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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
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Brown/Wolfson

Mailed: **March 31, 2008**

Cancellation No. 92044201

Jet Enterprises Pvt. Ltd.

v.

Jet Airways, Inc.,

**Before Seeherman, Holtzman and Taylor, Administrative
Trademark Judges.**

By the Board:

This case now comes before the Board for consideration of petitioner's motion for summary judgment (filed June 29, 2007). The motion is fully briefed.

By way of background, petitioner seeks cancellation of Registration No. 2839676 for the mark **JET AIRWAYS** and **design** for "air transportation; air transportation featuring a frequent flyer program; airline transportation services; freight transportation by air; transportation of passengers and/or goods by air; and, transportation reservation services" in International Class 39.¹ That registration issued from an application filed on December 17, 2002, alleging October 23, 2002 as the date of first use and December 1, 2002 as the date of first use in commerce. In

¹ The registration issued on May 11, 2004.

its petition to cancel (see petition to cancel at paragraph #7) as well as in its motion for summary judgment, petitioner asserts that respondent failed to satisfy the use in commerce requirement of the Trademark Act prior to filing its use-based application under Section 1(a), and therefore was not entitled to registration of its mark. For the following reasons, we grant petitioner's motion for summary judgment.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(c). A party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to summary judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). All justifiable inferences to be drawn from the undisputed facts must be viewed in the light most favorable to the nonmoving party. See *Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992).

With regard to whether petitioner has standing to maintain this proceeding, we note that respondent has not challenged petitioner's standing to cancel the involved registration. Moreover, according to petitioner, it has been refused registration of two of its pending applications

because of respondent's registration and in such instances, a real interest in the proceeding and a reasonable belief in damages may be found. See *Cerveceria Modelo S.A. de C.V. v. R.B. Marco & Sons, Inc.*, 55 USPQ2d 1298, 1300 (TTAB) and *Hartwell Co. v. Shane*, 17 USPQ2d 1569, 1570 (TTAB 1990). Therefore, we find that there is no genuine issue that petitioner has a direct commercial interest in this proceeding, and that it has sufficiently demonstrated its standing cancel respondent's registration.

Inasmuch as respondent based its application on use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. §1051(a), respondent had to have made actual use of the mark in commerce, on or in connection with all of the services listed in the application, on or before the filing date of the application. Section 45 of the Trademark Act further provides that a mark is in "use in commerce" on services when "used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services."

In support of its motion for summary judgment, petitioner relied upon its unanswered requests for admissions. As respondent did not timely file its responses

to petitioner's first set of requests for admissions, petitioner asserted in its motion for summary judgment that the admissions were deemed admitted.

By rule, any matter admitted under Fed. R. Civ. P. 36(a) is conclusively established unless the Board, upon motion, permits withdrawal or amendment of the admission. Because respondent did not file a formal motion to withdraw or amend its admissions as contemplated under Fed. R. Civ. P. 36(b), the Board may not consider the admissions withdrawn. *See American Automobile Ass'n (Inc.) v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 117, 19 USPQ2d 1142, 1144 (5th Cir. 1991). However, to avoid injustice to respondent in this case, and finding that petitioner will not be prejudiced thereby, we have considered respondent's amended responses in making our decision. Nevertheless, we hasten to add that whether the admissions are deemed admitted or whether we consider the amended responses, our decision in this case would not change.

In considering his answers to the forty nine (49) numbered requests, we note that respondent repeatedly admits that it has never used its registered mark in commerce for any of the services recited in Registration No. 2839676. For example, in response to Request No. 5, "[a]dmit that neither YOU nor any RELATED COMPANY has ever used YOUR MARK

in commerce for "[a]ir transportation," respondent admits that it has never used its mark for those services. In response to Request No. 9, "[a]dmit that neither YOU nor any RELATED COMPANY was using your mark in commerce for "[a]irline transportation services" as of the time YOU executed and filed the application which resulted in Registration No. 2839676," and Request No. 10, "[a]dmit that YOU knew that neither YOU nor any RELATED COMPANY was using YOUR MARK in commerce for "[a]irline transportation services" as of the time YOU executed and filed the application which resulted in Registration No. 2839676," respondent goes on to state that since it is not operating as an airline, it "cannot operate a frequent flyer program." Likewise, in response to Request No. 11, "[a]dmit that neither YOU nor any RELATED COMPANY has ever used your mark in commerce for "[a]irline transportation services," respondent states that its mark "cannot be used" for those services.

