

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MAGELLAN MIDSTREAM PARTNERS L.P. and
POWDER SPRINGS LOGISTICS, LLC,
Petitioner,

v.

SUNOCO PARTNERS MARKETING & TERMINALS L.P.,
Patent Owner.

IPR2019-00024 (Patent 9,494,948 B2)
IPR2019-00025 (Patent 9,606,548 B2)¹

Before BARRY L. GROSSMAN, JON B. TORNQUIST, and
BRENT M. DOUGAL, *Administrative Patent Judges*.

TORNQUIST, *Administrative Patent Judge*.

DECISION
Denying Patent Owner's Requests for Rehearing
37 C.F.R. § 42.71(d)

¹ This Decision addresses issues that are the same in both of the above-identified proceedings. We exercise our discretion to issue one Decision to be entered in each proceeding. The parties are not authorized to use this joint heading and filing style in their papers.

I. INTRODUCTION

On April 8, 2019 we instituted review in IPR2019-00024 and IPR2019-00025. IPR2019-00024, Paper 9, “Dec. on Inst” or “Decision to Institute”; (-00025) Paper 9.² In the Decisions to Institute, we construed the terms “gasoline” and “gasoline stream” to include “gasoline streams in a refinery.” Dec. on Inst. 14–15; (-00025) Paper 9, 15. Patent Owner seeks rehearing of these constructions, as well as our associated decisions to institute *inter partes* review, asserting we misconstrued or misinterpreted a multitude of Patent Owner’s arguments set forth in Patent Owner’s Preliminary Responses. Paper 16, “Req. Reh’g.”; (-00025) Paper 16.³ We address Patent Owner’s arguments below.

II. ANALYSIS

A party requesting rehearing bears the burden of showing that the decision should be modified, and the request for rehearing must specifically identify all matters the party believes the Board misapprehended or overlooked. 37 C.F.R. § 42.71(d).

A. *Failure to Resolve the Claim Construction Dispute*

As noted above, we preliminarily construed the term “gasoline” to include “gasoline streams in a refinery.” Dec. on Inst. 14–15. Patent Owner contends this construction fails to address the central issue of the case, which

² Citations to IPR2019-00025 are preceded by (-00025).

³ Apart from referencing different patents, Patent Owner’s requests for rehearing in IPR2019-00024 and IPR2019-00025 are essentially identical. Thus, unless otherwise noted, we cite only to the papers and page numbers in IPR2019-00024.

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is not *where* gasoline may be found, but whether the term “gasoline” “only covers finished gasoline *that may be used as fuel.*” Req. Reh’g 2–3.

In adopting our preliminary construction of “gasoline,” we rejected Patent Owner’s argument that “gasoline” is limited to “finished gasoline that may be used as fuel,” and determined that the term is broad enough to encompass the component gasoline streams of Bajek and the gasoline stocks of Hass. Dec. on Inst. 10–14, 22, 26 (“In particular, on this record, we determine that the term ‘gasoline’ is broad enough to encompass the gasoline stocks of Hass”). As this conclusion was sufficient to determine whether Petitioner demonstrated a reasonable likelihood of prevailing with respect to at least one claim of the ’948 and ’548 patents, we declined to determine exactly what other types of petroleum products would be considered “gasoline” in the art. *Id.* at 15.

To the extent Patent Owner misunderstood our preliminary construction, for sake of clarity, we reiterate our preliminary determination that “gasoline” encompasses gasoline streams or gasoline stocks in a refinery, and is not limited to “finished gasoline that may be used as fuel.” See Ex. 1001, 2:40–42 (Bajek “discloses a system for blending butane and gasoline at a petroleum refinery”); Ex. 1007, 3 (“The Bajek reference discloses a gasoline blending system comprising a source of gasoline 6”), 17 (“The Bajek patent teaches a system for blending gasoline streams.”); Ex. 1003 ¶ 40 (Dr. Nikolaou testifying that a straight-run gasoline stream exiting a crude-oil tower is “gasoline”).

B. Construction of Gasoline

1. EPA Regulations

In construing the term “gasoline” to include gasoline streams or stocks within a refinery, Patent Owner contends we overlooked the definition of “gasoline” set out in the relevant Environmental Protection Agency (EPA) regulations. Req. Reh’g 4–5.

