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Datasheet for the decision of 24 January 2013

Case Number: T 0149/11 - 3.2.04

Application Number: 97202226.3

Publication Number: 819381

IPC: A22B 5/00, A22B 7/00, A22C 21/00

Language of the proceedings: EN

Title of invention:
Method and device for processing a slaughtered animal or part thereof in a slaughterhouse

Patent Proprietor:
STORK PMT B.V.

Opponent:
Meyn Food Processing Technology B.V.

Headword:
-

Relevant legal provisions:
EPC Art. 53a), 100a), 100b, 123(3)
EPC R. 28, 29

Articles 4 and 5 of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 1950)

Articles 3 to 6, Charter of Fundamental Rights of the European Union

Keyword:
"Main request and auxiliary requests 4 to 6 - subject-matter contravenes Art. 53(a) EPC (yes)"
"Auxiliary requests 1 and 2 - subject-matter extends the scope of the claim (yes)"
"Auxiliary request 3 - admissibility (yes), sufficiency of disclosure (yes), novelty and inventive step (yes)"

Decisions cited:
-

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0149/11 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 24 January 2013

Appellant: (Opponent)
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Decision under appeal:
Decision of the Opposition Division of the European Patent Office posted 7 December 2010 rejecting the opposition filed against European patent No. 819381 pursuant to Article 101(2) EPC.

Composition of the Board:

Chairman: A. de Vries
Members: C. Scheibling
C. Heath
P. Petti
T. Bokor

Summary of Facts and Submissions

I. By its decision dated 7 December 2010 the Opposition Division rejected the opposition. On 17 January 2011 the Appellant (opponent) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 25 March 2011.

II. The patent was opposed on the grounds based on Article 100(a), (b), (c) EPC. The ground based on Article 100 c) was withdrawn during the oral proceedings before the Opposition division.

III. The following documents played a role in the appeal proceedings

D3: US-A-4 627 007
D4: GB-A-1 603 860
D7: EP-A-0 196 373

IV. Oral proceedings took place on 24 January 2013 before the Board of Appeal.

V. The Appellant requests that the decision under appeal be set aside and that the patent be revoked.

VI. The Respondent requests that the appeal be dismissed (main request), or, in the alternative, that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of one of the auxiliary requests 1, filed during the oral proceedings before the Board, 2 filed by letter dated 21 December 2012, 3 filed during the oral proceedings before the Board, 4 filed by letter dated 21 December

2012, or 5 and 6 filed as auxiliary requests 1 and 3 by letter dated 21 December 2012.

VII. The independent claims of the main request (as granted) read as follows:

"1. Method for processing a slaughtering object, such as a slaughtered animal or part thereof, which, in a conveyor with a carrier for the slaughtering object, is passed along a slaughter line of a slaughterhouse, the method comprising the following steps:

assigning an identification to the carrier or the associated slaughtering object;

performing at least one processing step on the slaughtering object;

performing one or more observations on the slaughtering object;

determining a test result for the slaughtering object, which test result comprises an approval or rejection, based on the observation data;

storing the test result in conjunction with the corresponding identification;

providing an automatic discharging device (6a; 13a, 18a, 22; 26a), which is disposed in the slaughter line and has at least a first discharge for removing the slaughtered object, if the said object has been approved, and a second discharge for removing the slaughtering object, if the said object has been rejected and

controlling the choice of the first or the second discharge of the discharging device on the basis of the stored test result,

characterized in that

the slaughtered object removed via the second discharge is returned to an upstream point in the slaughter process, where at least part of the processing step on the slaughtering object is repeated."

"3. Method for processing a slaughtering object, such as a slaughtered animal or part thereof, which, in a conveyor with a carrier for the slaughtering object, is passed along a slaughter line of a slaughterhouse, the method comprising the following steps:

assigning an identification to the carrier or the associated slaughtering object;

performing one or more observations on the slaughtering object;

determining a test result for the slaughtering object, which test result comprises an approval or rejection, based on the observation data;

storing the test result in conjunction with the corresponding identification,

characterized by

on the basis of the stored test result, removing the identified slaughtered object from a separating device (28a; 32a), which is disposed in the slaughter line and has at least a first discharge for removing a portion of the slaughtering object which is to be separated off in the separating device, if the said portion has been approved, and a second discharge for removing a portion of the slaughtering object which is to be separated off in the separating device, if the said portion has been rejected".

