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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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 JAMES P. CONSTANTINO, RAYMOND H. GOSNELL
RICHARD A. JORDAN and JAMES W. JACOBY JR.

Appeal No. 97-4260
Application 08/445,660[1]

ON BRIEF

Before CALVERT, ***Administrative Patent Judge,***
McCANDLISH, ***Chief Administrative Patent Judge,*** and
STAAB, ***Administrative Patent Judge.***

CALVERT, ***Administrative Patent Judge***.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1 to

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[1]Application for patent filed May 22, 1995. According to appellants, this application is a continuation of application serial no. 07/975,805, filed November 13, 1992, now abandoned.

4, 6 to 11, and 14 to 18, all of the claims remaining in the application. However, in the examiner's answer, the examiner did not repeat a provisional rejection of all of the claims on the ground of double patenting, so that rejection is assumed to be withdrawn. *Ex parte Emm*, 118 USPQ 180 (Bd. Apps. 1957). Since claims 4 and 18 were not finally rejected on any other ground, they are not involved in this appeal.

The subject matter on appeal concerns a pallet formed of upper and lower thermoplastic sheets. The claims on appeal are reproduced in the Appendix to appellants' brief, although we note that claims 16 and 17 therein do not include all of the additions made by the amendment filed on May 22, 1995 (Paper No. 14).

The references applied in the final rejection are:

Griffin	4,000,704	Jan. 04, 1977
Dresen et al. (Dresen)	4,428,306	Jan. 31, 1984
Shuert	4,879,956	Nov. 14, 1989
Cool (European Application)	305,082	Mar. 01, 1989

The claims stand finally rejected as follows:

(1) Claims 8, 9, 11 and 14, anticipated by either of Shuert or Dresen, under 35 USC § 102(b);

(2) Claims 14, 15, and 17, anticipated by Cool, under 35 USC § 102(b);

(3) Claims 1 to 3, 6, 7, 10, 16 and 17, unpatentable over Dresen in view of Griffin, under 35 USC § 103.

Rejection (1)

The claims to which this rejection applies call for a plurality of bosses "in a substantially non-linear arrangement." Appellants' argument may be summarized as follows: (1) they may be their own lexicographers; (2) they have defined "non-linear" in the specification (page 9, lines 13 to 15) as an arrangement wherein "a line formed through the center of two adjacent bosses does not intersect the center of any boss adjacent to either of the line defining bosses"; and (3) neither Shuert nor Dresen anticipates these claims because in their disclosed pallets, a line can be formed through the center of two adjacent bosses that intersects the center of a boss adjacent to either of the line defining bosses (brief, pages 5 and 6).

It is well settled that patent applicants may be their own lexicographers, in that a term used in the claims shall be given a special meaning if that meaning is sufficiently clear in the specification. *Multiform Desiccants Inc. v. Medzam Ltd.* 133 F.3d 1473, 1477, 45 USPQ2d 1429, 1432 (Fed. Cir. 1998). In the present case, the paragraph of the specification from which appellants extracted the above-quoted definition reads, in part (page 9, lines 3 to 16, emphasis added):

> Bosses 13 are arranged on upper surface 9 of deck 7 in an essentially non-linear pattern. The pattern substantially avoids formation of hinge or bending moments by avoiding linear arrangements of bosses. The pattern is non-symmetrical about either of the two major axes -X or -Y. In a preferred embodiment, the bosses are generally evenly distributed over the surface of the deck yet are not symmetrical about either of the X or Y axes. The arrangement of bosses may also be non-symmetrical about axes along the diagonals of the deck. A non-hinge forming arrangement may also be formed by locating bosses so that a line formed through the center of two adjacent bosses does not intersect the center of any boss adjacent to either of the line defining bosses.

Also on page 10, lines 3 to 10 (emphasis added):

> Turning to FIG. 6, another embodiment of the invention is illustrated. Minor bosses 19 are arranged in a non-hinge forming pattern as are major bosses 17. Stepped boss floors 57 may be used in either arrange-ment of major and minor bosses 17, 19. <u>In arrangements comprising major and minor bosses 17, 19, two adjacent bosses of the same size will define the line which should not intersect the boss center of the next adjacent boss, regardless of size, to form a non-hinge forming arrangement</u>.

From these portions of the specification, it is evident that the definition which appellants contend should be applied to the term "non-linear" in the claims is not presented in the specification as a definition of that term, but as a definition of the term "non-hinge forming arrangement". It is questionable whether it is sufficiently clear from the specification (as required by *<u>Multiform Desiccants</u>*, supra) that this definition

should be the special meaning to be given the term "non-linear".

