Commissioner of Patents and Trademarks
Patent and Trademark Office (P.T.O.)

IN RE FERRERO S.P.A.
Serial No. 73/748,088
June 29, 1992

G. Franklin Rothwell and Raymond A. Kurz of Rothwell, Figg, Ernst & Kurz, P.C. for applicant.

Jerry L. Price

Senior Examining Attorney

***1** Law Office 14

(R. Ellsworth Williams, Managing Attorney)

Before Comer

Deputy Commissioner

Samuels

Assistant Commissioner

Sams and Rice

Members [FNa1]

Opinion by Rice

Member

Request for Reconsideration

In a decision dated November 25, 1991, the Board reversed the Trademark Examining Attorney's refusal to register, on the Supplemental Register, the mark EXTRA MILK-MILK CHOCOLATE for candy. On January 17, 1992, the Examining Attorney submitted a request for reconsideration of the Board's decision. Applicant opposed the request for reconsideration, citing In re McKee Baking Co., 219 USPQ 759 (TTAB 1983), where the Board held that "it is not a proper procedure for an Examining Attorney to seek reconsideration of a decision rendered by the Board." In a decision dated April 22, 1992, an augmented panel of the Board expressly overruled McKee, and allowed applicant time in which to respond to the merits of the Examining Attorney's request for reconsideration.

On May 26, 1992, by certificate of mailing dated May 22, 1992, applicant filed a request for reconsideration of the Board's decision of April 22, 1992.

The arguments contained in applicant's request have been given careful consideration. However, the Board is not persuaded thereby that its decision of April 22, 1992, is in error.

In this regard, we note that while the applicable statute (that is, the Trademark Act of 1946, 15 U.S.C. 1051 et seq.) and rules do not specifically provide for a request by the Examining Attorney for reconsideration of the decision of the Board on an ex parte appeal, neither do they prohibit such a request. [FN1] We are of the opinion that in the absence of a statutory or regulatory prohibition, the Board has the inherent authority to entertain a request from the Examining Attorney for reconsideration of the Board's decision on an ex parte appeal. Although the Board chose in the past not to exercise that inherent authority, we now believe that the better policy is to entertain such requests, which may identify, and provide us with an opportunity to correct, possibly erroneous decisions.

Applicant maintains that the Examining Attorney's request for reconsideration in this case is, in any event, untimely, having been filed more than one month after the date of the decision to which it is directed. Because we have not chosen previously to exercise our inherent authority to entertain a request from an Examining Attorney for reconsideration of the Board's decision on an ex parte appeal, we have not established any specific time limit for the filing of such a request. Accordingly, we will not reject the Examining Attorney's request for reconsideration in this case as untimely. However, we hereby give notice that in future cases, we will require that any request by the Examining Attorney for reconsideration of the decision of the Board, on an ex parte appeal, be filed within one month of the date of the decision to which the request is directed, unless the time is extended by the Board upon a showing of sufficient cause.

***2** For the foregoing reasons, applicant's request for reconsideration is denied. A decision on the merits of the Examining Attorney's request for reconsideration will be issued, in due course, by the panel which issued the decision to which the request is directed.

Douglas B. Comer

Jeffrey M. Samuels

J. David Sams

Janet E. Rice

Members, Trademark Trial and Appeal Board

FNa1. Commissioner Manbeck, who participated in the decision which is the subject of the present request for reconsideration, left Government service effective May 1, 1992, and therefore did not participate in this decision.

FN1. Rule 2.144, which relates to reconsideration of the Board's decision on an ex parte appeal, provides as follows:

Any request for rehearing or reconsideration, or modification of the decision, must be filed within one month from the date of the decision. Such time may be extended by the Trademark Trial and Appeal Board upon a showing of sufficient cause.

This rule clearly does not prohibit the Examining Attorney from seeking reconsideration of the decision of the Board on an ex parte appeal.

24 U.S.P.Q.2d 1155

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