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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Northland Seed & Grain Corp.

Serial No. 75980346

Jana L. France of Fish & Richardson P.C., P.A. for Northland Seed & Grain Corp.

Christopher S. Adkins, Trademark Examining Attorney, Law Office 101 (Odette Bonnet, Managing Attorney).

Before Hohein, Hairston and Walters, Administrative Trademark Judges.

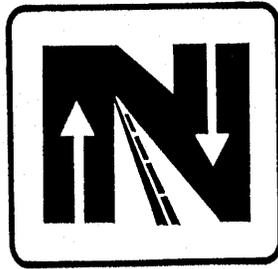
Opinion by Hohein, Administrative Trademark Judge:

Northland Seed & Grain Corp. has filed an application to register the mark "NORTHLAND SEED & GRAIN" for "transportation by freight, train and truck and storage of seeds and grain."<sup>1</sup>

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its services, so resembles the following marks, which are each registered for "freight

<sup>1</sup> Ser. No. 75980346, filed on February 17, 1999 as, initially, a part of Ser. No. 75643321, and which alleges a date of first use anywhere and in commerce of June 1, 1998. The phrase "SEED & GRAIN" is disclaimed.

transportation of goods by truck and freight brokerage services" and are owned by the same registrant, as to be likely to cause confusion, mistake or deception: (i) the mark "NORTHLAND EXPRESS TRANSPORT"<sup>2</sup> and, as illustrated below, (ii) the mark "N NORTHLAND EXPRESS TRANSPORT" and design.<sup>3</sup>



**NORTHLAND EXPRESS TRANSPORT**

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

The determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion

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<sup>2</sup> Reg. No. 1,994,991, issued on August 20, 1996, which sets forth a date of first use anywhere and in commerce of May 1, 1986; combined affidavit §§8 and 15. The words "EXPRESS TRANSPORT" are disclaimed.

<sup>3</sup> Reg. No. 1,976,425, issued on May 28, 1996, which sets forth a date of first use anywhere and in commerce of May 1, 1986; combined affidavit §§8 and 15. The words "EXPRESS TRANSPORT" are disclaimed.

analysis, two key considerations are the similarity of the goods and/or services and the similarity of the marks.<sup>4</sup>

Turning first to consideration of the respective services, we concur with the Examining Attorney that, as identified, applicant's "transportation by freight, train and truck and storage of seeds and grain" and registrant's "freight transportation of goods by truck and freight brokerage services" are considered to be legally identical in part in that both encompass freight transportation of seeds and grain by truck. In view thereof, the channels of trade and classes of purchasers for the services rendered in common by applicant and registrant are likewise considered to be identical.

Applicant argues, however, that "[s]ignificant differences exist between the channels of trade in which Applicant's and registrant's services are marketed and sold and the classes of purchasers to which the parties' services are rendered." Specifically, unlike registrant's services, which applicant contends "are consumed by companies involved in the shipment of freight, not individual consumers," applicant urges that its "transportation... services are offered exclusively to those working in the field of non-genetically modified crops--namely, farmers and organic food producers"--and that it "does not offer transportation ... services to the ordinary consumer." Nonetheless, as the Examining Attorney correctly notes in his

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<sup>4</sup> The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and/or services] and differences in the marks." 192 USPQ at 29.

brief, it is settled that the issue of likelihood of confusion must be determined on the basis of the services as they are set forth in the involved application and cited registration. See, e.g., CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Thus, where the services in the application at issue and in the cited registration are broadly described as to their nature and type, it is presumed in each instance that in scope the application and registration encompass not only all services of the nature and type described therein, but that the identified services move in all channels of trade which would be normal for such services and that they would be purchased by all potential buyers thereof. See, e.g., In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

