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D E C I S I O N
of 27 April 2004

Case Number: T 0621/02 - 3.2.7

Application Number: 97922281.7

Publication Number: 0907560

IPC: B65B 5/06

Language of the proceedings: EN

Title of invention:

Method and apparatus for packaging series of articles in
different formations

Applicant:

Nor-Reg AS

Opponent:

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Headword:

-

Relevant legal provisions:

EPC Art. 96(2), 113(2)

EPC R. 67

RPBA Art. 10

Keyword:

-

Decisions cited:

-

Catchword:

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Case Number: T 0621/02 - 3.2.7

D E C I S I O N
of the Technical Board of Appeal 3.2.7
of 27 April 2004

Appellant: Nor-Reg AS
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 13 December 2001
refusing European application No. 97922281.7
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: A. Burkhart
Members: H. E. Felgenhauer
E. Lachacinski

Summary of Facts and Submissions

- I. The appellant (applicant) filed an appeal against the decision of the Examining Division refusing the European patent application No. 97 922 281.7.

The Examining Division held that the subject-matter of claim 1 did not satisfy the requirement of Article 123(2) EPC. Introduction of the term "above" into the feature "a stop zone (8) above the discharge end of each conveyor (2)" has been understood as defining that a space exists between an article transferred and the associated conveyor. Based on this understanding this feature has been found as leading to the subject-matter of claim 1 extending beyond the content of the application as filed.

The Examining Division further held that the subject-matters of claims 1 and 3 do not involve an inventive step.

- II. An appeal has been filed against this decision requesting that the decision under appeal be set aside and a patent be granted
- (i) based on claims 1 to 17 filed with letter dated 9 February 2001 (main request);
 - (ii) based on claims 1 to 17 filed with the statement setting out the grounds of appeal (auxiliary request I);

(iii) on an amended claim 3 comprising the features of claims 3 and 8 and a correspondingly amended claim 1 (auxiliary request II).

(iv) Furthermore, it has been requested to reimburse the appeal fee and, auxiliary, that

(v) oral proceedings be held.

III. The only prior art document referred to in the decision under appeal is document

D1: GB-A-1 457 624.

IV. Claims 1 and 3 underlying the decision under appeal (main request) read as follows:

"1. Method of packaging series of articles (3) in different formations, whereby articles for each formation (71) are being fed on two longitudinal conveyors (2) in mutually opposite directions (69, 70) towards a common receiving zone (6), on the way to which they are stopped in a stop zone (8) above the discharge end of each conveyor (2), where the articles (3) firstly are stopped by stop means (7-11), then are transferred laterally to said receiving zone (6) for collecting and stacking of articles (3), where alternating articles from both conveyors are stopped for collecting a stack (72) of two formations of articles (3), whereby they are stopped and adjusted in their position by receiving and positioning means (17-22), whereupon the so stopped and adjusted articles are released individually or pairwise in a first collecting step (25), and then are handed over to and are

completed to a stack (72) in a second collecting step (34), whereupon a so collected stack (72) is moved onwards for further handling and packaging, the said onward movement being carried out during the said first collecting step."

"3. Apparatus (1) for carrying out the method according to claim 1 or 2, comprising means for packaging series of articles (3) in different formations (71), wherein articles for each formation (71) are provided to be fed in mutually opposite directions (69, 70) by longitudinal conveyors (2) located on the same level towards a common receiving zone (6) for collecting and stacking of articles (3), where alternating articles from both conveyors (2) are provided to be stopped for collecting a stack (72) consisting of two formations (71) of articles, whereupon a so collected stack (72) is provided to be moved onwards for further handling and packaging, characterized in that actuating means (7) are located across the discharge end of each conveyor establishing a stop zone (8) for stopping articles, each actuating means comprising a stop plate (9), that in front of each stop plate (9), upstreams of each conveyor, there is provided at right angle across and above the latter a lateral conveyor (15) having carrier plates (16) for transferring said stopped articles (3) laterally to said receiving zone (6), where said articles are provided to be stopped and adjusted in their position by receiving and positioning means (17-22), which are provided to release said stopped and adjusted articles (3) individually or pairwise to first collecting means (25) cooperating with second collecting means (34) for collecting further articles for a complete stack (72), and that there are means for

carrying out the said onward movement during the operation of the said first collecting means."

V. The appellant argued essentially as follows:

- (i) The appeal fee should be reimbursed since the decision under appeal is premature, unjustified and in disagreement with a cooperative examination practice.
- (ii) The term "above" upon which the objection in view of Article 123(2) EPC has been based has led to an absurd understanding of the corresponding feature.

