

Internal distribution code:

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

**Datasheet for the decision
of 5 April 2016**

Case Number: T 2565/11 - 3.2.01

Application Number: 04251272.3

Publication Number: 1512601

IPC: B61D27/00, B60H1/00

Language of the proceedings: EN

Title of invention:

Method of operating ventilator and air conditioner for vehicle

Patent Proprietor:

Hitachi, Ltd.

Opponent:

Bombardier Transportation GmbH

Headword:

Relevant legal provisions:

EPC Art. 56, 123(2), 84

Keyword:

Public prior use - proven beyond reasonable doubt (yes)

Novelty - main request (yes)

Inventive step - main request (no)

Amendments - intermediate generalisation - auxiliary request 1
(yes)

Claims - clarity - auxiliary requests 2 and 3 (no)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 2565/11 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 5 April 2016

Appellant: Bombardier Transportation GmbH
(Opponent) Schöneburger Ufer 1
10785 Berlin (DE)

Representative: Cohausz & Florack
Patent- & Rechtsanwälte
Partnerschaftsgesellschaft mbB
Bleichstraße 14
40211 Düsseldorf (DE)

Respondent: Hitachi, Ltd.
(Patent Proprietor) 6 Kanda Surugadai 4-chome
Chiyoda-ku,
Tokyo 100-8010 (JP)

Representative: Gill, Stephen Charles
Mewburn Ellis LLP
City Tower
40 Basinghall Street
London EC2V 5DE (GB)

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 11 October 2011 rejecting the opposition filed against European patent No. 1512601 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	G. Pricolo
Members:	W. Marx
	P. Guntz
	C. Narcisi
	O. Loizou

Summary of Facts and Submissions

- I. The appellant (opponent) lodged an appeal against the decision of the opposition division rejecting the opposition against European patent No. 1 512 601.
- II. In its decision the opposition division held that the alleged public prior use had not been proven beyond reasonable doubt and that the subject-matter of granted claim 1 involved an inventive step over the disclosure of document D6 (US 4,219,071).
In support of the alleged prior use, *inter alia*, the witness Frank Hähnel was heard and the following set of documents (prior use V1) were filed:
- D1: "Instruction handbook of heating and cooling unit BR424-426 of DB"; Alex. Friedmann GmbH, Wien, AT, description nr: 971007, pages 1-9;
- D2: "Description of central control unit in BR424-426 of DB"; Alex. Friedmann GmbH, Wien, AT, description nr: 971204, pages 1-4 and 12-14;
- D3: "Description of compact heating and cooling roof unit type 10.727.00.00"; Alex. Friedmann GmbH, Wien, AT, description nr: 971127, pages 1-24.
- III. With its reply to the statement of grounds of appeal dated 19 June 2012 the respondent (patent proprietor) re-filed same auxiliary requests 1 to 3, already filed with its letter of 13 May 2011 in opposition proceedings.
- IV. With letter dated 10 February 2016 the respondent notified the board of its intention not to attend the oral proceedings scheduled for 5 April 2016. Thus, oral proceedings before the board took place on 5 April 2016 in the absence of the patent proprietor.

- V. The appellant (opponent) requested that the decision under appeal be set aside and that the European patent be revoked.

The respondent (patent proprietor) requested in writing that the appeal be dismissed and the patent be maintained as granted or, in the alternative, be maintained in amended form according to one of the auxiliary requests 1 to 3 filed with the letters of 13 May 2011 and 19 June 2012.