However, assuming arguendo that the term "non-linear" as used in claims 8, 9, 11 and 14 should be construed as argued by appellants, we do not consider that the claims are patentable over either Shuert or Dresen. Appellants seem to

assume that the claims are not anticipated by Shuert or Dresen because not all of the references' bosses are in a non-linear arrangement, but the claims are not so limited. During patent examination, pending claims must be interpreted as broadly as their terms reasonably allow. *In re Zletz*, 893 F.2d 319, 321, 13 USPQ 2d 1320, 1322 (Fed. Cir. 1989). Here, the claims recite a pallet "comprising" certain elements, which leaves open the inclusion of other, unclaimed structures. Thus, with respect to the bosses recited in independent claims 8 and 14, all that the claims require is a plurality (i.e., two or more) bosses "in a substantially non-linear arrangement", and do not exclude the presence of other bosses in a linear arrangement.

The following is an enlargement of a portion of Fig. 8 of Shuert, with reference characters added:

Reading the "non-linear arrangement" limitation of claims 8 and 14 on this figure, there are a plurality (two) of adjacent[2] bosses, "a" and "b", which are in a "non-linear arrangement" (as defined by appellants) because a line through their centers does not intersect the center of any adjacent boss, e.g., bosses "c", "d", "e", "f" or "g". Thus, Shuert

[2]Appellants assert in their reply brief that "adjacent" means "relatively near and having nothing of the same kind intervening." Bosses "a" and "b" meet this definition.

anticipates claims 8 and 14.

Similarly, claims 8 and 14 are anticipated by Dresen. As the examiner shows in the copy of Dresen's Fig. 2 in Appendix B of the examiner's answer, the disclosed pallet of Dresen has at least two bosses which meet appellants' definition of a "non-linear" arrangement. Here again, the fact that there are other bosses on Dresen's pallet which are not non-linearly arranged is irrelevant, since their presence is not excluded by these claims.

Accordingly, we will sustain the rejection of claims 8 and 14 as anticipated by Shuert or Dresen, as well as the same rejection of claims 9 and 11, which, appellants state on page 4 of their brief, stand or fall with claim 8.[3]

Rejection (2)

The Cool reference shows in Fig. 1 a plastic pallet

[3]Appellants also indicate that claims 10 and 15 stand or fall with claims 8 and 14, respectively, but since claims 10 and 15 were not included in rejection (1), these statements were evidently intended to apply to rejections (3) and (2), respectively.

having nine bosses 20 with stepped floors. With regard to claim 14, the bosses at the centers of two adjacent sides of the pallet meet appellants' asserted definition of a non-linear arrangement, because a line joining their centers (as shown in Appendix C of the examiner's answer) does not intersect the center of any other boss. As discussed above, that is sufficient to anticipate the non-linear arrangement recited in claim 14.

We also conclude that independent claim 17 is anticipated by Cool. This claim calls for a plurality of bosses "in a non-symmetrical, non-hinge forming arrangement." As the examiner points out on page 8 of the answer, the claim does not require the bosses to be non-symmetrical about each and every axis, and while they are symmetrical about the X and Y axes, they are "non-symmetrical about the diagonal axis because the pallet is rectangular." Since Cool's bosses are non-symmetrical about at least one axis, they meet the "non-symmetrical" limitation of claim 17; as with the term "non-linear", supra, the term "non-symmetrical" does not exclude a symmetrical arrangement of the bosses around some axes, but

only requires that they be non-symmetrical about at least one axis. As for the requirement of a "non-hinge forming arrangement", our previous conclusion that some of Cool's bosses are in a "non-linear" arrangement carries with it the conclusion that they are also in a "non-hinge forming" arrangement, since in the portions of the specification quoted previously, appellants give "non-hinge forming" the definition which they contend should be given to "non-linear".

We will therefore sustain the rejection of claims 14 and 17, and of claim 15 which falls with 14 (brief, page 4).

Rejection (3)

The crux of this rejection, as stated on page 5 of the examiner's answer, is that it would have been obvious "to have formed the boss arrangement of Dresen et al. in a non-symmetrical/major and minor boss arrangement as taught by Griffin [as seen in Fig. 12]." Appellants argue on page 8 of the brief that the rejection is improper because the bosses of Griffin, e.g., those on each side of the center foot, are symmetrical, presum-ably about the vertical center line of the pallet. Considering the apparatus recited in claim 1 *vis-a-*

vis the Dresen patent, it appears that, with the possible exception of the last paragraph, Dresen discloses all the structure recited. The last paragraph of the claim reads: "said bosses being arranged substantially non-symetrically about one of said axes". The "said axes" are defined in the claim as:

> a first axis in the plane of said deck member extending through the center of said deck member running between two non-adjacent sides of said deck member;
> a second axis extending through the center of said deck member in the plane of the deck member perpendicular to said first axis.

