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**Datasheet for the decision
of 20 January 2015**

Case Number: T 1702/10 - 3.4.01

Application Number: 03814903.5

Publication Number: 1585578

IPC: A61N5/10

Language of the proceedings: EN

Title of invention:

CONFIGURATION MANAGEMENT AND RETRIEVAL SYSTEM FOR PROTON BEAM
THERAPY SYSTEM

Patent Proprietor:

LOMA LINDA UNIVERSITY MEDICAL CENTER

Opponent:

Siemens Aktiengesellschaft

Headword:

Relevant legal provisions:

RPBA Art. 12(4)

Keyword:

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- admission of a request requiring further examination into the proceedings
- remittal to the opposition division for further prosecution

Decisions cited:

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Case Number: T 1702/10 - 3.4.01

D E C I S I O N
of Technical Board of Appeal 3.4.01
of 20 January 2015

Appellant: LOMA LINDA UNIVERSITY MEDICAL CENTER
(Patent Proprietor) 24888 Prospect Street
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Representative: Vossius & Partner
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Respondent: Siemens Aktiengesellschaft
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 8 June 2010
revoking European patent No. 1585578 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman G. Assi
Members: H. Wolfrum
C. Schmidt

Summary of Facts and Submissions

- I. The appeal of the patent proprietor lies from the decision of the opposition division dispatched on 8 June 2010 revoking European patent No. 1 585 578 for the reasons of lack of novelty (Article 100(a) EPC) for the main request then on file (*i.e.* of the subject-matter of claim 1 of the patent as granted) and lack of inventive step (Articles 52(1) and 56 EPC) of the subject-matter of claim 1 of an auxiliary request then on file.

The notice of appeal was received on 10 August 2010 and the prescribed fee was paid on the same day. On 18 October 2010 a statement of grounds of appeal was filed.

- II. With the statement setting out the grounds of appeal the appellant requested, by way of a main request, that the contested decision be set aside and the patent be maintained as granted.

Alternatively it was requested that the patent be maintained in amended form on the basis of various versions of amended independent claims 1 and 24, according to a first to seventh auxiliary request, respectively, all filed with the statement setting out the grounds of appeal dated 18 October 2010.

- III. The respondent (the sole opponent) requested that the appeal be dismissed.

- IV. According to corresponding requests, the parties were summoned to oral proceedings by a notification dated 1 September 2014. In a communication pursuant to Article

15(1) RPBA, annexed to the summons, the Board gave a preliminary opinion as to the merits of the appeal.

- V. By letter of 29 December 2014 the appellant, while maintaining its main request, replaced all previous auxiliary requests by three new auxiliary requests.
- VI. Oral proceedings were held on 20 January 2015.

As a result of the debate, which comprised a detailed discussion of the matters of novelty and inventive step of the subject-matter of the independent claims of the main request and the first and second auxiliary requests, the appellant withdrew these requests and requested remittal of the case to the opposition division for further prosecution on the basis of its third auxiliary request of 29 December 2014 remaining as its new sole request.

The respondent requested that the appellant's new request, *i.e.* the third auxiliary request of 29 December 2014, not be admitted into the proceedings and that the appeal be dismissed.

At the end of the oral proceedings the Board admitted the appellant's request into the proceedings and decided to remit the case to the opposition division for further prosecution on the basis of this request.

- VII. Claim 1 of the respondent's sole remaining request reads as follows :

"1. A radiation beam therapy system (10) having a plurality of treatment stations having rotatable gantries (18) so as to accommodate multiple patients and a plurality of treatment devices (11, 12, 14)

including a radiation beam source (11), an accelerator (12) and a beam transport device (14), and a plurality of switchyards (16) for deflecting a radiation beam to respective ones of the plurality of treatment stations, the radiation beam therapy system (10) comprising

a configuration management system (54) containing a database component (72) that stores subsets of parameters (80) associated with selected treatment devices and mapping tables (74) comprising deployment labels (76a, 76b, 76c) to lookup keys (78), wherein the parameters (80) comprise instructional information that can be used to configure the selected treatment devices for operation; and

an interface component (52) associated with the database component (72) that allows a user to modify the subsets of parameters (80) associated with selected treatment devices stored in the database component (72);

the configuration management system (54) further containing a management component (70) and a control file component (74), wherein the management component (70) extracts subsets of parameters (80) from the database component (72), maps parameters (80) to selected treatment devices using the plurality of mapping tables (74) and generates system control files (56) using the control file component (74), the system control files (56) comprising the extracted subsets of parameters (80) in a format recognizable by the selected treatment devices, wherein the system control files (56) permit configuration of the selected treatment devices based, at least in part, on the instructional information comprised therein, the management component (70) further distributes the system control files (56) to the selected treatment devices to thereby permit the selected treatment devices to operate independently of the database component (72) so that failure of the

configuration management system (54) does not inhibit operation of the radiation beam therapy system."