The argumentation of the appellant given in this respect in the letter dated 9 February 2001, which clearly indicates that the term "above" relates to the definition of the position of the stop zone, whereas the articles are clearly defined as being fed on the corresponding conveyor, has been completely ignored.

- (iii) Likewise the declaration in the letter dated 09 February 2001, indicating that the applicant agrees to the term "above" being replaced by e.g. the term "across", which is clearly disclosed in the application as filed, has been completely ignored.
- (iv) As far as the decision relates to the examination of inventive step of the method and the apparatus according to claims 1 and 3, it reveals that the invention, which concerns packaging series of

articles in different formations, has not been understood appropriately.

(v) In the decision document D1 has been considered as disclosing a method and an apparatus concerning packaging series of particles in different formations, which is clearly not the case since according to this document articles are collected in a uniform way. Consequently the apparatus according to this document is not suited for packaging series of articles in different formations as asserted in the decision under appeal.

(vi) In case it being required, amendment of the claims to clarify the expression "different formations" as well as the expression "second collecting means" is agreed upon.

Reasons for the decision

1. *Original disclosure (Article 123(2) EPC)*

Claim 1 according to the main request comprises the feature "a stop zone (8) **above** the discharge end of each conveyor (2)" which according to the decision under appeal does not satisfy the requirements of Article 123(2) EPC, due to the term "above" being introduced into this feature.

1.1 In this decision this feature has been understood as defining that articles stopped in the stop zone are not **on** but "above" the conveyor, the term "above" defining

that there is a space between the transferred article and the conveyor. Based on such an understanding the conclusion has been drawn that this feature leads to a method extending beyond the content of the application as filed, according to which articles are fed on conveyors and not spaced above them.

- 1.2 This understanding does not take into account that, as indicated by the applicant in its letter dated 9 February 2001 in great detail (cf. paragraph bridging pages 1, 2), the feature concerned defines the position of the stop zone. It further does not take into account that this feature is preceded in claim 1 by a feature defining the manner in which the articles are fed and thus the relationship between an article fed and the associated longitudinal conveyor. According to this feature "... articles ... being fed **on** two longitudinal conveyors (2) ..." are according to the feature concerned "stopped in a stop zone (8) **above** the discharge end of each conveyor".

Thus claim 1, as pointed out by the applicant (letter dated 9 February 2001, paragraph bridging pages 1, 2), clearly defines that articles are fed on conveyors and not spaced above them. This corresponds to the manner in which the relationship between an article and the associated conveyor is described and shown in the drawings of the application (cf. e.g. page 7, lines 29 to 32; Figures 1 to 3).

- 1.3 The reason given in the decision under appeal for claim 1 not satisfying the requirement of Article 123(2) EPC is thus not a valid one, since with respect to the feature concerned it has not been examined whether or

not the expression "stop zone (8) above the discharge end of each conveyor" satisfies in its correct meaning, as defining the position of the stop zone with respect to the discharge end of a conveyor, the requirement of Article 123(2) EPC.

2. *Procedural violation*

2.1 Within its letter dated 9 February 2001 the applicant, in an attempt to overcome the objections raised in the only communication of the Examining Division, gave comprehensive explanations as to the meaning of the feature comprising the term "above" and its disclosure in the application as filed.

Furthermore the applicant agreed to the term "above" being replaced by the term "across" (cf. letter dated 9 February 2001, page 2, first paragraph). This agreement has been clearly expressed and the subject-matter of a correspondingly amended claim 1 has been clearly defined, such that in the sense of an auxiliary request a further amended claim 1 has been defined by the applicant. As indicated by the applicant in its letter dated 9 February 2001 the term "across" agreed upon is explicitly disclosed in the application as filed (cf. page 3, lines 3, 4). A claim 1 comprising the feature agreed upon thus gives a new basis for an examination concerning the objection based on the requirement of Article 123(2) EPC.

The decision under appeal does not show that such a claim 1 has been considered, as would have been required according to the Guidelines (cf. Guidelines 1999, C-VI, 4.1) and Article 113(2) EPC. Failure to

consider such a claim 1 thus constitutes in the opinion of the Board a substantial procedural violation with respect to one of the grounds for refusal referred to in the decision (reasons, No. 1).

- 2.2 The Board furthermore considers the applicant's reply (letter dated 9 February 2001) as a bona fide attempt to deal with the objections raised by the Examining Division in its single communication. Despite this response of the applicant it has immediately been decided to refuse the application. Under these circumstances, however the established practice of the Examining Divisions, as set out in the Guidelines (Guidelines 1999, C-VI, 4.3), requires that "the examiner should not refuse immediately but should warn the applicant; e.g. by a telephone conversation or by a short further written action, that the application will be refused unless he can produce further more convincing arguments or makes appropriate amendments within a specified time limit."

Moreover according to the Guidelines (July 1999, C-VI, 4.3) only in the case, being considered as exceptional, that "the applicant has not made any real effort to deal with these objections, the examiner should consider recommending to the other members of the Examining Division that the application be refused immediately."

Consequently, in the present case, the immediate refusal of the application without any prior warning to the applicant constituted a further substantial procedural violation within the meaning of Rule 67 EPC in view of Article 96(2) EPC.

3. *Remittal to first instance*

Due to the substantial procedural violations indicated above the decision must be set aside and the case be remitted to the Examining Division for further examination of the application (cf. Article 10 of the Rules of Procedure of the Boards of Appeal), on the basis of claims 1 to 17 according to the main request and the sets of revised claims according to the auxiliary requests as filed with the statement setting out the grounds of appeal.

4. *Reimbursement of appeal fee*

The substantial procedural violations (point 2 of the reasons) lead to reimbursement of the appeal fee being equitable. The request of the appellant for reimbursement of the appeal fee is thus allowed.

5. *Further examination*

- 5.1 Concerning the further examination of the application, with respect to the second ground for refusal of the application, namely lack of inventive step (reasons, Nos. 2 and 3) it is observed, that the feature of claim 3, according to which the apparatus comprises "means for packaging series of articles (3) in different formations" has not been taken into account appropriately.

According to the description the feature "packaging series of articles in different formations" concerns "articles ... being packed in two formations abutting

and/or overlapping each other within an outer wrapping or package, preferably a carton which may be torn apart into two parts, each of which is holding one of said formations of articles, which thus won't have to be rearranged upon opening said carton or the like, but are ready for display, sale and use in this fashion" (cf. page 1, lines 16 to 22; page 7, lines 20 to 27). A stack to be collected by the apparatus according to claim 3, which thus comprises "two formations (71) of articles" is clearly shown in Figures 1, A, B and C of the application.

5.2 In order to be able to collect such a stack the apparatus according to claim 3 comprises

- (a) "means for packaging series of articles (3) in different formations (71)
- (b) wherein articles for each formation (71) are provided to be fed in mutually opposite directions (69, 70) by longitudinal conveyors (2) located on the same level towards a common receiving zone (6) for collecting and stacking of articles (3), where
- (c) alternating articles from both conveyors (2) are provided to be stopped for collecting a stack (72) consisting of two formations (71) of articles".

5.3 According to the decision under appeal document D1 constituting the closest prior art discloses an apparatus comprising means suitable for packaging series of articles in different formations (reasons, No. 2.1).

As indicated by the appellant, Figures 1 and 3 of document D1, to which the decision under appeal refers to, do not, contrary to feature a), relate to an apparatus for packaging articles in a stack of the kind referred to in claim 3, since according to this document each layer of a stack consists of articles fed by a single conveyor with the result that the articles are arranged in a uniform manner and not in two formations (cf. document D1, e.g. Figures 1, 2).

Within the apparatus according to document D1 articles for each layer of a stack, within which these articles are uniformly arranged, are fed in the same direction by one of the longitudinal conveyors 25, 27, 29, 31 provided on different levels. Thus contrary to the apparatus according to claim 3 the longitudinal conveyors are not located on the same level and thus do not feed articles towards a common receiving zone for collecting and stacking articles, where alternating articles from both conveyors are provided to be stopped.

Due to these differences it appears to be doubtful whether the apparatus according to document D1 can be considered as comprising means suitable for packaging series of articles in different formations as indicated in the decision under appeal (reasons, No. 2.1).

Furthermore in view of the difference concerning the stacks to be collected according to claims 1 and 3 and according to document D1 it appears to be doubtful, whether the features distinguishing the apparatus according to claim 3 from the one according to document D1 can be considered as straightforward design possibilities (reasons, no. 2.1).

5.4 Taking the above considerations into account the Examining Division will also have to decide on whether the claims as such are clear, e.g. with respect to the reference to the "two formations of articles" referred to, or whether clarification, e.g. as agreed upon by the appellant (statement setting out the grounds of appeal, page 4, paragraphs 3 and 5), is required.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution.
3. Reimbursement of the appeal fee is ordered.

The Registrar:

The Chairman:

G. Nachtigall

A. Burkhardt