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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/281,246	05/19/2014	Judson A. Bradford	BRP-316US	5916
26875	7590	01/29/2019	EXAMINER	
WOOD, HERRON & EVANS, LLP 2700 CAREW TOWER 441 VINE STREET CINCINNATI, OH 45202 UNITED STATES OF AMERICA			PATEL, BRIJESH V	
			ART UNIT	PAPER NUMBER
			3736	
			NOTIFICATION DATE	DELIVERY MODE
			01/29/2019	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JUDSON A. BRADFORD and ERIC S. BRUINSMA

Appeal 2018-004408
Application 14/281,246¹
Technology Center 3700

Before STEFAN STAICOVICI, EDWARD A. BROWN, and
FREDERICK C. LANEY, *Administrative Patent Judges*.

STAICOVICI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner’s decision in the Final Office Action (dated May 3, 2017, hereinafter “Final Act.”) rejecting claims 1–20. We have jurisdiction over this appeal under 35 U.S.C. § 6(b).

SUMMARY OF DECISION

We AFFIRM-IN-PART and denominate our affirmance as a NEW GROUND of REJECTION pursuant to our authority under 37 C.F.R. 41.50(b).

¹ Bradford Company is the applicant and identified as the real party in interest in Appellants’ Appeal Brief (filed Sept. 18, 2017, hereinafter “Appeal Br.”). Appeal Br. 5.

INVENTION

Appellants' invention is related "to containers with movable members for supporting product." Spec. 1.

Claims 1, 8, 13, and 17 are independent. Claim 1 is illustrative of the claimed invention and reads as follows:

1. A container for holding product therein during shipment, the container comprising:
 - a bottom and two opposed sides;
 - at least one set of tracks supported by the opposed container sides, each of the tracks of each set of tracks comprising a back, upper and lower walls extending outwardly from the back, the lower wall having a lower lip folded back upon itself to create a rounded edge;
 - multiple movable dunnage supports extending between each set of tracks, each of the dunnage supports having a narrowed portion at each end and an end portion, the narrowed portions of each dunnage support being engaged with and slidable along the rounded edges of the tracks of the set of tracks to facilitate movement of the dunnage supports and the end portions being sized to remain inside the tracks of the set of tracks during movement of the dunnage supports; and
 - dunnage supported by the dunnage supports.

REJECTION

The Examiner rejects claims 1–20 under 35 U.S.C. § 103(a) as being unpatentable over Van Bree (US 6,164,440, iss. Dec. 26, 2000), Bolt et al. (US 4,527,694, iss. July 9, 1985, hereinafter "Bolt"), and Lautenschläger (US 4,778,230, iss. Oct. 18, 1998).

ANALYSIS

Claims 1–7

Appellants do not present arguments for the patentability of claims 2–7 apart from claim 1. *See* Appeal Br. 10–19. Therefore, in accordance with 37 C.F.R. § 41.37(c)(1)(iv), we select claim 1 as the representative claim to decide the appeal of the rejection of these claims, with claims 2–7 standing or falling with claim 1.

Independent claim 1 requires, *inter alia*, “multiple movable dunnage supports,” wherein “each of the dunnage supports having a narrowed portion at each end and an end portion.” Appeal Br. 20 (Claims App.).

The Examiner finds that Van Bree discloses most of the limitations of independent claim 1, including, *inter alia*, “multiple movable dunnage supports” 7 “having a narrowed portion at each end and an end portion.” Final Act. 2–3; *see also* Van Bree, Figs. 6, 7. However, the Examiner finds that Van Bree “fails to teach the lower lip (of the lower wall) being folded back upon itself to create a rounded edge.” *Id.* at 4. Nonetheless, the Examiner finds that Lautenschläger discloses a container 10 having at least one set of tracks 10, 14, wherein each track includes a back 22, lower wall 14, “and a lower lip folded back upon itself to create a rounded edge.” *Id.* (citing Lautenschläger, col. 3, ll. 29–49, Fig. 1). Thus, the Examiner concludes that

[I]t would have been obvious to one of ordinary skill in the art before the effective filing date of the claimed invention to modify the respective lower lips (of Van Bree ‘440) to [be] folded back on itself (as taught by Lautenschlager ‘230) for structural reinforcement of the (respective) lower lip of the (respective) lower wall (of each track) which will prevent the supports from falling off the track (due to the large contact surface that has been formed).

