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**Datasheet for the decision
of 12 February 2009**

Case Number: T 1057/06 - 3.4.02

Application Number: 97943971.8

Publication Number: 0931245

IPC: G01G 15/00

Language of the proceedings: EN

Title of invention:

Apparatus and method for processing articles

Patentee:

Linco Food Systems A/S

Opponent:

Meyn Food Processing Technology B.V.

Headword:

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Relevant legal provisions:

-

Relevant legal provisions (EPC 1973):

EPC Art. 100(a), (b)

Keyword:

"Sufficiency of disclosure: yes"
"Novelty and inventive step: yes"

Decisions cited:

-

Catchword:

-



Case Number: T 1057/06 - 3.4.02

D E C I S I O N
of the Technical Board of Appeal 3.4.02
of 12 February 2009

Appellant: Linco Food Systems A/S
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 23 May 2006
revoking European patent No. 0931245 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: A. Klein
Members: M. Stock
C. Rennie-Smith

Summary of Facts and Submissions

- I. The appellant and patent proprietor lodged an appeal against the decision of the opposition division revoking European patent number 0 931 245 (application number 97 943 971.8).
- II. Opposition had been filed against the patent as a whole, based on the grounds under Article 100(a) EPC 1973 that the subject-matter of the patent was not new and did not involve an inventive step (Article 52(1) EPC 1973 in connection with Articles 54(1) and 56 EPC 1973, respectively), and under Article 100(b) EPC 1973, that the patent did not disclose the invention in manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

The opposition division reasoned that the subject-matter of claim 1 as granted (main request) was sufficiently disclosed. However, it was found that this subject-matter as well as that of two auxiliary requests was not novel. A third auxiliary request was not admitted into the proceedings because it was filed late and clearly not allowable under Articles 123(2) and 84 EPC 1973.

Reference was made to the following documents:

- D1: US-A-5 004093
D2: US-A-3 944 078
D3: Stork brochure: Poultry Processing International, VIV Special, November 1990, pages 1 and 3
D4: Stork brochure: Poultry Processing International, VIV Special, September 1992, pages 1, 8 and 9
D5: NL-A-1 000 029

- D6: EP-A-0 736 255
- D7: Letter to EPO dated February 9, 1999
- D8: EP-A-0 496 083
- D9: W089/05444
- D10: US-A-4163488
- D11: W094/15726
- D12: US-A-2 471 711
- D13: CH-A5-647 865
- D14: US-A-4 770 260
- D15: US-A-3 291 303

III. In its statement of grounds of appeal the appellant and patent proprietor requested that the patent be maintained as granted (main request), or in amended form on the basis of amended claims according to an auxiliary request. Oral proceedings were requested, should the Board decide not to maintain the patent as granted.

The patent proprietor's arguments in support of novelty of the claimed subject-matter can be summarised as follows:

The weigh stations disclosed in D2 cannot be considered as transfer means in the sense of the present claims, which are provided as separate devices on which the articles are weighed while they are split into two streams. In D2 the weighing occurs prior to a splitting action as the weighing is performed to decide whether some of the articles should be released from the conveyor.

The grading effected in a weigh station cannot be compared with the splitting of the articles into two

streams according to the present invention, where all articles after passage of the transfer means will be replaced on empty article carriers on the same conveyor or on a separate conveyor. Articles dropped into a bin from a conveyor as in D2 do not constitute a stream. Moreover, the correct manner of interpreting D2 is to consider the articles on the conveyor arriving at a weigh station and the weighing process performed during the passage through the weigh station. The weighing performed in the next station, e.g. weigh station 30, is to be evaluated based on the articles arriving at the station. Whatever takes place in other preceding handling units, e.g. in weigh station 26, should not be of interest. As a matter of fact D2 does not disclose that articles are necessarily released in weigh station 26. D2 only discloses that it is possible to release the articles. Accordingly, D2 does not disclose splitting the articles into two streams.

Even though some articles should have been removed from the conveyor prior to arrival at a weigh station, such articles (which are led into a bin or another kind of container) cannot be considered to constitute a stream. Even after the passage of a first weigh station, D2 only discloses articles in one stream. Accordingly, the invention as defined in the independent claims 1 and 16 is novel.

IV. The argumentation of the respondent and opponent as set out in its reply to the appellant's statement of grounds of appeal is summarised as follows:

The reasoning of the opposition division in favour of sufficiency of disclosure is erroneous in view of the

fact that the main claim clearly features that each article must be weighed on the transfer means while the articles are split into two streams. The word "while" clearly links the weighing activity regarding the articles to the splitting of the articles into two streams. The essence of the invention therefore relates to not simply weighing per se but to weighing in motion. The common general knowledge of the skilled person, whatever the content of this knowledge may be, does not fill the gap that the patent-in-suit leaves as to the missing disclosure of how this weighing in motion should be executed. This disclosure-gap cannot be filled with reference to patent literature such as the seven patent citations that the proprietor mentioned in a letter to the opposition division. Such patent specifications cannot contribute to sufficiency of disclosure; only textbooks showing the content of what constitutes common general knowledge could fill this gap. In particular, since weighing on the transfer means is the only feature that differentiates the patent-in-suit from the prior art, this is an essential feature which may therefore not be dispensed with in the disclosure of the invention as provided by the patent-in-suit as a whole.