In consequence thereof, applicant's attempt to distinguish the respective services with respect to channels of trade and classes of purchasers is without merit. Instead, as the Examining Attorney persuasively points out in his brief, what applicant's arguments fail to acknowledge is that registrant's services, as identified in the cited registration, "are not limited to large commercial companies or specific trade channels, and may certainly include the same goods and identical clientele for which the applicant's services are performed. As such, the registrant's services are still considered to be identical to the applicant's services" in part because "the broader identification

of the [services of the] registrant, which has not been limited in type or scope of goods being transported (and therefore includes agricultural goods of all kinds), does not ... [exclude] the more specific items in the applicant's recitation of services." For the same reason, the Examining Attorney is also correct that the classes of purchasers for the respective freight transportation services would be the same and thus such customers would include farmers and organic food producers.

Applicant additionally maintains, however, that the customers for the services which it and registrant offer are sophisticated and discriminating purchasers and that the conditions under which such services are rendered serve to avoid any likelihood of confusion. In particular, applicant insists in its brief that:

Applicant is in the business of wholesale distribution and storage of a variety of non-genetically modified agricultural commodities. Applicant offers its services to professional farmers who grow non-genetically modified commodities and [to] organic food producers interested in non-genetically modified ingredients. These professional farmers and commercial organic food producers are discriminating purchasers that give a great deal of thought and deliberation before purchasing Applicant's services. Indeed, Applicant's services are typically sold only after much information has been conveyed to the purchaser and usually after a face-to-face meeting between Applicant and the purchaser. In addition, Applicant's services are generally expensive, as Applicant and professional farmers typically enter into storage and distribution contracts that span a period of time and Applicant transports goods in bulk to organic food producers. The purchasing of Applicant's services, the deliberation required to enter into a service agreement with Applicant, and the expense associated

with ... such a service agreement renders confusion as to the source of Applicant's services nearly impossible.

Moreover, registrant's services--namely, freight transportation and brokerage services--are consumed by companies involved in the shipment of freight, not individual consumers. These companies employ operation, distribution, and/or traffic managers to oversee the companies' incoming and outgoing freight. As such registrant's services are also likely [to be] offered to and consumed by commercial purchasers with astute knowledge of the companies with which they deal. Given the conditions under which both Applicant's and registrant's services are rendered, and the discriminating consumers that purchase or are likely to purchase Applicant's and registrant's respective services, confusion as to source, affiliation, or sponsorship is highly unlikely.

The Examining Attorney, on the other hand, counters by pointing out in his brief that, even assuming that the services of freight transportation of agricultural commodities by truck are purchased only after careful consideration, it nevertheless is well settled that the fact that consumers may exercise deliberation in choosing such services "does not necessarily preclude their mistaking one [service mark or] trademark for another" or that they otherwise are entirely immune from confusion as to source or sponsorship. *Wincharger Corp. v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also *In re Decombe*, 9 USPQ2d 1812, 1814-15 (TTAB 1988); and *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983). Here, since applicant's and registrant's services are in part legally identical, it is plain that if the respectively identified services were rendered under the same or substantially similar

marks, even knowledgeable and sophisticate purchasers could be expected to attribute a common source thereto notwithstanding the care and deliberation typically exercised in the contracting for such services. For instance, farmers and organic food producers, who are familiar or acquainted with registrant's generalized services of freight transportation of goods by truck, could reasonably believe, upon encountering and dealing with applicant's services of transportation of seeds and grain by truck, that registrant had expanded its services into a new line devoted principally to transportation of agricultural commodities.

