

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte STEVEN R. CULLEN

Appeal No. 2002-0032
Application No. 08/514,507

ON BRIEF

Before COHEN, ABRAMS, and BAHR, Administrative Patent Judges.
ABRAMS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claim 10.
Claims 1-9, 15 and 16 have been allowed, and claims 12-14 have been canceled.

We REVERSE.

BACKGROUND

This is an application for reissue of U.S. Patent No. 5,899,247, which has been sought on the basis that the appellant claimed less than he had a right to claim in the original application. The appellant's invention as recited in claim 10 relates to a bagging machine having a non-flexible anchor for resisting the movement of the machine away from the material being bagged. The claim has been reproduced in an appendix to the Brief.

The prior art reference of record relied upon by the examiner in rejecting the appealed claim is:

Cullen	5,425,220	Jun. 20, 1995
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Claim 10 stands rejected under 35 U.S.C. § 102(b) as being anticipated by Cullen.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejection, we make reference to the Answer (Paper No. 18) for the examiner's complete reasoning in support of the rejections, and to the Brief (Paper No. 17) 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 reference, and to the

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

The guidance provided by our reviewing court with regard to the matter of anticipation is that it is established only when a single prior art reference discloses, either expressly or under the principles of inherency, each and every element of the claimed invention. See, for example, In re Paulsen, 30 F.3d 1475, 1480-1481, 31 USPQ2d 1671, 1675 (Fed. Cir. 1994) and In re Spada, 911 F.2d 705, 708, 15 USPQ2d 1655, 1657 (Fed. Cir. 1990).

Claim 10 is directed to a machine for bagging material into bags having a closed end and an open mouth. According to the claim, the machine comprises a wheeled frame, a tunnel on the wheeled frame having a material receiving means at an intake end for receiving the material to be bagged and an output end adapted to receive the open mouth of a bag, material packing means on the wheeled frame for forcing the material to be bagged into the bag, and

a non-flexible anchor positioned rearwardly of the intake end of said tunnel so as to be in the path of material placed in the bag;

said anchor resisting the movement of said bagging machine away from the bagged material.

The examiner's position being that claim 10 is anticipated by Cullen, all of the subject matter recited in claim 10 must be disclosed or taught by Cullen, either explicitly or by way of inherency. However, whereas the claim requires that the anchor be "non-

flexible,” Cullen on its face does not appear to meet this limitation, for the anchor disclosed therein comprises a pair of cables which are passed through sheaves so they can be lengthened and shortened as necessary by hydraulic actuators to achieve the desired resistance to movement of the bagging machine with respect to the bagged material, and cables normally would be considered to be “flexible” rather than “non-flexible.” To overcome this apparent shortcoming, the examiner explains in the statement of the rejection on page 3 of the Answer that

[the Cullen cables] are accordingly made of metal which has inherent rigid properties (i.e. “non-flexible”).

In the response to the appellant’s argument he states

[i]n regard to Appellant’s argument that the cables of the Cullen reference fail to define a “non-flexible anchor” since the cables must be flexible so they can be wound on the respective drums and so they can assume various shapes, Examiner agrees that the cables must exhibit some flexible properties in order to be wound on drums. However, Examiner’s position is that the cables are made of materials such as metals that have inherent rigid (i.e. “non-flexible”) properties in order for the cables not to break or snap under load.

We find the examiner’s position to be untenable.

The common definition of “flexible” is “bendable” (see, for example, Webster’s New Collegiate Dictionary, 1976, page 439), and it follows that “non flexible” means not bendable. A different definition has not been established in the appellant’s specification, where the reader is informed that resistance to movement of the bagging machine is accomplished by a pair of adjustable anchor wing members 34 and 36

which are pivotally movable between fully closed and fully opened positions (see column 4 and Figure 2). While it is not explicitly stated, in our view one of ordinary skill in the art would have appreciated from the appellant's specification that wing members 34 and 36 are intended to be and must be non-flexible in order to operate in the manner intended. Thus, from our perspective, there is no question that non-flexible as used in claim 10 means just that.

In the Cullen system, the flexible properties commonly associated with cables are necessary in order for the apparatus to perform in the manner intended, which is to provide variable resistance to the movement of the bagging machine away from the bagged material by alteration of the length and shape of loops of cable (see column 4 and Figures 1 and 2). Therefore, we cannot agree, on the basis of common definition or the teachings provided by Cullen, that the cables disclosed in the reference meet the claim limitation of "non-flexible." In this regard, we point out that the examiner's statement that cables must have inherent rigid properties in order not to break or snap under load is unsupported by evidence.

Since Cullen fails to disclose or teach one of the elements recited in claim 10, it is not anticipatory thereof and we will not sustain the rejection.

SUMMARY

The rejection is not sustained.

The decision of the examiner is reversed.

REVERSED

IRWIN CHARLES COHEN
Administrative Patent Judge

NEAL E. ABRAMS
Administrative Patent Judge

JENNIFER D. BAHR
Administrative Patent Judge

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RETURN TO LESLEY

APPEAL NO. 2002-0032 - JUDGE ABRAMS
APPLICATION NO. 08/514,507

APJ ABRAMS

APJ BAHR

APJ COHEN

DECISION: **REVERSED**

Prepared By:

DRAFT TYPED: 04 Aug 03

FINAL TYPED: