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**Datasheet for the decision
of 1 October 2015**

Case Number: T 1170/13 - 3.2.01

Application Number: 05800978.8

Publication Number: 1827975

IPC: B64D9/00, B65G13/12, B60P7/13

Language of the proceedings: EN

Title of invention:
CARGO SYSTEM ROLLER/LOCK/POWER DRIVE UNIT TRAY INTEGRATION

Patent Proprietor:
The Boeing Company

Opponents:
Telair International GmbH
Airbus Operations SAS/ Airbus Operations Limited/
Airbus Operations GmbH/ Airbus Operations S.L.
Airbus SAS

Headword:

Relevant legal provisions:
EPC 1973 Art. 54(2), 54(1), 56

Keyword:
prior use -
substantiation and availability to the public (yes)
Novelty - (yes)
Inventive step - all requests (no)

Decisions cited:

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Case Number: T 1170/13 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 1 October 2015

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
15 March 2013 concerning maintenance of the
European Patent No. 1827975 in amended form.**

Composition of the Board:

Chairman	G. Pricolo
Members:	Y. Lemblé
	O. Loizou
	C. Narcisi
	P. Guntz

Summary of Facts and Submissions

- I. All parties of the first instance proceedings, the Patent Proprietor, Opponent I and Opponents II, appealed against the decision of the Opposition Division to maintain the European patent No. 1 827 975 in amended form on the basis of the second auxiliary request filed with letter of 28 December 2012.
- II. In the decision under appeal, the Opposition Division held, after having heard the witness T. Huber, chief technical officer at the first Opponent, that the prior use of a cargo tray system no. SR 193820 as shown in drawing D4-1, containing a tray no. 193410-302 according to drawing D4-2, allegedly sold by Opponent I and subsequently installed in a Boeing 747-400 F in April 2002 that had been delivered to Asiana Airlines in May 2002 (hereinafter called prior use II of tray II) was sufficiently proven and that tray II was prior art for the purpose of Article 54 (2) EPC 1973.

The Opposition Division also held that another prior use relied upon by Opponent I, a cargo tray system no. 193100-101 as shown in drawing D3-1, containing a tray with part no. 193141-9 according to drawing D3-2 allegedly sold by Opponent I to Boeing and subsequently installed in a Boeing 747-300 in May 2001 (hereinafter called prior use I of tray I) was not sufficiently proven.

At the end of the Oral Proceedings, the Opposition Division held that the subject-matter of claim 1 of the second Auxiliary Request, filed on 28 December 2012, met the requirements for patentability having regard to the prior use II and the prior art documents cited by the Opponents.

III. In support of its contention that prior use II had not been sufficiently proven, the Appellant/Proprietor filed with letter dated 20 August 2013 a declaration of William R. Clos and David A. Blake (Boeing staff members), respectively.

IV. Oral proceedings before the Board were held on 1 October 2015.

Appellants/Opponents I and II requested that the decision under appeal be set aside and that the patent be revoked.

The Appellant/Patent Proprietor requested that the decision under appeal be set aside and that the patent be maintained as granted (main request) or in the alternative, that the patent be maintained in amended form on the basis of one of the auxiliary requests 1 to 5 filed on 25 July 2013 with its statement of grounds of appeal.

V. Claim 1 as granted (main request) reads as follows:

A variable width tray (300) for housing cargo-moving devices (104, 106, 208), comprising:
a first portion (304) of the variable width tray having a first width;
a second portion (302) of the variable width tray having a second width that is greater than the first width; and
a transition section (306) configured to connect the first portion of the variable width tray to the second portion of the variable width tray **characterized in that** the second portion of the variable width tray houses a power drive unit (208).

Claim 1 of the first auxiliary request reads as follows (amendments as compared to claim 1 as granted underlined):

A variable width tray (300) for housing cargo-moving devices (104, 106, 208), comprising:
two first portions (304) of the variable width tray, each having a first width;
a second portion (302) of the variable width tray between the first portions and having a second width that is greater than the first width; and
two transition sections (306), each configured to connect a respective one of the first portions of the variable width tray to the second portion of the variable width tray **characterized in that** the second portion of the variable width tray houses a power drive unit (208).

Claim 1 of the second auxiliary request consists of the combination of the features of claim 1 as granted with the following feature:
and wherein the power drive unit has a width greater than the first width.

Claim 1 of the third auxiliary request consists of the combination of the features of claim 1 as granted with the following feature:
wherein the second portion has an internal width corresponding to a standard width.