Turning, therefore, to the marks at issue, applicant asserts in its brief that its mark is not similar to either of registrant's marks inasmuch as the respective marks share only the term "NORTHLAND," which according to applicant "is a geographically suggestive element" which is too weak to support a finding of a likelihood of confusion when the marks are considered in their entirety. Applicant notes, in support of such contention, that Merriam-Webster's Collegiate Dictionary (10th ed. 1998) at 793 defines "northland" as a "word in the English language meaning 'land in the north' or 'the north of a country.'" Applicant further notes that it made of record "printouts from the Lexis-Nexis database showing that 'northland' is frequently used to describe geographical regions" and mentions in particular the following two examples: (i) a July 4, 2000 article from the Duluth News-Tribune which reports that "The five stations are the first in the Northland to accept Mobil

speedpass"; and (ii) a July 3, 2000 article from the Detroit News which states that "It looked as if this 350-acre tract had been plucked out of the Leelanau Peninsula in Michigan's northland and dropped into northern Oakland Count." Applicant observes, moreover, that:

Notably, both Applicant and registrant are located in the northern part of the United States; Applicant is located in Minnesota and registrant in Michigan. As such, plainly the "NORTHLAND" component in the marks at issue are intended to and do in fact evoke the geographic regions in which the parties are located.

Continuing with its argument, applicant insists in view of the above that:

Because the "NORTHLAND" component of [each of registrant's] NORTHLAND EXPRESS TRANSPORT mark[s] is geographically suggestive, that component is weak. In addition, because the [disclaimed term] "EXPRESS TRANSPORT" directly describes registrant's services, that component is also weak. Accordingly, the cited marks as [a] whole are weak, as they obviously tells [sic] consumers that the party offering the services is an express transportation company hailing from and/or serving the Northland. Given the plain weakness of the NORTHLAND EXPRESS TRANSPORT mark[s], the degree of distinction between Applicant's mark and [each of] registrant's mark[s]--namely, the difference between SEED & GRAIN and EXPRESS TRANSPORT--is more than sufficient to dispel a likelihood of confusion.

Applicant also maintains that, viewing the marks as a whole, its mark "is visually and phonetically distinguishable" from both of registrant's marks because "the vast majority of Applicant's mark differs from the cited marks."<sup>5</sup> Moreover, applicant argues that

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<sup>5</sup> Applicant urges, in this regard, that notwithstanding the disclaimer thereof, "[t]he 'SEED & GRAIN' component of Applicant's mark is

the respective marks "provide different connotations and commercial impressions, [inasmuch] as the cited marks emphasize that the nature of the services offered under the marks," that is, the express transportation of goods by truck, while applicant's mark "does not invoke Applicant's transportation and storage services." Applicant consequently concludes that its mark and registrant's marks "are sufficiently distinguishable to avoid a likelihood of confusion."<sup>6</sup>

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distinctive of Applicant's services and must be afforded equal weight as the 'NORTHLAND' component of the mark." Specifically, and notably without citation to any authority, applicant asserts that "extending the disclaimer entered into the Parent Application to the present [Child] Application is improper and the disclaimer should be given no consideration." According to applicant, when the original application was divided, the Examining Attorney "never asserted that the words 'SEED & GRAIN' are descriptive of the services covered by the instant Application, and, indeed, the words are not." Therefore, applicant contends, "the Application does not rightly contain the disclaimer and the existence of the disclaimer should be given no weight." A review of the Office Actions issued herein since the division occurred clearly reveals, however, that the Examining Attorney has steadfastly regarded a disclaimer of "SEED & GRAIN" to be applicable herein since it is obvious that such term merely describes the particular goods (seed and grain) which applicant's services transport and store. As indicated to applicant in, for example, each of the Office Actions of April 19, 2001 and February 27, 2002, "the wording 'SEED & GRAIN' (which has been disclaimed) in the applicant's mark and 'EXPRESS TRANSPORT' in the registered marks have [sic] been disclaimed and is not the dominant wording in the marks" in that, as specifically stated in the latter, "[c]onsumer recollection . . ., despite the addition of the highly descriptive wording 'SEED & GRAIN' or 'EXPRESS TRANSPORT[,]' would be for the dominant term 'NORTHLAND.'" In any event, the technicality of whether the phrase "SEED & GRAIN" is considered merely descriptive of applicant's services and therefore is properly the subject of a disclaimer or is instead viewed as highly suggestive and thus no disclaimer would be necessary is not determinative inasmuch as the result herein is the same with respect to whether the marks at issue, when considered in their entirety, are confusingly similar.

