

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. 20

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte DONALD B. FETTERMAN and STEPHEN W. SMITH

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Appeal No. 2004-1192  
Application No. 09/691,631

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ON BRIEF

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Before GARRIS, WALTZ, and PAWLIKOWSKI, Administrative Patent Judges.

WALTZ, Administrative Patent Judge.

**DECISION ON APPEAL**

This is a decision on an appeal from the primary examiner's final rejection of claims 1 through 3, 8 and 9. The remaining claims in this application are claims 4 and 10, and the examiner has indicated that claim 10 is allowable while claim 4 is objected to as allowable but dependent upon rejected base claim 1 (Answer, page 2, ¶(3)). We have jurisdiction pursuant to 35 U.S.C. § 134.

According to appellants, the invention is directed an increased capacity railway car including a first end, a second end,

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and at least a first side disposed longitudinally between the first and second end where this first side has a concave portion in a generally vertical plane of the railway car (Brief, page 3).

Representative independent claim 1 is reproduced below:

1. A railway car comprising:

a first end and a second end; and

a first side disposed longitudinally between the first end and the second end, the first side including an arcuate concave portion in a generally vertical plane of an outer surface thereof, wherein the depth of the arcuate concave portion varies along the longitudinal length of the concave portion.

The examiner has relied upon the following references in support of the rejections on appeal:

Geyer et al. (Geyer)	3,712,250	Jan. 23, 1973
Gielow et al. (Gielow)	4,738,203	Apr. 19, 1988

Claims 1-3, 8 and 9 stand rejected under 35 U.S.C. § 102(b) as anticipated by Geyer (Answer, page 3). Claims 1-3 and 8 stand rejected under 35 U.S.C. § 102(b) as anticipated by Gielow (Answer, page 4). We reverse both rejections on appeal essentially for the reasons stated in the Brief and those reasons set forth below.

**OPINION**

*A. The Rejection over Geyer*

Under section 102(b), anticipation requires that the prior art reference disclose, either expressly or under the principles of inherency, every limitation of the claim. See *In re King*, 801 F.2d 1324, 1326, 231 USPQ 136, 138 (Fed. Cir. 1986). As correctly argued by appellants (Brief, page 5), Geyer fails to disclose a "first side including an arcuate concave portion in a generally vertical plane of an outer surface thereof..." as required by claims 1 and 8 on appeal. It is the examiner's position that inward slope S2 in Figures 2 and 11 of Geyer correspond to the "arcuate concave portion" (Answer, pages 3 and 5). However, as also correctly argued by appellants (Brief, page 5), the examiner has not viewed the railway car of Geyer in a "generally vertical plane" as required by claim 1 on appeal. A "generally vertical plane" is one that is generally parallel to the plurality of partitions 50, or generally perpendicular to the longitudinal axis of the railway car (specification, page 10, ll. 19-22). As clearly shown by the end views of Figures 3 and 12, the railway cars of Figures 2 and 11 do not possess an "arcuate concave portion in a generally vertical plane."

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The examiner states that the "broad limitation" of an arcuate concave portion can be met by any component of a vehicle side wall such as a sheet member undergoing deformation by the action of the wind or simply by a dent in the side wall (Answer, paragraph bridging pages 5-6). However, these assertions by the examiner have not been supported by any evidence on this record. See *In re Lee*, 277 F.3d 1338, 1344-45, 61 USPQ2d 1430, 1434-35 (Fed. Cir. 2002).

For the foregoing reasons and those set forth in the Brief, we determine that the examiner has not established that Geyer describes every limitation of claims 1 and 8 on appeal within the meaning of section 102(b). Therefore we reverse the rejection of claim 1, and claims 2 and 3 which depend on claim 1, as well as claim 8, and claim 9 which depends on claim 8.

*B. The Rejection over Gielow*

The examiner finds that Gielow teaches an "arcuate concave portion (58) in a generally vertical plane" (Answer, page 4). The examiner finds that Figure 11 of Gielow shows the top view of a railway car having a concave portion (58) in a generally vertical plane (Answer, page 6).

As correctly argued by appellants (Brief, page 7), portion (58) of Gielow is a "connective portion" of an airfoil assembly

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which is affixed to the upper end portion or top portion of end wall 5, and therefore is not part of the side wall of the railway car (col. 4, ll. 14-21). Furthermore, Figure 11 of Gielow is a top view of the railway car and not a view in a "generally vertical plane" as discussed above.

For the foregoing reasons and those stated in the Brief, we determine that the examiner has not established that all of the limitations of claims 1 and 8 on appeal have been described by Gielow within the meaning of section 102(b). Therefore we cannot sustain the rejection of claims 1-3 and 8.

*C. Summary*

The rejection of claims 1-3, 8 and 9 under 35 U.S.C. § 102(b) over Geyer is reversed.

The rejection of claims 1-3 and 8 under 35 U.S.C. § 102(b) over Gielow is reversed.

The decision of the examiner is reversed.

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

REVERSED

BRADLEY R. GARRIS	)	
Administrative Patent Judge	)	
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	)	
	)	BOARD OF PATENT
THOMAS A. WALTZ	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
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	)	
BEVERLY A. PAWLIKOWSKI	)	
Administrative Patent Judge	)	

TAW/jrg

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JAY B. JOHNSON ESQ  
BAKER BOTTS LLP  
2001 ROSS AVENUE  
DALLAS, TX 75201-2980