Id.

Appellants contend that Lautenschläger constitutes non-analogous art. Appeal Br. 10. As such, Appellants argue that “Lautenschläger is not from the same field of endeavor as the claimed invention” and “is not reasonably pertinent to the particular problem with which the current inventor was involved.” *Id.* at 10–11. According to Appellants, the invention in the instant application relates to “containers with movable members,” whereas Lautenschläger “relates to desk and kitchen drawers.” *Id.* Appellants further assert that the current invention pertains to the problem of “a container whereby the contents may be more easily accessible for the person required to access the contents,” whereas Lautenschläger “pertain[s] to the problem of having a short drawer in a long cabinet carcass, or the problem of having fully opening drawers.” *Id.* at 12.

The Federal Circuit has explained that “[t]he analogous art inquiry is a factual one, requiring inquiry into the similarities of the problems and the closeness of the subject matter as viewed by a person of ordinary skill in the art.” *Scientific Plastic Prods., Inc. v. Biotage AB*, 766 F.3d 1355, 1360 (Fed. Cir. 2014).

Criteria for determining whether prior art is analogous may be summarized as “(1) whether the art is from the same field of endeavor, regardless of the problem addressed, and (2) if the reference is not within the field of the inventor’s endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved.”

Id. at 1359 (citing *In re Clay*, 966 F.2d 656, 658–659 (Fed. Cir. 1992)). In this case, we appreciate Appellants’ position that the claimed container is not from the same field of endeavor as Lautenschläger’s drawer. However, the Examiner is correct in that “an inventor considering a support track mechanism for a container would naturally look to other references employing supporting grooves, sliders, etc. which may come from areas such as a file cabinet, a kitchen drawer, a sliding

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door, a server rack or a sliding support rack.” Examiner’s Answer (dated Jan. 9, 2018, hereinafter “Ans.”) at 3.

Stated differently, both Appellants’ invention and Lautenschläger address the same problem of providing a rail for movement of a structure thereon, i.e., dunnage supports, as per Appellants’ invention, or a drawer, as per Lautenschläger. The function of a rail to maintain a structure within its track and permit its movement is the same, regardless of whether the structure is a dunnage support or a drawer. As such, the Examiner correctly found that Lautenschläger is analogous art, and properly considered its teachings in determining that the subject matter of claim 1 would have been obvious.

We further note that Appellants’ statement of the problem would focus the analysis not on the problem at issue but on the specific *application* and *setting* identified in the Specification—“problems associated with tracks and support configurations for shipping containers that use dunnage supported by dunnage supports for transporting large items such as automobile doors and the like.” Reply Brief (filed Mar. 9, 2018, hereinafter “Reply Br.”) at 6; *see also* Spec. 1 (generally disclosing this application and setting). Appellants’ position, in effect, would conflate the two-prong analogous art inquiry into a single prong, field of endeavor inquiry. The analogous prior art should not be so limited. *See Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 35 (1966) (rejecting the argument that the cited references were not “pertinent prior art” and stating that “[t]he problems confronting [the patentee] and the insecticide industry were not insecticide problems; they were mechanical closure problems”). Thus, the Examiner correctly finds that Lautenschläger is analogous art.

Appellants further argue that “the Examiner provides no particular motivation to combine the references.” Appeal Br. 13. According to Appellants, the Examiner’s rejection is “indicative of impermissible hindsight.” *Id.* at 15.

We are not persuaded by Appellants' arguments because the Examiner has provided reasoning with rational underpinnings to modify Van Bree's rail to have a lower lip folded upon itself, as taught by Lautenschläger, namely, "for structural reinforcement . . . which will prevent the supports from falling off the track (due to the large contact surface that has been formed)." *See* Final Act. 4; *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) ("[R]ejections on obviousness grounds [require] some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness") (*cited with approval in KSR*, 550 U.S. at 418). Appellants' conclusory assertion that there is "no motivation" ignores and fails to point out the error in the rationale provided by the Examiner, and, thus, Appellants do not persuasively argue that the Examiner's conclusion lacks rational underpinning.

Accordingly, for the foregoing reasons, we sustain the rejection under 35 U.S.C. § 103(a) of claim 1 as unpatentable over Van Bree and Lautenschläger. Claims 2–7 fall with claim 1. However, we denominate our affirmance as a NEW GROUND OF REJECTION pursuant to 37 C.F.R. § 41.50(b), because our analysis relies upon facts and reasoning that the Examiner did not use.

