DECISION OF THE COMMISSIONER

IN THE MATTER of a request for a review by the Commissioner of Patents of the Examiner's Final Action under Section 47 of the Patent Rules (Prior to the Amendment by Order-in-Council P.C. 1970 728 effective June 1, 1970).

AND

IN THE MATTER of a patent application serial number 862,758 filed November 21, 1962 for an invention entitled:

SWINE FEEDS

Patent Agent for Applicant: Messrs. Gowling & Henderson, Ottawa, Ontario.

This decision deals with a request for review by the Commissioner of Patents of the Examiner's Final Action refusing to allow claims 1 and 2 of application number 862,758. The request was made in accordance with Section 46 of the Patent Rules.

The facts are as follows:

The subject matter of the application is set forth in the two claims under rejection and which are the only claims in the application:

1. A process for increasing the rate of growth of normally healthy swine which comprises feeding said swine a nutrient ration containing from about 0.01 to about 5% by weight of monosodium glutamate to produce weight gain.

2. A process as claimed in claim 1 wherein the amount of monosodium glutamate ranges from about 0.05 to about 1% by weight.

The application was filed November 21, 1962 with a U.S. convention date of December 7, 1961 and had 12 claims which included process claims similar in scope to the above claims and also claims to the feed composition.

During the prosecution which preceded the examiner's Final Action the claims to the composition were cancelled and the examiner rejected the process claims as being the mere use of a feed ration, as being a physiological process which is not reproducible and over which the applicant has no precise control, that the process was therefore indefinite and contrary to Section 36(1) of the Patent Act, and that a method of feeding animals is not subject within

the field of invention defined in Section 2(d) of the Act.

The applicant presented arguments against each of the objections in turn, pointing out that the claims were quite specific and the process possessed novelty, and gave unexpected results. The applicant expressed the view that the process is reproducible and admits of precise control within practical limits. The applicant suggested that claims of this type have been allowed in the U.S. and even in the U.K. where the comparable section of their Act is much more restrictive than Section 2(d) of the Patent Act.

On January 15, 1970 the examiner issued a Final Action under Section 46 of the Patent Rules refusing claims 1 and 2 on the grounds that they defined a method of feeding animals, that feeding of animals is a physiological process over which the applicant has no precise control and therefore the process is not within the field of inventions defined in Section 2(d) of the Act.

The applicant responded in a letter dated July 15, 1970 asking the Commissioner to review the Final Action and indicating that a hearing might be desired. Accordingly a hearing was arranged and held by the Patent Appeal Board on October 29, 1970. Mr. G.A. Macklin, supported by Mr. N.S. Hewitt represented the applicant.

Mr. Macklin argued that applicant's process applied to healthy animals, thus removing it from the human area and also avoiding medical processes. He submitted that there was nothing in Sections 2(d) or 36 of the Patent Act which exclude physiological processes either specifically or generally and further pointed out that the Patent Office has been allowing claims to a variety of physiological processes. Mr. Macklin referred to earlier objections by the examiner in the prosecution and maintained that the applicant has shown that the process is in fact reproducible and that control of the process can be exercized within reasonable limits.

The Board's attention was directed to the Swift decision 1961 RPC 129 which is interesting but which I do not consider is a parallel case. Reference was also made to the recent decision of Cattanach J. in the case of Lawson Commissioner of Patents reported in CPR vol 62 and it was submitted that the applicant's process fell within the judge's definition of "art".

Mr. Macklin was asked for his stand in regard to the supplement to Office Notice No. 119A on Non-Statutory Subject Matter which had been distributed to Patent Agents in order to obtain their views on this aspect of Office practice. He submitted that the paper merely set forth guidelines which at this stage should not be binding on the Patent Appeal Board and in any case the applicant's process conformed to the criteria of the guidelines and that even though monosodium glutamate is a chemical, the use of it in applicant's process did not make the process a chemical process.

Further reference was made by Mr. Macklin to a recent decision by Kerr J. in the Exchequer Court case of Tennessee Eastman v. Commissioner of Patents

but since this case is under appeal I will make no comment.

I have carefully studied the Final Action and the written and oral argument presented against the Final Action and I am unable to find support for the rejection which the examiner has made. I agree with the examiner that applicant's process is a physiological process, however, in his disclosure, applicant has demonstrated, by normal testing methods, that an unexpected weight gain per unit of feed is obtained when monosodium glutamate is added to the feed. Applicant is concerned with feeding swine on a commercial scale, that is, he is concerned with feeding groups of animals rather than a single animal. It is clear to me, from reading the disclosure and studying the arguments presented, that the physiological process defined by applicant in his claims is one that is reproducible and is capable of control within reasonable limits, and furthermore it results in an enhanced vendible product. For these reasons I do not agree with the examiner's rejection. I do not feel it incumbent on me at this time to make any finding as to the allowability of applicant's claims other than as they stand rejected by the examiner's Final Action and it is my opinion that the Action should be withdrawn.

R.E. Thomas,
Chairman,
Patent Appeal Board.

I agree with the findings of the Patent Appeal Board and direct that the Final Action be withdrawn and the application be remanded to the examiner for further prosecution.

Decision accordingly,

A.M. Laidlaw,
Commissioner of Patents.

Dated at Ottawa, Ontario
this 9th day of November, 1970.