The ’948 and ’548 patents identify EPA regulations related to the volatility of gasoline, including EPA regulation 40 C.F.R. § 80.27. Ex. 1001, 1:64–21, 7:33–54; (-00025) Ex. 1001, 1:67–2:1. EPA regulation 40 C.F.R. § 80.2 defines gasoline to mean “any fuel sold in any State for use in motor vehicles and motor vehicle engines, and commonly or commercially known or sold as gasoline.” Paper 8, 17 (“Prelim. Resp.”). According to Patent Owner, this definition “make[s] clear that ‘gasoline’ is a type of refined petroleum used as fuel.” *Id.*

There is no dispute that the term “gasoline” includes petroleum that is used as fuel (the subject of the EPA regulations). We are directed to no clear definition or discussion in the ’948 or ’548 patents, however, evidencing an unambiguous intent to limit the scope of the term “gasoline” to EPA-regulated gasoline. Moreover, the ’948 and ’548 patents, as well as the examiner during prosecution, use the term more broadly to encompass component gasoline streams within a refinery. Ex. 1001, 2:40–42; Ex. 1007, 3, 17; *see also* Ex. 1003 ¶ 40 (Dr. Nikolaou testifying that the term “gasoline” is understood broadly in the art to encompass various streams inside a refinery, including a “straight-run gasoline” stream exiting a crude-oil tower (as disclosed in Bajek)). Thus, we are left with a material issue of fact to be resolved at trial as to how one of ordinary skill in the art would

have interpreted the term “gasoline” in the ’948 and ’548 patents in view of the potentially conflicting disclosures and admissions found in the intrinsic record.

2. The District Court’s Prior Construction

At least one district court has construed the term “gasoline” to mean “[v]arious types of refined petroleum that are used as fuel.” Ex. 2004, 35. In the Institution Decision, we determined that this construction was “of limited assistance” in this proceeding because (1) the ’948 and ’548 patents were not at issue in the case when the district court rendered its claim construction, and (2) the construction was adopted at the request of the parties, and was not based on a detailed analysis of the intrinsic record. Dec. on Inst. 14.

Patent Owner contends the district court’s analysis is not only of assistance in this proceeding, but is “near conclusive.” Req. Reh’g 6–7. According to Patent Owner, the ’948 and ’548 patents are in fact being asserted in the district court proceeding, and despite the fact that the defendants would have benefited from the allegedly “overbroad construction” of “gasoline” set forth in the Institution Decision, the parties in the district court proceeding agreed that “gasoline” means various “types of refined petroleum that are used as fuel.” *Id.* at 7.

Patent Owner provides no evidence that the ’948 and ’548 patents were at issue in the district court proceeding when the construction of “gasoline” was adopted. *See* Ex. 2004, 3–4 (identifying “[t]he three patents at issue” as U.S. Patent Nos. 6,679,302, 7,032,629, and 7,631,671). Nor are we presented with any evidence that the district court subsequently analyzed the intrinsic evidence related to the ’948 and ’548 patents to determine the

correct construction of the term “gasoline.” Thus, on this record, we are not persuaded that we misapprehended or misunderstood the importance of the district court’s prior construction of “gasoline.”⁴

3. *Remarks and Amendments Made During Prosecution*

In the Decision to Institute, we noted that (1) the Examiner found that “[t]he Bajek reference discloses a gasoline blending system comprising a source of gasoline 6,” which is a light straight-run gasoline stream obtained from the crude oil distillation column; (2) the patentee expressly stated during prosecution that Bajek discloses blending gasoline streams; and (3) rather than argue that Bajek does not disclose “gasoline,” Patent Owner amended the claims to require blending *at a location* that distributes finished gasoline. Dec. on Inst. 12–13. Thus, we concluded that the prosecution history of the ’302 patent “suggests that the term ‘gasoline’ includes gasoline streams in a refinery.” *Id.* at 12.