- VI. Claim 1 of the main request corresponds to claim 1 as granted and reads (broken into a feature analysis according to the contested decision):

(M1) A method of operating a railway vehicle ventilator (60) and air conditioner (20, 40)

(M1.1) the ventilator comprising an intake blower for feeding an outside air into the vehicle and an exhaust blower for discharging the air in said vehicle to the outside of the vehicle

(M1.2) the air conditioner comprising an outdoor blower (27, 47) for feeding air to an outdoor heat exchanger (26, 46), an indoor blower (24, 45) for feeding the air passing through an indoor heat exchanger into the vehicle and a compressor (22, 42) for circulating a coolant in a cooling cycle characterized in that

(M1.3.1) when said railway vehicle approaches a stop position,

or

(M1.3.2) when the velocity of said railway vehicle is equal to or lower than a predetermined velocity,

(M1.3) operations of said ventilator (60) and said air conditioner (20, 40) are slowed down or stopped

As for the auxiliary requests 1 to 3, the preamble of claim 1 remains unmodified. The characterising portion of claim 1 according to auxiliary request 1 reads:

"when said railway vehicle approaches a stop position, operations of said ventilator (60) and said air conditioner (20, 40) are slowed down or stopped, by
(i) stopping the intake and exhaust blowers of the ventilator and the outdoor and indoor blowers of the air conditioner,
(ii) reducing the number of revolutions of the intake and exhaust blowers of the ventilator and reducing the number of revolutions of the outdoor and indoor blowers of the air conditioner or
(iii) stopping the intake and exhaust blowers of the ventilator and reducing the number of revolutions of the outdoor and indoor blowers of the air conditioner."

The characterising portion of claim 1 according to auxiliary request 2 reads:

"when said railway vehicle approaches a stop position, or when the velocity of said railway vehicle is equal to or lower than a predetermined velocity, operations of said ventilator (60) and said air conditioner (20, 40) are slowed down or stopped,
said ventilator (60) is installed in said air conditioner, and
said intake blower of said ventilator (60) feeds said outside air into the vehicle via said indoor blower (45) of said air conditioner (40)."

The characterising portion of claim 1 according to auxiliary request 3 reads (modifications in comparison to auxiliary request 2 are marked):

"when said railway vehicle approaches a stop position, or when the velocity of said railway vehicle is equal to or lower than a predetermined velocity, operations of said ventilator (60) and said air conditioner (20, 40) are slowed down or stopped,

said ventilator (60) is installed in said air conditioner, and

said intake blower of said ventilator (60) feeds said outside air ~~into the vehicle via~~ to said indoor blower ~~(45)~~ via said indoor heat exchanger (43) of said air conditioner (40)."

VII. The appellant's (opponent's) arguments, insofar as relevant to the present decision, can be summarized as follows:

As can be taken from the contested decision, the opposition division had no doubts on the credibility of the witness's statements and his technical competence and involvement in the development of the vehicles BR424 and BR425 (railway vehicles delivered with the participation of the opponent in the year 2000 to the DB Regio AB and used in public transport). There were no doubts that these railway vehicles had been delivered (delivery and use were not contested by the respondent), even though no written evidence was provided. As regards the reliability of his recollections, the alleged prior use V1 related to a specific and problematic project of commercial significance, in which the witness for many years was heavily involved as technical project manager for the air conditioning of the vehicles, therefore he was able to remember details. As derivable from D1, there existed multiple projects - a series of trains designated BR 424 to 426 - with the same air

conditioning unit implemented. Accordingly, the witness was familiar with the technical details, which were used in many projects, and which did not only represent a single solution for a few vehicles. Moreover, the witness could rely on documents (D1 to D3) on what was implemented in those vehicles for backing his statements. The specific air conditioning unit according to V1 was therefore implemented in those specific vehicles delivered in the year 2000. The opposition division had neglected clear statements of the witness, although he was found credible, in particular the backing evidence submitted with documents D1 to D3. According to the minutes of the witness's hearing, with regard to V1 (see page 10), the same type of air conditioning units were delivered up to two years before the witness's hearing. The door release switch mentioned by the witness did not introduce new facts, and there was no discrepancy with the disclosure of D1 to D3. The witness was only more precise in describing the manner of implementing the described function. The door release switch together with a velocity threshold was the trigger for initiating the function as described in D1 to D3. Document D1 (dated 1999) was the description of the final outcome of the development process and related to the fully developed device. Therefore, the prior use of the vehicles (V1) had been proven beyond reasonable doubt and these vehicles formed part of the state of the art according to Article 54 EPC.

