

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 27

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Ex parte EARL W. MOORE  
and DAVID J. KLEE

Appeal No. 96-0109  
Application 08/023,263<sup>1</sup>

ON BRIEF

MAILED

JUN 27 1996

PAT. & T.M. OFFICE  
BOARD OF PATENT APPEALS  
AND INTERFERENCES

Before LYDDANE, MEISTER and STAAB, Administrative Patent Judges.

LYDDANE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the final rejection of claims 4 through 8 and 12 through 14. Claim 9, which is the only other claim remaining in the application, stands allowed.

<sup>1</sup> Application for patent filed February 25, 1993. According to applicant, the application is a continuation of Application 07/759,261, filed September 13, 1991.

Appeal No. 96-0109  
Application 08/023,263

The subject matter on appeal is directed to a cryogenic freezer for refrigerating a product. Claim 12 is exemplary of the invention and a copy thereof, as it appears in the appendix to the appellants' brief, has been appended to this decision.

None of the references of record have been relied upon by the examiner in any rejection of the claims.

Claims 4 through 8 and 12 through 14 stand rejected under 35 USC 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the invention. The examiner has stated in the final rejection, Paper No. 19, dated December 12, 1994 that

[t]he claims remain confused and indefinite. The recitations of an element without an article (ie. the or said) preceding it is confusing, such as "gas control fan means" in claim 12, line 6. In claim 12, lines 15-16 [lines 24-25 in Appendix A] it is unclear if the recitation of "means to control the speed of rotation of gas control fan means" is different from the "means to control the speed of rotation" recited in claim 12, lines 5-6 [lines 9-10 in Appendix A]. In claim 12, lines 8-10 [lines 13-16 in Appendix A] it is unclear how the "temperature controller electrically connected to (sic, the) thermocouple" operates "to prevent ingress of ambient atmosphere or egress of vaporized cryogen". There is no proper antecedent basis for "said exhaust means" in claim 12, line 12 [lines 19-20 in Appendix A] and "said [sic, the] exhaust" in claim 12, line 20 [line 33 in Appendix A], for "said control means" in claims 14, 5 and 6 in that more than one control means appears to be recited

Appeal No. 96-0109  
Application 08/023,263

earlier, for "said motor controller" in claim 15 [sic, claim 4] in that two motor controllers are recited in claim 14. The relationship between the elements remain grammatically confused.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants, we refer to pages 2 and 3 of the examiner's answer, to pages 5 through 8 of the appellants' brief and to the reply brief for the full exposition thereof.

#### OPINION

In arriving at our decision in this appeal, we have given careful consideration to appellants' specification and claims and to the respective positions advanced by the appellants and by the examiner, and upon evaluation thereof, it is our conclusion that the examiner's rejection of claims 4 through 8 and 12 through 14 under 35 USC 112, second paragraph, is proper and should be sustained. Our reasoning for this determination follows.

Appellants have not disputed with particularity any of the indefiniteness pointed out by the examiner in the rejection quoted above. Rather, they have argued in general that

Appeal No. 96-0109  
Application 08/023,263

claims 12-14 and 4-8 recite the invention in clear and concise terms when the claims are viewed, as the claims should be, in light of the specification and the prior art [brief, page 5]

that

[a]ppellants are permitted to use the Jepsen [sic, Jepson] form of claim in claiming an invention to avoid lengthy recitation of prior art which is unnecessary for the purpose of determining the metes and bounds of Appellants invention. This Appellants have clearly elected to do [brief, page 6],

that

[a]ppellants have enclosed as Appendix "C" proposed amendments to claims 12, 14, 5 and 6 which they believe will overcome the problems suggested by the Examiner in the Final Rejection [brief, page 8],

and that

[a]ppellants respectfully submit that the claims on appeal, especially with the amendments suggested in the claims appended to the Appeal Brief as Exhibit C are clear and unambiguous and contain no "flaws" [reply brief, page 2].

At the outset, we note that the purpose of the second paragraph of 35 USC 112 is to ensure that the metes and bounds of the claims can be accurately determined. See In re Hammack, 427 F.2d 1378, 1382, 166 USPQ 204, 208 (CCPA 1970). Furthermore, claims in a pending application are given their broadest reasonable interpretation consistent with the specification, see In re Sneed, 710 F.2d 1544, 1548, 218 USPQ 385, 388 (Fed. Cir. 1983), and claims

Appeal No. 96-0109  
Application 08/023,263

are read in light of a specification to interpret limitations explicitly recited in the claim. However, this is distinctly different from reading limitations of the specification into a claim by implicitly adding disclosed limitations which have no express basis in the claim. See In re Prater, 415 F.2d 1393, 1404, 162 USPQ 541, 550 (CCPA 1969). Under 35 USC 112, it is the language itself of the claims which must particularly point out and distinctly claim the subject matter which one regards as their invention, without limitations imported from the specification. See In re Lundberg, 244 F.2d 543, 548, 113 USPQ 530, 534 (CCPA 1957) and In re Winkhaus, 527 F.2d 637, 188 USPQ 129 (CCPA 1975).

