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Paper No. 17

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re **Bishamon Industries Corporation**

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Serial No. 75/404,247

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**Antonio R. Durando**, Esq. for **Bishamon Industries Corporation**.

**Vivian Micznik First**, Trademark Examining Attorney, Law Office  
104 (**Sidney Moskowitz**, Managing Attorney).

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Before **Cissel**, **Hohein** and **Bucher**, Administrative Trademark  
Judges.

Opinion by **Hohein**, Administrative Trademark Judge:

**Bishamon Industries Corporation** has filed an  
application to register the term "AIRPOWER" for "material  
handling equipment; namely, pneumatic or hydraulic lift tables  
and tilt tables."<sup>1</sup>

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<sup>1</sup> Ser. No. 75/404,247, filed on December 12, 1997, which is based on an  
allegation of a bona fide intention to use the term "AIRPOWER" in  
commerce.

Registration has been finally refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the basis that, when used in connection with applicant's goods, the term "AIRPOWER" is merely descriptive of them.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

It is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods or services. See *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover, 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. See In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979).

Consequently, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985).

Applicant, while conceding in its brief "[t]he fact that the words 'air' and 'power' are individually generic and descriptive" for pneumatic lift tables and tilt tables, contends nonetheless that such fact "does not prevent the combination [from] being registrable as a trademark."<sup>2</sup> In particular, as stated in its response to the Office Action which issued after the application was remanded in order to make of record evidence gathered from a search of the "NEXIS" database in support of the refusal to register:

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<sup>2</sup> Applicant also argues in its brief that, because its goods are identified in the application as "pneumatic or hydraulic lift tables and tilt tables" (*emphasis added*), "the goods may or may not be 'air-powered,' since they are also hydraulically powered, with no air system at all." Applicant consequently insists that, "[a]s such, the mark does not describe a quality or characteristic of the goods, nor does it convey an immediate idea of the nature of the goods." However, as the Examining Attorney correctly points out in her brief, "[t]he law is settled that registration should be refused if the mark is [merely] descriptive of any of the goods or services for which registration is sought," citing In re Quik-Print Copy Shop, Inc., 616 F.2d 523, 205 USPQ 505, 507 (CCPA 1980) and In re Richardson Ink Co., 511 F.2d 559, 185 USPQ 46, 47 (CCPA 1975). Thus, if the term "AIRPOWER" is merely descriptive of applicant's pneumatic material handling equipment, the refusal to register is proper irrespective of the fact that applicant's goods also include hydraulic material handling equipment.

Based on the [NEXIS] excerpts, the Examining Trademark Attorney noted that the term "AIRPOWER" is commonly used to describe a product's pneumatic feature. The applicant does not disagree with the fact that the word "air-power" (and related terms, such as air power and air-powered) refer to items powered by air and, therefore, are used to describe goods characterized by that feature. What the applicant respectfully submits, in support of its argument for registrability, is that the mark "AIRPOWER," while it may be suggestive, does not describe a significant feature, function or characteristic of ... its goods, and does not convey the immediate impression of the precise nature of the goods. In essence, the mark is not believed to reach the threshold of descriptiveness required for denial of registration.

According to applicant, while its goods "consist of machinery to lift and handle material," it is nevertheless the case that, as asserted in its brief:

The working and most recognizable features of the products lie in the table used to support the load and the mechanisms provided to raise, lower, tilt, and otherwise maneuver the table. The power source is incidental and it could be electrical, hydraulic, pneumatic or even manual. The power source does not define the equipment, its uses or its performance.

In view thereof, applicant urges that "the mark does not convey an immediate impression of the precise nature of the appellant's goods or ... a [significant] feature of the goods." Instead, applicant maintains that the term "AIRPOWER" is suggestive because it "requires imagination, thought and perception to

reach the conclusion that it refers to a lift table and similar equipment which may be pneumatically powered" and that such term "could just as easily suggest that the lift tables provide a powerful tool to lift heavy loads 'in the air.'"

