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**Datasheet for the decision
of 14 September 2017**

Case Number: T 1139/12 - 3.2.01

Application Number: 05708664.7

Publication Number: 1758811

IPC: B66F17/00

Language of the proceedings: EN

Title of invention:

SAFETY DEVICE FOR A FORK LIFT TRUCK

Patent Proprietor:

TOYOTA MATERIAL HANDLING MANUFACTURING ITALY S.p.A

Opponent:

Linde Material Handling GmbH

Headword:

Relevant legal provisions:

EPC Art. 123(2)
RPBA Art. 13(1)

Keyword:

Added subject matter (yes)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
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Case Number: T 1139/12 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 14 September 2017

Appellant: Linde Material Handling GmbH
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 3 April 2012
rejecting the opposition filed against European
patent No. 1758811 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman G. Pricolo
Members: C. Narcisi
O. Loizou

Summary of Facts and Submissions

I. The Opposition against European patent No. 1 758 811 was rejected by the decision of the Opposition Division posted on 3 April 2012. The patent was maintained on the basis of granted claim 1 as corrected pursuant to Rule 139 EPC. Against this decision an appeal was lodged by the Opponent on 18 May 2012 and the appeal fee was paid. The statement of grounds of appeal was filed on 13 August 2012.

II. Oral proceedings took place on 14 September 2017. The Appellant (Opponent) requested that the appealed decision be set aside and that the patent be revoked. Subsidiarily the Appellant requested referral of the case to the Enlarged Board of Appeal. The Respondent (Patentee) requested that the appeal be dismissed and the patent be maintained in amended form according to the impugned decision (main request) or, in the alternative, that the patent be maintained as granted (auxiliary request).

III. Claim 1 (main request) reads as follows:

"A safety device for a fork lift truck (2), comprising means (31) for acquiring information relative to the load (X) lifted by a lifting apparatus (8) of a fork lift truck (2), said lifting apparatus (8) being attached to a chassis (3) at a front axle (4) fitted with respective wheels (6) of said fork lift truck (2) and comprising a mast (9), whereby a slide (10) slides along the mast from the bottom to the top and vice versa, the safety device further comprising a processing unit (18) connected to the acquisition means (31), and safety means (30) which act on the truck (2) following a signal (S, S1, S2) processed by the

processing unit (18); wherein the acquisition means (31) comprise a load detector (13) attachable to a rear axle (5) fitted with respective wheels (7) of the fork lift truck (2), said load detector (13) generating a signal (C) indicating the distribution of the weights relative to the rear axle (5); the safety device being characterized in that the processing unit (18) receives the signal (C) and calculates command ramps (LUP1, LDOWN1) for the slide (10) upstroke and downstroke according to commands (LUP, LDOWN) set by the driver (OP) and calculates a limit (LO) on the slide (10) upstroke and downstroke speed, said limit (LO) on the slide (10) upstroke and downstroke speed depending on said signal (C)."

Granted claim 1 (auxiliary request) differs from claim 1 of the main request in that instead of the wording "set by the driver (OP) and calculates a limit (LO) on the slide (10) upstroke and downstroke speed" it reads "set by the driver (OP) and according to a limit (LO) on the slide (10) upstroke and downstroke speed".

IV. The Appellant's arguments may be summarized as follows:

The subject-matter of claim 1 (main request) was obtained by a correction of granted claim 1 pursuant to Rule 139 EPC. However, the prerequisites for this correction are not fulfilled since it is not obvious that an error has occurred and that nothing else would have been intended than what was offered as the correction (according to the wording of claim 1 of the main request).

