

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(2) is not binding precedent of the Board.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. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CRAIG HACKL
and TED KOELLING

Appeal No. 1996-0351
Application 08/075,740¹

ON BRIEF

Before PAK, WALTZ, and SPIEGEL, Administrative Patent Judges.
PAK, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the examiner's
refusal to allow claims 1 through 6, 8 through 10, 12 through
14, 19, 20, 22 and 23 which are all of the claims remaining in
the application. Subsequent to the final Office action dated

¹ Application for patent filed June 11, 1993.

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December 12, 1994, claim 1, 10, 19 and 22 were amended and claims 7, 11, 15 through 18, 21 and 24 were canceled. See Paper No. 11.

Claims 1, 10, 19 and 22 are representative of the subject matter under consideration in this appeal and read as follows:

1. A method of curing a pickle stock consisting essentially of the steps of:

(a) immersing the pickle stock in a curing liquid;

(b) subjecting the immersed pickle stock to a vacuum treatment for a period of time not exceeding one minute; and

(c) subjecting the immersed pickle stock to a pressure treatment for a period of time not exceeding one minute.

10. A method of curing a pickle stock comprising the steps of:

(a) immersing the pickle stock in a curing solution consisting essentially of water;

(b) subjecting the immersed pickle stock to a vacuum treatment for a period of time not exceeding one minute; and

(c) subjecting the immersed pickle stock to a pressure treatment for a period of time not exceeding one minute.

19. A method of curing pickle stock consisting essentially of the steps of:

(a) immersing the pickle stock in a curing liquid;

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(b) subjecting the immersed pickle stock to a vacuum treatment for a period of time not exceeding one minute;

(c) subjecting the immersed pickle stock to a pressure treatment for a period of time not exceeding one minute; and

(d) repeating the vacuum treatment.

22. A method of curing pickle stock consisting essentially of the steps of:

(a) immersing the pickle stock in a curing liquid;

(b) subjecting the immersed pickle stock to a vacuum treatment for a period of time not exceeding one minute;

(c) subjecting the immersed pickle stock to a pressure treatment for a period of time not exceeding one minute; and

(d) repeating the pressure treatment.

As evidence of obviousness, the examiner relies on the following prior art:

Winkler et al. (Winkler)	4,789,558	Dec.
6, 1988		

Claims 1 through 6, 8 through 10, 12 through 14, 19, 20, 22 and 23 stand rejected under 35 U.S.C. § 103 as unpatentable over the disclosure of Winkler.

In reaching our decision in this appeal, we have carefully reviewed the specification, claims and applied prior art, including all of the arguments advanced by both the

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examiner and appellants in support of their respective positions. As a consequence of this review, we make the determinations which follow.

The claimed subject matter is directed to a method of curing a pickle stock, such as cucumbers. See, e.g., claims 1, 8, 10, 13, 19 and 22. The method consists essentially of the steps of immersing the pickle stock in a curing liquid, applying a vacuum pressure to the immersed pickle stock for less than or equal to one minute and applying an unknown pressure to the immersed pickle stock for less than or equal to one minute. See claim 1. The immersed pickle stock may be subjected to additional vacuum or unknown pressure. See claims 19 and 22. The curing liquid is selected from the group consisting of water, a liquid containing sweetener or vinegar and a brine solution. See, e.g., claims 2-5. Although the transitional phrase "consisting essentially of" is used in claims 1, 19 and 22, it, when read in light of page 6, lines 1-4, of the specification, does not preclude additional vacuum and high pressure treatments. In re Herz, 537 F.2d 549, 551, 190 USPQ 461, 463 (CCPA 1976); Ex parte Boukidis, 154 USPQ 444, 444 (Bd. App. 1966). Similarly, the

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phrase "a curing solution consisting essentially of water" in claim 10, when read in light of the specification, does not preclude a brine solution which contains calcium salts and a significant amount of water. Note also that appellants have not demonstrated that both additional negative and high pressure treatment steps and a calcium salt materially affect the basic and novel characteristics of the method defined in the claims. See In re De Lajarte, 337 F.2d 870, 874, 143 USPQ 256, 258 (CCPA 1964).

As evidence of obviousness of the subject matter defined by claims 1 through 6, 8 through 10, 12 through 14, 19, 20, 22 and 23 under 35 U.S.C. § 103, the examiner relies on the Winkler reference. The examiner states, and appellants do not dispute that:

Winkler et al. disclose a method for producing sweet pickles where the pickle stock, such as cucumbers, are pricked, immersed in a brine solution and exposed to at least two cycles of a first negative (less than atmospheric pressure) and then a high (greater than atmospheric pressure) pressure. The brine solution is comprised of 1 to 2% calcium chloride in water. The parameters of the negative pressure portion of a cycle are a negative pressure of greater than 6,215 kg/m² for a time ranging from 3 to 10 minutes. The parameters of the high pressure portion of a cycle are pressures of 31,638 to 52,730 kg/m²

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for a time ranging from about 2 to 10 minutes (Claim 1). The pickle stock is then separated from the brine solution and placed into a high sugar syrup (col. 3, lines 59 to 64). [See Answer, page 3].

