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**Datasheet for the decision
of the Enlarged Board of Appeal
of 18 February 2016**

Case Number: R 0007/14
Appeal Number: T 1278/11 - 3.2.04
Application Number: 03000852.8
Publication Number: 1330952
IPC: A01K 45/00
Language of the proceedings: EN

Title of invention:

A method and system for transporting live poultry

Patent Proprietor:

GIORDANO POULTRY-PLAST S.p.A.
Zanotti, Massimo

Opponent:

STORK PMT B.V.

Headword:

-

Relevant legal provisions:

EPC Art. 112a(2)(c), 112a(2)(d)
EPC R. 104

Keyword:

"Petition for review clearly unallowable - yes"

Decisions cited:

R 0004/08, R 0010/08, R 0014/10, R 0006/11, R 0019/11,
T 0911/99, T 0492/00, T 0764/06, T 1570/07

Catchword:

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Case Number: R 0007/14

D E C I S I O N
of the Enlarged Board of Appeal
of 18 February 2016

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Decision under review: Decision of the Technical Board of Appeal
3.2.04 of the European Patent Office of
14 January 2014.

Composition of the Board:

Chairman: W. van der Eijk
Members: F. Blumer
J. Riolo

Summary of Facts and Submissions

- I. The petition for review concerns the decision T 1278/11 of 14 January 2014 of Board of Appeal 3.2.04 (notified on 25 February 2014), revoking European patent 1 330 952 after it had been maintained by the opposition division in amended form. The patent was opposed on the grounds of Articles 100(a), (b) and (c) EPC. During oral proceedings, the Board decided that the then pending main request was not allowable because claim 6 did not meet the requirements of Article 123(2) EPC and that the auxiliary request was not admitted into the proceedings because the request was late filed and because it was not immediately apparent that the amendments made successfully addressed all the issues raised with respect to the main request.
- II. The petition was filed on 18 April 2014, and the corresponding fee was paid on the same day. The petitioners' arguments put forward in the petition for review focus on the fact that there was no debate during the oral proceedings on the method claims (claims 1 to 5) of both the main request and the auxiliary request. Reminding also of the requirement of fair oral proceedings under Article 15(4) RPBA, the petitioners claim that parts of the minutes of the oral proceedings are inconsistent and that the Articles 15(5) and (6) RPBA were violated. The specific arguments on the inconsistencies in the minutes and the alleged violation of Articles 15(5) and (6) RPBA can be summarised as follows:
- (a) Before the final deliberation of the Board, the chairman did not declare the debate closed. He

only declared it closed in respect of the auxiliary request but failed to declare the closure of the overall debate. Had the chairman explicitly communicated to the parties that the debate would be closed after the decision on the admissibility of the auxiliary request, the petitioners would have manifested the intention to discuss the method claims.

(b) The chairman did not ask the parties for their final requests but merely summarised the then pending requests and asked for confirmation of the latter. When the parties confirmed their then pending requests, it could not be concluded that the parties were not willing to make any further request.

(c) After the parties confirmed their then pending requests, the chairman did not ask them if they had any further comments or requests. Had he done so, the petitioners would have made a request for discussing method claims 1 to 5.

III. The petitioners further argued that the failure to discuss the method claims means that the case was not ready for decision at the conclusion of oral proceedings (contrary to Article 15(6) RPBA). The petitioners could not have anticipated the intention of the Board to close the debate without discussing the remaining claims, on which the Board had given its preliminary comments in its communication sent with the summons. The fact that no specific request comprising only the method claims had been made did not mean that the petitioners would not be willing to make such request.

IV. The petitioners (patent proprietors) requested that decision T 1278/11 of 14 January 2014 be set aside and that the proceedings be re-opened in accordance with Rule 108(3) EPC. Furthermore, the petitioners requested that the fee for a petition for review be reimbursed and that the proceedings be re-opened before another Board of Appeal, i.e., having a different composition from the board that issued the decision under review. The petitioners did not request oral proceedings.

Reasons for the Decisions

1. Formal requirements

1.1 The petition was filed and the prescribed fee was paid within the applicable time limit under Article 112a(4) EPC. The petitioners and the decision to be reviewed have been identified, and the petitioners are adversely affected by the decision to be reviewed.

1.2 The petitioners did not request oral proceedings and the Enlarged Board did not consider oral proceedings to be expedient on its own motion.

2. The petitioners' objections

2.1 The petition shall indicate the reasons for setting aside the decision of the board of Appeal, and the facts and evidence on which the petition is based (Rule 107(2) EPC). The grounds for a petition are exhaustively listed in Article 112a(2) EPC. Item (d) in said list ("any other fundamental procedural defect defined in the Implementing Regulations") refers to

Rule 104 EPC which contains an exhaustive list of two specific procedural defects, namely, the failure to arrange for requested oral proceedings and the failure to decide on a request relevant for the decision. No other grounds than those listed in Article 112a(2) EPC and Rule 104 EPC may be heard (see, for example, R 6/11, point 11.1, R 19/11, point 2.4).