The prior-use of the vehicles according to V1 comprised an air conditioner and a ventilator. D1 described one single blower ("Zuluftlüfter") for feeding air into the cabin of the railway vehicle, comprising the intake blower, the indoor blower and the exhaust blower. In D1 no separate exhaust blower was provided, but claim 1

was not limited in that sense. Moreover, D1 explicitly mentioned an outdoor blower ("Kondensatorlüfter"). D1 also showed (page 9, paragraph 3.3) that the rotational speed of "Zuluftlüfter" and "Kondensatorlüfter" was reduced when the train had stopped (see also D2, page 14, paragraph 3.5, mentioning noise reduction) and, as explained by the witness, in any case when the speed was below a predetermined threshold. These measures were acoustically recognisable within the vehicle and at the outside.

In case the board considered that claim 1 did not specify a mere function as required by any air conditioning unit, but required a separate blower, it was apparent for the skilled person - as a customary replacement - to allocate separate blowers to the obligatory functions required in the customary air conditioning of vehicles. It was particularly necessary for exhausting air to the outside of the cabin in a high pressure environment, e.g. for high-speed vehicles running into a tunnel and producing pressure waves. A separate exhaust blower could be placed in D1 in existing air conducting channels. Moreover, the air-conditioning unit of D6 provided all the functions according to claim 1 and showed - as a clear indication to have separate blowers - three blowers, one of which combined the function of the intake blower and the indoor blower. Therefore, it was obvious to provide a separate exhaust blower.

The amendment of claim 1 of auxiliary request 1, comprising three features taken in isolation out of the context of concrete embodiments (Figures 1, 2 and 4) described in different passages of the description, resulted in an unallowable intermediate generalisation. Feature (ii) e.g. was based on the specific design of

the device described in paragraph [0017] of the patent specification in combination with a specific sequence of operation and specific operating ranges, i.e. closely related features not included in claim 1.

The same scenario applied to auxiliary requests 2 and 3 in which claim 1 was supplemented by adding the feature that "said ventilator (60) is installed in said air conditioner" (see paragraph [0017]). According to the patent specification, a clear structure of the device was disclosed, implying e.g. a synchronicity of the operation of the intake blower and the exhaust blower, which was not reflected by the wording of claim 1 (unallowable intermediate generalisation). Moreover, the term "installed in" left open whether a common housing was meant or a functional integration. Therefore, without further details, the subject-matter of claim 1 was rendered unclear.

VIII. The respondent (patent proprietor) essentially argued as follows:

The decision of the Opposition Division was correct in all aspects, and the reasoning contained in it was not affected by the appeal grounds put forward by the opponent. It was not contested that the trains which were the subject of prior use allegation V1 were indeed delivered to DB Regio AB and operated in a public manner on the tracks of DB Regio AB. However, it was disputed that information concerning the ventilation and air conditioning system of those trains was published in the sense of Article 54 EPC by the delivery and operation of the trains and further that the structure and operation of the ventilation and air conditioning system had been adequately proved by the opponent. The opponent should not be allowed to attempt

to improve its position in relation to the alleged prior use in appeal by bringing forward new facts and evidence, to the detriment of the patentee.

Reasons for the Decision

1. Public availability of alleged prior use V1

1.1 According to the contested decision (see points 2.4 and 2.5), the public prior use according to V1 - the air conditioning unit allegedly pre-used in vehicles BR424 and BR425 - had not been proven beyond reasonable doubt. The opposition division had doubts

- as regards the reliability of the witnesses recollections as far as the delivery was concerned, in view of the length of time between the witness statement and the alleged prior use and because no written evidence as regards the sale or delivery had been produced,
- whether the witness could reliably remember that a specific type of air conditioning unit (as shown in documents D1 to D3) had been used in that particular project, and
- as regards the technical features of the allegedly pre-used air conditioning system, since the witness had introduced new facts (referring to the door release switch), these had no support in D1 to D3.