<sup>6</sup> Although applicant, with its request for reconsideration of the final refusal, submitted copies of 31 third-party registrations, which it had previously referred to, of marks which consist of or include the term "NORTHLAND," applicant makes no mention of such evidence in its appeal brief. While such copies form part of the record herein, it appears that applicant is no longer relying thereon to support an argument that marks containing the term "NORTHLAND" in whole or in part have been so commonly used and registered that they are

We agree with the Examining Attorney, however, that while there are differences in the respective marks which are apparent upon a side-by-side comparison, such differences are not sufficient to preclude a likelihood of confusion when the marks are considered in their entirety. As the Examining Attorney correctly notes, a side-by-side comparison is not the proper test to be used in determining the issue of likelihood of confusion inasmuch as it is not the ordinary way that customers will be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the concomitant lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is accordingly on the recollection of the average purchaser, who normally retains a general rather than a specific impression of marks. See, e.g., *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973); *Envirotech Corp. v. Solaron Corp.*, 211 USPQ 724, 733 (TTAB 1981);

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considered to be weak marks which are entitled to only a narrow scope of protection. Nonetheless, as the Examining Attorney accurately observes, such marks cover "a variety of goods and services" but "do not pertain to [the relevant ... services at issue" herein; instead, the record shows that "only three marks contain the wording 'NORTHLAND' in relation to 'transportation' related services, the applicant's word mark 'NORTHLAND SEED & GRAIN' and the two cited registered marks (owned by the same entity)." In addition, it is well established that third-party registrations simply do not constitute proof of actual use of the registered marks and that the purchasing public, having become conditioned to encountering various goods and services under marks which consist of or include the term "NORTHLAND," is therefore able to distinguish the source thereof based upon differences in such marks. See, e.g., *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) and *In re Hub Distributing, Inc.*, 218 USPQ 284, 285-86 (TTAB 1983). The number and nature of similar marks in use on similar goods and services is therefore not a relevant *du Pont* factor in this appeal.

and Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975).

Moreover, as the Examining Attorney also properly observes, while marks must be considered in their entirety, including any design elements and/or any highly suggestive or descriptive matter, our principal reviewing court has indicated that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entirety." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, according to the court, "that a particular feature is descriptive ... with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark ...." Id.

In the present case, the Examining Attorney "asserts that the applicant's mark and [the] prior registered marks are similar in appearance, sound, meaning and connotation because those marks share the identical dominant and identifying literal feature 'NORTHLAND,' thus creating an extremely strong likelihood of confusion." We concur with the Examining Attorney that, overall, it is the term "NORTHLAND" which constitutes the dominant and distinguishing portion of applicant's "NORTHLAND SEED & GRAIN" mark and hence is entitled to greater weight in determining whether such mark is likely to cause confusion with

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registrant's marks since the phrase "SEED & GRAIN," as indicated by the disclaimer thereof, plainly is merely descriptive of applicant's services in that it immediately describes, without speculation or conjecture, the agricultural commodities which applicant transports and stores.<sup>7</sup> Likewise, we agree with the Examining Attorney that, with respect to registrant's "NORTHLAND EXPRESS TRANSPORT" mark, it is the term "NORTHLAND" which forms the dominant and distinguishing element thereof for the purpose of determining whether applicant's mark is confusingly similar thereto inasmuch as the words "EXPRESS TRANSPORT," as confirmed by the disclaimer thereof, clearly are merely descriptive of registrant's services of freight transportation of goods. With respect to registrant's "N NORTHLAND EXPRESS TRANSPORT" and design mark, however, we disagree with the Examining Attorney's assertion in his brief that the stylized letter "N" design is an element which is "less likely to be impressed upon a purchaser's memory." Visually, such design is very prominent and eye-catching, relative to the words "NORTHLAND EXPRESS TRANSPORT,"