In addition, respondent's responses to Request Nos. 12 through 20 were virtually identical. By those responses, respondent admits that it was not and had not used its claimed mark for "freight transportation by air," (see responses to Request Nos. 12, 13 and 14) "transportation of passengers and/or goods by air" (see responses to Request Nos. 15, 16 and 17) as well as "transportation reservation

services" (see responses to Request Nos. 18, 19 and 20). Likewise, in answering other admission requests, respondent repeatedly refers to its answer to Response No. 2, wherein respondent states that it "cannot use the mark to engage in domestic or foreign air scheduled transportation until a Certificate of Public Convenience and Necessity has been granted by the Federal Aviation Administration (FAA)." Furthermore, according to respondent, it has yet to receive, from the FAA, the requisite certification (see response to Request No. 2). Thus, there is no genuine issue that respondent failed to use the mark in commerce for any of the services recited in its registration as of the filing date of the application, and indeed, had not used the mark for the identified services at the time its registration issued, and moreover, respondent was prohibited from doing so by law.

We realize that in its response to Request No. 1, respondent indicates that it has used its mark for "start up purposes such as checking accounts, office leases, business cards, telephone numbers, travel expenses" and "appointments with FAA officials." Nevertheless, such "uses" constitute preparatory activities only, and fail to demonstrate actual use of the mark in commerce. *See Lucent Information Management, Inc. v. Lucent Technologies, Inc.*, 986 F. Supp. 253, 45 USPQ2d 1019 (D. Del. 1997), *aff'd*, 186 F.3d 311, 51

USPQ2d 1545 (3d Cir. 1999); *Computer Food Stores Inc. v. Corner Store Franchises, Inc.*, 176 USPQ 535 (TTAB 1972).

Respondent, in opposition to the motion for summary judgment, also submitted documents that allegedly support use of the mark in commerce. Those documents include an e-mail from respondent, two letters addressed by respondent to two local airports, an application addressed to the FAA for respondent to "engage" in the air transportation of passengers and a pre-application statement of intent.

The Board, however, notes that these documents were drafted at least a year after respondent's trademark application was filed, and they do not show use of the mark as of the filing date of respondent's trademark application. In addition, even if these documents were dated prior to the trademark application filing date, as previously discussed, they only show start up uses and fail to show actual use in commerce. Given the record in this case, it is therefore clear that respondent has yet to use its mark in commerce for any of the services listed in its registration.

As a result, no genuine issue of material fact that respondent did not use its mark in commerce for "air transportation; air transportation featuring a frequent flyer program; airline transportation services; freight transportation by air; transportation of passengers and/or goods by air; and, transportation reservation services"

prior to December 17, 2002, the filing dates of the underlying application for the registration which is the subject of this proceeding exists. In view thereof, we find that petitioner has met its burden of demonstrating that there are no genuine issues of material fact with respect to respondent's failure to use the mark in commerce, and that petitioner is entitled to judgment as a matter of law.

Accordingly, petitioner's motion for summary judgment is granted, judgment is entered against respondent, the petition to cancel is granted and Registration No. 2839676 will be cancelled in due course.²

² On July 30, 2007, respondent filed a motion to extend the discovery period. Respondent's contested motion to extend was not filed under Fed. R. Civ. P. 56(f) and respondent has never alleged that he could not substantively respond to petitioner's motion for summary judgment without further information known only to petitioner. In light of the Board's decision to grant petitioner's motion for summary judgment, respondent's motion to extend the discovery period is moot.