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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte PATRICK M. MCDANIEL
and KARL H. KOSTER

Appeal 2014-003981¹
Application 13/742,024²
Technology Center 3600

Before BIBHU R. MOHANTY, BRADLEY B. BAYAT, and
MATTHEW S. MEYERS, *Administrative Patent Judges*.

MEYERS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner’s final rejection of claims 1–27. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ Our decision references Appellants’ Appeal Brief (“Appeal Br.,” filed October 21, 2013), and Reply Brief (“Reply Br.,” filed December 18, 2013), the Examiner’s Answer (“Ans.,” mailed November 18, 2013) and Final Office Action (“Final Act.,” mailed July 26, 2013).

² Appellants identify Noble Systems Corporation as the real party in interest (Appeal Br. 2).

CLAIMED INVENTION

Appellants' claimed invention relates generally to a system "for fulfilling a worker resource deficiency by inviting multiple reserve workers to be recalled to work" (Spec. ¶ 4).

Claims 1, 9, and 17 are the independent claims on appeal. Claim 1, reproduced below with bracketing matter added, is illustrative of the subject matter on appeal:

1. A method comprising the steps of:

[a] determining an employee resource deficiency by at least one computer processor, the employee resource deficiency comprising a second quantity of employee resources needed to work during a future time period in addition to a first quantity of employee resources currently scheduled to work during the future time period;

[b] identifying a first employee associated with a first reserve schedule by the at least one computer processor, the first reserve schedule comprising (1) one or more reserve time periods identified by the first employee, the one or more reserve time periods occurring during off-time that is outside one or more regularly scheduled work shifts for the first employee and indicating when the first employee is potentially available to be recalled to work and (2) one or more unavailable time periods, the one or more unavailable time periods occurring during the off-time that is outside the one or more regularly scheduled work shifts for the first employee and indicating when the first employee is unavailable to be recalled to work, wherein the first reserve schedule has a first reserve time period that coincides with the future time period;

[c] identifying a second employee associated with a second reserve schedule by the at least one computer processor, the second reserve schedule comprising (1) one or more reserve time periods identified by the second employee, the one or more reserve time periods occurring during off-time that is outside one or more regularly scheduled work shifts for the second employee and indicating when the second employee is potentially available

to be recalled to work and (2) one or more unavailable time periods, the one or more unavailable time periods occurring during the off-time that is outside the one or more regularly scheduled work shifts for the second employee and indicating when the second employee is unavailable to be recalled to work, wherein the second reserve schedule has a second reserve time period that coincides with the future time period;

[d] transmitting a first invitation to the first employee, the first invitation inquiring as to whether the first employee is willing to work during the first reserve time period identified in the first reserve schedule that coincides with the future time period to fulfill at least a portion of the second quantity of employee resources needed to work during the future time period;

[e] receiving a first reply from the first employee indicating whether the first employee is willing to work during the first reserve time period identified in the first reserve schedule that coincides with the future time period;

[f] transmitting a second invitation to the second employee, the second invitation inquiring as to whether the second employee is willing to work during the second reserve time period identified in the second reserve schedule that coincides with the future time period to fulfill at least a portion of the second quantity of employee resources needed to work during the future time period; and

[g] receiving a second reply from the second employee indicating whether the second employee is willing to work during the second reserve time period identified in the second reserve schedule that coincides with the future time period.

REJECTIONS

Claims 9–16 are rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter.

Claims 1–3, 9–11, and 17–19 are rejected under 35 U.S.C. § 103(a) as unpatentable over deSilva (US 2005/0004828 A1, pub. Jan. 6, 2005) and Thompson (US 8,219,430 B1, iss. July 10, 2012).

Claims 4, 5, 8, 12, 13, 16, 20, 21, and 24 are rejected under 35 U.S.C. § 103(a) as unpatentable over deSilva, Thompson, and Gorder (US 2008/0255919 A1, pub. Oct. 16, 2008).

Claims 6, 14, and 22 are rejected under 35 U.S.C. § 103(a) as unpatentable over deSilva, Thompson, and Narasimhan (US 2005/0096962 A1, pub. May 5, 2005).

Claims 7, 15, and 23 are rejected under 35 U.S.C. § 103(a) as unpatentable over deSilva, Thompson, and Stolyar (US 2010/0266116 A1, pub. Oct. 21, 2010).

Claims 25–27 are rejected under 35 U.S.C. § 103(a) as unpatentable over deSilva, Thompson, and Brown (US 2009/0292555 A1, pub. Nov. 26, 2009).