"13. Device for processing a slaughtering object, such as a slaughtered animal or part thereof, in a slaughter line of a slaughterhouse, the device comprising:

at least one conveyor with carriers, each for the purpose of carrying the slaughtering object, an identification being assigned to each carrier or associated slaughtering object;

means for performing at least one processing step on the slaughtered object;

at least one observer positioned along the slaughter line for the purpose of performing one or more observations on the slaughtering object;

an input station (11b) for the observer to input data relating to at least one observation on the slaughtering object;

a data-processing system (5) for processing the data input by means of the input station (11b), in order to determine a test result for the slaughtering object, which test result comprises an approval or rejection, and for storing the test result in conjunction with the corresponding identification;

at least one automatic discharging device (6a; 13a, 18a, 22; 26a), which is disposed downstream of the observer along the slaughter line and has at least a first discharge for removing the slaughtering object, if the said object has been approved, and has a second discharge for removing the slaughtering object, if the said object has been rejected;

an identification reading system (12a), which interacts with the discharging device (6a; 13a, 18a, 22; 26a), for reading out the identification belonging to the slaughtering object supplied to the discharging device or the associated carrier;

the choice of the first or the second discharge of the discharging device by the data-processing system (5) being controlled on the basis of the test result stored therein and belonging to the identification read out by the identification reading system (12a), characterized by

means returning the slaughtered object removed via the second discharge to an upstream point in the slaughter process for repeating at least part of the processing step on the slaughtering object."

"14. Device for processing a slaughtering object, such as a slaughtered animal or part thereof, in a slaughter line of a slaughterhouse, the device comprising:

at least one conveyor with carriers, each for the purpose of carrying the slaughtering object, an identification being assigned to each carrier or associated slaughtering object;

at least one observer positioned along the slaughter line for the purpose of performing one or more observations on the slaughtering object;

an input station (11b) for the observer to input data relating to at least one observation on the slaughtering object;

a data-processing system (5) for processing the data input by means of the input station (11b), in order to determine a test result for the slaughtering object, which test result comprises an approval or rejection, and for storing the test result in conjunction with the corresponding identification, characterized by:

at least one separating device (10d; 16a; 28a; 32a), which is disposed downstream of the observer along the slaughter line and has at least a first

discharge for removing a portion, which is to be separated off in the separating device (10d; 16a; 28a; 32a), of the slaughtering object, if the said portion has been approved, and a second discharge for removing a portion, which is to be separated off in the separating device (10d; 16a; 28a; 32a), of the slaughtering object, if the said portion has been rejected;

an identification reading system (12a), which interacts with the separating device (10d, 16a; 28a; 32a), for reading out the identification belonging to the slaughtering object supplied to the separating device (10d, 16a; 28a; 32a) or the associated carrier;

the choice of the first or the second discharge of the separating device (10d, 16a; 28a; 32a) by the data-processing system (5) being controlled on the basis of the test result stored therein and belonging to the identification read out by the identification reading system (12a)."

"15. Device for processing a slaughtering object, such as a slaughtered animal or part thereof, in a slaughter line of a slaughterhouse, the device comprising:

at least one conveyor with carriers, each for the purpose of carrying the slaughtering object, an identification being assigned to each carrier or associated slaughtering object;

means for performing at least one processing step on the slaughtered object;

at least one observation device (4a, 10c; 11a; 15a, 17a, 20; 25a) disposed along the slaughter line for the purpose of performing one or more observations on the slaughtering object;

a data-processing system (5) for processing data obtained by means of the observation device (4a, 10c; 11a; 15a, 17a, 20; 25a) and relating to at least one observation on the slaughtering object, in order to determine a test result for the slaughtering object, which test result comprises an approval or rejection, and for storing the test result in conjunction with the identification read out by means of the identification reading system (12a);