1.2 The board, however, on the basis of the relevant material at hand (i.e. witness statement of Mr Hähnel, documents D1 to D3, the submissions of the parties), comes to a different conclusion:

1.2.1 The board, in the case at hand, overturns the evaluation of evidence made by the department of first

instance because the opposition division (i) erred as regards the underlying facts and (ii) failed to give an evaluation that is free of contradictions.

(i) As regards the delivery of trains BR424 and BR425, the respondent himself confirmed that those trains had been delivered to DB Regio AG and operated in a public manner on their tracks. The opposition division, therefore, erred when putting in question sale and delivery of the respective trains. Moreover, the board considers that the clear link between the underlying project - which was commercially significant, receiving high attention since it concerned delivery of trains for the Expo 2000 event in Hannover - and the technical problems as recollected by the witness (see page 6 of the minutes of the witness's hearing), leading to a delayed delivery of the trains in autumn 2000 only, leaves no doubt that the trains concerned were available to the public prior to the priority date of the contested patent. Therefore, even void of any further documentary evidence about delivery of the trains, the board has no reason to consider the witness's testimony as insufficient and to cast doubts onto the witness's recollections in this respect.

(ii) The board also notes that the witness was found credible by the opposition division, since he had been working in that technical field and had been involved in the development of the vehicles BR424 and BR425. This is in contradiction with the opposition division's finding raising doubts regarding, *inter alia*, the length of time between the witness's testimony and the prior use and subsequently not trusting the witness's recollections.

Thus, the board has to give its own evaluation of the evidence regarding the relevant facts.

- 1.2.2 In order to prove the allegations in respect of the features of the air conditioning units used in that particular project, the appellant provided evidence D1 to D3 prepared in 1998 to 1999, which either refers explicitly to trains BR424-426 (see front page of D1, D2), or referred (see front page of D3) to the air conditioning unit of type 10.727.00.00 as mentioned on page 3 of D1. Moreover, by hearing the witness during oral proceedings, the type of air conditioning unit used in vehicles BR424 and BR425 was described in a way which perfectly correlated with the disclosure of those documents, i.e. supporting evidence to the witness's statements had been submitted. The witness had explicitly confirmed (see page 14 of the minutes) that devices according to the technical specifications D1 to D3 had been implemented in the trains BR424 and BR425 right from the start.

Moreover, on a concrete question posed by the opposition division during the witness hearing (see minutes page 10, last paragraph), the witness stated uncontestedly that he could recollect all the details because vehicles with air conditioning units of same type had been delivered subsequently to DB Regio, some of them still being in the warranty period. The board cannot therefore agree with the opposition division's difficulties in understanding why the witness could not have remembered the type of air conditioning unit delivered with trains BR424 and BR425. There is also no reason not to accept the witness's statement that he was still responsible for these vehicles (minutes page 11, first paragraph).

In this regard, the board also notes that the technical details of the air conditioning unit implemented in trains BR424 and BR425, which - in view of the features of claim 1 - were relevant, were of minor complexity, basically comprising a ventilator, an air conditioner, several blowers and a specific operation mode of ventilator and air conditioner when coming to a halt. The board has no doubts that the witness was able to recollect such rather simple details, in particular following the appellant's argument (see also minutes of witness hearing, page 10) that units of the same type were being delivered up to two year before the witness's hearing.

- 1.2.3 As regards the structural details specified in claim 1, the board even finds that a combined heating and air conditioning unit for a train (as labelled e.g. in D1), which typically would include blowers, heat exchangers and a compressor, can even be implicitly assumed for any state of the art train vehicle which was delivered around the year 2000.

Even applying a high standard of proof ("beyond any reasonable doubt"), the board finds that the basic facts presented by the witness with regard to the claimed structural features of a ventilator and an air conditioner in the pre-used vehicles BR424 and BR425 cannot be questioned.