ANALYSIS

Non-Statutory Subject Matter

Independent claim 9 and dependent claims 10–16

Appellants do not offer any response to the Examiner’s rejection of claims 9–16 under 35 U.S.C. § 101. Therefore, we summarily sustain the Examiner’s rejection.

Obviousness

Appellants argue claims 1–27 as a group (*see* Appeal Br. 8, 13). We select independent claim 1 as representative. The remaining claims stand or fall with independent claim 1. *See* 37 C.F.R. § 41.37(c)(1)(vii).

We are not persuaded by Appellants’ argument that the Examiner erred in rejecting independent claim 1 under 35 U.S.C. § 103(a) because the combination of deSilva and Thompson fails to disclose or suggest “identifying a first employee associated with a first reserve schedule” and

“identifying a second employee associated with a second reserve schedule,” as required by limitations [b] and [c] of independent claim 1 (*see* Appeal Br. 8–13; *see also* Reply Br. 4–8). Instead, we agree with, and adopt the Examiner’s findings and rationale, as set forth at pages 3–6 of the Final Action (*see* Final Act. 4–8 (citing deSilva ¶¶ 70, 78–79, 88–89; Fig. 7)), and the Examiner’s response to Appellants’ arguments, as set forth at pages 2–4 of the Answer (*see* Ans. 2–4 (citing deSilva ¶¶ 6–9, 33, Abstract; Thompson, col. 11, l. 64 – col. 12, l. 21)). We add the following discussion for emphasis only.

deSilva is directed “to a system and method for providing an improved ability to schedule staffing resources” which “allow[s] workers to indicate preferences for specific shifts during a planning horizon, within limitations imposed by the scheduling system” (deSilva ¶¶ 1, 6).

deSilva discloses

[s]cheduling constraints received in step **105** may include, for example, staff preferences, staff hired profiles, demand profiles, scheduling guidelines, and history. Staff preferences may include, by way of example and not limitation, data such as the time of day and/or the day of week that a worker prefers to work or not to work.

(*id.* ¶ 33). deSilva further discloses that “[s]cheduling guidelines may include a permission relating to granted time off, federal and state labor laws, contractual obligations, labor costs, or other information” (*id.*).

deSilva discloses that “[d]ata relating to staff preferences, staff hired profiles, demand profiles, scheduling guidelines and history may be further classified as either hard constraints or soft constraints, according to management choice” (*id.* ¶ 34). deSilva also discloses that “[d]aily scheduling may be necessary where, for instance, staffing demand

(workload) and/or supply (available staff) has changed in a way that limits the utility of the schedule output in step **125**” (*id.* ¶ 70). In this regard,

deSilva discloses optimizing daily schedules using a

process [which] reads the constraints and strategies for daily scheduling in step **610**. The constraints may include staff qualifications needed to meet the demand. Staff preferences and profiles may also be considered in step **610**. The process reads the actual staffing needs in step **615** and the up-to-date schedules in **620** (including any changes made to the schedule by shift-swap messaging step **135** and any previous daily adjustments to the schedule output in step **125**).

(*Id.* ¶ 78). deSilva further discloses “[t]he process reads the availability of staff resources in step **625**, then reads the availability of other resources, such as overtime staff, pool staff, staff scheduled to be on-call, and the agency staff in step **630**. In an alternative embodiment, steps **625** and **630** may be combined” (*id.* ¶ 79). deSilva also discloses that “[d]aily optimization step **513** may be based on staff dissatisfaction and/or monetary costs” (*id.* ¶ 83; *see also id.* ¶¶ 88–89; Fig. 7).

Thompson is directed to a “resource management system that manages worker resources based on factors including work plans input by the workers” (Thompson, col. 1, ll. 11–15). Thompson’s system allows workers to create a work plan using activity codes which correspond to possible activities for the work or vacation leave (*id.* at col. 8, ll. 10–34).

Thompson also discloses

[m]onitor module **156** determines that additional workers are needed to handle an unexpected surge in telephone calls on a particular day and/or an unexpectedly high degree of absenteeism, the module may automatically generate and transmit an e-mail message to workers requesting additional workers for a certain time period (e.g., between 7:00 PM and 9:00 PM that evening). Interested workers may respond to the e-

mail and the work plans of these interested workers will be automatically updated to reflect this interest.

(*Id.* at col. 12, ll. 1–9).

Appellants argue that deSilva, upon which the Examiner relies, fails to disclose or suggest a first and second “reserve schedule,” as recited by limitations [b] and [c] of independent claim 1 because “a list of ‘on-call’ staff is not the same as a ‘reserve schedule’ having the features as recited in Claim 1” (Appeal Br. 9–10). However, Appellants’ argument is not persuasive at least because the Examiner does not rely solely on the “on-call” list referenced in deSilva. Instead, as the Examiner points out, “the ‘overtime staff’ and ‘pool staff’ availability of deSilva could also be considered as ‘reserve schedules’” (Ans. 3). We agree with the Examiner.

