UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
12/711,091	02/23/2010	Mark D. Miller	38100-CNT1	1017

23589 7590 01/30/2013
Hovey Williams LLP
10801 Mastin Blvd., Suite 1000
Overland Park, KS 66210

EXAMINER
SAYALA, CHHAYA D

ART UNIT	PAPER NUMBER
1791	

MAIL DATE	DELIVERY MODE
01/30/2013	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MARK D. MILLER and TIMOTHY A. MURPHY

Appeal 2011-013117
Application 12/711,091
Technology Center 1700

Before CHARLES F. WARREN, TERRY J. OWENS, and
GEORGE C. BEST, *Administrative Patent Judges*.

OWENS, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

The Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1-4, 6, 7, 9-11, 14, and 15, which are all of the pending claims. We have jurisdiction under 35 U.S.C. § 6(b).

The Invention

The Appellants claim a ruminant feed. Claim 1 is illustrative:

> 1. A ruminant feed comprising first and second ingredients, said first ingredient being present at a level of from about 16-80% by weight, dry basis, and comprising a distiller's grain product derived from the production of fuel ethanol and treated with base to elevate the pH thereof to a level of from about 5-8, said second ingredient being present at a level of from about 20-50% by weight, and comprising a processed grain product selected from the group consisting of flaked grain, dry rolled grain, ground grain, ensiled grains, and mixtures thereof.

The References

Rasco	US 4,828,846	May 9, 1989
Zimlich	US 5,316,782	May 31, 1994
Bisgaard-Frantzen	US 2004/0023349 A1	Feb. 5, 2004
Langhauser	US 2004/0187863 A1	Sep. 30, 2004
Scheimann	US 2006/0006116 A1	Jan. 12, 2006
Castillo	US 7,597,916 B2	Oct. 6, 2009 (filed Sep. 21, 2006)
Viktorovych (UA '062) (as translated)	UA 66 062 A	Apr. 15, 2004

C.M. Gordon et al., *Dakota Gold®-Brand Dried Distiller's Grains with Solubles: Effects on Finishing Performance and Carcass Characteristics*, CATTLEMEN'S DAY 2002, 27-29 (2002) (hereinafter Gordon).

R.W. Daubert et al., *Optimizing Use of Wet Sorghum Distiller's Grains with Solubles in Flaked-Corn Finishing Diets*, BEEF CATTLE RES. 2005, 15-21 (2005) (hereinafter Daubert).

Mark E. Corrigan et al., *Effect of Corn Processing and Wet Distillers Grains Inclusion Level in Finishing Diets*, NEBRASKA BEEF CATTLE REP. 2007, 33-35 (Jan. 2007) (hereinafter Corrigan).

The Rejections

Claims 1-4, 6, 7, 9-11, 14, and 15 stand rejected under 35 U.S.C. § 103 over the combined disclosures of Corrigan, UA '062, Rasco, Zimlich, Castillo, Langhauser, Scheimann, Bisgaard-Frantzen, and either Daubert or Gordon.

OPINION

We affirm the rejection.

The Appellants argue the claims in two groups: 1) claims 1, 3, 4, 6, 7, 9-11, and 15 and 2) claims 2 and 14 (Br. 20-26). We therefore limit our discussion to one claim in each group, i.e., claims 1 and 2. The other claims in each group stand or fall with the claim we address. *See* 37 C.F.R. § 41.37(c)(1)(vii) (2007).

Claim 1

The Appellants argue that UA '062 and Castillo are nonanalogous art because UA '062 does not relate to producing a combined ruminant feed containing pH-adjusted distiller's grain and processed grain and Castillo does not pertain to a ruminant feed made of distiller's grain and processed grain (Br. 20-21; Reply Br. 6-7).

The test of whether a reference is from an analogous art is first, whether it is within the field of the inventor's endeavor, and second, if it is not, whether it is reasonably pertinent to the particular problem with which the inventor was involved. *See In re Wood*, 599 F.2d 1032, 1036 (CCPA 1979). A reference is reasonably pertinent if, even though it may be in a

different field of endeavor, it is one which, because of the matter with which it deals, logically would have commended itself to an inventor's attention in considering the inventor's problem. *See In re Clay*, 966 F.2d 656, 659 (Fed. Cir. 1992).

UA '062 discloses that the high acidity of distillery dregs limits its content in the daily diet of animals (first page). Hence, UA '062 is within the Appellants' field of endeavor of feeding distillery dregs (distiller's grain) to ruminants and is reasonably pertinent to the particular problem addressed by the Appellants which is that the pH of distiller's grain is sufficiently low as to limit the amount in which it can be added to ruminant processed grain feed (Spec. 1:10-20). UA '062, therefore, is analogous art.

