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**D E C I S I O N**  
**of 27 February 2002**

**Case Number:** T 0953/00 - 3.2.4

**Application Number:** 94904349.1

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**IPC:** A22B 3/00

**Language of the proceedings:** EN

**Title of invention:**  
Device for stunning of poultry

**Patentee:**  
STORK PMT B.V.

**Opponent:**  
NORSK HYDRO ASA  
Meyn Food Processing Technology B.V.

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 54, 56, 106 to 110 and 112  
EPC R. 36 and 64 to 66

**Keyword:**  
"Referral to the Enlarged Board of Appeal (refused)"  
"Appeal admissible (yes)"  
"Novelty (yes)"  
"Inventive step (yes)"

**Decisions cited:**  
-

**Catchword:**

-



Case Number: T 0953/00 - 3.2.4

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.4**  
**of 27 February 2002**

**Appellant:** STORK PMT B.V.  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 5 July 2000  
revoking European patent No. 0 680 259 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** c. A. J. Andries  
**Members:** R. E. Gryc  
H. Preglau

## Summary of Facts and Submissions

- I. The appellant (patent proprietor) lodged an appeal, received at the EPO on 4 September 2000, against the opposition division's decision revoking European patent No. 0 680 259 notified by post on 5 July 2000.

The appeal fee was paid on the same day and the statement setting out the grounds of appeal was filed on 3 November 2000.

- II. Oppositions were filed requesting revocation of the patent as a whole on the basis of lack of novelty and inventive step (Article 100(a) EPC). The opposition division held that lack of inventive step (Article 56 EPC) prejudiced the maintenance of the patent having regard to the following documents:

A1: EP-A-0 434 278 and

A6: JP-B2-61 42539 and its translation in English.

The following documents were also cited during the opposition proceedings:

A2B: US-A-4 107 818 and A2A: FR-A-2.334.296 (A2A and A2B both claiming the same priority.

A5: 1986 Report of the AVMA Panel on Euthanasia, JAYMA, vol. 188, No. 3, 1986, pages 252 to 268, and

A8: "Experimentation with in-line carbon dioxide immobilization of chickens prior to slaughter"- Kotula et al, 1960, US Dpt of Agriculture;

pages 213 to 216

III. With the statement setting out the grounds of appeal, the appellant pointed out the differences between the device of Claim 1 and the prior art disclosed in A1 and A2A/A2B and concluded that said device was new over said prior art.

According to the appellant, the problem to be solved by the skilled person starting from the installation according to A1 could be seen in providing an economical poultry stunning device where the stunning is reliable without discomfort for the poultry. As regards inventive step, the appellant contended in particular that A1 concentrated on oxygen-depleted atmospheres and focuses on stunning gases like argon and carbon dioxide but ignored the role of oxygen.

In his opinion, the skilled person would not combine the teachings of A2A/A2B with those of A1 mainly because A2A/A2B relates to the stunning of mammals and give no hint to the stunning of poultry and also because the device disclosed by A2A/A2B was for occasional single batch applications and not applicable in industry since gas losses through the open top of the chambers would be prohibitive in industrial applications.

In his reply, the respondent II (opponent II) contended first that the statement of grounds of the appellant was not signed and that the appeal should be thus rejected as admissible in application of Rule 65 EPC.

Respondent II also contended that there was no mention in the patent of applying control means in order to

secure that the concentration of gases in the chambers was controlled and maintained constant. He pointed out that the device of A1 comprised means to create an oxygen atmosphere in the first chamber of 14,7% by volume which should mean that this device was also suited to realise a concentration of 15% by volume of oxygen.

According to respondent II's opinion, all features of Claim 1 were known from A1 except the sealing means for sealing the openings of the first chamber. Considering that the objective problem with respect to A1 was to minimise the loss of stunning gas each time poultry enters or exits the chamber, respondent II found that it was obvious for the skilled person to simply seal off the chamber. In his opinion, the expert with ordinary skill would even the more do so when reading A6 since A1 and A6 were in the same field of technology and had the same objective; moreover A6 disclosed the application of sealing doors at both ends of the chamber.

Respondent II argued further that, in order to realise a specific concentration of oxygen in the first chamber of A1, the skilled person had two alternatives i.e. either to start with the ambient-air contained in the chamber and to add stunning gas to drive out sufficient air to attain the desired concentration of oxygen or to start with a stunning gas with no or little content of oxygen and to add oxygen. According to respondent II, both alternatives were known from A1 and to select one or the other specific solution from the two above alternatives available to the skilled person can be made without the exercise of inventive skill.