The above finding indicates that the Winkler reference does not mention that the pickle stock immersed in a brine solution be subjected to both the negative (vacuum) and high pressures for less than or equal to one minute. However, as indicated supra, the claims do not preclude repeating negative and high pressure treatments until the total duration of the negative and high pressure treatments equals 2 to 10 minutes as disclosed in the Winkler reference. Accordingly, we agree with the examiner that it would have been obvious to subject a pickle stock, such as cucumbers, in a brine solution to both negative and high pressure treatments once or twice for a prolonged period or repeatedly (many times) for the claimed shorter period to expose the pickle stock to the negative and the high pressure treatments for the duration taught by the Winkler reference. See In re Sovish, 769 F.2d 738, 742-43, 226 USPQ 771, 774 (Fed. Cir. 1985)(skill is presumed on the part of those practicing in the art); In re Bozek, 416 F.2d 1385, 1390, 163 USPQ 545, 549-50 (CCPA

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1969)(the conclusion of obviousness may be made from "common knowledge and common sense" of the person of ordinary skill in the art); In re Jacoby, 309 F.2d 513, 516, 135 USPQ 317, 319 (CCPA 1962)(artisans must be presumed to know something about the art apart from what the references disclose). One of ordinary skill in the art would have had "common knowledge and common sense" to know that the "cured" pickle stock resulting from either approach would be identical or substantially identical since it would be subjected to the same negative (vacuum) and high pressure treatments for the same total period.

In any event, as acknowledged by appellants, the Winkler references teaches that such treatments are used to infuse a calcium salt into the pickle stock. Since the amount of the calcium salt infused would affect the flavor of pickle stocks, we agree with the examiner that it would have been obvious to one of ordinary skill in the art to obtain pickle stocks having a desired taste by subjecting them to negative (vacuum) and high pressure treatments for an appropriate time, such as the claimed time period.

Appellants argue that the Winkler reference is not

directed to curing pickle stocks. See Brief, page 6. However, appellants consider pickle stocks (including fermented pickle stocks) "cured," when they, like those pickle stocks described in the Winkler reference, are immersed in a brine solution and are subjected to vacuum and high pressure treatments for a desired period (e.g., 2 to 10 minutes). See specification, page 7, lines 17-23 and page 6, lines 1-4. Thus, we agree with the examiner that the Winkler reference is directed to producing "cured" pickle stocks, as required by the claims.

Appellants argue that the Winkler reference does not teach, nor would have suggested, a curing or treatment liquid consisting essentially of water. See Brief, page 7. For the reasons indicated supra, however, we conclude such curing or treatment liquid includes a brine solution. As such, we observe no

difference between the claimed curing or treatment liquid and the curing or treatment liquid described in the Winkler reference.

In view of the foregoing, we affirm the examiner's decision rejecting claims 1, 4, 6, 8 through 10, 12 through 14, 19 and 22 under 35 U.S.C. § 103.²

Claims 2, 3, 5, 20 and 23, however, are on a different footing.³ As indicated by appellants at pages 7 and 8 of their Brief and pages 1 and 2 of their Reply Brief, we find no suggestion in the Winkler reference, which would have led one of ordinary skill in the art to apply vacuum and high pressure to pickle stocks immersed in water, sweetener or vinegar. While water, sweetener and vinegar may be known for treating pickle stocks, the Winkler reference does not indicate that the vacuum and high pressure treatments described therein are

² Claims 4, 6, 8, 9 and 12 through 14 stand or fall together with their respective parent claim 1 or 10 since appellants have supplied no substantive arguments for the separate patentability of these claims. See Brief and Reply Brief in their entirety.

³ Claims 2, 3, 5, 20 and 23 are considered separately since appellants have supplied substantive arguments for the separate patentability of these claims. See Brief, pages 7 and 8 and Reply Brief, pages 1 and 2.

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useful for infusing water, sweetener and vinegar components
into the pickle

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stocks. Accordingly, we reverse the examiner's decision rejecting claims 2, 3, 5, 20 and 23 under 35 U.S.C. § 103.

In summary,

- (1) The § 103 rejection of claims 1, 4, 6, 8 through 10, 12 through 14, 19 and 22 is sustained; and
- (2) The § 103 rejection of claims 2, 3, 5, 20 and 23 is not sustained.

The decision of the examiner is affirmed-in-part.

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

AFFIRMED-IN-PART

CHUNG K. PAK)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
THOMAS A. WALTZ)	APPEALS AND
Administrative Patent Judge)	INTERFERENCES
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CAROL A. SPIEGEL)	
Administrative Patent Judge)	

CKP:svt

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FLYNN, THIEL, BOUTELL & TANIS
2026 Rambling Road
Kalamazoo, MI 49008