

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM LINEBERGER, d/b/a)	
JET OIL COMPANY,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 86-3986
)	
DEPARTMENT OF AGRICULTURE AND)	
CONSUMER SERVICES,)	
)	
Respondent,)	
and)	
)	
CONOCO, INC.,)	
)	
Intervenor.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, an administrative hearing was held before Diane D. Tremor, Hearing Officer with the Division of Administrative Hearings, on April 21, 1987, in St. Petersburg, Florida. The issue for determination in this proceeding is whether Conoco, Inc.'s "JET +" liquid petroleum brand name registration should be cancelled.

APPEARANCES

For Petitioner:	David W. Pettis, Jr., Esquire Pettis & McDonald, P.A. Post Office Box 1528 Tampa, Florida 33601
,For Respondent:	Harry L. Michaels, Esquire Room 513, Mayo Building Tallahassee, Florida 32399-0800
For Intervenor:	Lee J. Keller, Esquire 600 North Dairy Ashford McLean 2068 Houston, Texas 77079

INTRODUCTION

In support of his contention that the respondent Department of Agriculture and Consumer Services improperly permitted Conoco to register the name "JET +" as a liquid fuel brand name, petitioner William Lineberger testified in his own behalf and also presented the testimony of his son, Ian Lineberger and John Whitton, Chief of the respondent's Bureau of Petroleum Inspection. Petitioner's Exhibits 1 through 16 were received into evidence.

The intervenor Conoco presented the testimony of Dennis Reilley, the Vice President of Operations for Kayo Oil Company, and Rod Percy, Kayo's Director of Construction. The intervenor's Exhibits 1 through 9 were received into evidence, as was Hearing Officer's Exhibit 1.

The respondent Department presented no oral or documentary evidence at the hearing.

Subsequent to the hearing, counsel for the petitioner and for the intervenor submitted proposed findings of fact and proposed conclusions of law. To the extent that the parties' proposed factual findings are not included in this Recommended Order, they are rejected for the reasons set forth in the Appendix hereto.

FINDINGS OF FACT

Based upon the oral and documentary evidence adduced at the hearing, the following relevant facts are found:

1. Petitioner William Lineberger, doing business as Jet Oil Company, has, since 1950, continuously used the brand name "Jet" for identifying gasoline sold by him in the State of Florida. At one time, petitioner owned or operated some thirteen stations in various locations in Florida. Since 1980, he has operated only three stations, all located in Pinellas County-- two in St. Petersburg and one in Pinellas Park.

2. Pursuant to Chapter 525, Florida Statutes, the respondent Florida Department of Agriculture and Consumer Services first issued petitioner a liquid fuel brand name registration for the name "JET" in 1973.

3. Pursuant to Chapter 495, Florida Statutes, the Florida Secretary of State issued petitioner mark registration number 922,820 on August 11, 1980, for the mark "JET" as a trademark and a service mark to be used in connection with gasoline and oil product convenience store items.

4. Kayo Oil Company (Kayo) is a Delaware corporation and a wholly-owned subsidiary of Conoco, Inc. Kayo operates a chain of retail gasoline and convenience stores in 22 states. It has approximately 465 locations concentrated mainly in the southeast portion of the country, with 38 locations in Florida, including one in Pinellas Park. Kayo currently has plans for further expansion in Florida. It's fixed asset base in Florida is approximately \$10 million. The typical Kayo retail gasoline outlet in Florida has four multiple product dispensers, sells 500 to 600 different convenience items inside an 800 to 1600 square foot building, markets fast food products and employs a color scheme of black on yellow on its signage and building facade.

5. Conoco, Inc. first began using the "JET" trade name in Europe in the 1960's when it acquired a large chain of European retail gasoline outlets selling under that brand name. It currently operates about 2,000 units under the brand name "JET" in Europe. In the United States, Kayo has used various trade names in the operation of its outlets, including "Kayo" and "JET". In the early 1980's, Kayo made the decision to standardize the name it traded under throughout the United States, and selected the name "JET". In most instances, it accomplished the conversion of its stations from "Kayo" to "JET", with the black on yellow color scheme, during the period from the early 1980's through 1984.

6. The intervenor initially sought to obtain from the Florida Department of Agriculture and Consumer Services the liquid fuel brand name "JET". That request was denied for the reason that "JET" had been previously registered to the petitioner. Thereafter, the Department issued to the intervenor the liquid fuel brand name registration, "JET +" on April 27, 1981. Kayo is required to display the "JET +" liquid fuel brand name on its dispensers or pumps. 1/ With the exception of two of its Florida locations, Kayo uses the word "JET" on its street and building signage. At its Pinellas Park and Clearwater stations, it has retained the name "Kayo". Being an independent brand marketer, Kayo attempts to dedicate the majority of its signage to display the price of gasoline, as opposed to the gasoline brand name. It is Kayo's marketing philosophy that the consumer is more influenced by low prices and location than by the fuel brand name.

7. In 1984, the physical appearance of petitioner's three stations did not resemble the physical appearance of the typical Kayo station in Florida. Subsequent to 1984, petitioner did some remodeling work at its Pinellas Park station which included yellow and black signage and the name "JET" in black block letters on a yellow background, resembling Kayo's style of lettering on both its pump decals and its signage in areas outside Pinellas County.