Claim 1 of the fourth auxiliary request reads as follows (amendments as compared to claim 1 as granted underlined):

A variable width tray (300) for housing cargo-moving devices (104, 106, 208), comprising:
a first portion (304) of the variable width tray having a first width along the entirety of the first portion;
a second portion (302) of the variable width tray having a second width along the entirety of the second portion, the second width being greater than the first width; and
a transition section (306) configured to connect the first portion of the variable width tray to the second portion of the variable width tray **characterized in that** the second portion of the variable width tray houses a power drive unit (208).

Claim 1 of the fifth auxiliary request reads as follows (amendments as compared to claim 1 as granted underlined):

A variable width tray (300) for housing cargo-moving devices (104, 106, 208), comprising:
a first portion (304) of the variable width tray having a first internal width along the entirety of the first portion and a first external width along the entirety of the first portion;
a second portion (302) of the variable width tray having a second internal width along the entirety of the second portion and a second external width along the entirety of the second portion, the second internal width being greater than the first internal width; and the second external width being greater than the first external width; and
a transition section (306) configured to connect the first portion of the variable width tray to the second portion of the variable width tray **characterized in that** the second portion of the variable width tray houses a power drive unit (208).

VI. The arguments of the Appellant/Patent Proprietor, as far as they are relevant for the present decision, may be summarised as follows:

To the alleged public prior use I and II

The original two allegations regarding public prior use in the first opponent's notice of opposition (trays I and II) both related to allegations of a sale from Telair to Boeing. However, Opponent I now only relied on allegations regarding sales from Telair to Asiana Airlines in respect of tray II. In fact, during opposition proceedings the original allegations had been abandoned and replaced by new allegations which had been filed after expiry of the opposition period. The Opposition Division had considered that the issue of substantiation must be assessed on the basis of the submissions made within the opposition period (see point 8.2.2 of the decision). In this context and having in mind that the substantiation of a prior use was not a matter of discretion, the public prior use of tray II should have been dismissed, since it was not adequately substantiated. In particular, there was no indication as to "where" prior use II occurred. Since the Opposition Division consistently rejected all late allegations of prior use which were not substantiated within the opposition period, the public prior use allegations on which the first opponent now relied should not have been admitted into the proceedings and thus should be disregarded by the Board. As none of the original allegations have been substantiated, all of the public prior use allegations should be dismissed.

The conclusion of the Opposition Division concerning the question whether the prior use of tray II was

sufficiently proven, was incorrect and inconsistent. Having regard to the standard of proof applicable for prior use II, the Opposition Division took "into account that the proprietor could have but did not make any substantive submissions against which the first Opponent's evidence could be balanced" (see decision, first paragraph, page 18) and, thus, disregarded the fact that the prior use had been -and was still- contested by the Patent Proprietor. It wrongly applied a standard which was not the strict standard of "beyond any doubt" or "up to the hilt", although this standard should have been applied because all the evidence lay within the sphere of Opponent I. The Proprietor had no reason to assume that the burden of proof had shifted. On the presumption that the Opposition Division established its mind on the basis of another standard than absolute conviction, it was questionable whether the Patent Proprietor's right to be heard was respected (see point 8.7 of the minutes) as the Opposition Division did not indicate that it moved away from this strict standard.

But even if the standard to be applied by the Opposition Division were a less strict one, e.g. on the balance of probability, the documents and evidence adduced by Opponent I still failed to prove that tray II was installed in a Boeing 747 destined to Asiana Airlines. D5 was a delivery slip between two Telair subsidiaries (from Telair International GmbH to Telair Int'l Oxnard). It therefore could not on its own prove that a delivery to any non-Telair company had taken place. D5, as well as D4-2, suggested that no PDU had been included in the alleged delivery. In D4-2, in the list of four part numbers, the two part numbers listed in D5 were each stated as being "WITHOUT POS. 1", wherein position 1 was shown at the top-right of D4-2

with the reference numeral "1" as being the PDU. This suggested that no PDUs had been included in the alleged delivery.

The declaration of William R. Clos and David A. Blake (Boeing staff members) were filed as a precaution in case the burden of proof shifted to the Patent Proprietor during these proceedings. Especially the declaration of Mr. Blake showed that no reference or part numbers as mentioned in the documents D4-2 and D5, alleged to be installed in the B 747 of Asiana Airlines, could be found in the Boeing's Enterprise Resource Planning Database. None of the documents cited by Opponent I proved that tray II equipped with a PDU was actually received by Boeing and installed in a Boeing 747 delivered to Asiana Airlines. Thus, not even the balance of probabilities had been met.

