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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BRUCE F. ALLEN and GREGORY E. FALVO

Appeal 2019-000392
Application 13/406,876
Technology Center 3600

Before MICHAEL L. HOELTER, LEE L. STEPINA, and ARTHUR M. PESLAK, *Administrative Patent Judges*.

HOELTER, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

STATEMENT OF THE CASE

Appellant[1] filed a Request for Rehearing ("Req. Reh'g") dated October 1, 2019 of the Decision on Appeal mailed August 1, 2019 ("Decision"). This Decision sustained the Examiner's rejections of claims 1–4 and 8 as being obvious under 35 U.S.C. § 103(a). *See* Decision 7. "Appellant seeks rehearing because the Examiner's side of the issue is based on general information, e.g., speculation absent of any reference, and not specifically directed to the nuclear industry." Req. Reh'g 1.

Upon consideration of Appellant's Request, we do not modify our opinion.

A REQUEST FOR REHEARING

A request for rehearing "must state with particularity the points believed to have been misapprehended or overlooked by the [Patent Trial and Appeal Board, hereinafter "Board"]." *See* 37 C.F.R. § 41.52(a)(1). This section also states that arguments not raised in the briefs before the Board and evidence not previously relied upon in the briefs "are not permitted in the request for rehearing except as permitted by paragraphs (a)(2) through (a)(4) of this section." In addition, a request for rehearing is not an opportunity to express disagreement with a decision without setting forth points believed to have been misapprehended or overlooked by the Board in rendering its Decision. The proper course for an Appellant dissatisfied with a Board decision is to seek judicial review, not to file a request for rehearing to reargue issues that have already been decided. *See* 35 U.S.C. §§ 141, 145.

[1] We use the word "Appellant" to refer to "applicant" as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as "Westinghouse Electric Company LLC." Appeal Br. 2.

ANALYSIS

Appellant states that on page 5 of the Decision, "the Examiner explains that 'facilities are motivated to perform repairs in the most cost-effective manner.'" Req. Reh'g 1; *see also* Ans. 5. However, "Appellant submits that this statement is overly broad and not supported by any reference." Req. Reh'g 1. More exactly, "the statement is not directed to the claimed invention, i.e., a nuclear reactor" because "the Examiner does not specifically identify 'nuclear reactor' facilities." Req. Reh'g 1.

In one sense, Appellant is correct because, in making the above statement, the Examiner may have been addressing "facilities" in general, and not "nuclear reactor" facilities in particular. However, Appellant does not explain how nuclear reactor facilities are unique such that persons skilled in the relevant art would ignore a common business practice which is to perform repairs in a cost-effective manner. It is this underlying premise of being cost-effective that the Examiner relies upon when stating, "[t]he ordinary skilled artisan is well-aware that sometimes this manifests as not fixing auxiliary issues deemed particularly difficult." Ans. 5; Decision 5; Req. Reh'g 2. In other words, despite a possible need for a repair, the repair may not be justified at the present moment "in terms of both time and money." Ans. 4; Decision 5.

Appellant argues that that this more routine business approach is in not appropriate because the facility in question is a nuclear reactor facility. *See supra*. For example, Appellant acknowledges that in other "facilities wherein there is water leaking [], there may be a cost incentive" to delay repair. Req. Reh'g 1–2. "However, in a nuclear reactor facility, the water is radioactive reactor coolant that can cause serious consequences" (Req. Reh'g 2) thereby requiring immediate attention. As support for the

enhanced urgency a leak in a nuclear facility demands, Appellant references Takanabe (cited by the Examiner). *See* Req. Reh'g 2. Appellant identifies where Takanabe states, "[o]nce leakage occurs, there is the possibility of making an impact on the corrosion of ferritic materials" surrounding the reactor while also mentioning "the possibility of plant shut down." Takanabe, pg. 26, col. 1, first paragraph. Hence, Takanabe continues, "countermeasures for preventing leakage . . . have been required from the viewpoints of stable power supply and cost-effective performance." *Id.* Thus, despite the seriousness of nuclear reactor leakage (*see also* Req. Reh'g 2), Takanabe still mentions cost-effectiveness when considering repairs, the same as the Examiner above. The Examiner states it thusly, "the more time a nuclear power facility is shut down for repairs, the more money the company loses." Ans. 5; Decision 5; Req. Reh'g 2.

The different approaches undertaken by the Examiner and Appellant arise because Takanabe addresses *three* seal welds in need of the above "countermeasures." Both parties agree with Takanabe's description of the "middle" weld being "'the most difficult' weld" to address. Takanabe, p. 30, Section 4.4; Ans. 4; Decision 5; Req. Reh'g 2. This is because Takanabe "identifies various additional considerations that must be taken into account when replacing this middle weld." Decision 5. Such additional considerations include constructing "an advanced fabrication method" and creating "a new welding apparatus," among others. Takanabe, p. 33, Section 4.4.2; Decision 5. Hence, because of the added complexity required to provide "countermeasures" with respect to this middle weld, we do not fault the Examiner for stating, "[t]aking all these items under consideration [i.e., eliminating the middle canopy seal weld] requires a large amount of time relative to the fewer considerations listed for replacing the top and bottom

welds." Ans. 4; Decision 5. This is in contrast to Appellant's contention that, regardless, all three welds are to be replaced in view of Takanabe, not just the easier two. *See* Req. Reh'g 2. "Thus, Appellant submits that the Examiner's reasoning should be unpersuasive with respect to the larger amount of time needed to replace the middle canopy seal weld (see page 5 of the Decision on Appeal)." Req. Reh'g 2.

We are not persuaded by Appellant's contention that cost-effective issues are to be disregarded simply because the facility is a nuclear reactor facility. The Examiner explains, "canopy seal welds have known leaking problems" but also that "despite their problems, reactors have been operating and producing electricity successfully with canopy seal welds since the 1970s." Ans. 4; Decision 4–5. In other words, Appellant is not persuasive in asserting that Takanabe's discussion of repairing all three welds precludes the Examiner from relying on Takanabe, but for only (initially) repairing the easier two based on the aforesaid cost-effective rationale. In short, Appellant does not adequately explain how the Board misapprehended or overlooked any point raised by Appellant, or how the Examiner's motives lack articulated reasoning with rational underpinning. *See KSR Int'l Co. v. Teleflex Inc*., 550 U.S. 398, 418 (2007) (*citing In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006).

DECISION

Appellant's Request for Rehearing has been granted to the extent that the Board reconsidered its Decision in light of the statements made in this Request, but is denied with respect to the Board making any modification to the Decision.

DENIED