In making this determination, we note that deSilva does not merely disclose “a list of ‘on-call’ staff,” as Appellants contend (Appeal Br. 10), nor does deSilva merely disclose a list of “overtime staff” and “pool staff.” Instead, deSilva is directed to a system “for scheduling resources . . . [which] allow[s] workers to indicate preferences for specific shifts during a planning horizon” (deSilva ¶ 6). deSilva discloses that its system receives scheduling constraints “such as the time of day and/or the day of week that a worker prefers to work or not to work” during a daily optimization process (*id.* ¶¶ 33, 77, 78). deSilva further discloses that its system “reads actual staffing needs in step 615 and the up-to-date schedules in 620” and then, if adjustments must be made prior to the start of a shift, “reads the availability of staff resources . . . such as overtime staff, pool staff, staff scheduled to be on-call, and the agency staff” meet the needs (deSilva ¶¶ 77–79). Thus, Appellants’ argument is not persuasive to show error in the Examiner’s rejection.

Appellants also argue that “*deSilva* fails to teach or suggest reserve time periods that are identified by employees,” as recited by limitations [b] and [c] (Reply Br. 7–8). More particularly, Appellants argue

although the staff preferences described in *deSilva* are identif[ied] by staff members, these preferences serve as constraints identifying when a staff member prefers to work and are not used as some type of resource to read the availability of individual staff “for consideration as overtime staff, pool staff, on-call staff, and agency staff” as the Examiner has suggested.

(*Id.* at 8).

However, *deSilva* discloses that its system “seek[s] to meet all hard constraints imposed by a user, and utilize[s] a flexible scoring technique to minimize the violation of soft constraints” (*deSilva* ¶ 7). More importantly, *deSilva* discloses that “[d]ata relating to staff preferences, staff hired profiles, demand profiles, scheduling guidelines and history may be further classified as either hard constraints or soft constraints, according to management choice” (*id.* ¶ 34). *deSilva* also discloses that the “[d]aily optimization step 513 may be based on staff dissatisfaction . . . costs” which “indicate[] an undesirable work pattern for a staff member whose schedule is affected by the daily adjustments” and *deSilva* discloses that “[s]ome of the decisions that may result in dissatisfaction are: overtime assignment[s]” (*id.* ¶¶ 83, 88–89). Thus, Appellants’ argument is not persuasive to show error in the Examiner’s rejection of independent claim 1.

Appellants last argue that the Examiner’s “reference to the proposition that the preferences indicated by employees described in *deSilva* teach or suggest the reserve time periods identified by employees as recited in the independent claims . . . constitute[s] a new ground of rejection” (Reply Br. 8–9). The difficulty, however, with Appellants’ argument is that Appellants

did not file a petition under 37 C.F.R. § 1.181 to the Director requesting that the rejection in the Answer be designated as a new ground of rejection. *See* 37 C.F.R. § 41.40(a).³

Notwithstanding, Appellants have been provided with the opportunity to respond to the Examiner's Answer in the Reply Brief, and in fact done so (*see, e.g.*, Reply Br. 7–8). And, it is well-established that the Board is free to affirm an Examiner's rejection so long as “appellants have had a fair opportunity to react to the thrust of the rejection.” *In re Kronig*, 539 F.2d 1300, 1302–03 (CCPA 1976). Thus, Appellants' argument is not persuasive to show error in the Examiner's rejection of independent claim 1.

In view of the foregoing, we sustain the Examiner's rejection of independent claim 1 under 35 U.S.C. § 103(a). We also will sustain the Examiner's rejection of claims 2–27, which stands with independent claim 1.

DECISION

The Examiner's rejection of claims 9–16 under 35 U.S.C. § 101 is summarily sustained.

³ 37 C.F.R. § 41.40(a) reads:

Any request to seek review of the primary examiner's failure to designate a rejection as a new ground of rejection in an examiner's answer must be by way of a petition to the Director under § 1.181 of this title filed within two months from the entry of the examiner's answer and before the filing of any reply brief. Failure of appellant to timely file such a petition will constitute a waiver of any arguments that a rejection must be designated as a new ground of rejection.

Appeal 2014-003981
Application 13/742,024

The Examiner's rejection of claims 9–16 under 35 U.S.C. § 103(a) is affirmed.

The Examiner's rejections of claims 1–27 under 35 U.S.C. § 103(a) are 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)(1)(iv).

AFFIRMED