Novelty

The variable width tray of claim 1 as granted was novel with respect to tray II. The same conclusion applied for the tray of claim 1 according to auxiliary requests 1 to 5.

Inventive step

The variable width tray of claim 1 as granted involved an inventive step in view of the state of the art mentioned in the introductory part of the patent specification and of tray II as shown in D4-2. The claimed tray combined the advantages of narrow tray structure (lightness) with those of wider tray structure which could accommodate PDUs (reduced complexity). When applied to the hundred of meters of tracks forming the cargo handling system of an aircraft, the invention offered tremendous advantages

in respect of weight saving. This was not rendered obvious by tray II as shown in drawing D4-2 because this tray only had the function of a junction and this type of junction was only needed in a limited area of the platform of the aircraft. Moreover, the reason for the existence of the flared portion of tray II was only to enable the PDU to swivel in order to fulfil its function as a junction. As mentioned by the witness Huber (see page 40/44 of the hearing), the PDU shown in drawing D4-2 could fit anywhere in tray II at any point along its length, so that if the skilled person would consider removing the rotating ability linked to the junction, he would go back to what technology offered and install the PDU in a standard tray. He would not think about an enlargement of the section of the tray. The same conclusion applied for the tray of claim 1 according to any of the auxiliary requests 1 to 5.

VII. The arguments of the Appellants/Opponents in support of their request of revocation of the patent, insofar as they are relevant to this decision, can be summarised as follows:

The conclusion of the Opposition Division concerning the question whether the prior use of tray II was substantiated and sufficiently proven should be confirmed.

The tray defined in claim 1 as granted (main request) was not novel over tray II. As mentioned by the Opposition Division in point 9.1 of the decision, the word "portion" did not imply a predetermined length, nor did the width of the portions need to be constant. In any case, the tray defined in claim 1 as granted did not involve an inventive step. As mentioned in the patent specification, prior art trays included narrow

trays having weight-saving advantages and wide trays which could accommodate PDUs. Confronted with the problem of combining both advantages, the skilled person would find the solution in tray II. Indeed, contrary to the opinion of the Opposition Division, drawing D4-2, showing tray II, taught to widen a portion of a tray system in order to accommodate a PDU. A similar reasoning applied for all auxiliary requests.

Reasons for the Decision

1. The appeals are admissible.
2. Prior use of tray II
 - 2.1 Admissibility and substantiation of the prior use of tray II

As regards the objections of Appellant/Patent Proprietor relative to the lack of substantiation of the prior use of tray II and its non-admissibility into the opposition proceedings, the Board notes that Appellant/Opponent I made the following statement in the notice of opposition: "The cargo handling system according to drawing D4-1 with tray II according to drawing D4-2 was sold to Boeing and installed by Boeing in April 2002 into a Boeing 747-400 F. This airplane was delivered to Asiana Airlines in May 2002. At the latest by that date was the tray II freely available to the public" (translation).

The Opposition Division considered that this statement covered two aspects of an alleged public prior use of tray II including, first, the sale of tray II to Boeing and, secondly, the allegation that the same tray II was

made "freely accessible to the public" ("der Öffentlichkeit frei zugänglich") by the delivery to Asiana Airlines in May 2002. This second aspect was not considered by the Opposition Division as a new allegation of prior use, as contended by the Appellant/Patent Proprietor (see also points 8.3.4 and 8.3.5 of the decision of the Opposition Division) and it is this second aspect that the Opposition Division took into consideration in the later course of the proceedings (letter of Opponent I dated 16 May 2011 and relative to the installation and the delivery of tray II to Asiana Airlines: page 3, last paragraph).

Considering that the opposition was admissible, new facts, evidence or allegations relating to further prior uses or to already invoked prior uses must be treated in accordance with Article 114(2) EPC, i.e. they are not automatically dismissed but it is left to the discretion of the Opposition Division whether these new late-filed allegations, evidence and/or documents be admitted into the proceedings or not.

Thus, the Opposition Division was clearly entitled to take into consideration the late-filed document D5 and evidence (affidavits of Mr. Mulalley and of Mr. Huber), to recognise that the original assertion that tray II was sold to Being was incorrect and to accept the later "clarification" that only the sale of tray II to Asiana Airlines remained as public prior use. The Board cannot see here that the Opposition Division exerted its discretion under Article 114(2) EPC in an incorrect manner.

