

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 23

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RAINER BERMBACH, GERHARD DONGES and GEORG GEUS

Appeal No. 97-0165
Application No. 08/222,808¹

HEARD: June 9, 1999

Before KRASS, HECKER, and LALL, Administrative Patent Judges.

KRASS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the final rejection of claims 7 and 9, the only claims remaining in the application.

¹ Application for patent filed April 5, 1994.

The invention pertains to a monitoring installation for containers and trucks and is best understood from an analysis of independent claim 7, reproduced as follows:

7. A monitoring installation for monitoring containers and trucks, comprising:

a drive path through which a truck passes with a driver of the truck driving the truck;

a low-energy and low current X-ray source having an energy of maximum 140 keV and a current of maximum 1 mA; said X-ray source being located along the drive path for producing X-rays directed at a cargo area of the truck;

an X-ray detector located along the drive path and arranged to receive X-rays from the X-ray source after the X-rays have passed through the cargo area of the truck; and

light barrier means positioned along said drive path for activating said X-ray source when a cab of the truck has passed the X-ray source.

The examiner relies on the following references:

Bermbach et al. (Bermbach)	5,065,418	Nov. 12, 1991
Pantelleria et al. (Pantelleria)	5,097,494	Mar. 17, 1992

Claims 7 and 9 stand rejected under 35 U.S.C. 103 as unpatentable over Bermbach in view of Pantelleria.

Reference is made to the briefs and answer for the respective positions of appellants and the examiner.

OPINION

The examiner contends that Bermbach teaches the subject matter of instant claim 7 but for the light barrier means for activating the x-ray source. The examiner relies on Pantelleria for the teaching of automatic triggering of an x-ray source in an inspection station, pointing to Pantelleria's light source 18 and photosensor 20. The examiner gives no patentable weight to "the manner in which the claimed apparatus may be operated such as the presence of a truck or a driver" [answer-page 3]. With regard to the specifically claimed energy and current values, the examiner takes official notice of Lambert's law, contending that the construction of the truck which is being inspected will dictate these values.

For their part, appellants take the position that it is important to the claimed invention that the driver stay with the truck during x-ray examination to provide for increased productivity and throughput rate and that the low level of energy and current of the x-ray source, in addition to not activating the x-ray source until after the cab portion of the truck has passed, permits the driver to stay with the truck while being protected from harmful x-rays. Appellants argue that the "drive path" of Bermbach is not the type of "drive

path" through which a truck may be driven by a driver as defined in claim 7. In their reply brief, appellants also argue that the examiner has, in effect, alluded to a new ground of rejection based on inoperability of the invention because the examiner questioned the specific values of energy and current recited in claim 7.

First, with regard to appellants' allegation of a new ground of rejection applied by the examiner, the examiner has made no formal new ground of rejection based on inoperability of the invention and does not appear to question the operability of the claimed invention. Accordingly, we offer no opinion with regard to operability and we assume the claimed invention to be operable for its intended purpose.

It appears to us that the examiner is contending that the specific values of energy and current recited in the claim are easily obtained, or calculated, through the use of Lambert's law, based on the particular material of the truck or container being inspected and, therefore, there would have been nothing unobvious about the specifically claimed values. While appellants dispute any allegation of inoperability of the

invention, stating that the "apparatus has been built, sold and used with the energy and current values as claimed" [reply brief-page 4], appellants do not challenge the obviousness of employing such values nor do appellants challenge the examiner's official notice of Lambert's law and the conclusion therefrom that it would have been obvious to employ the claimed values. Accordingly, since appellants make no substantive argument persuasive of the nonobviousness of the energy and current values claimed, we accept the examiner's view in this regard.

With regard to the claimed drive path and the driver, claim 7 calls for "a drive path through which a truck passes with a driver of the truck driving the truck." We agree with the examiner that Bermbach clearly teaches this limitation, as broadly claimed. In Bermbach, the driver of the truck drives the truck up the ramp 28 onto the conveyor 4 and pallet 6 and the driver drives the truck off the apparatus when the inspection is finished. The conveyor, ramp and pallet are all part of the "drive path" of the vehicle. Accordingly, the driver of the vehicle in Bermbach does, indeed, drive the truck along at least part of the drive path through which the truck

passes, which is all that is required by the instant claim language. Claim 7 does not preclude the driver from exiting the truck sometime during the inspection process, as the driver does in Bermbach.

In our view, the troubling part of the examiner's rejection is directed to the claimed "light barrier means." While Pantelleria clearly discloses a "light barrier means," in the sense of using a light source and photo detector means for activating an x-ray inspection when an article to be examined passes by, and this would be applicable to the vehicle inspection apparatus of Bermbach, claim 7 further requires that this light barrier means is "for activating said x-ray source when a cab of the truck has passed the x-ray source."

The x-ray source in Pantelleria is activated when the beam of light is interrupted as a result of a container passing therethrough [column 4, lines 38-46]. There is no teaching or suggestion, in either Bermbach or Pantelleria, of activating an x-ray source when an object [a cab of a truck in the claim] has passed the x-ray source. Of course, one *could* have placed the light source and photo detector of Pantelleria in such a location that the x-ray source was activated only after an

object has passed the x-ray source but the only reason for doing so would have been hindsight gleaned from a knowledge of appellants' invention. Pantelleria clearly is not interested in activating the x-ray source *after* the container to be inspected passes the x-ray source because Pantelleria is interested in inspecting the container itself by subjecting the container to x-rays. Further, the artisan would have had no reason to modify Bermbach in such a manner as to provide for activating the x-ray source *after* a portion of the vehicle has passed the x-ray source because the driver of the vehicle in Bermbach is not in the vehicle at the time of inspection by x-rays so protection of a driver within the vehicle is of no concern for Bermbach.

Accordingly, we find the subject matter of instant claim 7 to be unobvious, within the meaning of 35 U.S.C. 103, based on the evidence provided by Bermbach and Pantelleria, because we find no teaching or suggestion therein for the claimed "light barrier means positioned along said drive path for activating said x-ray source when a cab of the truck has passed the x-ray source."

The examiner's decision rejecting claims 7 and 9 under 35
U.S.C. 103 is reversed.

REVERSED

ERROL A. KRASS)	
Administrative Patent Judge)	
)	
)	
)	
)	BOARD OF PATENT
STUART N. HECKER)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
)	
)	
)	
PARSHOTAM S. LALL)	
Administrative Patent Judge)	

EAK/jlb

Appeal No. 97-0165
Application No. 08/222,808

Page 9

SPENCER, FRANK & SCHNEIDER
SUITE 300 EAST
1100 NEW YORK AVE., N.W.
WASHINGTON, DC 20005-3955

