

**Internal distribution code:**

- (A)  Publication in OJ  
(B)  To Chairmen and Members  
(C)  To Chairmen  
(D)  No distribution

**D E C I S I O N**  
**of 14 December 2005**

**Case Number:** T 0501/03 - 3.3.09

**Application Number:** 94300676.7

**Publication Number:** 0613772

**IPC:** B32B 27/30

**Language of the proceedings:** EN

**Title of invention:**  
Tough heat shrinkable film structures

**Patentee:**  
AMERICAN NATIONAL CAN COMPANY

**Opponent:**  
Cryovac, Inc.

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 123(2)(3)

**Keyword:**  
"Amendments - added subject-matter (no) - broadening of claim  
(no) "  
"Opposition withdrawn"

**Decisions cited:**  
-

**Catchword:**  
-



Case Number: T 0501/03 - 3.3.09

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.09  
of 14 December 2005

**Appellant:** AMERICAN NATIONAL CAN COMPANY  
(Proprietor of the patent) 8770 West Bryn Mawr Avenue  
Chicago IL 60631-3542 (US)

**Representative:** MacGregor, Gordon, et al  
Eric Potter Clarkson  
Park View House  
58 The Ropewalk  
Nottingham NG1 5DD (GB)

**Respondent:** Cryovac, Inc.  
(Opponent) 100 Rogers Bridge Road  
Building A  
Duncan  
South Carolina 29334-0464 (US)

**Representative:** Franck, Peter  
Uexküll & Stolberg  
Patentanwälte  
Beselerstr. 4  
D-22607 Hamburg (DE)

**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 17 March 2003  
revoking European patent No. 0613772 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** P. Kitzmantel  
**Members:** A.-T. Liu  
K. Garnett

## Summary of Facts and Submissions

I. European patent No. 0 613 772 was revoked by decision of the opposition division dated 17 March 2003, following an opposition filed on the grounds of Article 100(a), (b) and (c) EPC.

II. The decision was based on claims 1 to 13 as granted, with Claim 1 worded as follows:

"An irradiated multiple layer polymeric film comprising :

(a) an outer protective layer comprised of a blend of from 80% to 90% ethylene vinyl acetate and from 10% to 20% of a material selected from ultra low density polyethylene, low density polyethylene, linear low density polyethylene, very low density polyethylene and ionomers, and;

(b) an inner heat sealant layer made of different polymer to that of the outer protective layer, and which comprises a copolymer comprising at least 50% ultra low density polyethylene, low density polyethylene, linear low density polyethylene, very low density polyethylene, and ionomers,

wherein said inner heat sealant layer has a dose level of incipient cross-linking higher than the dose level of incipient cross-linking of said outer protective layer, said film being irradiated at a dose level between 1.5 and 10 megarads such that at a given radiation dose level said outer protective layer

undergoes more cross-linking than said inner heat sealant layer."

- III. In essence, the opposition division held that the following feature in Claim 1 as granted contravened the requirements of Article 123(2) EPC:

"an inner heat sealant layer ... which comprises a copolymer comprising at least 50% ultra low density polyethylene, low density polyethylene, linear low density polyethylene, very low density polyethylene, or ionomers".

On the other hand, the opposition division exposed the view that the grounds of opposition under Articles 100(a) and (b) would not seem to prejudice maintenance of the patent in suit.

- IV. Notice of appeal by the patentee was received on 29 April 2003. With the Statement of the grounds of appeal dated 21 July 2003, the appellant submitted an amended Claim 1 as basis for an auxiliary request.
- V. By letter of 7 January 2004, the respondent - opponent reiterated its objection based on Article 123(2) EPC. In support of its interpretation of the subject-matter of Claim 1, it submitted excerpts from two dictionaries containing an entry for the word "comprise". In addition, it was requested that the board issue a communication in case it intended to consider the grounds of opposition based on Articles 100(a) and (b) EPC.