It can be noted that all the late-filed documents (D5, affidavits of Mr. Mulalley and of Mr. Huber) are consistent with the original allegations made with

respect to tray II and constitute a reaction of Opponent I to the objection of the Patent Proprietor which contested the availability to the public of tray II. The issue of the admissibility of these late-filed documents and evidence, or even new allegation in respect of prior use II -if considered as such by the Patent Proprietor- was duly dealt with in the oral proceedings before the Opposition Division (see point 5 of the minutes), so that there was no breach of the Patent Proprietor's right to be heard.

2.2 Standard of proof

There is nothing in the file which indicates or leads to the conclusion, that the Opposition Division used an incorrect standard of proof in deciding that public prior use II was sufficiently proven.

Contrary to the opinion of the Appellant/Patent Proprietor the Opposition Division came to the conviction that prior use II was established in the full knowledge that it was contested as a whole by the Patent Proprietor. Point 7.6 of the minutes of the oral proceedings before the Opposition Division mentioned by the Appellant/Patent Proprietor ("as the Proprietor had contested both prior uses, it was necessary to hear the witness") does not solely refer to the sale/involvement of Boeing in both prior uses but also to the delivery of tray II to Asiana Airlines, since points 7.4 and 7.7 of the minutes make clear that the delivery of tray II to Asiana Airlines was one of the two issues for which the witness would be heard.

At the latest after the invitation to oral proceedings before the Opposition Division, it was clear to the parties that the question of the availability to the

public of prior use II was at stake. The Board notes that the Patent Proprietor had the opportunity to present counter-evidence against the allegations of Opponent I. After the hearing of Mr Huber and the evaluation of the documents and evidence adduced by Opponent I, when the Opposition Division came to the conviction that the prior use of tray II was proven and, consequently, that the Patent Proprietor was involved in prior use II, it became apparent that the strategy chosen by the Patent Proprietor steadily requiring that the prior use and the involvement of Boeing be proven "up to the hilt" was at its own risks. The applicable standard of proof depends on the particular circumstances of the case and is left to the appreciation of the deciding body, i.e. the Opposition Division after it made its findings. It cannot be expected from the Opposition Division that it indicates in advance, i.e. before the testimony of the witness, which standard of proof it will apply.

2.3 Question whether the prior use II was sufficiently proven

The argument presented in this respect in appeal proceedings by the Patent Proprietor (no evidence for PDU, no evidence that any part was received by Boeing) was already made before the Opposition Division and was duly considered by the Opposition Division. As a consequence, the Board cannot find that the Opposition Division was mistaken when, after a free evaluation of the available evidence, especially the testimony of Mr Huber, it came to the conclusion that tray II equipped with a PDU was made available to the public by the delivery of the Boeing 747 before the priority date of the patent-in-suit. The Board cannot recognise in the contention of the Appellant/Proprietor good reasons for

questioning the correctness of this conclusion of the Opposition Division in respect of the prior use II. There are circumstances in relation with prior use II (Boeing 747-440-F delivered by Boeing to Asiana Airlines) which show that Opponent I did not easily dispose over all the necessary evidence. The contention of the Appellant/Proprietor requiring the prior use to be proven "up to the hilt" ignores, in the circumstances of the present case, that the Opposition Division obviously considered that this prior use was not the classical case in which all evidence lay within the sphere of Opponent I (see point 8.4.4 of the decision of the Opposition Division).

3. For the Board, the new documents filed by the Appellant/Patent Proprietor in appeal, the statements of Mr. Clos and Mr. Blake, are not able to overturn the conclusion of the Opposition Division.
- 3.1 As concerns the question of the public disclosure of the features of tray II once installed on a commercial Boeing 747, the statement of Mr. Clos (point 3) directly collides with the affidavit of Mr. Mulalley (point 6). For the Board, the contention of the Appellant/Patent Proprietor that the features of tray II would not be available to the public because the cargo area of any commercial aircraft in any area of the world is never allowed to the public, is not compelling. In view of the number of persons having access to the cargo area of such a big commercial aircraft and being able to appreciate the features of tray II, it does not seem plausible that these features could remain secret.

The affidavit of Mr. Blake is formulated as a negative statement asserting that specific part numbers used by

Opponent I in drawing D4-2 could not be found in a Boeing database. There is no explanation in this affidavit about what was stored in the database, how the search in the database was done, why some parts numbers mentioned by Opponent I could be found in the database of Boeing and some not. In the absence of any further information, this affidavit also falls short of convincing the Board that it should overturn the conclusion of the Opposition Division.

