

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 14

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LARRY G. CULVER

Appeal No. 2000-1667
Application No. 09/071,305

ON BRIEF

Before ABRAMS, CRAWFORD and LAZARUS, Administrative Patent Judges.

CRAWFORD, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 18 through 20, 25 through 27 and 29. Claims 32 through 37 and 39 are allowed. Claims 21 through 24 are objected to as being dependent on a rejected base claim. The examiner has indicated that claim 28 would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. Claims 1 through 17, 30, 31 and 38 have been canceled.

Appellant's claimed subject matter is a method of resurfacing a gravel road in which the surface is ripped, the coarse and fine material separated and the material deposited onto the road such that coarse material is deposited on top of the fine material.

Claim 18 is illustrative of the claims on appeal:

18. A method for resurfacing a gravel road having a surface, the gravel road including fine material and coarse material, the method comprising the steps of:

ripping the surface of the gravel road to break up fine and coarse material near the surface of the gravel road using a plurality of teeth spaced along a ripper bar, the plurality of teeth being located to penetrate the surface of the gravel road; and

separating coarse material from fine material such that coarse material is deposited on top of the fine material.

THE PRIOR ART

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

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| Scheunemann | 1,523,084 | Jan. 13, 1925 |
| Bach et al. (Bach) 1956 | 2,775,438 | Dec. 25, |
| Cicin-Sain | 4,682,428 | Jul. 28, 1987 |
| Constantin | 5,071,284 | Dec. 10, 1991 |
| Henthorn | 5,351,761 | Oct. 4, 1994 |

THE REJECTIONS

Claims 18 through 20, 25 through 27, and 29 stand rejected under 35 U.S.C. § 103 as being unpatentable over Constantin in view of Cicin-Sain and Scheunemann.

Claims 18, 20, 25 through 27, and 29 stand rejected under 35 U.S.C. § 103 as being unpatentable over Henthorn in view of Bach.¹

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the final rejection (Paper No. 5, mailed March 9, 1999), the answer (Paper No. 11, mailed, October 19, 1999) and the supplemental answer (Paper No. 13, mailed, February 4, 2000) for the examiner's complete reasoning in support of the rejections, and to the brief (Paper No. 10, filed, September 13, 1999) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the

¹ The examiner has withdrawn the rejection of claims 25 through 28 under 35 U.S.C. § 112 (see Paper No. 13) in view of an amendment (Paper No. 12) filed December 6, 1999.

respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

We turn first to the examiner's rejection of claims 18 through 20, 25 through 27 and 29 under 35 U.S.C. § 103 as being unpatentable over Constantin in view of Cicin-Sain and Scheunemann. The examiner finds that:

Constantin . . . teaches a method for resurfacing a gravel road comprising the steps of ripping the surface of the gravel road to break up fine and coarse material near the surface of the gravel road (column 4, lines 46-57), moving the gravel laterally outwardly with the middle buster 48 and laterally inwardly with the side delivery blades 50, and grading the material with the floating striker blade 52. [Final Rejection at pages 2-3].
(emphasis added)

The examiner relies on Cicin-Sain and Scheunemann for disclosing a scarifer 24 in Cicin-Sain and an agitator in Scheunemann for loosening metalling or gravel so that it can be easily manipulated by a ballast renewal machine. The examiner concludes that:

It would have been obvious, in view of these teachings of Cicin-Sain . . . and Scheunemann . . . to provide Constantin . . . with a ripper bar in front of the middle

buster 48 in order to loosen the road material prior to plowing it laterally back and forth with the blades 48 and 50 [Examiner's Answer at page 6].

Constantin discloses a road maintainer which comprises a middle buster 48 which includes a pair of conventional shearing or cutting blades which cut into the road surface and shear material from it as the middle buster 48 is pulled along the road (Col. 2, lines 61 to Col. 3, line 2). The road maintainer also includes side delivery blades 50 which cut into the road surface laterally outwardly from the middle buster 48 and deliver cut material in two ridges toward the longitudinal center of the road maintainer (Col. 3, lines 16-19). The examiner's rejection states that it would be obvious to provide a ripper bar in front of Constantin's middle buster 48 in order to loosen road material prior to it being plowed by blades 48 and 50. However, Constantin discloses that the road surface is cut by two sets of blades i.e. the middle buster 48 and the delivery blades 50. As such, we agree with the appellant that as the road surface is already cut and thereby loosened by blades 48 and 50, there is no motivation

to modify Constantin so as to include a ripper bar in front of the middle buster 48 to loosen the road surface.

Therefore, we will not sustain this rejection as it is directed to claim 18 or claims 19, 20, 25-27 and 29 dependent therefrom.

We turn next to the examiner's rejection of claims 18, 20, 25-27, and 29 under 35 U.S.C. § 103 as being unpatentable over Henthorn in view of Bach. The examiner is of the opinion that Henthorn discloses:

. . . ripping the surface with a plurality of teeth 28 spaced along a ripper bar and separating course material from fine material as illustrated in figure 3 [Final Rejection at page 5].

The examiner relies on Bach for teaching that it is common knowledge that the ballast particles which serve as the foundational bed for railroad tracks become interspersed with finely divided material that results in loose track and poor conditions because water cannot drain rapidly through the ballast. The examiner further relies on Bach for disclosing that it would have been conventional to clean the ballast periodically in order to remove the finely divided particles to effect proper drainage. The examiner concludes:

It would have been obvious in view of these teachings of Bach et al, to resurface a gravel road using stones recovered by the apparatus of Henthorn et al in order to provide a productive use of the gravel, and to simultaneously provide a road that drains well. [Examiner's Answer at page 7].

Appellant argues that Henthorn does not disclose the step of separating coarse material from fine material such that coarse material is deposited on top of fine material.

Bach discloses a method and apparatus for processing ballast which includes the steps of removing ballast from the crib between track ties (Col. 1, lines 15-19). The ballast is separated from the dirt and returned to the track. The dirt is sent to a dirt bin 70 (Col. 4, lines 25-28).

Henthorn discloses a farm tractor field stone collection implement which collects field stones and dumps the stones at a non-cultivated site (Col. 2, lines 51-54).

We agree with the appellant that neither Henthorn nor Bach discloses the step of "separating coarse material from the fine material such that coarse material is deposited on top of fine material" as recited in claim 18. Bach discloses that the large ballast material is removed from the field, the dirt is removed from the ballast and the ballast is returned

to the field. Henthorn discloses that the large material is removed from a first location and the large material is dumped at a second location. There is no disclosure in either reference of the step of "separating coarse material from the fine material such that the coarse material is deposited on top of the fine material." Therefore, we will not sustain this rejection as it is directed to claim 18 or claims 20, 25 through 27 and 29 dependent thereon.

The decision of the examiner is reversed.

REVERSED

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| NEAL E. ABRAMS |) | |
| Administrative Patent Judge |) | |
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| |) | BOARD OF PATENT |
| MURRIEL E. CRAWFORD |) | APPEALS |
| Administrative Patent Judge |) | AND |
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| RICHARD B. LAZARUS |) | |
| Administrative Patent Judge |) | |

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ANTHONY R. LAMBERT
10328-81 AVENUE, #204
EDMONTON, ABC T6E1X-2