Further, regardless of whether or not the mentioned prerequisites for said correction are met, both claim 1 of the main and of the auxiliary request contravene Article 123(2) EPC. Indeed the subject-matter of claim

1 of these requests results from a(n) (intermediate) generalization of the disclosure of the patent application as filed (WO-A hereinafter designates the published patent application). The feature reading "a limit (LO) on the slide (10) upstroke and downstroke speed, said limit (LO) on the slide (10) upstroke and downstroke speed depending on said signal (C)" (present in claim 1 of both requests) (hereinafter designated as feature (i)) is derived in conjunction from paragraphs [0088] and [0094] of the patent specification (hereinafter designated as EP-B), or equivalently from the corresponding passages in WO-A. Nonetheless, various features linked to above feature (i) (disclosed in said two paragraphs) were omitted. In particular, the constant L1, defining the "weight" of the signal C in said limit LO (on the upstroke and downstroke speed) and likewise the dependence of the limit LO on the command ramps LUP1, LDOWN1 (all mentioned in the same paragraph [0094]), were all omitted. These omissions are further made evident by the fact that these quantities define said limit LO by a function $LO = LIM(LUP1; LDOWN1; L1; C)$ (see paragraph [0094] and figure 4b, reference sign 109). In addition, in paragraph [0088] reference is made to figure 4b illustrating the flow chart for calculating LUP1 and LDOWN1 commands and for calculating LO. Therefrom it can be seen that in the characterizing portion of claim 1 the further quantities RC1, RC2 (time constants for calculating LUP1, LDOWN1) have been omitted. Finally, in the flow chart of figure 4b various limiting values for the signal C (i.e. > 95%, > 85% in blocks 105, 107) are indicated, defining the implementation of corresponding operating steps by the safety device. All these omissions are not permissible, given that they are inextricably linked to the other quantities defined in the claim.

The Respondent should not be granted an interruption of the oral proceedings for formulating new auxiliary requests. The above objections were already presented by the Appellant with the statement of grounds of appeal and were reiterated later in further written submissions. Hence, the Respondent had already enough opportunities to submit new requests.

V. The Respondent's arguments may be summarized as follows:

The subject-matter of claim 1 of the main request fulfils the prerequisites for a correction pursuant to Rule 139 EPC. In effect, it is evident to the person skilled in the art that an error has occurred in granted claim 1 and it is evident that nothing else would have been intended than what is offered as the correction, according to the present main request.

Further, the subject-matter of claim 1 of the main and of the auxiliary request complies with the requirements of Article 123(2) EPC, given that it does not go beyond the content of the application as filed (WO-A). Contrary to the Appellant's opinion, no (intermediate) generalization has occurred, for the characterizing portion of claim 1 is based on paragraph [0088] of EP-B (and of the corresponding paragraph in WO-A), which summarizes the essential parts and concepts of the invention and is not inextricably linked to any other paragraph. Specifically, time constants RC1, RC2 do not need to be included in claim 1 since command ramps LUP1, LDOWN1 do not necessarily have to include a time constant and various kinds of such command ramps are known. Likewise, including signal C in aforesaid feature (i) is entirely sufficient to define the invention, as the constant L1 merely represents the

"weight" given to the signal C in the function LIM defining the limit LO and it constitutes therefore only a minor detail. The omission of the features included in blocks 105, 107 of the flow diagram (see figure 4b) in claim 1 similarly does not lead to any generalization, for these features (such as for instance: if $C > 95\%$ the slide upstroke is stopped and inhibited) are already implicit in feature (i) of claim 1, stating "the upstroke and downstroke speed depending on said signal C". Finally, said function $LO=LIM(LUP1; LDOWN1; L1; C)$ defined in block 110 of the flow chart (see figure 4b) does not need to be identically reproduced in claim 1, as the dependence of LO on the command ramps LUP1 and LDOWN1 already results from the "upstroke and downstroke speed" included in the wording "and calculates a limit (LO) on the slide (10) upstroke and downstroke speed".

A request for interruption of the oral proceedings was submitted in order to prepare further auxiliary requests. The Respondent considered that the Appellant's objections in relation to Article 123(2) EPC came unexpectedly and as a surprise during oral proceedings, particularly concerning said alleged generalizations of the subject-matter of the disclosure as filed, which supposedly occurred in claim 1 (of the main and of the auxiliary request), i.e. for instance the omission of the features included in said blocks 105 and 107 of the flow chart.

Reasons for the Decision

1. The appeal is admissible.

2. The Board did not need to decide on whether or not an error occurred in granted claim 1 (auxiliary request) and whether the corrected version of claim 1 (main request) meets the requirements of Rule 139 EPC. Indeed, as results from the discussion hereinafter, both the main and the auxiliary request fail on the grounds of added subject-matter (Article 100(c) and Article 123(2) EPC). For this reason also it was not necessary to decide on the Appellant's request for referral of the case to the Enlarged Board of Appeal to decide on the issue relating to Rule 139 EPC.