Claims 8–20

In contrast to independent claim 1, each of independent claims 8, 13, and 17 requires, *inter alia*, dunnage supports having "flattened" portions. Appeal Br. 21–23 (Claims App.).

The Examiner finds that although Van Bree fails to teach such "flattened" portions, Bolt discloses "a plurality of dunnage supports (27) . . . having a flattened portion (63) at each end (27a)." Final Act. 3 (citing Bolt, col. 3, l. 32–5, l. 61, Figs. 1–4). Thus, the Examiner concludes that

[I]t would have been obvious to one of ordinary skill in the art . . . to modify each of the plurality of dunnage supports (of Van Bree ‘440) to have a similar flattened portions at each end (as taught by Bolt ‘694) for easier insertion of each of the plurality of dunnage supports within the tracks.

Id.

Appellants argue that “modifying Van Bree with the . . . end portions disclosed in Bolt” “would render it unsatisfactory for its intended purpose.” Appeal Br. 17. According to Appellants, “replacing the rollers 30 provided at the end of the rods 2 and 3 in Van Bree with the recessed area 61 at the edge portion 27a found in Bolt . . . would render Van Bree inoperable” because it “would provide an essentially round end portion inserted into the track area with a flattened portion engaging an upper lip of the upper wall of the track.” *Id.* at 17–18 (citing Van Bree, Fig. 7; Bolt, Fig. 8). Appellants explain that such an arrangement is “disfavored as it tends to create unwanted friction, require greater force to move the hanger bars, and/or cause damage of either the hanger bar or the tracks, such as spall.” *Id.* at 18 (citing Appellants’ Spec. 3, l. 23–4, l. 4).

In reviewing the Examiner’s response to Appellants’ arguments discussed *supra*, Appellants are correct that the Answer does not address Appellants’ arguments. *See* Ans. 3–5; *see also* Reply Br. 9. Specifically, the Examiner does not provide findings or reasoning rebutting Appellants’ arguments. Thus, on the record before us, weighing the Examiner’s reasons for combining the teachings of Van Bree and Bolt against Appellants’ arguments supported with evidence from Appellants’ Specification and unrebutted by the Examiner, we disagree with the Examiner’s conclusion of obviousness. Moreover, the Examiner’s use of the Lautenschläger disclosure does not remedy the Examiner’s combination of Van Bree and Bolt. *See* Final Act. 3–4.

Accordingly, for the foregoing reasons, we do not sustain the rejection under 35 U.S.C. § 103(a) of claims 8–20 as unpatentable over Van Bree, Bolt, and Lautenschläger.

SUMMARY

The Examiner’s decision to reject claims 1–7 under 35 U.S.C. § 103(a) as unpatentable over Van Bree and Lautenschläger is affirmed.

The Examiner’s decision to reject claims 8–20 under 35 U.S.C. § 103(a) as unpatentable over Van Bree, Bolt, and Lautenschläger is reversed.

For the reasons discussed above, we denominate our affirmance of the rejection of claims 1–7 as a new ground of rejection pursuant to 37 C.F.R. § 41.50(b).

This decision contains new grounds of rejection pursuant to 37 C.F.R. § 41.50(b). 37 C.F.R. § 41.50(b) provides “[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review.”

37 C.F.R. § 41.50(b) also provides:

When the Board enters such a non-final decision, the appellant, within two months from the date of the decision, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new Evidence relating to the claims so rejected, or both, and have the matter reconsidered by the Examiner, in which event the prosecution will be remanded to the Examiner. The new ground of rejection is binding upon the examiner unless an amendment or new Evidence not previously of Record is made which, in the opinion of the examiner, overcomes the new ground of rejection designated in the decision. Should the examiner reject the

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claims, appellant may again appeal to the Board pursuant to this subpart.

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same Record. The request for rehearing must address any new ground of rejection and state with particularity the points believed to have been misapprehended or overlooked in entering the new ground of rejection and also state all other grounds upon which rehearing is sought.

Further guidance on responding to a new ground of rejection can be found in the Manual of Patent Examining Procedure § 1214.01.

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-IN-PART; 37 C.F.R. § 41.50(b)