at least one automatic discharging device (6a; 13a, 18a, 22; 26a), which is disposed downstream of the observation device (4a, 10c; 11a; 15a, 17a, 20; 25a) along the slaughter line and has at least a first discharge for removing the slaughtering object, if the said object has been approved, and a second discharge for removing the slaughtering object, if the said object has been rejected;

an identification reading system (12a), which interacts with the observation device (4a, 10c; 11a; 15a, 17a, 20; 25a), for reading out the identification belonging to the observed slaughtering object or the associated carrier, and which interacts with the discharging device, for reading out the identification belonging to the slaughtering object supplied to the discharging device or the associated carrier;

the choice of the first or the second discharge from the discharging device (6a; 13a, 18a, 22; 26a) by the data-processing system (5) being controlled on the basis of the test result stored therein and belonging to the identification read out by the identification reading system (12a)

characterized by

means returning the slaughtered object removed via the second discharge to an upstream point in the

slaughter process for repeating at least part of the processing step on the slaughtering object."

"16. Device for processing a slaughtering object, such as a slaughtered animal or part thereof, in a slaughter line of a slaughterhouse, the device comprising:

at least one conveyor with carriers, each for the purpose of carrying the slaughtering object, an identification being assigned to each carrier or associated slaughtering object;

at least one observation device (4a, 10c; 11a, 15a, 17a, 20; 25a) disposed along the slaughter line for the purpose of performing one or more observations on the slaughtering object;

a data-processing system (5) for processing data obtained by means of the observation device (4a, 10c; 11a, 15a, 17a, 20; 25a) and relating to at least one observation on the slaughtering object, in order to determine a test result for the slaughtering object, which test result comprises an approval or rejection, and for storing the test result in conjunction with the identification read out by means of the identification reading system (12a);

characterized by:

at least one separating device (10d; 16a; 28a; 32a), which is disposed downstream of the observation device along the slaughter line and has at least a first discharge for removing a portion, which is to be separated off in the separating device (10d; 16a; 28a; 32a), of the slaughtering object, if the said portion has been approved, and a second discharge for removing a portion, which is to be separated off in the separating device (10d; 16a; 28a; 32a), of the

slaughtering object, if the said portion has been rejected;

an identification reading system (12a), which interacts with the observation device (4a, 10c; 11a, 15a, 17a, 20; 25a), for reading out the identification belonging to the observed slaughtering object or the associated carrier, and which interacts with the separating device (10d; 16a; 28a; 32a), for reading out the identification belonging to the slaughtering object supplied to the separating device (10d; 16a; 28a; 32a) or the associated carrier;

the choice of the first or the second discharge of the separating device (10d; 16a; 28a; 32a) by the data-processing system (5) being controlled on the basis of the test result stored therein and belonging to the identification read out by the identification reading system (12a)."

VIII. Auxiliary requests

Claim 13 and 14 of auxiliary request 1 differ in essence from claims 13 and 14 as granted in that the features "… at least one observer positioned along the slaughter line for the purpose of performing one or more observations on the slaughtering object;
an input station (11b) for the observer to input data relating to at least one observation on the slaughtering object …" have been amended to read "… an input station (11b) for at least one observer positioned along the slaughter line for the purpose of performing one or more observations on the slaughtering object to input data relating to at least one observation on the slaughtering object …"

Both claims are also modified to read that the at least one automatic discharging device respectively separating device is "disposed downstream of the *input station for the* observer" (italics added to indicate what is changed).
Claim 13 and 14 of auxiliary request 2 differ in essence from claims 13 and 14 as granted in that "at least one observer positioned …" has been changed to "at least one observer position …" while "input station for the observer" is changed to "an input station for an observer".

The set of claims of auxiliary request 3 corresponds to the set of claims of the main request where claims 13 and 14 have been deleted and claims 15 to 24 have been renumbered 13 to 22 and the references to other claims adapted.