The number of blowers used in the pre-used vehicles (a "Zuluftlüfter" and a "Kondensatorlüfter", see witness statements and also D1 to D3) might differ from the number of (four) blowers specified in claim 1, so novelty would not be at stake. However, disregarding an alleged prior use because it is not novelty-destroying to the claimed subject-matter would attribute a minor

relevance to prior art represented by pre-used vehicles in comparison to documents of prior art, which run counter to the requirements of Article 54(2) EPC, according to which the state of the art shall be held to comprise everything made available to the public - explicitly reciting "by use" - before the date of filing of the European patent application. A prior use might also be relevant for the assessment of inventive step, and the issue of novelty/inventive step has to be separated from the issue of whether a prior use is proven beyond reasonable doubt.

- 1.2.4 From the foregoing it can be concluded that the issue to be examined in the present case only concerns the question of "what", i.e. which technical features of the delivered "product" - trains BR424 and BR425 - have been made available to the public. In this regard, the opposition division was not satisfied that the witness could reliably remember the technical features of the allegedly pre-used air conditioning system, but did not further explain which features they were referring to.

As already argued above, the board has no reasonable doubt that railway vehicles of type BR424 and BR425 had been delivered, comprising a ventilating/heating and air conditioning unit, which implicitly comprised a heat exchanger (e.g. a condenser) and a compressor and also two blowers for ventilating the air. Therefore, the main issue to be decided is whether a method of operation including the characterising feature of claim 1 was disclosed to the public by operating the trains BR424 and BR425 on public tracks.

As described in D1 (point 3.3, page 9), the rotational speed of a blower belonging to the ventilating unit ("Zuluftlüfter") and a blower belonging to the air

conditioner ("Kondensatorlüfter") was reduced when the vehicle came to a halt. This mode of operation was also explained by the witness (see pages 11 and 12), according to which blower speed was reduced when the vehicle speed was lower than 1 km/h, after the conductor had operated a door release switch. The witness also explained (see page 12) that speed reduction of the blowers was necessary - due to over pressure generated inside of the vehicle - in order to be able to safely close the doors, and a side effect was an advantageous noise reduction when stopping. The witness's statement correlates perfectly with what is described in D2 (point 3.5, page 14), i.e. that when coming to a halt the rotational speed of the "Zuluftlüfter" had to be reduced for security reasons (to be able to close the doors) and the rotational speed of the "Kondensatorlüfter" was reduced in order to reduce noise emission. In the board's judgement, this mode of operation of the blowers of vehicles BR424 and BR425 - as consistently described in all the specifications D1 to D3 stemming from 1998 and even from 1999 (the year of the intended delivery) and also confirmed by the witness - must be considered as a design requirement for security and environmental reasons (and not a mere design option) of the heating and air conditioning unit according to prior use V1, which could not be dispensed with.

Therefore, the board has no reasonable doubts that such mode of operation - to slow down operation of ventilator and air conditioner when coming to a halt - was also implemented in the pre-used trains BR424 and BR425 as delivered in the year 2000 according to V1.

- 1.2.5 Although D1 to D3 do not recite a door release switch, the board cannot see that the witness - by mentioning

this switch - had introduced "new facts which would cast some doubts as regards the reliability of the witness's recollections as regards the technical features of the allegedly pre-used air conditioning system", as found by the opposition division (see contested decision, point 2.4).

D1 to D3 represent specifications of sub-supplier Alex Friedmann GmbH of air conditioning units provided to the train manufacturer. The door release switch operated by the train driver is located somewhere within the train, not within the air conditioning unit, and does not fall under the responsibility of the sub-supplier. It is implicitly clear from D1 to D3 that there must be a stop signal to initiate the reduction in speed of the blowers when coming to a halt, but it is up to the train manufacturer to further specify how this signal is generated. The witness described that a door release switch together with a velocity threshold was the trigger to initiate the function as described in D1 to D3. The board cannot see that the witness's explanation casts any doubt on his recollections as regards the technical features of the pre-used air conditioning system.