Independent claim 17 is directed to a corresponding method for managing a plurality of distributed instruments used in treatment delivery for a radiation beam therapy system as defined in claim 1.

Claims 2 to 16 and 18 to 34 are dependent claims.

Reasons for the Decision

1. The appeal complies with the requirements of Articles 106 to 108 EPC and Rule 99 EPC and is, therefore, admissible.
2. Admission of the appellant's request into the proceedings
 - 2.1 The appellant's request is identical to the third auxiliary request that was filed with the letter of 29 December 2014.

The request builds on the higher ranking second auxiliary request that was filed with the same letter and was admitted by the Board into the proceedings in the course of the oral proceedings.

The further amendments concern the addition of the features "*and mapping tables (74) comprising deployment labels (76a, 76b, 76c) to lookup keys (78)*" and "*, maps parameters (80) to selected treatment devices using the plurality of mapping tables (74)*" to the definitions of the structure and function of the "*configuration*

management system (54)" in claim 1. Corresponding amendments are made to method claim 17.

- 2.2 The respondent objected to the admission of the request into the proceedings as being filed belatedly. The request was not identical to any of the requests filed with the statement setting out the grounds of appeal, nor was the concrete wording of the amendments to be found in any of these former requests.

The amendments concerned technical details which were taken from the description and had not been the subject of any request that was previously filed. Moreover, the amendments were not occasioned by the Board's communication accompanying the summons to the oral proceedings. Instead, they raised new issues which neither the respondent nor the Board could be expected to deal with instantly.

- 2.3 In the appellant's view, the admission of its request into the proceedings was justified because it constituted a serious attempt to better distinguish the present invention from the cited prior art and thus to overcome the Board's conclusions as to lack of inventive step with respect to the subject-matter of the previous higher-ranking requests.

Contrary to the respondent's allegation, the further amendments made in the request under consideration had already been the subject of each of the fourth to sixth auxiliary requests filed with the statement setting out the grounds of appeal. Therefore, the respondent, and correspondingly the Board of appeal, could not have been taken by surprise but instead had had sufficient time to deal with the claimed amendments.

Finally, neither the EPC nor the Rules of Procedure of the Boards of Appeal require that each and every amendment has to be presented in the first instance proceedings in order to be considered in an appeal.

- 2.4 The respondent's submission is correct insofar as the amendments in question which have been made to claims 1 and 17 of the appellant's request remaining on file indeed originate from the description and have no antecedent in any of the claims filed during the proceedings before the examining division and the opposition division. Based on this observation, it is likely that the subject-matter of the amendments was not taken into consideration, for example in the search for relevant prior art.

In such a situation, Article 12(4) RPBA would allow a board to hold the appellant's request inadmissible as it could have been presented in the first instance proceedings and, normally, the boards would adopt such a line of action.

On the other hand, however, Article 12(4) RPBA does not force a board into holding inadmissible a request which has been filed for the first time in the appeal proceedings. Thus, in which way the board's discretion will be exercised depends on the specific circumstances of the case at hand.

- 2.5 In the present case, the amendments listed in point 2.1 above were in essence already the subject of the sixth auxiliary request filed with the statement of grounds of appeal and were thus presented at the earliest opportunity in the appeal. The reformulation of the request into the form of the third auxiliary request filed with the letter of 29 December 2014 basically

addressed objections concerning added subject-matter which were raised in the Board's communication of 1 September 2014 but did not change the substance of the amendments in question.

A quite particular - and finally decisive - circumstance of the present case is the fact that in its reply of 3 May 2011 to the grounds of appeal the respondent did not object to the admission into the proceedings of any of the requests filed with the grounds of appeal. Instead, in the said reply (see paragraph 11) the respondent raised an objection of lack of inventive step against the subject-matter of the sixth auxiliary request. Therefore, it is not plausible that the respondent, during the oral proceedings, was not in a position to further comment in substance on the appellant's request on file.

On the other hand, the Board considers the respondent's objection presented in writing as being too rudimentary so as to form a conclusive basis for a final decision.

- 2.6 In this situation the Board considers it fair to admit the appellant's sole remaining request into the proceedings but to refrain from taking any position as to whether the request complies with the requirements of the EPC. Instead, it is considered appropriate to remit the case to the opposition division for further prosecution on the basis of the said request.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The case is remitted to the opposition division for further prosecution on the basis of the appellant's third auxiliary request, as filed by letter of 29 December 2014, to be considered as a new single request.

The Registrar:

The Chairman:



R. Schumacher

G. Assi

Decision electronically authenticated