Castillo discloses that the ideal rumen pH is 5.8-6.8 and that a lower pH results in acidosis (col. 1, ll. 29-52). Castillo adds an antacid to conventional ruminant feed, including distiller's grain, to raise its pH and thereby prevent acidosis (col. 2, ll. 44-46; col. 3, ll. 31-54; col. 4, ll. 48). Castillo is analogous art because it is reasonably pertinent to the particular problem of distiller's grain low pH addressed by the Appellants (Spec. 1:10-20).

UA '062 and Castillo would have led one of ordinary skill in the art, through no more than ordinary creativity, to raise the pH of distiller's grain to the ideal rumen pH of 5.8-6.8 to increase its content in the daily diet, i.e., to increase the amount of it which can be combined with other feed such as processed grains without causing acidosis, or to raise the pH of a distiller's grain/processed grain ruminant feed to that pH because it is the ideal rumen pH. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (In making

an obviousness determination one "can take account of the inferences and creative steps that a person of ordinary skill in the art would employ").

The Appellants argue that because, as shown in Tables 1 and 2 of each of Gordon, Daubert, and Corrigan, the combination of distiller's grain and processed grain which provides the highest average daily weight grain is outside the Appellants' recited relative amounts of distiller's grain and process grain, those references teach away from using the Appellants' relative amounts of those grains (Br. 25; Reply Br. 7-11).

The Appellants have not provided evidence that one of ordinary skill in the art would have used only Gordon's, Daubert's or Corrigan's feed which provides the highest weight gain. The Appellants have provided mere attorney argument to that effect, and such argument cannot take the place of evidence. *See In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984); *In re Payne*, 606 F.2d 303, 315 (CCPA 1979); *In re Greenfield*, 571 F.2d 1185, 1189 (CCPA 1978); *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974). As stated in *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994), "[a] known or obvious composition does not become patentable simply because it has been described as somewhat inferior to some other product for the same use." Hence, we are not persuaded that it would have been unobvious to one of ordinary skill in the art, in view of UA '062's and Castillo's disclosures discussed above, to raise the pH of the distiller's grain or distiller's grain/processed grain mixture in Gordon's, Daubert's or Corrigan's feeds having distiller's grain and processed grain contents which fall within the Appellants' recited ranges.

The Appellants argue, in reliance upon the Loerch Declaration (filed April 10, 2010) (¶¶ 5-6, 11),that the art has not appreciated that distiller's

grain's inorganic acidity resulting from the use of sulfuric acid in the production of fuel alcohol limits the distiller's grain's optimum dietary inclusion in ruminant feed (Br. 26-27).

UA '062's disclosure that the acidity (pH 3.5-4.5) of distiller's dregs (distiller's grain) limits its content in an animal's daily diet (p. 1) would have led one of ordinary skill in the art, through no more than ordinary creativity, to add a sufficient amount of base to the distiller's grain to raise its pH to the ideal rumen pH which, as disclosed by Castillo (col. 1, l. 31), is 5.8-6.8, regardless of whether the distiller's grain is obtained from the production of human consumable alcohol or fuel alcohol. The amount of base needed to raise the pH to that level merely would be higher when the distiller's grain contains a relatively high concentration of sulfuric acid.

For the above reasons we are not persuaded of reversible error in the rejection of claims 1, 3, 4, 6, 7, 9-11, and 15.

Claim 2

The Appellants argue that UA '062's method requires calcium hydroxide which has a solubility in water which is much lower than the at least about 60g/100ml at 25 ºC required by claim 2 (Br. 25-26).

UA '062's disclosure that the high acidity of distiller's dregs (distiller's grain) limits its content in the daily diet (first page) would have led one of ordinary skill in the art, through no more than ordinary creativity, to add to the distiller's grain or distiller's grain/processed grain mixture any base known in the art to be suitable for raising its pH, including sodium hydroxide as disclosed by Rasco (col. 2, ll. 15-18, 36-41, 61-64) which, as indicated by the Appellants (Spec. 8:1-2), has the solubility in water required by the Appellants' claim 2.

Hence, we are not convinced of reversible error in the rejection of claims 2 and 14.[1]

DECISION/ORDER

The rejection of claims 1-4, 6, 7, 9-11, 14, and 15 under 35 U.S.C. § 103 over the combined disclosures of Corrigan, UA '062, Rasco, Zimlich, Castillo, Langhauser, Scheimann, Bisgaard-Frantzen, and either Daubert or Gordon is affirmed.

It is ordered that the Examiner's decision is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

sld

[1] The Appellants' argument that Rasco is nonanalogous art (Br. 20-21) is not persuasive because Rasco is reasonably pertinent to the particular problem of distiller's grain low pH addressed by the Appellants (Spec. 1:10-20).