as purchasers of yeast would include members of the general public who would read these publications, these articles are evidence of how prospective purchasers, in general, may perceive the term "rapid rise."

Further, even assuming that applicant is the only company in the field using the term "rapid rise," this would not justify registration where, as here, the term is shown to be merely descriptive of yeast. In re National Shooting Sports Foundation, Inc., 219 USPQ 1018, 1020 (TTAB 1983). Also, the fact that there may be other terms (e.g., "quick rising") that can be used to designate applicant's product does not alter the descriptive character of the term "rapid rise."

As to applicant's contention that many of the excerpts submitted by the Examining Attorney are recipes derived

from applicant's website, and thus, presumably the uses of "rapid rise" yeast therein are references to applicant's product, there is simply no support for applicant's contention.

Further, we are not convinced that the mere combining of the words "rapid" and "rise" to form the term RAPIDRISE results in a designation which loses its descriptiveness when used in connection with yeast. The only connotation of the combined term is the same as RAPID RISE. Whether shown as two words or a combined term, the two designations would be perceived as the same and be viewed as having the same connotation, namely yeast that causes dough to rise rapidly. Also, there is nothing particularly unusual or unique in the style of lettering or the slight shading in applicant's mark. Thus, we are not persuaded by applicant's argument that its mark is presented in a distinctive display such that it creates a commercial impression separate and apart from the term RAPIDRISE.

In sum, we find that the applied-for mark is merely descriptive of applicant's yeast in that it immediately and directly informs purchasers that applicant's yeast will cause dough to rise rapidly or quickly.

Acquired Distinctiveness

As to acquired distinctiveness, applicant has the burden to establish a prima facie case of acquired distinctiveness. *Yamaha International Corp. v. Hoshino Gakki Co., Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988). The evidence that the Examining Attorney has submitted is relevant to the issue of acquired distinctiveness because the more descriptive the mark, the greater the evidence needed to establish acquired distinctiveness. *Yamaha*, supra, at 1008. As we have stated, the Examining Attorney's evidence establishes that the term "rapid rise" is at least highly descriptive of applicant's goods.

As indicated above, applicant submitted the declaration of its Assistant Secretary, Mr. Petty, setting forth information about applicant's use of its mark since 1983.

Applicant's use and revenues suggest that applicant has enjoyed a degree of business success. In point of fact, as Mr. Petty attests, applicant enjoys a 34% share of the market. Nevertheless, this evidence demonstrates only the popularity of applicant's goods, not that purchasers of such goods have come to view RAPIDRISE in the form sought to be registered by applicant as its source-identifying

trademark. In re Bongrain International (American) Corp., 894 F.2d 1316, 13 USPQ2d 1727, 1728-29 (Fed. Cir. 1990) [Sales may indicate the popularity of the product itself rather than recognition of the mark]. The Court in *Bongrain International* also noted that sales may indicate acceptance of the other trademark associated with the product. Id. On the package specimens submitted by applicant, the applied-for mark is shown along with the mark FLEISCHMANN'S which is shown with a registration symbol. In addition, although applicant's advertising and promotional expenses are substantial, in the advertising and promotional materials, the applied-for mark is always used with the FLEISCHMANN'S mark.

The issue here is the achievement of distinctiveness, and given the highly descriptive nature of applicant's mark, the evidence falls short of establishing this. Applicant's evidence is outweighed by the other evidence of record.

To be clear on this point, we emphasize that the record is completely devoid of direct evidence that consumers view RAPIDRISE in the form sought to be registered as a distinctive source indicator for applicant's goods. We would need to see a great deal more evidence (especially in the form of direct evidence from

customers) in order to find that the applied-for mark has become distinctive of applicant's goods.

Although Mr. Petty states that applicant has made extensive efforts to educate consumers regarding its mark, these efforts seem to have consisted of no more than applicant's use of the TM designation with its mark. The mere use of the TM designation cannot convert a descriptive term into a registrable trademark.

In sum, after careful consideration of the relevant authorities and the evidence and arguments submitted by applicant and the Examining Attorney, we find that RAPIDRISE in the form sought to be registered by applicant is merely descriptive of applicant's goods, and that applicant has failed to submit sufficient evidence of acquired distinctiveness to warrant registration under Section 2(f) of the Trademark Act.

Decision: The refusal to register is affirmed.