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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 24

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

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Ex parte STEPHEN J. PLAS

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Appeal No. 1999-2324
Application 08/723,737

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ON BRIEF

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Before STAAB, McQUADE, and BAHR, Administrative Patent Judges.

STAAB, Administrative Patent Judge.

ON REQUEST FOR REHEARING

This appeal comes before us again on request for rehearing of our decision dated May 24, 2000 (Paper No. 22), wherein we affirmed the examiner's rejection of the appealed

claims under 35 U.S.C. § 103.

Many of the arguments advanced by appellant in the request are merely a variation of arguments made in the brief, and are no more persuasive now than they were then. For example, on page 4 of the request, appellant notes that the air classification system disclosed in US 4,963,634 (DiRienzo) is similar to the air classification systems of Jones and Micro-Sizer, and implies that one of ordinary skill in the art would operate the air classification systems of Jones and/or Micro-Sizer at a rotary rejector speed on the order of 900 rpm based on the teaching of the ‘634 patent. This implied argument is similar to the argument made by appellant on pages 6-7 of the main brief and was thoroughly treated in our decision in the paragraph spanning pages 10-11 thereof.

On page 4 of the request, appellant makes much of the fact that practicing the claimed invention by modifying commercial air classifiers of the design of Jones and Micro-Sizer by removing every other rejector blade (for a blade spacing of about 3.57% of the circumference) and operating the

modified air classification system at a speed of from 100 to 300 rpm results in significantly greater yields. This argument is not well taken because it is not commensurate in scope with claims 1, 4, 5, 7, 9 and 10, which

call for blades that are merely "widely spaced." For the reasons set forth in the paragraph spanning pages 4-5 of our decision, we do not consider the terminology "widely spaced" as applied to the blades of the rotary rejector to distinguish over the blade spacing of Jones, Micro-Sizer, or Jäger.

Appellant also argues on page 4 of the request that the increase in yield of low ash fraction by lowering the speed of the rotary rejector is unexpected and, as such, provides clear evidence of patentability of appellant's claimed invention over Jones and Micro-Sizer. This argument is a repeat of an argument made by appellant on pages 10-13 of the main brief, which we thoroughly treated on pages 11-14 of our decision.

On page 4 of the request, appellant advances the general argument that Jäger discloses an air classifying system that functions in an entirely different way than appellant's

claimed air classifier. Appellant also contends that Jäger's impeller 6 is not a "rotary rejector" as called for in the claims. However, appellant has not explained, and it is not apparent to us, how the device of Jäger operates differently than appellant's invention *as claimed* or why the impeller 6 of Jäger cannot be considered a "rotary rejector." In the absence of a more

specific explanation of how Jäger's air classifier differs from appellant's invention as claimed, and/or why Jäger's impeller cannot be considered a "rotary rejector" as broadly claimed, these arguments are not well taken. Furthermore, we are not in agreement with appellant's implied argument on page 4 of the request to the effect that Jäger's system is limited to separating flour from grit.

Appellant argues on pages 4 and 5 of the request that the air classifier systems of Jäger and MPVI are disclosed for classifying material with a disparity of size and density, and therefore would not have made obvious appellant's claimed method of separating substantially similarly sized particles.

This argument is not persuasive for several reasons. First, the claim terminology "substantially similarly sized" (claim 1, line 1) does not preclude at least some disparity in the size of the material being classified. Second, in the "Background" section of appellant's specification in the paragraph spanning pages 1 and 2, it is stated that it was known in the art at the time of appellant's invention to separate high and low ash fractions of rendered animal on the basis of particle size. Further, in US Patent 4,759,943 to Ross[1] at column 2, line 13, through column 3, line 17, there appears a discussion of separating high and low ash fractions of rendered animal meal on the basis of either particle density or particle size. Based on the breadth of the claim language appellant has chosen to employ, and fact that prior to appellant's invention it was known to classify rendered animal meal on the basis of size, we remain of the view that it would have been obvious to one of ordinary skill in the art to use air classifier systems like those of Jäger and MPVI to separate high and low ash fractions of rendered animal meal,

[1]The Ross patent is discussed in the "Background" section of appellant's specification on page 2.

notwithstanding that said high and low ash fractions may be made up of "substantially similarly sized" particles.

On page 5 of the request, appellant argues that MPVI's strewing plate technology is "entirely different" than that of appellant's, and that MPVI provides no suggestion to increase yield by limiting the number of blades and rotation speed of the rotary rejector. This argument is not well taken. First, we simply do not agree with appellant that MPVI's strewing plate

technology is "entirely different" than the technology of appellant or the primary references, since all are directed to air classification in the general sense. Second, MPVI was not relied upon to show limiting the number of blades or rotation speed of the rotary rejector.

As to the argument on page 5 of the request that a person of ordinary skill in the art having the applied references before him would not be cognizant of the "yield problem" allegedly solved by appellant's invention, this argument is

not persuasive because it fails to take into account that artisans must be presumed to know something about the prior art apart from what the references disclose. *In re Jacoby*, 309 F.2d 513, 516, 135 USPQ 317, 319 (CCPA 1962). In the present instance, we are informed in the "Background" section of appellant's specification (see page 1, line 13, through page 2, line 24) that the so-called "yield problem" in processing rendered animal meal is a known problem to those versed in the art.

Appellant's request has been granted to the extent of reconsidering our decision, but is denied with respect to making any changes therein.

DENIED

LAWRENCE J. STAAB Administrative Patent Judge	)	
JOHN P. McQUADE Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
JENNIFER D. BAHR Administrative Patent Judge	)	

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