2.2 In view of the exhaustive list of reasons for a petition, the alleged violation of Articles 15(5) and 15(6) RPBA cannot in itself constitute a valid ground for the petitioners' requests. The alleged procedural violations can only become relevant as far as they involve a fundamental violation of Article 113 EPC (right to be heard) or a fundamental procedural defect under Article 112a(2)(d) in combination with Rule 104(b) EPC (failure to decide on a relevant request)(see R 10/08, point 5).

3. Admissibility / (Lack of) Objection under Rule 106 EPC

3.1 Pursuant to Rule 106 EPC, a petition for review under Article 112a(2)(a) to (d) EPC is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board of Appeal, except where such objection could not be raised during the appeal proceedings. The objection is a specific procedural act which must be expressed by the party concerned in such a form that the Board of Appeal is able to recognize immediately and without doubt that an objection pursuant to Rule 106 EPC is intended. The objection must be specific, i.e., the party must clearly indicate which particular defect of those listed in Article 112a(2)

and Rule 104(b) EPC is relied on (see R 4/08, point 2.1).

3.2 The alleged procedural defects (namely, the failure to discuss the method claims and the denial of the possibility to file an additional auxiliary request) were not addressed by the petitioners during the appeal proceedings. Neither the minutes of the oral proceedings before the Board nor the petition contain any reference to any interventions of the petitioners during oral proceedings concerning the alleged procedural violations.

3.3 Since no objection concerning the alleged procedural defects was raised during oral proceedings, the question remains whether such objections could have been raised during appeal proceedings, i.e., before the debate was closed (see R 10/08, point 3). The petitioners did not explicitly refer to the impossibility to raise objections to the procedural defects but made arguments on how they were deprived of the possibility to discuss the method claims and to file further auxiliary requests.

3.3.1 With respect to the failure to discuss the method claims, they argued that they could not have anticipated the intention of the Board to close the debate without discussing these claims (point 4.2.11 of the petition).

3.3.2 In connection with the right to be heard, the petitioners argued that they were denied the possibility to file another auxiliary request containing only method claims (point 4.2.13 of the petition).

3.4 The Enlarged Board has serious doubts whether an objection under Rule 106 EPC could not have been raised during the oral proceedings even if the missing opportunity to discuss the method claims (either as part of the requests on file or forming an additional auxiliary request) came as a surprise to the petitioners. However, the Enlarged Board does not see a need to decide on the impossibility to raise an objection during the appeal proceedings (and thereby on the admissibility of the petition) since the petition is clearly unallowable (see below point 4).

4. Allowability of the petition

4.1 As explained above (point 2.2), a petition may be based only on the specific grounds listed in Article 112a(2) EPC and Rule 104 EPC. Violations of provisions in the Rules of Procedure of the Boards of Appeal (RPBA) (e.g., Article 15(5) RPBA) do not constitute such grounds. However, the Enlarged Board in the following applies the statutory grounds which may be pertinent to the facts presented by the petitioners.

4.2 Possible violation of Article 112a(2)(d) in combination with Rule 104(b) EPC

4.2.1 The Board based its decisions not to allow the main request and not to admit the auxiliary request solely on the product (system) claim 6 of each request. The method claims of both the main request and the auxiliary request had not been discussed. In the petitioners' view, the failure to discuss method claims 1 to 5 of both requests constituted a substantial procedural violation.

4.2.2 Under consistent case law, decisions on the admissibility and the allowability of requests are taken with respect to the whole request only. As a consequence, a request as a whole must be rejected if one claim fails to meet the requirements of the EPC (see, for example, T 911/99, points 2.5, 2.6; T 1570/07, point 4). In this context it is irrelevant whether the other claims are of the same category as the claim found to be unallowable (see, for example, T 911/99 where a product claim was found to unallowable and *inter alia* the method claims of the same request did not have to be considered). If one claim of a request is found not to be allowable, a board has no obligation to examine the other claims of that request (see T 492/00, point 15). In opposition proceedings, it is sufficient for the opponent to substantiate the ground(s) for opposition in respect of at least one claim of the patent. If one claim of each request is found not to be allowable, the patent will be revoked (see T 764/06, point 3.1).

4.2.3 In view of the described case law, the Board acted correctly when it did not discuss the method claims 1 to 5 after it was clear that at least one claim of the respective request was not allowable or could not be admitted into the proceedings. The fact that the Board did comment on the method claims in the communication sent with the summons to oral proceedings does not mean that the method claims had to be discussed in any case during oral proceedings. They could have become relevant if, for example, the product claims of the same request had been allowable or if a request without the product claims had been filed.

4.2.4 The Board was in a position to take a final decision on the allowability of the main request (as a whole) and the admissibility of the auxiliary request after finding that at least one claim of the respective requests was not allowable or could not be admitted into the proceedings. The failure to discuss the method claims of both requests did not constitute a violation of Article 112a(2)(d) in combination with Rule 104(b) EPC since a decision was taken with respect to all requests.

4.3 Possible violation of the right to be heard
(Article 112a(2)(c))

4.3.1 Under Article 112a(2)(c) EPC, a petition for review may be filed on the ground that "a fundamental violation of Article 113 [EPC] occurred". Under Article 113(1) EPC, the decision of the EPO (including any decision of the Boards of Appeal) may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments.