IV. Oral proceedings took place on 27 February 2002

Referring to Rule 36(3) EPC, respondent II objected again that the appellant's written statement setting out the grounds of appeal was not signed within the time limit settled in Article 108 EPC and that the appeal was therefore not admissible.

Respondent II further requested that, if the Board considers the appeal as admissible, the question of admissibility in this particular case be referred to the Enlarged Board of Appeal.

Respondent II was of the opinion that the particular use of the device of Claim 1 for stunning poultry cannot distinguish the device itself from the apparatus disclosed by A2B all the more since, according to A5, the six veterinarians of the Panel on Euthanasia considered small mammals and chickens at the same level and recommended CO<sub>2</sub> as euthanatizing agent for small laboratory animals, birds included. According to respondent II, when starting from the state of the art disclosed by A2B, the skilled person would have to solve two different problems i.e. to avoid loss of gas in the first chamber and to render the device of A2B suitable for industrial use and the solutions were to be found respectively in A6 and A1.

When starting now from A1, and the problem being to apply a certain level of oxygen for the comfort of poultry as recommended by A5, respondent II argued that the skilled person would find a solution in the combination of the teachings of A1 and A5 which both pointed in the same direction and led to the invention.

Respondent II contended that the use of sealing means was not essential since A2B disclosed a device having no sealing means although high level concentrations of oxygen were applied. He pointed also out that A5 was made by veterinary experts, that it gave an overview of the methods used for euthanasia, that these method were also conceived for industrial production and that increasing the percentage of oxygen to avoid discomfort was already recommended in A5.

Respondent II came thus to the conclusion that the subject-matter of Claim 1 was not inventive in view of A1 and A2B together with the teachings of A5 and A6.

The appellant contradicted the argumentation of respondent's II and emphasized that the invention did not concern euthanasia of any type of small animals as in A2B but the stunning of poultry in an industrial line of production. Therefore in his opinion, when starting from A1, the skilled person would not consult A2B let alone combine the teaching of A1 with the teaching of A2B whatever the teaching of A5 was.

V. Requests

At the end of the oral proceedings, the appellant (patentee) requested that the decision under appeal be set aside and that the patent be maintained as granted.

Respondent II (opponent II) requested that the appeal be dismissed. He requested referral of a question to the Enlarged Board of Appeal if the Board intended to consider the appeal to be admissible.

No request has been brought forward by respondent I



(opponent I).

VI. Claim 1 reads as follows:

"Device for stunning poultry, comprising a first chamber (23) and a second chamber (33) having one or more openings through which the poultry (8a, 8b, 8c, 8d) can be taken into the first and second chamber, respectively, and be removed therefrom, the first chamber (23) being provided with means (10) for feeding in a first stunning gas or gas mixture which is mixed with oxygen in a concentration of at least 15% by volume fed in by oxygen supply means, and the second chamber (33) being provided with means (10) for feeding in a second stunning gas or gas mixture, characterized in that the first chamber (23) comprises sealing means (20, 22) for generally sealing the openings of the first chamber (23), mechanical conveying means (2, 6; 70) being provided for taking the poultry into and out of the first (23) and second (33) chamber."

## **Reasons for the Decision**

1. Admissibility of the appeal.

In his letter of 7 May 2001, respondent II referred to Articles 108 to 110 and Rules 36(3), 65 and 66 EPC to support his request for rejecting the appeal as inadmissible on the ground of lack of signature on the statement setting out the grounds of appeal.

1.1 The Board cannot accept this request since the grounds for rejection of the appeal as inadmissible are cited in Rule 65 EPC and are limited to failure to comply

with Articles 106 to 108 and with Rule 1, paragraph 1 and Rule 64(a) and (b) EPC.

Since the present appeal complies with all the articles and rules cited in Rule 65 EPC, it is admissible.

1.2 Moreover, the Board has the following additional reasons for considering the appeal as admissible:

1.2.1 Rule 36(3) EPC states as a general principle applicable to all procedures before the European Patent Office that documents filed with this Office have to be signed. But this provision does not contain an obligation to sign on a particular place e.g. first or last page or every page. The reason to require a signature is to show clearly that the content of a document is authorised by the person who has filed it.

It is therefore up to the applicant to decide if he signs on the last page or if he signs - as done in the present case - on the front page, indicating additionally that the following pages are the statement of grounds, thus authorizing the text which can be read afterwards.