3.2 Thus, the Board judges that it is not justified to set aside the evaluation of evidence by the Opposition Division and can only confirm that tray II belongs to the state of the art within the meaning of Article 54(2) EPC 1973.

4. Main request

4.1 Novelty

In respect of the interpretation of the features of the claim, the Board shares the view of the Patent Proprietor that they should be interpreted with a mind willing to understand and not on the search for any devious interpretation lacking any coherence (see T 190/99).

The claim defines a variable width tray comprising two portions and begins by specifying that the first portion has a first width. The skilled person can only understand here that the first portion is formed as a conventional channel consisting of two parallel rims defining that first width, which is consequently a constant width. On this basis, there is absolutely no reason to interpret the next feature "a second portion of the variable width tray having a second width that is greater than the first width", which has exactly the

same semantic structure, differently than the first one. The contention of lack of novelty made by the the Appellants/Opponents relies on an inconsistent approach giving both above-mentioned features a different significance. The variable width tray shown in drawing D4-2 does not show that the second portion of the variable width tray defines a second -constant- width greater than the first width of the first portion. Therefore, the tray of claim 1 is novel over tray II.

4.2 Inventive step

4.2.1 As mentioned in the introductory part of the patent specification, it is state of the art in the field of cargo handling systems for commercial aircraft to handle and lock palletized loads on a tray structure which is detachably secured to the floor of the aircraft. Such a tray structure is composed of a plurality of elongated trays which integrate rollers, locks and, in the case of wider trays, power drive units (PDUs), whereby the PDUs are used to drive and brake the pallets. It is also known to use narrow trays which are lighter than wider trays, since they necessitate less material. The latter, however, prove inconvenient in that they cannot incorporate PDUs which have then to be secured separately onto the floor of the airplane, thus adding complexity to an arrangement with narrow trays (see paragraph [0014] of the patent specification).

4.2.2 The objective problem is formulated in the patent specification (paragraph [0004]): "it is desirable to provide a cargo handling system tray structure that combines the advantages of both the narrow and the wide tray designs while minimizing their traditional disadvantages".

4.2.3 Drawing D4-2 discloses a variable width tray (tray II) for housing cargo-moving devices, comprising a first portion having a first width and a second portion having a variable width greater than the first width. The second portion of the variable width tray houses a PDU.

Tray II functions as a junction to drive pallets along a first track or a second track crossing the first one. The second portion is wider than the first portion in order to accommodate a special PDU which is able to swivel, thus determining which direction the driven pallet should take. For the Board, the skilled man would recognise in D4-2 a solution to the above-mentioned problem, since it teaches to widen a portion of a tray in order to accommodate a special PDU. Contrary to the opinion of the Appellant/Patent Proprietor, it is obvious that this teaching could be applied to a tray for housing a PDU which does not necessarily need a swivelling function.

5. Auxiliary requests; inventive step

The above reasoning on inventive step made with respect to claim 1 of the main request also applies to claim 1 of the auxiliary requests 1 to 5.

Especially as regards the second auxiliary request, the Appellant-Patent Proprietor argued that the additional feature ("the power drive unit has a width greater than the first width") was not taught by D4-2, since the PDU shown in this document could be placed anywhere along the length of the tray. This small but significant difference with respect to the object of the previous requests involved an inventive step.

The Board does not agree. The teaching of D4-2, i.e. to locally increase the width of a tray in order to accommodate a relatively large PDU, is also applicable to a narrow tray in order to accommodate a PDU which would be too wide to fit inside a standard narrow tray. This can be easily deduced from the fact that the tray of D4-2 is not only widened on the left by the provision of an oblique rim (to allow the PDU to swivel) but also on the right where the rim of the tray bulges out to form a staggered rim portion which remains parallel to the direction of the rim within the first portion. The skilled person would readily recognise that such a tray combines the advantages of weight savings with a reduced complexity, since there is no need for a special mounting of the PDU on the floor of the aircraft. The application of this teaching to a narrow tray would lead in an obvious manner to the subject-matter of claim 1 of all the auxiliary requests.

Thus, all auxiliary requests must also fall for lack of inventive step of their subject-matter.

Order

For these reasons it is decided that:

- The decision of the Opposition Division is set aside.
- The patent is revoked.

The Registrar:

The Chairman:



A. Vottner

G. Pricolo

Decision electronically authenticated