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<sup>7</sup> Applicant, as part of its previously noted contention that the phrase "SEED & GRAIN" is distinctive of its services and must be afforded equal weight with the "NORTHLAND" component of its mark, cites in support thereof the following statement by the court in *In re National Data Corp.*, supra: "The technicality of a disclaimer in ...[an] application ... has no legal effect on the issue of likelihood of confusion." While the court noted, as the reason therefore, that "[t]he public is unaware of what words have been disclaimed during prosecution of the ... application at the PTO," it added that a disclaimer "cannot affect the scope of protection to which *another's* mark is entitled" (emphasis in original) because: "Without question, the descriptive ... character of an expression which forms part of both marks under consideration is pertinent to the issue of likelihood of confusion." Id. Consequently, what matters herein is whether a phrase such as "SEED & GRAIN" would be regarded by the purchasing public as descriptive or highly suggestive, rather than arbitrary, and not whether such a phrase has technically been disclaimed.

and is unlike any portion of applicant's mark. Nonetheless, even though, with respect to appearance, it is the stylized letter "N" design which must be regarded as the predominant element in registrant's "N NORTHLAND EXPRESS TRANSPORT" and design mark, it is still the case that, in terms of overall sound, connotation and commercial impression conveyed by such mark, it is the word "NORTHLAND" which is of principal significance. The reason therefor, as the Examining Attorney contends in his brief, is that the word "NORTHLAND" is the portion of the mark which, in light of the descriptiveness of the words "EXPRESS TRANSPORT," would be used by the purchasing public in calling for and otherwise referring to registrant's services. See, e.g., In re Appetito Provisions Co. Inc., 3 USPQ2d 1553, 1554 (TTAB 1987). The stylized letter "N" design is obviously derived from and visually serves, in the context of the mark, to symbolize or underscore the source-indicative word "NORTHLAND," but such design is so highly stylized, with its arrows and highway features, that it would not tend to be verbalized. Consequently, notwithstanding the absence of a similar design element in applicant's mark, the fact remains that, when considered in their entirety, applicant's mark is still substantially similar to both of registrant's marks due to the shared presence of the term "NORTHLAND."

Furthermore, even if, as indicated by the dictionary definition and "Lexis-Nexis" excerpts, the term "NORTHLAND" may have some geographical connotation in that it could suggest that applicant's and registrant's services originate in a northern

land or region of the United States, it is nonetheless the case that, when used in the respective marks, the meaning of such term would be identical in each instance. Such term, unlike perhaps a geographically descriptive one, is not so weak that the presence of other elements, namely, the merely descriptive phrase "SEED & GRAIN" in applicant's mark and the stylized letter "N" design and/or the merely descriptive words "EXPRESS TRANSPORT" in registrant's marks, will suffice to differentiate the respective marks and avoid a likelihood of confusion, especially when such marks are used in connection with, in part, legally identical services. Such marks, notwithstanding the differences therein, are substantially similar in overall commercial impression since, for the reasons previously set forth, the source-indicative significance engendered by the shared term "NORTHLAND" is essentially the same in the case of each mark.

We accordingly conclude that customers seeking freight transportation services for goods by truck, including farmers and organic food producers, and who are familiar or acquainted with registrant's "NORTHLAND EXPRESS TRANSPORT" and "N NORTHLAND EXPRESS TRANSPORT" and design marks for, in each instance, the services of "freight transportation of goods by truck and freight brokerage services," would be likely to believe, upon encountering applicant's substantially similar "NORTHLAND SEED & GRAIN" mark for the services of "transportation by freight, train and truck and storage of seeds and grain," that legally identical freight transportation services for seeds and grain by truck emanate from, or are sponsored by or associated with, the same

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source. In particular, even sophisticated customers are likely to regard the services rendered by applicant under its mark as an expansion or specialized line of the services offered by registrant under its marks which is devoted to transporting seeds and grain.

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