Furthermore, Rule 36(3) EPC also states, that an exception is made for annexed documents, which therefore do not have to be signed. In the present specific case, the signed cover letter dated 3 November 2000, twice refers to the annexed "Statement setting out the grounds of appeal", namely firstly in the body of that letter "... , please find enclosed a written Statement..." and secondly at the bottom of that cover letter, where the enclosures are indicated, namely "Encl.: Written Statement".

The written statement setting out the grounds of appeal was therefore not filed isolated but attached to and identified by the signed appellant's letter of 3 November 2000 and, at the reception at the Office, both letter and statement were perforated together with a single punch as pages of a single document. Also, solely the accompanying letter was stamped (EPO-DG1 03 11.2000) as the front page of a single document and said front page has been signed.

1.2.2 Also the notice from the EPO dated 2 June 1992 concerning the filing of patent applications and other documents (OJ EPO 92, 306 ff - see in particular section 3 entitled: "Signature") does not contain more or specific requirements as to where a signature has to be placed.

1.2.3 Moreover, it should be pointed out that even failure to sign a document is not critical since it is a deficiency which belongs to those which can be remedied within a time period laid down at any time by the Board itself (see for example Rule 36(3), second sentence EPC and Rule 65(2), first sentence EPC). As regards the present case, if the Board had considered the statement as inadmissible, it was to the Board's discretion to invite the appellant to sign the statement at any time during the appeal proceedings, even during the oral proceedings.

1.3 For the aforementioned reasons the Board saw no need for requiring another signature and has therefore decided to admit the present appeal as it was filed.

2. *Referral to the Enlarged Board of Appeal (Article 112 EPC)*

According to Article 112(1)(a) EPC, the Board of Appeal shall refer any question to the Enlarged Board of Appeal if it considers that a decision is required in order to ensure uniform application of the law, or if an important point of law arises. Therefore, referring a question to the Enlarged Board of Appeal is a matter within the judicial discretion of the Board.

Since, in the present case, the admissibility of the appeal depends on an alleged deficiency which in case of it were given could even be remedied at any time at the invitation of the Board itself, the Board does not consider this to be either an important point of law in the meaning of Article 112(1) EPC or a risk to jeopardize the uniform application of the law. Therefore, there is no need to refer a question in this respect to the Enlarged Board of Appeal.

Therefore, the Board rejects the request of referral.

3. *Interpretation of Claim 1*

The following phrase (see the specification: column 6, lines 16 to 19) of the preamble of Claim 1:

"means (10) for feeding in a first stunning gas or gas mixture which is mixed with oxygen in a concentration of at least 15% by volume fed in by oxygen supply means",  
should be interpreted as meaning implicitly that the feeding means (10) comprise not only oxygen supply means but also control means for controlling the concentration of oxygen in the gas mixture fed into the first chamber.

4. *Novelty of Claim 1 (Article 54 EPC)*

Lack of novelty was objected to Claim 1 by respondent I in his notice of opposition against A8.

It should be recalled that, when assessing novelty, even the slightest difference between the subject-matter of a claim and the state of the art disclosed in a single document should be taken into account to acknowledge novelty.

On the contrary, equivalents should not be taken into account according to established case law of the Boards of Appeal of the EPO.

In the present case, the device of Claim 1 comprises two separate chambers provided with two different atmospheres whereas A8 discloses a tunnel provided with a uniform stunning atmosphere maintained throughout the tunnel length.

Moreover, the device of Claim 1 comprises oxygen supply means which are not present in the experimental installation of A8 and the chutes at both ends of the tunnel of A8 maintaining the gas in the tunnel may possibly only be considered as equivalent to sealing means in the meaning of the invention.

Taking into account firstly the above arguments relating to A8 and secondly the other available prior art documents, the Board came to the conclusion that the subject-matter of Claim 1 is new in the meaning of Article 54 EPC.

5. *Closest prior art*

Among all the prior art documents cited during the proceedings, A1 is the sole document describing an installation for stunning poultry at an industrial scale comprising two distinct chambers each provided with a different atmosphere. Therefore, the Board considers that the state of the art disclosed in A1 is the closest to the invention.

The stunning device of Claim 1 differs from the stunning installation of A1 in that the first chamber is provided with:

- oxygen supply means,
- controlling means to control the concentration of oxygen in the chamber,
- a stunning atmosphere comprising at least 15% by volume of oxygen and
- sealing means at the openings thereof.

