

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte EDWIN B. BRUNSDEN

Appeal No. 2000-1833
Application 09/002,650

ON BRIEF

Before FRANKFORT, McQUADE, and BAHR, Administrative Patent Judges.

McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Edwin B. Brunsdan appeals from the final rejection of claims 1 through 19, all of the claims pending in the application.

THE INVENTION

The invention relates to "portable shelves capable of holding sundry articles customarily found in a bathroom such as shampoo bottles and bars of soap while also providing a bar that may be used to hold towels" (specification, page 1).

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Representative claim 1 reads as follows:

1. A portable shelf for mounting on a wall affixed towel bar of width W that is spaced a distance N from the wall, comprising:

a plurality of rods each having an essentially uniform cross-section;

a plurality of brackets each having a top, back, bottom and front where said top has a plurality of through-openings that are aligned horizontally and that have a cross-section that is essentially the same as said rod's cross-section,

said back has a vertical edge,

said bottom has at least one through-opening that has a cross-section that is essentially the same as said rod's cross-section, and

said front extends downward from a point that is more than N distant from said back's vertical edge to a point that is less than N distant from said back's vertical edge; and

said rods and said brackets are connected by sliding each of said rods within each similar one of said through-openings such that the outermost of said brackets are spaced less than W, whereby a shelf that can be supported by the towel bar and the wall is effected.

THE PRIOR ART

The references relied on by the examiner as evidence of obviousness are:

Whitehead et al. (Whitehead)	5,706,737	Jan. 13, 1998
Adams	5,711,434	Jan. 27, 1998

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THE REJECTION

Claims 1 through 19 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Adams in view of Whitehead.

Attention is directed to the appellant's main and reply briefs (Paper Nos. 12 and 14) and to the examiner's answer (Paper No. 13) for the respective positions of the appellant and the examiner regarding the merits of this rejection.¹

DISCUSSION

I. Amendments subsequent to final rejection

The appellant presents for review the examiner's refusal to enter the amendment submitted subsequent to final rejection on December 23, 1998 (Paper No. 5). It is well settled, however, that the refusal of an examiner to enter an amendment after final rejection is a matter of discretion reviewable by petition to the Director rather than by appeal to this Board. In re Mindick, 371 F.2d 892, 894, 152 USPQ 566, 568 (CCPA 1967). Hence, we shall not further address this matter.

¹In the final rejection (Paper No. 4), claims 1 through 19 also stood rejected under 35 U.S.C. § 112, second paragraph, as being indefinite. We consider this rejection to be withdrawn in light of the lack of restatement thereof in the answer (see Ex parte Emm, 118 USPQ 181 (Bd. App. 1958)) and the examiner's comments to this effect in the now "vacated" (see Paper No. 17) communication mailed February 2, 2000 (Paper No. 15).

The appellant also proposes what appear to be conditional claim amendments within the body of the main brief (see pages 8 through 11) in response to the 35 U.S.C. § 112, second paragraph, rejection.² As this rejection is withdrawn, the issue of these amendments is moot. We would nonetheless point out to the appellant that the submission of amendments within a brief, rather than in a separate paper, is improper (see MPEP § 1207) and that it is not the normal practice of this Board to consider proposed amendments (see MPEP § 1211.01).

II. The merits of the rejection

Adams, the examiner's primary reference, discloses an auxiliary towel rack designed for use with a conventional wall-mounted towel rack to achieve additional towel hanging capacity. The auxiliary rack consists of a single unitary piece of formed rod material which is simple to construct, inexpensive to manufacture and easy to use (see column 1, lines 42 through 51). As described in more detail by Adams,

[t]he auxiliary towel rack . . . is composed of a rod having a bar portion, a support portion at each end of the bar portion, and an arm portion connected with each of the support portions. The bar portion has a length substantially nearly that of a bar of a conventional barred towel holder so that it allows for

² See n.1, supra.

one or more towels to be placed thereupon in the same manner as the user would place one or more towels on the bar of the conventional barred towel holder. Each support portion is formed by a 90 degree bend of the rod in a first plane, wherein a first section ends at a first curve formed in the rod in a second plane orthogonal to the first plane which bends toward the bar portion preferably between 90 and 180 degrees, a second curve formed in the rod which bends in the second plane away from the rod portion preferably just under about 90 degrees, a second section, and a third curve formed in the rod which bends in the second plane toward the bar portion preferably between 90 and 180 degrees. Each arm portion is connected with a respective third curve, and terminates in an end segment upturned in the second plane.

In operation, the auxiliary towel rack is placed onto a bar of a conventional barred towel holder, whereupon the inside radius of the first curve rests upon the bar of the conventional barred towel holder and the outside radius of the third curve abuts the wall. In such position, the bar portion is located spaced outwardly from and below the bar of the conventional barred towel holder in an orientation parallel thereto. Further, each of the arm portions are oriented substantially perpendicular to the wall [column 1, line 52, through column 2, line 13].

As implicitly conceded by the examiner (see page 4 in the answer), the Adams auxiliary towel rack differs substantially from the portable shelf set forth in independent claims 1, 7 and 13, failing as it does to respond to the various claim limitations pertaining to the rods and brackets. The examiner's reliance on Whitehead to overcome these deficiencies is not well founded.

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Whitehead discloses "a multi-purpose storage apparatus capable of holding a variety of sports paraphernalia in an orderly manner" (column 1, lines 53 through 55). The Figure 5 embodiment focused on by the examiner

employs plastic side wall support members having attachment areas allowing for the support of rod members . . . therebetween. The rod members are constructed of a steel tube having a polyethylene sleeve bound to the tubing during a unique manufacturing process. The side wall members can accommodate up to six adjoining rod members or any variation therebetween allowing a consumer to choose the amount of supporting shelf a particular sporting item warrants. A tray is also provided for support of miscellaneous items [column 1, lines 55 through 65].

In proposing to combine Adams and Whitehead to reject the appealed claims, the examiner concludes that

[i]t would have been obvious to one of ordinary skill in the art to provide Adams' rack with a shelf that is made up of two brackets holding top and bottom rods horizontally between the brackets as taught by Whitehead in order [that] more towels can be hung on the rack [answer, page 4].

Even if Whitehead is analogous art (the appellant seemingly urges that it is not), there is nothing in the combined teachings of the references which would have suggested the extensive reconstruction of Adams in view of Whitehead proposed by the examiner. Indeed, Adams' stated desire for a simple, inexpensive and easy to use auxiliary towel rack clearly teaches away from

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the complex modification advanced by the examiner which would somehow incorporate into the rack shelf brackets (side wall support members) and rods of the sort disclosed by Whitehead. The only suggestion for combining these disparate devices so as to arrive at the claimed invention stems from hindsight knowledge impermissibly derived from the appellant's disclosure.

Accordingly, we shall not sustain the standing 35 U.S.C. § 103(a) rejection of independent claims 1, 7 and 13, and dependent claims 2 through 6, 8 through 12 and 14 through 19, as being unpatentable over Adams in view of Whitehead.

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SUMMARY

The decision of the examiner to reject claims 1 through 19
is reversed.

REVERSED

CHARLES E. FRANKFORT)	
Administrative Patent Judge)	
)	
)	
)	BOARD OF PATENT
JOHN P. McQUADE)	
Administrative Patent Judge)	APPEALS AND
)	
)	INTERFERENCES
)	
JENNIFER D. BAHR)	
Administrative Patent Judge)	

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Mclaughlin and Mclaughlin
James C. Mclaughlin
1432 Duffield Road
Lennon, MI 48449