We consider that Dresen meets the limitation in the last paragraph of the claim, since the axes are broadly defined. Looking at Fig. 2 of Dresen, for example, the lead line from reference numeral 32, if extended across the pallet 10, would constitute a "first axis" extending through the center of deck member 13 and running between two non-adjacent sides of the deck member, as claimed, and a second axis would extend through the center of the deck member perpendicular to the first axis. Since the bosses 22 of Dresen would not be symmetrical about

either of these axes, Dresen meets all of the limitations of claim 1, and it is unnecessary to consider the Griffin patent.[4]

Appellants state on page 4 of their brief that claims 2, 3, 6 and 7 stand or fall with claim 1. Also, claims 10, 16 and 17 fall with claim 1, since no explanation is presented as to why they are believed to be separately patentable. 37 CFR 1.192(c)(7).

Rejection Under 37 CFR 1.196(b)

Claim 18 reads:

> 18. A plastic pallet comprising:
>
> a substantially planar load bearing deck member formed from an upper and lower sheet of thermoplastic;
>
> a plurality of bosses thermoformed in said deck member in a non-symmetrical, non-hinge forming arrangement and;
>
> a plurality of bosses thermoformed in said deck member whereby no more than three adjacent boss centers are collinear.

Pursuant to 37 CFR 1.196(b), as amended effective

[4]We recognize that this is, in effect, a holding that Dresen anticipates claim 1, but this is considered proper since lack of novelty is the epitome of obviousness. *In re May*, 574 F.2d 1082, 1089, 197 USPQ 601, 607 (CCPA 1978).

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1, 1997, 62 F.R. 53132, 53197 (Oct. 10, 1997), 1203 O.G. 63,

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(Oct. 21, 1997), claim 18 is rejected under 35 USC § 102(b) as anticipated by Cool.[5]

Cool discloses a plastic pallet 10 formed from upper and lower plastic sheets, having bosses 20. As discussed previously, these bosses are in a non-symmetrical, non-hinge forming arrangement, and no more than any three adjacent boss centers are collinear.

Conclusion

The examiner's decision to reject claims 1 to 3, 6 to 11 and 14 to 17 is affirmed. Claim 18 is rejected pursuant to 37 CFR 1.196(b).

In addition to affirming the examiner’s rejection of one or more claims, this decision contains a new ground of

[5]The expression "not more than three" in the last paragraph of the claim appears to have no antecedent basis in the specification, as required by 37 CFR 1.75(d)(1). Also, the recitation of two pluralities of bosses seems to imply that different bosses are referred to, whereas, as disclosed, these would seem to be the same bosses.

rejection pursuant to 37 CFR § 1.196(b)(amended effective Dec. 1, 1997, by final rule notice, 62 Fed. Reg. 53,131, 53,197 (Oct. 10, 1997), 1203 Off. Gaz. Pat. & Trademark Office 63, 122 (Oct. 21, 1997)). 37 CFR § 1.196(b) provides, "A new ground of rejection shall not be considered final for purposes of judicial review."

Regarding any affirmed rejection, 37 CFR § 1.197(b) provides:

> (b) Appellant may file a single request for rehearing within two months from the date of the original decision . . . .

37 CFR § 1.196(b) also provides that the appellant, <u>WITHIN TWO MONTHS FROM THE DATE OF THE DECISION</u>, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of proceedings (37 CFR § 1.197(c)) as to the rejected claims:

> (1) Submit an appropriate amendment of the claims so rejected or a showing of facts relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the application will be remanded to the examiner. . . .

> (2) Request that the application be reheard under § 1.197(b) by the Board of Patent Appeals and Interferences upon the same record. . . .

Should the appellants elect to prosecute further before the Primary Examiner pursuant to 37 CFR § 1.196(b)(1), in order to preserve the right to seek review under 35 U.S.C. §§ 141 or 145

with respect to the affirmed rejection, the effective date of the affirmance is deferred until conclusion of the prosecution before the examiner unless, as a mere incident to the limited prosecution, the affirmed rejection is overcome.

If the appellants elect prosecution before the examiner and this does not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for final action on the affirmed rejection, including any timely request for rehearing thereof.

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

Affirmed
37 CFR 1.196(b)

IAN A. CALVERT Administrative Patent Judge	)	
HARRISON E. McCANDLISH Senior Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
LAWRENCE J. STAAB Administrative Patent Judge	)	

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