6. *Problem to be solved*

The problem to be solved by the invention is to increase the performances and to reduce the costs of the installation of A1.

This is obtained by the invention by using atmospheres with high concentrations of oxygen in the first chamber together with sealing means for reducing the quantity of atmosphere, rich in oxygen, swept out of the first chamber, in particular by the passage of the poultry through the chamber.

7. Inventive step (Article 56 EPC)

7.1 A1 relates to a method of treatment of birds essentially based on lack of oxygen in the atmosphere where the birds are placed (see A1: page 2, lines 16 to 19 and Claims 1 and 11). Accordingly, the apparatus used for implementing said method may comprise two separate chambers provided with different atmospheres for stunning and for killing, both atmospheres being oxygen-depleted (see A1: page 3, lines 11 to 15) and, in the chambers, fans may be used to help reducing local pockets rich in oxygen (see A1: page 3, lines 17 to 19). Throughout the description of A1, the general teaching is to reduce the concentration of oxygen in both the stunning and the killing atmospheres and to provide means for extracting air from the chambers receiving the poultry. Nowhere in this document is taught to increase the concentration of air, let alone the concentration of oxygen in the first chamber; on the contrary A1 teaches to provide the installation with means for forming oxygen-depleted atmosphere in order to induce hypercapnic anoxia in the poultry (see A1: page 2, lines 22 to 24 and 35 to 44).

Furthermore, the Board cannot accept that argument of the Respondent II, that A1 would disclose an oxygen supply means as one of two alternatives to create the controlled composition of the atmosphere. No such disclosure at all, either explicitly, or implicitly can be found in A1. Instead A1 is working with nitrogen, argon, other noble gases, carbon dioxide, and air, but not with oxygen as such.

7.2 Since the installation of A1 is an industrial fixed installation, adapted for continuous stunning of food

animals for human consumption on an industrial scale whereas A2B relates to a movable device conceived specifically for unitary euthanasia, one after the other (occasional single batch applications) of surplus animals not intended for human consumption (see A2B: column 4, lines 10 to 14), the skilled person starting from the installation of A1 and looking for increasing the performances and reducing the costs of such an industrial installation could not expect to find in A2B a solution to his problem and would have a priori no reason for consulting this document.

Assuming that he would nevertheless do so, the skilled person would not have been inclined to adopt and to transfer to the installation of A1 the technical measures taught by A2B because, for a skilled person, it does not make sense and is therefore not obvious to choose as a starting point an installation originally conceived for implementing specific technical measures (i.e. to reduce the oxygen concentration in order to induce hypercapnic anoxia in the poultry) and thereafter to modify the said freely chosen installation in order to make it suitable for implementing measures leading right in the opposite direction (i.e. to increase the oxygen concentration). Such an approach can only be the result of an ex-post-facto-analysis.

- 7.3 A5 (see page 261) reports and recommends the use of carbon dioxide only for euthanatizing small laboratory animals without any indication that the recommendations could be appropriate for industrial applications. Therefore, a priori, the skilled person would not expect finding in A5 informations suitable for improving an industrial installation for stunning food



animals, in particular poultry, in a continuous processing line of the type disclosed in A1.

7.4 Moreover, the other documents cited in the appeal proceedings concerning industrial processing of birds for human consumption (i.e. A6 and A8) disclose neither the use of an apparatus comprising two chambers with different atmospheres nor the supply of oxygen into the single chamber by supply means but, on the contrary, they teach (see A6: page 2 of the translation, lines 21 and 22 and A8: page 213, right-hand column, lines 21 to 26 and page 214, left-hand column) to supply carbon dioxide and to exhaust air from the processing chamber as according the general teaching of A1 (see section 7.1. above). Therefore, the skilled person would have a priori no reason for processing in contradiction to the teachings of all the documents A1, A6 and A8 concerned with industrial processing of birds, let alone to complicate the installation of A1 with additional and apparently unnecessary supply means for oxygen.

7.5 For all the aforementioned reasons, the Board considers that to improve the device of A1 according to the teaching of Claim 1 does not follow plainly and logically from the cited prior art and that the subject-matter of Claim 1 involves an inventive step in the meaning of Article 56 EPC.

8. Therefore, the opposed European patent No. 680 259 complies with the requirements of the EPC and can be maintained as granted.

**Order**

**For these reasons it is decided that:**

1. The request for referral to the Enlarged Board of Appeal is refused.
2. The decision under appeal is set aside.
3. The case is remitted to the first instance with the order to maintain the patent as granted.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries