

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 13

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte ROGER FRANET, DAMIEN FAIVRE and DAVID DEMESMAY

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Appeal No. 2004-0864  
Application 09/850,924

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ON BRIEF

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Before PAK, TIMM and PAWLIKOWSKI, Administrative Patent Judges.

PAWLIKOWSKI, Administrative Patent Judge.

**DECISION ON APPEAL**

This is an appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 1, 2, 3, 8, 9 and 10.

Claims 1 and 8 are representative of the subject matter on appeal, and are set forth below:

1. In a combination including a mowing implement capable of forming a windrow therebehind and a windrow grouper arrangement mounted on the mowing implement for pivoting vertically between a lowered working position wherein crop discharged by the mowing implement is intercepted and conveyed sideways to form a windrow

beside said implement and wherein a majority of a first fore-and-aft dimension of said windrow grouper arrangement is located behind a vertical, transverse plane located at a rear end of said mowing implement, and a raised non-working position wherein crop passes beneath said windrow grouper-arrangement to form a windrow, the improvement comprising: said windrow grouper arrangement including a frame and pivot arrangement establishing said non-working position at a location wherein said windrow grouper arrangement has a rear end located approximately at said vertical transverse plane at said rear end of said mowing implement.

8. In a combination of a windrower and a windrow grouper wherein said windrower includes an inverted "U" shaped main frame having ground wheels mounted to opposite depending legs thereof, and a housing guiding mowed crop material between said legs and said ground wheels for depositing crop to form a windrow, said grouper including a fore-and-aft extending mounting frame having its forward end mounted to said main frame for vertical movement between a lowered working position and a raised transport position, and having its rear end coupled to a conveying arrangement disposed for intercepting crop exiting said housing when said mounting frame is in said working position and conveying said crop sideways to form a windrow alongside said windrower, the improvement comprising: said mounting frame and conveying arrangement being constructed and arranged relative to each other and

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said windrower such that said conveying arrangement is located within a zone bounded at a front side by said ground wheels and bounded at a rear side by a rear portion of said mounting frame when said mounting frame is in said working position; and said conveying arrangement is located no further rearward than said zone when said mounting frame is in said raised non-working position.

The examiner relies on the following references as evidence of unpatentability:

Welsch et al. (Welsch)	6,145,289	Nov. 14, 2000 <sup>1</sup> (filed Feb. 01, 1999)
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Claims 8 through 10 stand rejected under 35 U.S.C. § 112, first paragraph (written description).

Claims 1 through 3 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Welsch.

On page 6 of the answer, the examiner indicates that claims 4 through 7 contain allowable subject matter.

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<sup>1</sup>We observe that the present application has a U.S. filing date of May 8, 2001. Welsch has a publication date of November 14, 2000, and was filed in the United States on February 1, 1999, and has a foreign priority date of February 4, 1998. Hence, it appears that Welsch is applicable under 102(e) rather than 102(b). However, we reverse the instant anticipation rejection for other reasons, stated, infra.

**OPINION**

I. The 35 U.S.C. § 112, first paragraph (written description) rejection

On page 3 of the answer, the examiner states that claim 8, as amended, requires a zone, a newly defined zone, not described in the specification or shown in the drawings. Answer, page 4.

We initially note that the Federal Circuit has held that adequate written description support for an applicant's claim limitation exists even though it was not set forth "in haec verba" in the specification. In re Wright, 866 F.2d 422, 425, 9 USPQ2d 1649, 1651 (Fed. Cir. 1989). Also, there is no requirement under Section 112 that the subject matter of a claim be described literally in the disclosure. In re Lukach, 442 F.2d 967, 969, 169 USPQ 795, 796 (CCPA 1971). The disclosure need only reasonably convey to one of ordinary skill in the art that the inventors had possession of the subject matter in question. See In re Edwards, 568 F.2d 1349, 1351-52, 196 USPQ 465, 467 (CCPA 1978). With this in mind, we provide the following determination.

Figure 1 depicts when the mounting frame is in the working position, and Figure 2 depicts when the mounting frame is in the non-working position.

Claim 8, as amended, recites that the mounting frame 30 and conveying arrangement 32 are constructed and arranged relative to each and the windrower, such that the conveying arrangement 32 is located **within a zone bounded at a front side by ground wheels 16, and bounded at a rear side by a rear portion of the mounting frame 30**, when the mounting frame 30 is in said working position [emphasis added], as depicted in Figure 1.

The conveying arrangement 32 is located no further rearward

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than this zone when the mounting frame 30 is in a raised, non-working position, as depicted in Figure 2.

Although appellants have amended original claim 8 by removing the term "entirely", the amended claim still requires conveyor arrangement 32 be located within a zone between the ground wheels and the rear portion of the mounting frame when the mounting frame is in the working position (Figure 1).

Upon our review of the entire record, we determine that conveying arrangement 32 is within the aforementioned zone. When the mounting frame 30 is in its working position (Figure 1), it is accurate to say that the mounting frame 30 is within the zone bounded at its front side by ground wheels 16, and at a rear side by a rear portion 34 of the mounting frame.

It is noteworthy to point out that the zone itself has not changed by the amendment made by appellants, i.e., the zone still is between ground wheels 16 and rear portion 34. The amendment simply expresses that the conveying arrangement 32 is within this zone.

We therefore conclude that amended claim 8 is supported by the original disclosure.

In view of the above, we reverse the 35 U.S.C. § 112, first paragraph (written description), rejection of claims 8 through 10.

II. The 35 U.S.C. § 102(b) rejection of claims 1 through 3

We have carefully reviewed the appellants' position and the examiner's position on this issue. Critical to the determination of this issue is the meaning of the phrase "located approximately at the vertical transverse plane" [emphasis added]. It is disputed whether Welsch discloses a windrower grouper arrangement having a rear end "located approximately at the vertical transverse plane". Brief, page 5.

Appellants' specification states that the conveying arrangement 32 "is then only slightly to the rear of the mowing implement 10 so that endwise transport of the mowing implement 10 and grouper arrangement 12 over the road is possible within the legal limits". See page 5 of the specification, lines 7 through 9. Figure 2 also depicts an example of such a location of the conveying arrangement 32. We interpret the claimed phrase "located approximately at the vertical transverse plane" in light of these aspects of the specification.

We note that the initial burden of presenting a prima facie case of unpatentability on any ground rests with the examiner. See In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). It is therefore the examiner's burden to explain how Welsh satisfies the above mentioned aspect of the claim. For example, it is the examiner's burden to show that the location of grouper attachment 12 relative to harvester 10 (as depicted in Welsch's Figure 3 in the first operating mode), anticipates this aspect of appellant's claim. The examiner fails to meet this burden. In fact, on page 8 of the answer, the examiner incorrectly places this burden on appellants by stating "[a]pplicant's argument does not explain how Welsch doesn't meet the actual claim language".

In view of the above, we reverse the anticipation rejection.

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III. Conclusion

We reverse the anticipation rejection.

We reverse the 35 U.S.C. § 112, first paragraph, rejection.

REVERSED

CHUNG K. PAK	)	
Administrative Patent Judge	)	
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	)	
	)	
CATHERINE TIMM	)	BOARD OF PATENT
Administrative Patent Judge	)	APPEALS AND
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BEVERLY A. PAWLIKOWSKI	)	
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BAP/vsh

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