Claim 11 of auxiliary request 4 is a combination of claim 13 as granted with claims 17 and 18 as granted.
Claim 12 of auxiliary request 4 is a combination of claim 14 as granted with claims 17 and 18 as granted.

Claims 13 and 14 of auxiliary requests 5 and 6 are identical with claims 13 and 14 as granted.

IX. The Appellant mainly argued as follows: Claims 13 and 14 of the main request clearly refer to the observer as being a part of the claimed device. This is contrary to the provisions of Article 53(a) EPC and therefore the main request must fail. As these claims are identically present in auxiliary requests 4, 5 and 6, these requests must fail too.

Claims 13 and 14 of auxiliary request 1 and 2 have been amended such that the operator is no longer part of the claimed device. However, this extends the scope of the claim contrary to Article 123(3) EPC.
Auxiliary request 3 was not filed in response to an unforeseeable development of the case and should therefore have been filed with the response to the ground of appeal. Accordingly, it is late filed and should not be allowed into the proceedings.
According to claim 3 of auxiliary request 3 the slaughtering object is first removed from the separating device for subsequently removing parts of it. This is physically not possible so that the skilled person would be unable to carry out such a method.
Claim 13 of auxiliary request 3 lacks novelty with respect to D4.
Moreover, starting from D3 or D4 the problem underlying the invention can be seen in increasing the efficiency of the method or device for processing a slaughtered object.
Increasing efficiency is one of the objects of D7, which teaches the skilled person to return unsatisfactorily processed objects to an upstream point to repeat the processing step. Consequently, the subject-matter of claim 13 lacks inventive step with respect to D3 or D4 in combination with D7 or when considering the general knowledge of the skilled person.

X. The Respondent (patentee) mainly submitted that a reasonable reader would never consider that the observer could be part of the claimed device.

Since it was never intended that the observer be part of the claimed device, removing it from the claims does not offend Article 123(3) EPC.
Auxiliary request 3 does not delay the proceedings, since it solely deletes claims of the main request and thus does not raise new issues. Only during the oral proceedings before the Board it became clear that the Board might not follow the first instance's decision and that it could reach the conclusion that the subject-matter of claims 13 and 14 is excluded from patentability.
D4 does by no means disclose returning objects back to an upstream point in the process where at least one processing step is repeated. Novelty is thus given.
A skilled person would not take D7 into consideration for improving a method or device as disclosed in D3 or D4 because there is no hint which could lead the skilled person to D7 in order to improve a method such as disclosed in D3 or D4.

Reasons for the Decision

1. The appeal is admissible.

2. *Exception to patentability under Article 53(a) EPC*

2.1. Pursuant to Article 53(a) EPC, a patent can not be granted in respect of inventions the commercial exploitation of which would be contrary to public order. However, a commercial exploitation shall not be deemed to be contrary to public order merely because it is prohibited by law or regulation in some or all of the Contracting States. Thus it needs to be examined if an

exploitation of the claimed invention - i.e. not the invention itself - would be contrary to public order ("ordre public") *per se*., i.e. apart from any special legislation restricting its commercial exploitation.

2.2. Claims 13 and 14 of the main request contain the following feature:

- at least one observer positioned along the slaughter line for the purpose of performing one or more observations on the slaughtering object.

2.3. According to the patentee, it should be obvious that the observer as such is not part of the claim. Applying the general rules on the interpretation of claims, the Board is not convinced by this position. In general, claims must be read with a mind willing to understand, and in a manner that does not render the claims illogical or devoid of technical sense. The patentee does not dispute that the above feature is clear in itself and gives the claim a clear technical meaning. He argues, though, that while the observer is necessary to carry out this non-automatic embodiment of the invention that underlies claims 13 and 14, the observer cannot reasonably be considered part of the invention as defined in those claims. In the opinion of the Board, if an observer should not be part of the claimed invention, the claim should and could have been worded correspondingly. Given the clear wording of the claim, and the fact that such wording makes technical sense, the Board finds that the claim must be interpreted as including at least one observer.