3. The Board considers that in above mentioned feature (i) at least the omission of the dependence of said limit LO on the command ramps LUP1 and LDOWN1, as well as on the constant L1 "weighting" the signal C, introduces subject-matter extending beyond the content of the application as filed (Article 100(c) and Article 123(2) EPC). In effect, there is no valid reason for neglecting the dependence of LO on the command ramps LUP1, LDOWN1 and on the constant L1 whilst, on the other hand, keeping the dependence on the signal C (see said function $LO = LIM (LUP1; LDOWN1; L1; C)$). This cannot be justified by considering paragraph [0088] (see EP-B) in isolation, even assuming that this were legitimate and permissible, as alleged by the Respondent, given the absence of any mention of said signal C in paragraph [0088]. What is more, even paragraph [0094] in combination with paragraph [0088] likewise does not provide a basis for aforesaid feature (i). In fact, paragraph [0094] mentions said quantities LUP1, LDOWN1 and L1 on an equal footing with said signal C.
The Respondent's further contention that the dependence of the limit LO on LUP1 and LDOWN1 is already implicit in the wording "and calculates a limit (LO) on the

slide (10) upstroke and downstroke speed" cannot be followed by the Board. Indeed, this wording clearly does not express (explicitly or implicitly) any dependence at all, let alone on any of the command ramps LUP1 and LDOWN1. Similarly, the dependence of said limit LO on signal C (as expressed by feature (i)) does not (implicitly) include or anyway render superfluous (contrary to the Respondent's opinion) indicating in claim 1 the dependence on constant L1. In particular, in EP-B (or equivalently in WO-A) the skilled person does not find any indication to the extent that said constant L1, or similarly said command ramps LUP1 and LDOWN1, can be dispensed with in the function $LO = LIM(LUP1; LDOWN1; L1; C)$. It would likewise not be evident to the skilled person how to equivalently replace, on the basis of common general knowledge, said quantities in said function LIM (if at all possible) without significantly affecting the further method steps illustrated in the flow chart of figure 4b. This is certainly likewise not disclosed or suggested in EP-B (or equivalently in WO-A), thereby proving that these features or quantities (in said function LIM) are inseparably linked.

4. The Respondent's request for granting an interruption for preparation and submission of further auxiliary requests was not allowed. As noted by the Appellant, the above objections (see point 3) based on Article 100(c) and 123(2) EPC were submitted already with the statement of grounds of appeal (filed on 13 August 2012, see page 11) and were reiterated in the letter filed on 31 May 2013 (see page 6 of said letter) and in the letter filed on 8 August 2017 (see pages 5, 6). Therefore the Respondent could not possibly be surprised by these objections and had adequate opportunities and sufficient time for replying to these

objections during written proceedings. It is not understandable, and no valid reasons were given, why the Respondent failed to respond to these objections. Even if, as alleged by the Respondent the objections were not developed in writing in such a detail as in the oral proceedings, still the objection of unallowable intermediate generalization had been raised at the earliest stage of the appeal proceedings and would have required a reaction by the Respondent well in advance of the oral proceedings. The Respondent in fact waited until the oral proceedings for providing such reaction, which was in the form of counterarguments. Only after the deliberation and having heard the Board's opinion that the objection was well founded did the Respondent request an interruption of the oral proceedings for preparing amended requests. Under these circumstances, the Respondent having had ample opportunity for reacting to the objection (also by filing amended requests) in advance of the oral proceedings rather than waiting for the result of the Board's deliberation, the Board concluded that it was justified in exercising its discretion pursuant to Article (13(1) RPBA (Rules of Procedure of the Boards of Appeal) having regard to the current state of the proceedings in the sense of not allowing any amendments of the Respondent's case (and, a fortiori of not allowing an interruption of the oral proceedings for allowing the Respondent to prepare an amended case).

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:



A. Vottner

G. Pricolo

Decision electronically authenticated