In this respect the board notes that further explanations given by a witness, in order to close a potential gap in the documentary evidence on file, cannot be considered *per se* as new facts. Otherwise, hearing of a witness would be meaningless, and evidence provided on the basis of documents would be given a higher evidentiary value than a witness testimony, for which no basis can be found in the EPC.

1.2.6 Finally, although not addressed in the contested decision, the issue of public availability of the

features of the prior use according to V1 when operating the trains on a public track must be commented upon.

Since the heating and air conditioning unit according to V1 was a compact unit placed on the roof of the railway vehicle, it was visible to anybody. The skilled person would therefore have easily recognised, based on his knowledge, at least implicitly the structural features as argued already above. The witness also confirmed that the "Kondensatorlüfter" was visible from the outside (see protocol page 17). The "Zuluftlüfter" was not visible from the outside, but as argued already above, a second blower must be at least implicitly assumed for ventilating purposes.

The only question remaining is therefore whether the reduced operation of blowers when coming to a halt, as described in D1 to D3 and confirmed by the witness testimony, was discernible from the outside. Since both blowers in the roof unit according to prior use V1 were located outside of the train compartment, the board has no doubt that a reduction in rotational speed of the blowers was at least acoustically recognisable at the outside of the train, as confirmed by D2 (paragraph 3.5: "In den Stationen ..., um die Schallemission zu verringern."). Moreover, the witness stated that also within the vehicle the passengers could realise reduced blower noise (see protocol page 16).

2. *Claim 1 as granted*

2.1 *Novelty (Article 54(1) and (2) EPC)*

The subject-matter of claim 1 as granted is considered to be new because the prior-used railway vehicles

according to V1 do not show an exhaust blower as specified in feature M1.1 (Article 54(1) and (2) EPC).

Claim 1 recites four blowers (feature M1.1: "the ventilator comprising an intake blower ... and an exhaust blower..."; feature M1.2: "the air conditioner comprising an outdoor blower ..., an indoor blower ...") and their specific function. The heating and cooling unit known from the prior-used railway vehicles, as described in D1 to D3, comprises two blowers, one of which ("Kondensatorlüfter") corresponds to the outdoor blower of the air conditioner. The second blower ("Zuluftlüfter") feeds air coming from the air filter and guided over the evaporator into the vehicle (see D1, page 8 of 16) and can be correlated to the intake blower and the indoor blower as claimed, assuming that blowers specified in claim 1 in features M1.1 and M1.2 for the ventilator and the air conditioner might be identical. However, since feature M1.1 lists two blowers, i.e. two mechanical devices, making up the ventilator ("the ventilator comprising..."), which in the board's understanding means that two separate blowers have to be provided, the intake blower must be different from the exhaust blower.

Therefore, the board cannot follow the appellant's assertion that the "Zuluftlüfter" of D1 also represents the exhaust blower as claimed, even if the function of delivering air to the outside via openings in the roof might be provided through this blower.

2.2 *Inventive step (Article 56 EPC)*

A method of operating a railway vehicle ventilator and air conditioner as specified by the second alternative

in the characterising portion of granted claim 1 (features M1.3 and M1.3.2) is known from prior use V1. As explicitly described in e.g. D1 (page 9 of 16) and confirmed by the witness statement (page 10), the two blowers of V1 are operated at lower rotational speeds when the train has stopped, i.e. when the train speed is lower than a predetermined threshold. As argued already above with respect to novelty, the two blowers known from V1 can be identified - except for the exhaust blower - with three of the four blowers recited in the preamble of claim 1.

According to the board's judgement, the distinguishing feature of providing a separate exhaust blower cannot contribute to an inventive step.