Patent Owner contends that, contrary to the conclusion of the Examiner during prosecution, the light-straight run gasoline stream of Bajek is not “gasoline,” but instead a component stream used to create finished “gasoline,” and each of Bajek’s disclosures cited in the Decision to Institute refers to components used to create gasoline, not finished gasoline. Req. Reh’g 8–9. But to the extent that Bajek’s light-straight run gasoline is not a

⁴ As noted in the Decision to Institute, because the Petition was filed before November 13, 2018, we apply the “broadest reasonable” claim construction in this proceeding. Dec. on Inst. 8, n.6. This claim construction standard differs from the *Phillips* standard applicable in the district court. See *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc). Thus, the fact that our preliminary construction is broader than that adopted by the district court is not necessarily persuasive of any error in our construction.

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finished product intended for use as fuel, the '948 patent and Bajek, as well as the patentee during prosecution of the '302 patent, describe Bajek as disclosing a system for blending butane and either “gasoline” or a “gasoline stream.” Ex. 1001, 2:40–42 (describing Bajek as “disclos[ing] a system for blending butane and gasoline at a petroleum refinery”); Ex. 1007, 3 (“The Bajek reference discloses a gasoline blending system comprising a source of gasoline 6 . . . and a source of Butane 11” that are blended “at there [sic] junctions with dispensing lines 1”), 17 (the patentee asserting that Bajek discloses “blending gasoline streams as part of the refining process”); Ex. 1010, 3:32–36 (Bajek describing the light straight-run fraction as a “gasoline stream”). Thus, we are not persuaded that we misconstrued the Examiner’s position during prosecution of the '302 patent, or that this conclusion was clearly erroneous.

Patent Owner also asserts the Board misconstrued the reason for the patentee’s claim amendments during prosecution of the '302 patent. Req. Reh’g 9–10. Patent Owner contends that, contrary to our preliminary analysis, the patentee disagreed during prosecution with the Examiner’s conclusion that the term “gasoline” includes gasoline component streams in a refinery, and amended the claims not because the term “gasoline” is broad enough to encompass the gasoline streams of Bajek, but in order to advance the application to issuance in a timely fashion. *Id.* at 10–12.

As noted by Patent Owner, the patentee stated during prosecution that, “[i]n contrast to the raw components at the refinery” disclosed in Bajek, “the tank farm distributes gasoline ready for consumption.” Req. Reh’g 10. The patentee, however, describes Bajek’s raw components as “gasoline streams,” and overcame the rejection based on Bajek not by arguing that the

raw components found in a refinery are not “gasoline,” but by amending the claims to require blending at the tank farm, *a location* that distributes finished gasoline. Ex. 1007, 17–18 (“The inventions defined by amended claims 1, 13, 37, and 41 are directed to controlling the volatility of gasoline at the point of distribution, namely the tank farm.”). Thus, although the patentee distinguished the *amended claims* from the blending systems of Bajek during prosecution, it is not evident that the patentee did so based on the scope of the term “gasoline.” Accordingly, we are not persuaded that we misunderstood or misapprehended the reasons for Patent Owner’s amendments during prosecution of the ’302 patent.

4. *The ’948 and ’548 Patent Disclosures*

In the Preliminary Response, Patent Owner states that “[t]he specification elsewhere consistently refers to ‘gasoline’ as meaning various types of refined petroleum that are used as fuel.” Prelim. Resp. 15. In support of this argument, Patent Owner provides a string cite to thirteen different sections of the ’302 patent and the ’948 or ’548 patents, but does not explain in any meaningful detail why these particular sections clearly support its argument. *Id.* Patent Owner now contends that we failed to appropriately consider these citations. Req. Reh’g 12 (asserting the Board failed to consider the identified passages “in context of the overall specification, the prosecution history, and the EPA regulations”).

String citations do not constitute argument that we could have misapprehended or misconstrued. In any event, we note that the string-cited portions of the ’948 and ’302 patents identified by Patent Owner are directed to discussions of various embodiments of the invention, and indicate that the blending of “gasoline” and butane in the disclosed invention “may” occur at

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various locations, including anywhere downstream of a refinery or at a gasoline tank farm. Req. Reh’g 13 (citing Ex. 1001, 5:1–8, 11:19–27, 16:36–45). Although these citations are consistent with Patent Owner’s proposed construction, on this record we are not persuaded that these disclosures unambiguously define (either expressly or by implication) the term “gasoline” as a finished gasoline product ready for use as fuel, especially in light of the ’948 patent’s identification of the component streams of Bajek as “gasoline.” Ex. 1001, 2:40–46; see *Trs. of Columbia Univ. v. Symantec Corp.*, 811 F.3d 1359, 1363–64 (Fed. Cir. 2016) (explaining that a definition of a claim term may be provided expressly or by implication in the specification). Nor does Patent Owner assert that these citations rise to the level of a disclaimer, requiring that the “pipe” of independent claims 1 and 7 of the ’948 patent, or the systems and methods of the ’548 patent, be located outside of a refinery. Thus, we are not persuaded that we misunderstood or misapprehended Patent Owner’s arguments with respect to the identified disclosures of the ’948, ’548, and ’302 patents.