4.3.2 The Board's decision to revoke the patent was based on the non-compliance of claim 6 of the main request with Article 123(2) EPC and on the decision not to admit the auxiliary request into the proceedings after said request *prima facie* did not address all issues necessary to overcome the objections raised in connection with the main request (see Summary of Facts and Submissions, point II; point 3 of the Reasons of the decision under review).

4.3.3 From the minutes of the oral proceedings before the Board and from the petition it must be concluded that the petitioners had the opportunity to comment and did in fact comment on these issues related to claim 6 of

each request (see minutes, page 2, four last paragraphs, page 3, paragraphs 2 to 4; petition, points 4.1.6 and 4.1.8). After the chairman declared that claim 6 of the main request was not allowable under Article 123(2) EPC, the chairman asked the petitioners for possible further requests, and the petitioners took the opportunity to file their auxiliary request in which claim 6 was amended (petition, point 4.1.7). These amendments were then discussed in connection with the admissibility of the auxiliary request. The petitioners were aware of the relevant grounds leading to the final decision of the Board, and they took the opportunity to comment on these grounds. All other issues which may have been in dispute between the parties, such as the allowability of method claims 1 to 5, were simply not relevant for a decision on the main request and the auxiliary request since these requests had to be rejected after one claim was found not to meet the requirements of the EPC (see above point 4.2.2). The Enlarged Board therefore cannot identify a violation of Article 113(1) EPC.

4.3.4 Article 113(2) EPC ensures that decisions of the EPO are taken only upon texts (including claims) submitted or agreed by the applicant or the patent proprietor. There is no doubt that both the main request and the auxiliary request were filed by the petitioners. Article 113(2) EPC can therefore not be relevant for the present proceedings.

4.3.5 The petitioners argued that they were denied the possibility of filing a further auxiliary request containing method claims 1 to 5 only (petition, point 4.2.13). Regardless of the question whether the right to be heard may imply the possibility to file additional requests under certain circumstances, the

Enlarged Board notes that the petitioners were given the opportunity to file additional requests after their main request was found to be unallowable under Article 123(2) EPC. The petitioners then filed their auxiliary request (including the amended product claim 6).

4.3.6 After the petitioners learnt that their main request and their auxiliary request (in their entirety) were not allowable or not admissible, respectively, they were asked for their final requests. They could not expect at this moment that the method claims of any of these requests would be discussed because the requests as a whole had been found to be unallowable or inadmissible. They could only confirm their requests, withdraw them and or file new requests. In view of this situation, a continuation of the oral proceedings could only have been possible if new requests had been filed.

4.3.7 Whether the petitioners still expected a discussion of the method claims or whether they had other reasons not to file a new request is irrelevant. The Boards of Appeal cannot speculate on the interests and intentions of the parties. If a request is unclear, the Board should ask for clarification. On the other hand, in view of the fairness owed to all parties, the Board may not hint at any amendments which might render the patentee's requests allowable (see T 492/00, point 15).

4.3.8 In the present case, it must have been clear to all parties that, after the Board gave its conclusions on all then pending requests and after the parties did not make any further requests, there was nothing left to discuss. The petitioners could not be surprised that their confirmed requests would be interpreted as their

final requests. The fact that the chairman also read out the opponent's request "that the decision under appeal be set aside and that the European patent be revoked" indicated beyond any reasonable doubt that the board was ready to give a final decision after the closure of the debate and a deliberation (see R 14/10, point 6).

- 4.3.9 The same arguments apply to the closure of the debate. The main request and the auxiliary request had been debated and the Board had given its conclusions. There was no other request pending to debate upon. The closure of the debate in this situation could only have been understood as the closure of the overall debate.
- 4.3.10 Even if the chairman had not asked explicitly for the final requests, the petitioners' confirmation of their already discussed requests could only be understood as identification of their final requests (determining the scope of the decision) since there was no need to discuss these requests anymore and there was also no need to discuss the requests of the other party (namely, the opponent's request that the decision under appeal be set aside and that the patent be revoked). From the fact that the petitioners did not make any reference to possible further requests, the Board had to conclude that the petitioners had no further requests, and the Board did not commit any procedural violation by not specifically asking for further auxiliary requests.
- 4.3.11 After examination of the facts appearing from the minutes of the oral proceedings before the Board and from the petitioners' presentation, the Enlarged Board found that the petitioners' right to be heard under Article 113 EPC clearly was respected and that there

was no act or omission of the Board which could be interpreted as a violation of Article 112a(2)(d) in combination with Rule 104(b) EPC. The petition is therefore to be rejected as clearly unallowable.

5. While the Enlarged Board did not decide whether the petition is clearly inadmissible (see above point 3.4), it found it to be clearly unallowable (see above point 4.3.11). The current composition of the Enlarged Board came to this conclusion unanimously, it could decide on the basis of the petition and without involvement of other parties (Rule 109(2)(a) and (3) EPC).

Order

For these reasons it is unanimously decided that:

The petition for review is rejected as clearly unallowable.

The Registrar

The Chairman

P. Martorana

W. van der Eijk