

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LENROC COMPANY,
Petitioner,

v.

ENVIRO TECH CHEMICAL SERVICES, INC.,
Patent Owner.

Case IPR2014-00382
Patent 7,728,132 B2

Before LINDA M. GAUDETTE, GRACE KARAFFA OBERMANN, and
KRISTINA M. KALAN, *Administrative Patent Judges*.

GAUDETTE, *Administrative Patent Judge*.

DECISION

Denying Petitioner's Request for Rehearing
37 C.F.R. § 42.71

On August 22, 2014, Lenroc Company (“Petitioner”) filed a request for rehearing (Paper 13, “Req. Reh’g”) of our Decision denying *inter partes* review (Paper 12, “Dec.”) of claims 1-12 of U.S. Patent No. 7,728,132 B2 (Ex. 1001, “the ’132 patent”). In the Decision, we determined the information presented in the Petition (Paper 1, “Pet.”) does not show sufficiently that there is a reasonable likelihood Petitioner would prevail at trial with respect to at least one claim of the ’132 patent. Accordingly, we denied the Petition and declined to institute trial.

For the reasons that follow, the Request for Rehearing is denied.

ANALYSIS

When considering a request for rehearing of a decision on a petition, the Board reviews the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion may arise if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if an unreasonable judgment is made in weighing relevant factors. *Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *Arnold P’ship v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004); *In re Gartside*, 203 F.3d 1305, 1315-16 (Fed. Cir. 2000). The party requesting rehearing has the burden of showing that the decision should be modified, and “[t]he request must specifically identify all matters the party believes the Board misapprehended or overlooked.” 37 C.F.R. § 42.71(d).

Petitioner seeks rehearing of the Board’s decision denying institution as to all anticipation and obviousness grounds. Petitioner contends a legal error made in connection with those grounds resulted in an abuse of discretion. Req. Reh’g 6 (“Lenroc respectfully submits that rehearing is warranted to remedy a case-dispositive error of law in the construction of ‘wetcake.’”). Specifically, Petitioner contends the Board legally erred in interpreting the claim term “wetcake” as excluding free-flowing powders. *Id.* at 8. Petitioner asserts that, as a

result of this claim interpretation error, the Board erroneously found the independent claim recitations “monoalkali metal cyanurate wetcake” (Ex. 1001, claims 1, 7) and “wetcake of a monoalkali metal cyanurate” (*id.*, claims 10-12) do not read on Stephen’s free flowing powder of monosodium cyanurate monohydrate containing 89.35% monoalkali metal cyanurate and 10.65% water by weight. Req. Reh’g 11-13.

Petitioner argues the Board’s interpretation of “wetcake” as excluding free-flowing powders “conflicts with the patent owner’s own descriptions of the claimed wetcakes of cyanuric acid and monoalkali metal cyanurate presented during prosecution of the ’132 patent.” *Id.* at 8. In support of this argument, Petitioner relies on an amendment submitted as part of an office action response (Ex. 1008 (“the Amendment”)) and an inventor’s declaration under 37 C.F.R. § 1.132 (Ex. 1009 (“the Howarth Declaration”)) filed concurrently in the USPTO on December 18, 2009. Req. Reh’g 8-9.

A rehearing request must specifically identify the place where matters allegedly misapprehended or overlooked by the Board were previously addressed by the party. 37 C.F.R. § 42.71(d). Petitioner has not met this requirement because it did not rely previously on the Amendment or Howarth Declaration to support its proposed claim construction. *See generally*, Pet. 3-6. However, even upon reconsideration of our claim construction in light of these exhibits and the arguments made in the Rehearing Request, we are not convinced we legally erred in interpreting the claim term “wetcake” as excluding free-flowing powders for the reasons explained below.

The Howarth Declaration and the Amendment were filed in response to an Office Action mailed July 13, 2009 (Ex. 1007 (“the Office Action”)) rejecting claims under 35 U.S.C. § 103(a) as unpatentable over Jany (Ex. 1004) and over

Doonan (Ex. 1005) in view of Jany (Ex. 1004). Ex. 1007, 1; Ex. 1008, 1. The rejected independent method claims recited a step of blending cyanuric acid wetcake with a monoalkali metal base to form a monoalkali cyanurate wetcake. The Amendment added to this step the negative limitation: “without dispersing the cyanuric acid wetcake in an aqueous medium prior to blending.” Ex. 1008, 2-3 and 5. In their remarks, Applicants argued the amended claims were patentable over the Jany and Doonan processes which require forming slurries of cyanuric acid and monoalkali metal base. *Id.* at 6-7.