While we have no difficulty understanding the invention as disclosed in appellants' specification, which is referenced by appellants in the brief, we do agree with the examiner that the scope of the claims on appeal, i.e., the metes and bounds of the claims, cannot be accurately determined for the reasons stated by the examiner in the rejection quoted above. The lack of clear antecedents as noted render the claims confusing and unclear. Moreover, the relationship of the "temperature controller being electrically connected to [sic, a] thermocouple located adjacent said discharge end of said tunnel" (claim 12, lines 13 through 15, Appendix A to the brief) is not sufficiently related to either the "gas control fan means" or the "means to exhaust vaporized cryogen from the tunnel" in order to provide the function set forth in lines

Appeal No. 96-0109  
Application 08/023,263

15 through 17 of claim 12 "to prevent the ingress of ambient atmosphere or the egress of vaporized cryogen." Thus, the scope of appealed claim 12 is indeterminate for this additional reason.

As to appellants' argument that they are permitted to use Jepson-type claims, we agree that this form of claim is provided for by 37 CFR 1.75(e) and MPEP §608.01(m). However, appellants' claim 12, in our view, is not couched in typical Jepson format which would, for example, begin "[i]n a cryogenic freezer..." and include a statement such as "wherein the improvement comprises." The appellants use of the term "characterized by" does not, in our view, suggest the recitations which follow are intended to be an improvement over the apparatus recited in the paragraph preceding the words "characterized by." We note that appellants appealed claim 1 which was the subject of the prior appeal (Appeal No. 94-2703) was in the proper Jepson form. In any event, neither we, nor the examiner, have criticized appealed claim 12 for its particular format.

With respect to the arguments directed to the proposed amendments presented subsequent to final rejection (Appendix C), which have not been entered by the examiner, we must point out that under 35 U.S.C. § 134 and 37 CFR 1.191, appeals to the Board of Patent Appeals and Interferences are taken from the decision of the primary examiner to reject claims. We exercise no general supervisory power over the examining corps and decisions of primary examiners concerning the entry of papers are not subject to our

Appeal No. 96-0109  
Application 08/023,263

review. See M.P.E.F. 1002.02(c) and 1201; In re Mindick, 371 F.2d 892, 894, 152 USPQ 566, 568 (CCPA 1967) and In re Deters, 515 F.2d 1152, 1156, 185 USPQ 644, 648 (CCPA 1975). An applicant who disagrees with an examiner's refusal to enter an amendment after final rejection must pursue his grievance by way of petition under 37 CFR 1.181 rather than by way of appeal under 37 CFR 1.191. Moreover, the Board of Patent Appeals and Interferences is constrained to review rejections of the claims before us on the written record, and the claims presented by the appellants in Appendix C have neither been entered in the record in the present application nor have they been subject to any rejection by the examiner.

Accordingly, the decision of the examiner rejecting claims 4 through 6 and 12 through 14 under 35 USC 112, second paragraph, is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR 1.136(a).

AFFIRMED

*Will. E. Lyddane*

WILLIAM E. LYDDANE )  
Administrative Patent Judge)

*James M. Meister*

JAMES M. MEISTER )  
Administrative Patent Judge)

*Lawrence J. Staab*

LAWRENCE J. STAAB )  
Administrative Patent Judge)

BOARD OF PATENT  
APPEALS  
AND  
INTERFERENCES

Appeal No. 96-0109  
Application 08/023,263

James C. Simmons  
Air Products and Chemicals, Inc.  
Patent Department  
7201 Hamilton Boulevard  
Allentown, Pennsylvania 18195-1501

Appeal No. 96-0109  
Application 08/023,263

APPENDIX

12. A cryogenic freezer 10 for refrigerating a product 32, wherein said freezer 10 comprises a generally elongated insulated tunnel having a conveyor belt 30 for moving product 32 from an entry end 42 to a discharge end 34; a liquid cryogen injection system located near said discharge end 34 of said tunnel; gas control fan means 36 to move cryogen vaporized by contact with said product moving in counter flow heat exchange with said product 32 through said tunnel 10; means 50 to control the speed of rotation of gas control fan means by means of a temperature controller 48 electrically connected to a fan speed controller 50 connected to said gas control fan means 36, said temperature controller 48 being electrically connected to a thermocouple 41 located adjacent said discharge end 34 of said tunnel to prevent the ingress of ambient atmosphere or the egress of vaporized cryogen, and means 44 to exhaust vaporized cryogen from said tunnel, characterized by:

fluid movement fan means 45 disposed in said exhaust means 44 to control the movement of vaporized cryogen from said tunnel 10; and

control means comprising a fan speed controller 100 connected to said fluid movement fan means 45 and electrically connected with means 50 to

Appeal No. 96-0109  
Application 08/023,263

control the speed of rotation of gas control fan means 36 so as to vary the rate of removal of vaporized cryogen through said means 44 to exhaust vaporized cryogen from said tunnel 10, the rate of removal being controlled to vary the rate of vaporized cryogen through said means 44 to exhaust vaporized cryogen from said tunnel in direct proportion to changes in the speed of rotation of gas control fan means 36 thus minimizing the infiltration of ambient atmosphere into the exhaust 44.