2.4. According to the appellant, by including the observer as an integral part of the invention defined in these

claims, its commercial exploitation contravenes basic human right and is thus contrary to "ordre public", so that the claimed invention is subject to the exception of Article 53(a) EPC.

2.5. The Board considers that "ordre public" must be seen in particular as defined by norms that safeguard fundamental values and rights such as the inviolability of human dignity and the right of life and physical integrity. See also Singer/Stauder, Europäisches Patentübereinkommen, 6th ed. 2013, Art. 53 note 7, opining that human and civil rights, such as those guaranteed by international treaties and national constitutions, are to be regarded as the principal foundations of the legal order of the contracting states, and as such also the foundations of "ordre public". Fundamental rights and freedoms that underpin "ordre public" are codified in Articles 4 and 5 of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 1950), according to which no one should be held in slavery, and everyone has the right to liberty and shall be deprived thereof only under certain circumstances. This corresponds to the human right of integrity, the prohibition of slavery and the right to liberty under the Charter of Fundamental Rights of the European Union (Official Journal of the European Communities C 364/1 of 18 December 2000), Articles 3 to 6. Since patents are instruments of private property and as such freely transferable, a patent for an invention that includes one or more human beings among its features gives rise to serious concerns as to these fundamental rights and freedoms of the particular human beings that would be the subject of such a patent when

commercialized, however far-fetched such an interpretation may seem. These serious concerns regarding human liberty and the prohibition of slavery lead the Board to conclude that claims 13 and 14 of the main request contravene Article 53(a) EPC.

2.6. The Board emphasises that it is not relevant for this finding whether for the time being there exists any serious reality of infringing the human rights of the claimed observer, either as being treated as an "object of private property" or is some other manner. The prohibition of patenting with reference to the "ordre public" is neither intended nor suitable for effectively restricting acts seen as being contrary to "ordre public" (or morality). Rather, it is a question of principle, which seeks to safeguard the public trust in the patent system as a whole. This public trust would erode if the broader public outside of the patent profession would perceive that a morally unacceptable condition - here the ownership of a human being - somehow acquires official approval through the seal of the granted patent document (see also Singer/Stauder, Europäisches Patentübereinkommen, 6th ed. 2013, Art. 53 note 13). For this reason, it is not relevant that the proprietor is unlikely ever to enforce the disputed claim in the sense of its immediate wording, e.g. by demanding the delivery up (or possibly even destruction) of the claimed device, including the observer. It is sufficient that the immediate wording could potentially lead the broader public to believe that such a claim indeed covers a human being with all its legal consequences. The Board also makes reference to Rules 28 and 29 EPC, the legislative history of which equally illustrates that a possible interference with

fundamental human rights may well support an unequivocal and strict exclusion from patenting of such "sensible" subject-matter.

2.7. Accordingly, the main request must fail. Since claims 11 and 12 of auxiliary request 4, and claims 13 and 14 of auxiliary requests 5 and 6 likewise comprise an observer they must also fail for the same reasons.

3. *Auxiliary requests 1 and 2*

Claims 13 and 14 of these requests have been modified so that they no longer comprise an observer, but "an input station (11b) for at least one observer positioned along the slaughter line …" (auxiliary request 1) and "an observer position" (auxiliary request 2).
However, claims 13 and 14 as granted both state "Device … comprising: … at least one observer positioned along the slaughter line …" As stated previously, this wording is clear and unambiguous, makes technical sense and can be easily understood. According to this wording, the "observer" is a part of the device and has a technical purpose, i.e. fulfils a technical function. He performs qualitative observations and inputs data relating to said observations which is used for approval or rejection of parts of the slaughtered object. The suppression of the "observer" removes limiting technical information and extends therefore the scope of protection conferred by claims 13 and 14. This is contrary to Article 123(3) EPC. Consequently, auxiliary requests 1 and 2 must fail.

4. *Auxiliary request 3*

4.1 Admissibility

This auxiliary request was first filed at the oral proceedings before the Board that is after filing of the grounds of appeal. Consequently, this filing constitutes an amendment to the appellant's case in the sense of Article 13(1) of the Rules of Procedure of the Boards of Appeal. Under that article the Board is afforded discretion in admitting and considering such amendments. The article further stipulates that this discretion "shall be exercised in view of inter alia the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy".