As discussed above, the ’948 and ’548 patents indicate that Bajek discloses blending gasoline and butane in a refinery. Ex. 1001, 2:40–46; (-00025) Ex. 1001, 2:40–46. Patent Owner asserts the Board placed too much emphasis on this single passage in the “Background” section of these patents when construing the term “gasoline.” Req. Reh’g 13–14. According to Patent Owner, at the beginning of the discussion of prior art systems in the ’948 and ’548 patents, the patents state that “[b]utane is often blended with other gasoline components at the refinery.” *Id.* at 14. Patent Owner concludes therefore that “the reference to Bajek in the cited passage is in the

context of discussing blending butane with ‘other gasoline components’ in a refinery to create finished gasoline,” and does not suggest that the term “gasoline” includes component parts that are blended to create gasoline. *Id.*

Again, the problem with Patent Owner’s argument is that the ’948 and ’548 patents describe Bajek’s method of blending gasoline component streams as a system for blending butane and “gasoline,” which is the same term used in the challenged claims.⁵ Ex. 1001, 2:40–49, 17:10–18; (-00025) Ex. 1001, 17:13–14. Moreover, this disclosure is consistent with the Examiner’s interpretation of Bajek during prosecution of the ’302 patent and with Dr. Nikolaou’s declaration testimony. Ex. 1007, 3; Ex. 1003 ¶ 40. Thus, we are not persuaded that we misunderstood the ’948 and ’548 patent’s discussion of Bajek, or that we placed too much emphasis on these disclosures.

C. Conclusion

Upon review of Patent Owner’s arguments and supporting evidence, we are not persuaded that we misapprehended or overlooked Patent Owner’s arguments in the Preliminary Response. Accordingly, we deny Patent Owner’s request for rehearing.

As noted above, we are cognizant that certain disclosures of the ’948 and ’548 patents, including the referenced EPA regulations, are consistent with Patent Owner’s proposed construction of “gasoline.” In addition,

⁵ The claims of the ’548 patent require blending butane with a “gasoline stream.” (-00025) Ex. 1001, 17:11–12. This is the precise term used in the Bajek reference, and is also the same term used by the patentee during prosecution of the ’302 patent to describe Bajek’s blending system. Ex. 1010, 3:36, 3:60; Ex. 1007, 17.

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Patent Owner provides supporting testimony from Mr. Goddard that the term “gasoline is used in the industry to refer to the final blended product that meets the specifications for finished gasoline,” and does not encompass component gasoline streams in a refinery. Ex. 2001 ¶ 69. We therefore reiterate that our construction of the term “gasoline” is preliminary, and that our final claim construction will be provided at the close of all the evidence, upon review of any cross-examination testimony of Dr. Nikolaou and Mr. Goddard, and after any hearing. See Dec. on Inst. 15, n.8 (noting the conflicting testimony of Dr. Nikolaou and Mr. Goddard), 18 (noting that claim construction is an issue to be addressed at trial, and will be determined at the close of all the evidence and after any hearing).

IV. ORDER

It is

ORDERED that Patent Owner’s Motions for Rehearing in IPR2019-00024 (Paper 16) and IPR2019-00025 (Paper 16) are *denied*.

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PETITIONER:

Dorothy Whelan

Martina Hufnal

FISH & RICHARDSON

whelan@fr.com

hufnal@fr.com

David Moreland

MEUNIER CARLIN & CURFMAN LLC

dmoreland@mcciplaw.com

PATENT OWNER:

Andrew Sommer

John Keville

Michelle Replogle

WINSTON & STRAWN LLP

asommer@winston.com

jkeville@winston.com

mreplogle@winston.com