Exhausting air from a railway cabin to the outside via a blower instead of an opening in the roof is a well-known alternative in the field of air conditioning of railway vehicles. As disclosed in D6 (see Figure 5), air from the outside is cooled by passing through the evaporator and fed into the cabin via a duct system in the roof area, i.e. the roof blower sucking air into the vehicle represents the intake blower and the indoor blower as specified in features M1.1 and M1.2, similar to the device known from V1 as discussed previously. The cooling air is then, although roof openings also exist in D6, exhausted via a separate blower placed in a region underneath the floor of the cabin.

Moreover, providing a separate exhaust blower provides the advantage of improving the exhaust function under severe driving conditions, e.g. when running into a tunnel and overpressure might occur at the outside of the train so that ventilation via a roof opening would be prohibited. Therefore, depending on the application

area of the railway vehicle, providing an exhaust blower separate from the intake blower would be obvious or even be mandatory when trying to provide a certain degree of comfort with regard to air quality.

3. *Auxiliary request 1*

The board concurs with the appellant that the subject-matter of claim 1 according to auxiliary request 1 constitutes an unallowable intermediate generalisation of the disclosure in the application as filed.

As regards e.g. feature (ii) introduced in claim 1, a basis for the operation of the ventilator and the air conditioner according to said feature can be found on page 6 of the application as filed, which corresponds to paragraph [0017] of the patent specification. However, according to the original disclosure in this passage, reduction of the number of revolutions of the ventilator and of the blowers of the air conditioner is not performed simultaneously but sequentially ("number of revolutions of the ventilating blower ... is first reduced. Then, the numbers of revolutions of indoor blowers 24 and 45 and outdoor blowers ... are reduced"). Moreover, it is explicitly described in this context that the operations of the air conditioners are "reduced by half", i.e. just claiming a reduction in the number of revolutions of the outdoor and indoor blowers of the air conditioner comprises modes of operation which are not originally disclosed.

A similar reasoning applies to feature (iii), since page 8 of the application as filed only describes that the air conditioners are operated with a half of a rated power when the ventilator has been stopped.

The amendment in claim 1 by way of auxiliary request 1 therefore does not comply with the requirement of Article 123(2) EPC.

4. *Auxiliary requests 2 and 3*

4.1 The board finds that auxiliary requests 2 and 3 do not fulfil the requirements of Article 84 EPC according to which the claims shall define the matter for which protection is sought, in a clear and concise manner supported by the description.

Claims 1 according to auxiliary requests 2 and 3 contain the additional feature that the ventilator is installed in the air conditioner. However, it is not clear whether the installation "in the air conditioner" refers to the air conditioner as a system (which according to Figure 2 of the patent specifications consists of two units 20, 40, only one of which containing the ventilator 60), or to a common housing (which would only refer to unit 40 in Figure 2).

4.2 It is noted that if claim 1 were to be interpreted on the basis of the description of the specific embodiment as depicted in Figure 2, then the amendment would amount to an unallowable intermediate generalisation, because Figure 2 only discloses a specific embodiment where the ventilator comprises an intake blower and an exhaust blower which are provided on opposite sides of an electric motor. As described in the introductory portion of the description, such design provides the advantage that the exhaust air from the cabin introduced into a casing containing the electric motor cools the electric motor.

5. Finally, the board notes that the above objections in respect of the auxiliary requests were raised by the appellant with letter dated 9 February 2016, filed in advance of the date (5 April 2016) set for oral proceedings and were not commented by the respondent. These objections were admitted by the board in the exercise of its discretion under Article 13(1) of the Rules of Procedure of the Boards of Appeal (RPBA) in view, *inter alia*, of their relevance. By not attending the oral proceedings, the appellant waived the opportunity of discussing its case in respect of the auxiliary requests. Since the board did not see any reasons to delay any step in the proceedings by reason only of the absence at the oral proceedings of the respondent (patent proprietor), the board announced its decision at the end of the oral proceedings pursuant to Article 15(3) RPBA.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



M. Schalow

G. Pricolo

Decision electronically authenticated