In the present case, the amendments consist in deleting claims 13 and 14 from the main request. Although as correctly pointed out by the Appellant, these amendments could have been filed earlier because the Respondent could not rely on the assumption that the Board will follow the first instance's decision, they neither add complexity nor delay the procedure as they do not alter the discussion, since all claims of this request correspond to granted claims which were already present in the main request. In fact these amendments solely remove the issue related to the exception to patentability of claims 13 and 14.

Under these circumstances, using its discretion under Article 114(2) EPC and Article 13(1) RPBA the Board decided to admit auxiliary request 3 into the proceedings.

4.2 Sufficiency of disclosure

4.2.1 Claim 3 of auxiliary request 3 corresponding to claim 3 as granted states "on the basis of the stored test result, removing the identified slaughtered object from a separating device (28a; 32a), which is disposed in the slaughter line and has at least a first discharge for removing a portion of the slaughtering object which is to be separated off in the separating device, if the said portion has been approved, and a second discharge for removing a portion of the slaughtering object which is to be separated off in the separating device, if the said portion has been rejected"

4.2.2 The Appellant contended that once the slaughtering object is removed from the separating device, it is physically no longer possible to subsequently remove parts of it. Furthermore, claim 3 requires that the slaughtered object is removed on the basis of the stored test results. It cannot be understood how the test results should have an effect on the removal of the slaughtering object.

4.2.3 The Board acknowledges that this particular part of claim 3 is not ideally formulated and that claim 3 is not so clear that a skilled reader would immediately understand what is meant. However, where sufficiency of disclosure is concerned the skilled person does not look only at the claims defining the invention in its essence but he will consider the totality of the disclosure which includes also the description and drawings to provide him with the necessary detail, see Case law of the Boards of Appeal, 6th edition, 2010, II.A.1.

The relevant parts of the description in this case are paragraphs [0035] and [0036] describing how the method is carried out with respect to a wing separating device 28a and with respect to a liver separating device 32a. It is noted that such separating devices are known in the art and that although not specified, it is implicit that there is a conveyor means for carrying the slaughtering object, here the carcass or cluster of viscera in and out of the separating device in addition to the described first and second discharges.
The skilled person will understand from these examples that where claim 3 indicates "removing the identified slaughtering object from a separating device", this does not mean "taking it down from the conveyor" or "taking it out of the separating device", but rather simply conveying it through and out of the separating device. There parts are separated from the slaughtering object (by removing a portion of the slaughtering object) and discharged via a first or second discharge depending on whether said part is approved or rejected on the basis of the stored test results, whereas the remaining part or parts of the slaughtered object are conveyed out of the separating device for further processing.
The Board has no difficulty in understanding these passages and concludes that this disclosure of the invention defined (somewhat imperfectly) in claim 3 is sufficiently clear and complete for it to be carried out by the skilled person.

4.2.4 Accordingly, the objection based on Article 100(b) EPC is not prejudicial to the maintenance of the patent.

4.3 Novelty of claim 13 of the auxiliary request 3

4.3.1 Novelty of claim 13 corresponding to claim 15 as granted has been challenged with respect to D4. D4, see figure 1 and column 2, lines 28 to 35 discloses an endless loop conveyor 10 which conveys carcasses through grading and weighing stations 12 and 13 for subsequent removal at stations 14, 15 and 16 depending on grade and weight. The decisive question is whether D4 discloses that there are provided "means returning the slaughtered object removed via the second discharge to an upstream point in the slaughter process for repeating at least part of the processing step on the slaughtering object".

4.3.2 The Appellant contends that a carcass that is allowed to move past stations 14 to 16 will necessarily complete the loop and return to the upstream point in the process in which the processing on the returned carcass can be repeated.