The opponent further expressed its agreement with the opposition division's view concerning lack of novelty of the claimed subject-matter in view of document D2. Should the Board of appeal, however, reverse the appealed decision, it requested that the case be remitted to the opposition division for further decision on novelty over the other pieces of prior art and on inventive step.

V. In an annex to the summons to the oral proceedings requested by both parties, the Board made preliminary non-binding comments.

Sufficiency of disclosure primarily was a requirement which relates to the application as a whole. However, when there is a discrepancy between the description and the claims as granted, the resulting lack of clarity could be objected to under Article 83 EPC 1973. It appeared that there was no such discrepancy between the claims and the description as granted. The actual weighing was not explained in the present patent. Therefore it should be discussed at the oral proceedings whether the skilled person knew what kind of weighing apparatus was suitable for carrying out the weighing in the corresponding position on the rotatable member.

The Board provisionally considered that in D2 the poultry carcasses held by carriers were weighed at a "standard weight sorting station 26" and above a certain weight were released from the carrier and dropped into a bin. In contrast to this, claim 1 according to the main request defined "at least one transfer means to split the succession of articles into at least two streams" and further comprised "means to weigh each article on the transfer means while the articles are split into the two streams". Therefore the Board stated that it was inclined to conclude that the subject-matter of claim 1 according to the main request is new over D2.

Under "Procedural issues" the Board stated that in the impugned decision the opposition division had neither

decided on novelty nor inventive step of the claimed subject-matter. The opponent's request that the case be remitted to the opposition division for resolving these issues was noted. However, the right was reserved to decide on all issues at the oral proceedings.

- VI. After the discussion of the issues of sufficiency of disclosure and novelty at the oral proceedings held on 12 February 2009, the Board mentioned that lack of an inventive step had been substantiated by the opponent only with respect to the dependent claims in its notice of opposition. The proprietor submitted that it would not give its approval to the introduction of this ground. The opponent stated that it would not pursue this matter any further.

At the end of the oral proceedings the proprietor confirmed its requests to maintain the patent unamended (main request) or in amended form on the basis of claims submitted during the oral proceedings (auxiliary request).

The opponent requested that the appeal be dismissed. It withdrew its earlier request to refer the case back to the opposition division (see point IV above).

- VII. Claims 1 and 16, the only independent claims according to the patentee's main request read as follows:

"1. Apparatus for processing articles (10) moving in succession along a path, the apparatus comprising conveyor means (14, 16, 21, 23) arranged to convey a succession of articles along the path, at least one transfer means (19a, 19b, 19c, 26, 27, 28) to

split the succession of articles into at least two streams, and means (19a, 19b, 19c, 28) to weigh each article on the transfer means while the articles are split into the two streams.

16. A method of processing articles moving in succession along a path, comprising conveying the articles in succession along the path, splitting the succession of articles into at least two streams using at least one transfer means, and weighing each article on the transfer means while the articles are split into the two streams."

Reasons for the Decision

Sufficiency of Disclosure

1. According to the wording of claim 1 as supported by the description, paragraphs 0009, 0014 and 0026 of the present patent there is "at least one transfer means to split the succession of articles into at least two streams, and means to weigh each article on the transfer means while the articles are split into the two streams".
2. According to an embodiment defined in claim 5 and the description, see paragraph 0014, the transfer means comprises a mechanism operable to release an article from a first article carrier, swing the article in a weighing position, and then swing the article in another position in which it is placed on a second carrier".

3. In paragraphs 0031 to 0033 related to Figure 2 it is outlined that each of the three transfer devices is a rotatable member having two handling devices, one of which lifts the article clear of its carrier, the rotatable member then rotating through 90° and moving the article into a position where it can be weighed, and the other handling device bringing the article to a conveyor and replacing it on an empty carrier.

4. The actual weighing is not explained. However, in the Board's view, the skilled person would know what kind of weighing apparatus is suitable for carrying out the weighing in the corresponding position on the rotatable member.

5. The opponent argued that the essence of the invention was related to the weighing in motion. The common general knowledge of the skilled person did not fill the gap left by the patent-in-suit as to how this weighing in motion should be executed. This gap could not be filled by patent literature as cited by the proprietor. Only textbooks constituted common general knowledge. Document D1 cited in the introduction of the present patent, see paragraph 0009, correctly reflected the present situation. Whereas in paragraphs 0014 and 0031 to 0033 the position of the articles was described, in which they are weighed, the actual weighing was not described, in spite of the fact, that it was not trivial to weigh in motion with reasonable accuracy. This remained a wish or a desire and put an undue burden on the skilled person trying to work the patent. The seven documents cited by the proprietor for proving that weighing in motion was common, either showed that it was obvious to employ this technique or, if it were

not obvious, that there was not sufficient information in the present patent. Therefore, the subject-matter of the present patent suffered either from a lack of an inventive step or from insufficiency of disclosure.

