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THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

This opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 16

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte WAYNE T. CHIAPPE
and RANDY W. GASQUOINE

Appeal No. 95-1561
Application 07/902,388¹

HEARD: DECEMBER 5, 1995

MAILED

DEC 15 1995

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

Before CALVERT and McQUADE, Administrative Patent Judges,
and CRAWFORD, Acting Administrative Patent Judge.

McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

This appeal is from the final rejection of claim 31. Claim 32 stands allowed. Claims 33 through 40, the only other claims pending in the application, stand withdrawn from consideration

¹ Application for patent filed June 23, 1992. According to the appellants, the Application is a continuation of Application 07/638,679, filed January 8, 1991, now Patent No. 5,123,796 issued June 23, 1992, which is a continuation of Application 07/287,479, filed December 20, 1988, now Patent No. 4,983,095 issued January 8, 1991, which is a division of Application 06/906,063 filed September 11, 1986, now Patent No. 4,808,057 issued February 28, 1989.

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pursuant to 37 CFR 1.142(b) as being directed to a non-elected invention.

The subject matter on appeal pertains to a method of balancing the rates at which articles are conveyed to and from work stations in a mass production line. Claim 31 reads as follows:

31. In an industrial process, the method of balancing a first rate at which articles are being supplied from a first, upstream work station with a second rate at which such articles are in demand at a second, downstream work station, said method including providing at least one inbound staging area for receiving said articles from said first work station, and an outbound staging area for advancing articles to said second, downstream work station, said method including successively removing said articles in groups from said inbound staging area and transferring said groups of articles to said outbound staging area without substantial change in said first and second rates at which said articles are received and advanced, respectively, said method further including determining when an amount of articles called for by said second work station is less than an amount of articles being received at said inbound staging area, thereupon removing some of the groups of articles arriving at said inbound staging area from said inbound staging area from time to time, and placing such groups of articles in transient storage, and when the second rate at which said articles are called for to be used by said second work station exceeds the first rate at which said articles are being received at said work station, removing articles in groups from transient storage and placing such groups of articles at said outbound staging area.

The reference relied upon by the examiner as evidence of obviousness is:

Meeden et al. 2024758
(British Patent Application)

Jan. 16, 1980

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Claim 31 stands rejected under 35 U.S.C. 103 as being unpatentable over the British reference.²

The British reference discloses a cigarette conveying system which is disposed between a cigarette making machine and a cigarette packing machine. The system includes a feed conveyor 10 arranged to receive a stack-like stream of cigarettes from the making machine, a reservoir 14 at the distal end of the feed conveyor, and a chute 13 upstream of the reservoir leading from the feed conveyor to the packing machine. The reservoir, which includes a movable end wall 15, functions to continuously accommodate relatively small and temporary imbalances between the output rate of the making machine and the input rate of the packing machine. In this regard, the volume of the reservoir expands and contracts via the movable end wall to respectively accumulate and discharge cigarettes to adjust for rate imbalances. The conveying system also includes a conveying and storage loop upstream of the chute 13 for accommodating relatively large or longstanding rate imbalances which cannot be handled by the

² Although no formal rejection has been entered, the examiner has raised the issue of obviousness-type double patenting in this case (see, for example, pages 3 and 4 in the final rejection), and the appellants appear to have agreed to file an appropriate terminal disclaimer in response to the examiner's concerns (see Paper No. 8 filed on February 1, 1994). The record, however, does not indicate that any terminal disclaimer has been filed. This matter should be resolved upon the return of the application to the Examining Group.

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reservoir 14. The loop consists of chutes 17, 19, conveyors 18, 20, 28, a tray filling station 21 and an elevator 29 arranged as shown in the drawing figure. Cigarettes diverted into the loop from the feed conveyor 10 are separated into groups, stored and eventually transported back to the feed conveyor.

According to the examiner, the cigarette making machine, cigarette packing machine, feed conveyor 10, chute 13 and reservoir 14 disclosed by the British reference correspond, respectively, to the first work station, second work station, inbound staging area, outbound staging area and transient storage recited in claim 31. As for the method steps recited in claim 31, the examiner concludes that "[i]t would have been obvious to have conventionally carried out the method steps (as claimed) with the apparatus of the British [reference]" (answer, page 3). This conclusion is apparently based on the examiner's determination that the apparatus disclosed by the British reference "is obviously capable of carrying out the claimed method steps in the claimed order, if desired" (final rejection, page 4).

The teachings of the British reference, however, do not justify the examiner's conclusion that the process recited in claim 31 would have been obvious to one of ordinary skill in the art.

To begin with, the British reference, as applied by the examiner, does not meet the claim limitations relating to the

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handling of the articles in groups. In this regard, the cigarettes disclosed by the British reference move from the feed conveyor 10 to the reservoir 14 and/or the chute 13 in a continuous stream which is not segregated into any discernable groups. Moreover, there is nothing in the British reference which would have suggested modifying the flow of cigarettes in this area so as to meet the group handling claim limitations. The mere fact that prior art could be modified in a certain way would not have made the modification obvious unless the prior art suggested the desirability of the modification. In re Gordon, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984).

As for the disclosure in the British reference that the cigarettes moving through the above mentioned conveying and storage loop are handled in groups, the examiner has not relied on such disclosure to support the appealed rejection. Be that as it may, the British reference does not teach, and would not have suggested, operating the conveying and storage loop in accordance with the particular article group handling steps recited in claim 31.

In light of the foregoing, we shall not sustain the standing 35 U.S.C. 103 rejection of claim 31 as being unpatentable over the British reference.

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