4.3.3 However, simply because the conveyor forms a closed loop in D4, it does not mean that a carcass can pass all stations and be returned to the starting point. The plant described in D4 is foreseen to sort carcasses according to their grade and weight. Consequently, all carcasses are removed either in the first, the second or the third removal station. D4 does not envisage to let a carcass on the conveyor move past the removal stations, as clearly indicated page 2, lines 27 to 35 "the carcasses are removed at the stations 14, 15 and 16, depending on the grade and weight of each carcass" and page 3, lines 116 to 118 " to remove the carcass at station 14 if the carcass had the desired properties,

or the carcass may be allowed to remain for removal at stations 15 or 16".

The Appellant contends that the passage page 2, lines 21 to 27 that states "The conveyor travels along an endless path which commences … passes through … and then passes through … before returning again to the grading station 12" indicates a possible return to an upstream point of the line. However, this statement concerns solely the conveyor and not the poultry transported by it.
He further refers to a statement page 3, lines 118 and 119 that is incomplete but which most probably should read "The *stations 15* and 16 operate in a similar manner" (compared to station 14). This does not mean that the station 16 will allow carcasses to remain on the conveyor but that they are removed according to information recorded in the control unit in the same manner as in stations 14 and 15. In particular, considering that grade and weight would not change even if the carcasses were weighed and graded again, any carcass which would remain on the conveyor after having passed the last station 16 would remain on the conveyer for ever. Therefore, this cannot be a reasonable or correct interpretation of the quoted passage.

The Appellant also argued that claim 15 of D4 states that instead of being removed, the articles may be deflected along a different route. However, this does not mean that the articles are returned to an upstream point of the processing line.

4.3.4 Thus the subject-matter of claim 13 of the main request is novel with respect to D4.

4.4 Inventive step of claims 1 and 13

4.4.1 D4 and further D3 can be considered as suitable starting points for assessing inventive step. D3 discloses a similar system for processing poultry carcasses which are conveyed around an endless conveyor loop 12 from a load section 24 past a weighing station 36, a tool drum 18 and a further weighing station 40 to be removed at dump station 42 depending on grade and size of the processed carcass, see figure 1 and column 4, lines 23 to 49 and column 5, lines 40 to 62. Starting from D3 or from D4 as closest prior art, the method and device according to claims 1 and 13 differ from those of D3 or D4 in that:
- the slaughtered object removed via the second discharge is returned to an upstream point in the slaughter process, where at least part of the processing step on the slaughtering object is repeated, (claim 1)
respectively:
- there are provided means for returning the slaughtered object removed via the second discharge to an upstream point in the slaughter process for repeating at least part of the processing step on the slaughtering object (claim 13).

4.4.2 The problem underlying the invention is seen in reducing unnecessary rejection of slaughtered animals while increasing the overall efficiency (see patent specification, column 2, lines 33 to 39).

4.4.3 D7 discloses a conveyor system for application in a conditioned housing and more specifically for freezing,

drying or heating to bring the products in a desired condition (page 1, lines 6 to 10). As shown in figure 1, see also paragraph bridging pages 4 and 5, after having been conveyed on conveyor system 1 for a predetermined time through the conditioned housing 2, the products 9 reach the outlet 15, 16 of the housing where a sensor senses whether the product is sufficiently conditioned. If yes, the product is discharged from the carrier onto a conveyor belt 17 and processed further. If the product is not sufficiently conditioned, the product remains on the carrier, i.e. the belt 17 is swung downwards so that the product remains on the carrier and is not taken over by belt 17. Accordingly the product will re-enter the conditioned housing 2, return to the supply section and be moved again through the housing for conditioning.

4.4.4 It is doubtful whether the skilled person would consider D7 which relates to freezing, drying or heating products for solving the problem underlying the invention which is to increase the efficiency by reducing unnecessary rejection of slaughtered animals.

The Appellant argued that the skilled person would learn from D7 that if a product has been unsatisfactorily processed the operation which has failed should be repeated. Furthermore, trying to repeat an action that has failed at first attempt is common general knowledge.