6. This argument could not, however, convince the Board. It is essential in the context of the present patent to split the succession of articles into several streams by means of transfer means which temporarily store the articles and on which they are weighed. This has the advantage of allowing more time for weighing each article, even when the articles are moving at high speed, and minimises interference between the articles, see description of the present patent, paragraph 0010. The Board cannot see that a skilled person had any difficulty in selecting weighing means suitable to carry out weighing on the transfer device, which e.g. is a turntable with a corresponding mechanism. The opponent did not provide any evidence showing that standard weight detecting means could not be used on conveyors. The Board accepted the argument of the proprietor that in the present technical field, in which there are a limited number of competitors, no suitable textbooks were available. Accordingly, common general knowledge was provided by a rather limited number of documents including those brochures and patent documents which were cited by the opponent against novelty of the claimed subject-matter and disclose suitable transferring and weighing means, e.g. the rehangers with weighing units of documents D3 and D4.

7. Therefore the Board is satisfied that the subject-matter of the patent can be carried out by a skilled person.

Novelty

8. Employing the terminology used in claim 1 according to the main request, Document D2, see Figure 1 with the associated description, discloses an apparatus for processing articles (poultry or birds) moving in succession along a path, the apparatus comprising conveyor means (10) arranged to convey a succession of articles along the path.
9. In D2 the birds held by carriers are weighed at a standard weight sorting station 26 and above a certain weight are released from the carrier and dropped into a bin. Thus even if, following the opponent's approach, one considered the selection and separation of birds according to their weight as disclosed there to form some kind of "splitting", such splitting can only result from - and therefore follows - the weighing operation. In contrast to this, present claim 1 clearly defines at least one transfer means to split the succession of articles into at least two streams and further means to weigh each article on the transfer means while the articles are split into the two streams, which can only reasonably mean that the articles are already on the transfer means in a split arrangement when they are weighed.
10. Therefore the Board concludes that already by virtue of this fundamental difference the subject-matter of claim 1 according to the main request is not anticipated by

- document D2. Accordingly, it is necessary to investigate whether this subject-matter is disclosed by other documents cited during the proceedings.
11. The opponent made reference to documents D3 to D6 and submitted that they are even more pertinent than D2. D3 discloses several conveyor lines for processing poultry on selected and non-selected "rehangers". Non-selected rehanging is effective on all poultry, e.g. pre-chilling in a water bath, whereas selected rehanging is responsive to a specific command, e.g. depending on weight. The rehangers can be considered as the transfer means defined in the contested claim since weighing and rehanging is performed in an integrated fashion as is also confirmed by D4.
 12. In the opponent's view Figure 3 of the contested patent actually shows a known non-selected rehanger, because all poultry is treated on one single transfer device. Such a transfer device (21) arranged between conveyors (3 and 10) is also described in D6 (see Figures 1 and 2 with the associated description), which corresponds to the prepublished document D5. All poultry is transferred from conveyor 3 to conveyor 10 by the transfer device 21 which also employs means to weigh all poultry as in the contested patent.
 13. However, apart from the fact that what must be examined for novelty is the subject-matter defined in the claims and not the disclosure of a particular figure, the Board can also accept the proprietor's argument that, even though Figure 3 of the contested patent is designated as "a diagrammatic plan view of a further embodiment", it is clear from paragraphs 0037

and 0038 of the description that Figure 3 illustrates only how the arrangement shown in Figure 2 is modified in order to transfer poultry from one conveyor (21) to a second separate conveyor (22) rather than back to the same conveyor as in Figure 2. The Board in this respect also notes that a combined reading of paragraph 0036 of the patent, which refers to the embodiment of Figure 2 as involving "three weighing positions" with the following paragraph 0037 indicating that "it may be possible to use "two weighing positions or more than three" shows that embodiments with only one weighing position are not encompassed by the invention. This is further confirmed by the indication in paragraph 0036 that "weighing at three positions rather than one" makes more time available for weighing, which is precisely the technical problem the patent is said to solve (see paragraph 0010).

14. For these reasons, the devices of the documents cited by the opponent, none of which discloses any weighing of articles on a transfer means while split into at least two streams, cannot anticipate the subject-matter of claim 1. Therefore, taking due account of the arguments of the opponent, the Board concludes that the apparatus for processing articles defined in claim 1 according to the main request is novel. The same applies to the subject-matter of independent claim 16 directed to a corresponding method of processing articles, and to the remaining claims, all dependent on claim 1.

Procedural matters

15. No argumentation against inventive step was presented by the opponent in the written appeal proceedings. At the oral proceedings the Board stated that the ground of lack of an inventive step had not been substantiated in the notice of opposition and that, possibly, an attack based on this ground was not admissible at this stage of the procedure. The proprietor then indicated that it would not give its approval to the investigation of this ground. The opponent for its part stated that it would not pursue this matter any further.

Conclusion

16. Therefore the Board concludes that the grounds of opposition relied upon by the opponent do not prejudice maintenance of the patent as granted.

Order

For these reasons it is decided that:

1. The decision of the opposition division is set aside.
2. The patent is maintained unamended.

The Registrar:

The Chairman:

M. Kiehl

A. G. Klein