In his declaration, Dr. Howarth likewise explained that the invention is based on a surprising discovery that cyanuric acid wetcake could be dry-blended with a solid monoalkali metal base to yield a monoalkali metal cyanurate directly, i.e., without the need for making a slurry of the reactants. *See*. Ex. 1009, ¶¶ 3-4. To “illustrate how the claimed process differs from Jany and Doonan” (Ex. 1009, ¶ 5), Dr. Howarth described a process wherein cyanuric acid is blended with sodium hydroxide in a ribbon blender. Ex. 1009, ¶ 9. Dr. Howarth described the cyanuric acid starting material as “cyanuric acid wetcake” (Ex. 1009, ¶¶ 6, 10), “cyanuric acid powder” (*id.* at ¶ 9), and “cyanuric acid” (*id.* at ¶¶ 7-10). In describing the reaction of the cyanuric acid with sodium hydroxide, Dr. Howarth stated that “the heat of neutralization causes the water associated with the cyanuric wetcake to be driven off.” *Id.* at ¶ 10 (noting that a steam plume persists until the reaction is complete). Dr. Howarth explained “sodium cyanurate wetcake product” exits the ribbon blender and is sifted through a screen. *Id.* at ¶ 13. Dr. Howarth stated that the “sodium cyanurate wetcake is a free-flowing powder that could be packaged and sold . . . without the need for further drying.” *Id.*

Petitioner contends the Board’s construction of “wetcake” as excluding free-flowing powder “cannot be squared with” the Amendment’s “focus[] on using

the relative *dryness* of the claimed cyanuric acid wetcake to distinguish prior art cyanuric acid slurries.” Req. Reh’g 10. Petitioner contends Dr. Howarth’s use of the terms “wetcake” and “powder” to describe the same starting material, and description of the product exiting the ribbon blender as a “sodium cyanurate wetcake [that] is a free-flowing powder,” support its contention that we erred in construing the term “wetcake” as excluding a free-flowing powder. Req. Reh’g 9-10 (quoting Ex. 1009, ¶ 13).

Challenged independent claims 7, 11, and 12 recite “method[s] for preparing a *dry*, solid monoalkali metal cyanurate.” Ex. 1001, claims 7, 11, 12 (emphasis added). Method claims 7, 11, and 12 recite a first step of forming a monoalkali metal cyanurate wetcake by “blending cyanuric acid” (*id.*, claims 11, 12) or “cyanuric acid wetcake” (*id.*, claims 7, 11, 12) “with a monoalkali metal base” (*id.*). The ’132 patent specifies the cyanuric acid starting material may be either a “dry, virgin material or . . . by-product material . . . available as a water-washed *wetcake*” (Ex. 1001, 4:40-48, 6:53-62, 8:66-9:8 (emphasis added), quoted in Dec. 8). Dooney confirms that prior to the effective date of the ’132 patent, cyanuric acid was commercially available in powder and granular forms, or in cake/wetcake form. Ex. 1004, 1:17-20, 28-29, cited in Dec. 9. Given the evidence that cyanuric acid starting materials were available in either wetcake or powder/dry forms, it is not clear whether Dr. Howarth viewed the terms “wetcake” and “powder” as synonymous, or was unconsciously using terms which describe two different forms of cyanuric acid starting materials encompassed by the claimed method. On this record, even if we consider the new evidence that was not raised in the Petition, we are not persuaded that Petitioner shows sufficiently that Dr. Howarth’s declaration testimony controls the proper construction of claims 7, 11, and 12 in this proceeding.

Each of claims 7, 11, and 12 also recites a second step of drying the monoalkali metal cyanurate wetcake. Ex. 1001, claims. With respect to the drying step, claim 12 recites: “(b) Drying the formed wetcake of monoalkali metal cyanurate by allowing heat of neutralization caused by a reaction of the blended cyanuric acid or cyanuric acid wetcake and the monoalkali metal base to remove water from the monoalkali metal cyanurate wetcake as steam and by allowing the steam to escape.” The process described in the Howarth Declaration includes the drying step recited in claim 12. *Compare* Ex. 1001, claim 12(b) *with* Ex. 1009, ¶ 10. A process which meets the limitation of claim 12 produces a “dry, solid monoalkali metal cyanurate” (Ex. 1001, claim 12). Dr. Howarth stated that “Picture 8 shows the sodium cyanurate wetcake *product* being conveyed from an opening at the bottom of the ribbon blender.” Ex. 1009, ¶ 13 (emphasis added). Dr. Howarth then described the product exiting the ribbon blender in picture 8 as a “sodium cyanurate wetcake [that] is a free-flowing powder” (Ex. 1009, ¶ 13). However, we are not convinced Dr. Howarth’s statement was based on an understanding that the term “wetcake” encompasses a free-flowing powder, as opposed to an assumption that the reader appreciated that the sodium cyanurate material in the described process transitioned from a wetcake to a dry solid product (a free-flowing powder) during the drying step in the ribbon blender.

With respect to the Amendment, Petitioner has not explained clearly how arguments distinguishing a wetcake from a slurry based on relative dryness support their contention that we erred in interpreting the term “wetcake” as not encompassing a free-flowing powder. *See* Dec. 8, 1st para. (indicating the term “wetcake,” as used in the ’132 patent, describes a material that is not a slurry and

noting the dry-blending process described in the '132 patent forms a semi-dry solid cake).

In sum, Petitioner has not convinced us that the intrinsic evidence of record as a whole, taking into account the Howarth Declaration and Amendment, supports an interpretation of the claim term “wetcake” as encompassing a free-flowing powder. Therefore, we are not persuaded that we erred in interpreting the claims as excluding Stephen’s free flowing powder of monosodium cyanurate monohydrate containing 89.35% monoalkali metal cyanurate and 10.65% water by weight. Petitioner has not met its burden to show that the decision should be modified.

On this record, we are not persuaded that denying *inter partes* review of any challenged claim represents an abuse of discretion.

CONCLUSION

Petitioner’s request for rehearing is *denied*.

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