4.4.5 However, in D4 the sole disclosed embodiment relates to grading and weighing poultry carcasses. There would be no aim in having a carcass graded and weighed again, since it cannot be expected that repeating this kind of

operation would bring a different result. Therefore, there would be no objective reason for the skilled person to envisage combining the teaching of D7 with a device or method as disclosed in D4.

4.4.6 D3 discloses a method and device for processing poultry carcasses and more particularly a system for automatically injecting a flavour-enhancing additive into the carcass in an amount dependent on the weight of the carcass (column 1, lines 7 to 11). The main object of this invention is to determine the relative position of the critical portions of the anatomy of each carcass as it is being conveyed (see column 1, lines 48 to 51). Thus improving this method and device would mainly consist in improving the accuracy of the determination of the position.
In D3, see its abstract, the carcasses are first weighed and a sensor determines the position of predetermined portions of the anatomy of the carcass relative to the conveyor shackle. Based on the position data, tools are positioned to inject an amount of basting additive into each carcass based on the weight of the carcass measured by the weigh station. Afterwards, column 5, lines 46 to 53, the carcasses are weighed again and it is determined whether the proper amount of basting additive has been injected. The carcasses are then conveyed to a dump station which comprises discharges 42 to 47 for rejected, undergraded, size one, size two and size three carcasses (column 5, line 1 to column 6, line 5). The rejected carcasses are those which have been injected with an improper amount of additive. Undergraded carcasses are not processed at all (column 5, lines 64 to 67).

4.4.7 For the sake of argument it is assumed that a skilled person would envisage, based on the teaching of D7 or on his general knowledge to reduce the number of rejections in the device or method of D3 by repeating an unsatisfactorily executed injection.
In this case a distinction has to be made between, on the one hand, the carcasses that have been rejected because too much additive has been injected and on the other hand, the carcasses that have been rejected because the amount of the injected additive has been too small. Obviously, if the injected amount is already too high, this amount cannot be reduced by a further injection. Further, means to return the selected carcasses to the weighing station must be provided. Moreover, it has to be determined not only which additional amount of additive has to be injected to adjust the weight, but also which amount has already been injected because, although not stated in D3, it is implicit that there must be a limit to the total amount of additive that can be injected into a carcass.
However, since the weight is recorded for each respective shackle number (column 5, lines 45 to 50), once the carcasses have been removed from the shackles as described in column 5, lines 57 to 62, information about weight and the amount of already injected additive is lost.
Therefore, even if it were common knowledge for the skilled person to repeat an unsatisfactorily executed operation, adapting the method or device disclosed in D3 would require a further adaptation to retrieve information that is no longer available at the moment the carcasses should be returned to an upstream point.

In the Board's view such a further adaptation goes beyond the routine skills of the skilled person.

Accordingly, starting from D3 it would not be obvious for the skilled person to arrive at the method or device as claimed without inventive skill.

4.4.8 The Appellant also argued that D3 is not limited to a system for injecting an additive, but that other tasks such as evisceration, neck removal, etc, might also similarly be performed (column 5, lines 22 to 24). However, inventive step is normally assessed by applying the problem solution approach. This approach *inter alia* needs to define the closest prior art, and to assess the features that distinguish the claimed subject-matter from this prior art. Therefore the closest prior art cannot be a hypothetical construction but must necessarily be a fully disclosed embodiment of a prior art document. In D3 there is no clear and unambiguous disclosure of a device or method relating to evisceration or neck removal so that it is unclear which features such a device or method would have in common with the claimed invention. Consequently, such a device and method cannot be taken as starting point for further development.

4.4.9 Accordingly, the subject-matter of claims 1 and 13 involves an inventive step when starting from D3 or D4 and taking into consideration the teaching of D7 or the common general knowledge of the skilled person.

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 with the order to maintain the patent with the following claims, drawings and a description to be adapted:

Claims: 1 to 22 filed during the oral proceedings as auxiliary request 3

Description: columns 1 to 9 of the patent specification

Drawings: Figures 1, 1a, 2, 2a, 3, 3a, 4, and 4a of the patent specification

The registrar: The Chairman:

G. Magouliotis A. de Vries