- VI. With a summons dated 14 July 2005, the parties were informed that oral proceedings were scheduled to take place on 18 October 2005.
- VII. In a letter dated 7 September 2005, the respondent withdrew its opposition against the European patent and indicated that it would not attend the oral proceedings.
- VIII. In its communication dated 28 September 2005, the board expressed its preliminary view that the subject-matter of Claim 1 according to both the patentee's main and auxiliary requests did not comply with the requirements of Article 123(2) EPC. With reference to the observations in the decision under appeal, it also indicated that the maintenance of the patent could be envisaged once this objection was overcome.
- IX. By letter dated 13 October 2005, the appellant requested that the oral proceedings be cancelled and submitted a set of 12 claims comprising a new Claim 1 as the basis for its sole request.

The amendment to Claim 1 concerned the composition of the inner heat sealant layer which as now defined "is comprised of at least 50% ultra low density polyethylene, low density polyethylene, linear low density polyethylene, very low density polyethylene, and ionomers".

- X. In a communication dated 14 October 2005, the parties were informed that the oral proceedings scheduled for 18 October 2005 were cancelled and that the procedure would be continued in writing.

XI. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of Claims 1 to 12 submitted by letter dated 13 October 2005.

In withdrawing its opposition, the former opponent - respondent has ceased to be party to the proceedings.

## Reasons for the Decision

### 1. *Amendments*

Claim 1 is essentially directed to an irradiated multiple layer polymeric film comprising an outer protective layer of a blend of polymer and an inner heat sealant layer made of a different polymer. Specifically, according to present Claim 1, the **inner heat sealant layer is comprised of at least 50%** (emphasis added) ultra low density polyethylene, low density polyethylene, linear low density polyethylene, very low density polyethylene, and ionomers (see point IX above).

1.1 The Board accepts that the present definition of the inner heat sealant layer is fairly based on the application document as filed (page 10, lines 11 to 13). The amended Claim 1 therefore satisfies the requirements of Article 123(2) EPC.

1.2 Claim 1 as granted stipulated that the **inner heat sealant layer "comprises a copolymer comprising at least 50%** (emphasis added) ultra low density polyethylene, low density polyethylene, linear low

density polyethylene, very low density polyethylene, and ionomers". The open definition of the inner heat sealant layer (which "comprises a copolymer comprising ...") allows for inner heat sealant layers which incorporate ("comprise") an undefined quantity of any other (also undefined) material in addition to the stipulated copolymer. In such a case, the inner heat sealant layer could contain in total less than 50% of the specified polymer(s).

In contrast, the subject-matter of present Claim 1 is restricted to an irradiated multiple layer polymeric film with an inner heat sealant layer which contains in total at least 50% of the specified polymer(s) ("inner heat sealant layer ... comprised of at least.."). Those embodiments in which the inner heat sealant layer do not contain at least 50% of the specified polymer are thus no longer encompassed by the wording of amended Claim 1. The subject-matter of present Claim 1 being more restricted with respect to Claim 1 as granted, the amendments are also in compliance with Article 123(3) EPC.

2. Present dependent Claims 2 to 12 correspond to Claims 2 to 4 and 6 to 13 as granted. The compliance of these claims with the requirements of Article 123(2) EPC has never been questioned. The board does not see any reason for deviating from this view.
  
3. In the decision under appeal, it was remarked that the state of the art cited by the respondent did not support the opposition ground under Article 100(a) EPC. Furthermore, it was also accepted that the claimed invention was disclosed in a manner sufficiently clear

and complete for it to be carried out by the person skilled in the art. The opposition ground under Article 100(b) EPC was therefore held to be unfounded (see page 6 of the decision under appeal). In appeal, the respondent has not submitted any arguments to rebut these findings. Moreover, it withdrew its opposition by letter of 7 September 2005 (see point VII above). Under these circumstances, the board does not see any reason for continuing the opposition proceedings of its own motion.

## **Order**

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

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent based on the following documents:
  - Claims 1 to 12, filed with the submission dated 13 October 2005
  - Description, page 2 to 17 of the patent specification,
  - Figures 1 to 6 of the patent specification.

The Registrar:

The Chairman:

G. Röhn

P. Kitzmantel