The Examining Attorney, on the other hand, contends that the record establishes that the term "AIRPOWER" is merely descriptive of a significant feature of applicant's pneumatic lift and tilt tables, namely, the fact that such goods are operated by air pressure and thus constitute air powered or air-power material handling equipment. Of record in support thereof is a definition from The American Heritage Dictionary of the English Language (3rd ed. 1992) which sets forth the word "pneumatic," in relevant part, as an adjective meaning "1. Of or relating to air or other gases" and "3. a. Run by or using compressed air: *a pneumatic drill.* b. Filled with air, especially compressed air: *a pneumatic tire.*" Similarly, with her brief, the Examining Attorney has submitted a definition, which we judicially notice, from the on-line version of the Cambridge International Dictionary of English (2000) which lists the word "pneumatic" as an adjective connoting "operated by air pressure, or containing air."<sup>3</sup>

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<sup>3</sup> It is settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.,*

In addition, the Examining Attorney notes that the record contains evidence "retrieved from the "NEXIS" database which demonstrates that the term 'airpower' (including its variations, such as 'air-power' and 'air power') is used to describe the pneumatically powered characteristic of equipment." Pertinent examples thereof include the following (**emphasis added**):

"The increasing use of **air-power tools**, cordless and portable-electric tools ... are major trends in industrial tools ....

Higher-powered **pneumatic tools**

The major benefit of **air-power tools** is that they eliminate sparking, which can ignite a variety of fumes common in industrial environments." -- Industrial Maintenance & Plant Operations, December 31, 1999;

"On most new construction work the hammers are **air-powered** ....

....

With hammers, **air power** is nice but impractical for most do-it-yourselfers. .... Most of the carpenters I've worked with building custom homes with complicated framing use both **air power** and arm power. They use heavy, **pneumatic air** hammers for production jobs ..., but do most of the stick-building the old fashioned way ...." -- Des Moines Register, October 15, 1999;

"**Pneumatic lifts** are becoming more popular in some industries because of the greater availability of air throughout the plant.

Some **Pneumatic lifts** use **air power** to lift while other designs use air strictly as a counterbalance." -- Material Handling Engineering, July 1993 (article headlined: "**Lift tables**: positioning power to the worker; **materials handling equipment**"); and

"All our equipment is either explosion-proof or **pneumatic** so it runs on **air power**, not electricity." -- New York Times, June 30, 1991.

In view of such evidence, the Examining Attorney maintains that "pneumatic (also known as 'air power') equipment has distinct advantages ... when compared with electrically powered equipment," including safety. She concludes therefrom that, in particular, "the power source of lifts and tilt tables is a significant characteristic of the applicant's goods" and that the term "AIRPOWER" merely describes its pneumatic lift and tilt tables "because the term AIRPOWER means 'pneumatic.'"

Upon careful consideration of the arguments and evidence presented, we agree with the Examining Attorney that, in light of the dictionary definitions and "NEXIS" story excerpts, the term "AIRPOWER," which is simply a telescoped form of the words "air power," immediately describes, without speculation or conjecture, a significant characteristic or feature of applicant's pneumatic lift tables and pneumatic tilt tables, namely, that such goods are air-powered or air power material handling equipment. Clearly, as the Examining Attorney points out in her brief, "when used on pneumatic equipment,

consumers will readily understand the term to indicate that the goods are pneumatic since the term AIRPOWER is commonly used to describe the pneumatic operation of tools and equipment." There plainly is nothing in such term which is incongruous, ambiguous or otherwise subject to different connotations. No imagination, cogitation or mental gymnastics, therefore, is required in order for purchasers and/or users of pneumatic lift and tilt tables to immediately recognize that the term "AIRPOWER" designates the pneumatic means of operation of such products, a characteristic or feature of the goods which is integral to the utility, safety and commercial appeal thereof.

Moreover, as noted previously, applicant has admitted that "the word 'air-power' (and related terms, such as air power and air-powered) refer to items powered by air and, therefore, are used to describe goods characterized by that feature" and the "NEXIS" excerpt from the article in Material Handling Engineering in particular makes it plain that, not only do some pneumatic lift tables use air power to lift materials, but such tables are becoming more popular in certain industries. When viewed in this context, it is readily apparent that the term "AIRPOWER," rather than suggesting, as argued by applicant, that its pneumatic "lift tables provide a powerful tool to lift heavy loads 'in the air,'" instead immediately conveys, with the requisite particularity, a significant characteristic or feature

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of such goods. The term "AIRPOWER" is therefore merely descriptive of applicant's goods within the meaning of the statute.

**Decision:** The refusal under Section 2(e)(1) is affirmed.