8. The yellow pages of the St. Petersburg telephone directory lists both Kayo's Pinellas Park station and petitioner's Pinellas Park station under the heading of Jet Oil Company. In February or March of 1987, a local cigarette supplier attempted to deliver and present an invoice for cigarettes ordered by Kayo to one of petitioner's facilities. This occurred again with the same supplier in March of 1987. In January of 1987, a Motor Fuel Marketing Complaint against the "Jet" business at 7091 Park Boulevard was filed with the Division of Consumer Services, Department of Agriculture and Consumer Services. Although this is the address of the Kayo station in Pinellas Park, the Consumer Services Consultant, Division of Consumer Services, forwarded the complaint to "Jet Oil Company" at 7879 - 49th Street North, the petitioner's station, for a response. Petitioner presented evidence that other instances of confusion between its stations and Kayo stations had occurred with respect to bills, bank inquiries, and a newspaper article. Also, on one occasion, petitioner was ordered by the Pinellas Park police to close its stations because a bomb threat had been made against Jet Oil. Petitioner did not produce any evidence that the source of any of the incidents related was attributable to the liquid fuel brand names utilized by it or the intervenor.

CONCLUSIONS OF LAW

9. The registration of liquid fuel brand names falls within the authority of the Department of Agriculture and Consumer Affairs and is governed by Chapters 525 and 526 of the Florida Statutes, and Rule 5F-2.003 of the Florida Administrative Code. The only real guidance in those statutory and regulatory provisions as to the exercise of the Department's responsibilities and discretion when issuing brand name registrations is found in Rule 5F-2.003(2) and (3), Florida Administrative Code. In pertinent part, those regulations require that "each gasoline and kerosene shall have a different brand name..." and that "the Department will refuse the registration of any product under a name that would be misleading to the purchaser of the product."

10. It would appear from the regulatory scheme set forth in Chapters 525 and 526, Florida Statutes, that the purpose of requiring liquid fuel brand name registration with the Department is actually twofold. One purpose is to enable the Department to fully perform its inspection, investigative and enforcement

responsibilities with regard to the sale of gasoline and oil products in this State. By requiring registration under "different" names, the Department will have a complete inventory of products sold so that such products can be monitored in a manageable fashion. The second purpose is to prevent consumers from being misled as to the type or manufacturer of the product they are purchasing.

11. As applied to the facts of this proceeding, the liquid fuel brand names "JET" and "JET +" are "different" so as to enable the Department to manage its duties with respect to products sold in this State. With regard to the second objective, petitioner has not demonstrated that any purchaser has been misled by the similarity in the names of petitioner's products and Kayo's products.

12. While petitioner did present evidence of some instances of confusion between its places of business and Kayo's station in Pinellas Park, it was not demonstrated that the fuel brand names displayed on the pumps at the different establishments was the source of the confusion. Rather, it appears that the source of confusion in those instances was either the listing in the telephone directory, clerical error apparent on the face of the documents received into evidence, or, possibly, the similarity of the two competitors' street signage or color schemes. Moreover, the instances of confusion cited by the petitioner did not involve purchasers or purchases of gasoline at either facility. The confusion related more to site or location than to the fuel being offered for sale at either location.

13. Even if one were to utilize the broader standard which applies to the Secretary of State's registration of trademarks and service marks, the petitioner has failed to demonstrate that the intervenor's use of the name "JET +" on its fuel pumps so resembles petitioner's use of "JET" on its pumps as to be likely "to cause confusion or mistake or to deceive". See Section 495.021(1)(f), Florida Statutes. Petitioner presented no evidence that any consumer intending to patronize its station instead bought from Kayo's station (or vice versa) through confusion, mistake or deceit caused by the similarity of the fuel names appearing on the gas pumps.

14. In summary, it has not been demonstrated that the labels or decals on the petitioner's and intervenor's gasoline dispensers, or the registrations by the Department of the names "JET" or "JET +," are so similar as to either frustrate the duties and responsibilities of the Department or to mislead, confuse or deceive consumers. While beyond the scope of issues in this proceeding, it bears mention that Kayo has attempted to minimize the instances of mistaken identification of locations complained of by petitioner by retaining the Kayo signage at its facilities in Pinellas County. There being no demonstration that the Department abused its discretion in registering "JET +" as the liquid fuel brand name of the intervenor, cancellation of that registration is not warranted.

RECOMMENDATION

Based upon the findings of fact and conclusions of law recited herein, it is RECOMMENDED that petitioner's request for a hearing challenging the issuance of the "JET +" registration to the intervenor be DISMISSED.

DONE and ORDERED this 16th day of July, 1987, in Tallahassee, Florida.

DIANE D. TREMOR
Hearing Officer
Division of Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
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(904)488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of July, 1987.

ENDNOTE

1/ The petitioner presented evidence that Kayo displayed the word "JET" without the "+" on the pumps at the Pinellas Park station. The evidence further established that that situation has since been corrected. In any event, such an occurrence is reason, petitioner's post-hearing motion to submit additional evidence regarding a Kayo station in St. Augustine, Florida, has been denied.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 86-3986

The proposed findings of fact submitted by the petitioner and the intervenor have been fully considered and have been accepted and/or incorporated in this Recommended Order, except as noted below.

Petitioner

- 7. Accepted as fact, but irrelevant and immaterial to the issue in dispute in this proceeding.
- 8 - 10. Rejected; not supported by competent, substantial evidence.

Respondent

- 4. Accepted with respect to Kayo, but no such evidence with respect to petitioner.

COPIES FURNISHED:

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