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Datasheet for the decision of 24 September 2018

Case Number: T 1037/14 - 3.2.04

Application Number: 03076522.6

Publication Number: 1346639

IPC: A22C21/00

Language of the proceedings: EN

Title of invention:
Method for filleting slaughtered poultry

Patent Proprietor:
Marel Stork Poultry Processing B.V.

Opponent:
Nordischer Maschinenbau
Rud. Baader GmbH + Co. KG

Headword:

Relevant legal provisions:
EPC Art. 54(2), 123(2)

Keyword:
Novelty - (no)
Amendments - allowable (no)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

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Case Number: T 1037/14 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 24 September 2018

Appellant: (Patent Proprietor)	Marel Stork Poultry Processing B.V. Handelstraat 3 5831 AV Boxmeer (NL)
Representative:	EP&C P.O. Box 3241 2280 GE Rijswijk (NL)
Respondent: (Opponent)	Nordischer Maschinenbau Rud. Baader GmbH + Co. KG Geniner Strasse 249 23560 Lübeck (DE)
Representative:	Stork Bamberger Patentanwälte PartmbB Meiendorfer Strasse 89 22145 Hamburg (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 14 March 2014 revoking European patent No. 1346639 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	A. de Vries
Members:	S. Oechsner de Coninck
	T. Bokor

Summary of Facts and Submissions

I. The appellant (proprietor) lodged an appeal, received on 7 May 2014, against the decision of the Opposition Division dispatched on 14 March 2014 on the revocation of the patent EP 1 346 639, and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 8 July 2014.

II. The opposition was based on Article l00(a) together with 52(1), 54(1) and 56 EPC, and further Article 100(b) EPC. The Opposition Division held, inter alia, that the subject-matter of claim 1 according to the auxiliary request was not novel having regard to the following document:

D10: DE 40 08 719 A1

III. In a communication from the Board of 13 July 2018, in preparation for oral proceedings, the Board expressed its provisional opinion regarding novelty of granted claim 1 vis-à-vis D10, as well as regarding the amendments of claim 1 according to the second and third auxiliary requests.

IV. Oral proceedings were held on 24 September 2018, in the absence of the appellant, who had declared with letter of 17 July 2018 that he would not attend the oral proceedings.

V. The appellant (patent proprietor) requests in writing that the decision under appeal be set aside, and that the patent be maintained as granted, or alternatively in an amended form on the basis of any of the First to Third auxiliary requests, all filed with the grounds of appeal dated 8 July 2014.

VI. The respondent (opponent) requests that the appeal be dismissed.

VII. The wording of the independent claim 1 of the relevant requests reads as follows:

Main request and First auxiliary request

"Method for filleting at least the breast of a front half of slaughtered poultry, comprising the following steps:

(a) prior to filleting of the front half (58), at least two incisions are made, extending almost to or into the ribs, and each extending from the region of a shoulder in the direction of the position of the hip at the same side of the front half;

(b) detaching the breast meat from the carcass in the direction of the breastbone; and

(c) separating the breast meat from the carcass, and characterized in that the incision is made to the ribs along the breast side of the shoulder joint."

Second and Third auxiliary requests

Claim 1 according to these requests adds the following expressions (underscored) in step (c) of the granted claim 1:

"(c) separating the breast meat from the carcass, and characterized in that the incision is made essentially perpendicular to the ribs to the ribs along the breast side of the shoulder joint by a circular cutter driven by a motor."

VIII. The appellant's arguments are as follows:
- D10 discloses scraper blades that are unable to make incisions as requested by the wording of claim 1. This is clear for a skilled person and reading D10.
- Claim 1 as amended according to the second and third auxiliary requests adds further specifications that can found in figs. 6 and 7 and in par. [0023] of the B1 publication.

IX. The respondent's arguments are as follows:
- All steps of the method claim 1 can be read onto D10 which is thus novelty destroying for the subject-matter of granted claim 1.
- None of the figures 6 or 7 show the ribs, therefore they cannot give a clear and unambiguous basis on how the incision is made with respect to the ribs.

Reasons for the Decision

1. The appeal is admissible.

2. Novelty of granted claim 1, vis-à-vis D10

In its communication in preparation for the oral proceedings the Board gave a preliminary opinion regarding this issue. In particular it stated the following:

"The decision found the subject-matter of claim 1 to have been anticipated by the disclosure of D10. D10 discloses a method for filleting poultry, wherein prior to filleting in a process step c) described in column 3, lines 24 to 35, two scrapers blades ("Schabeklingen 23") operate on the filet meat of a carcass. There the scraper blades penetrate the meat ("in das Fleisch eintauchen", line 35) along the breast side of the

shoulder joint (col. 3, l. 30-33; "unmittelbar unterhalb der Flügelgelenke")....

In relation to that question the Board observes that the leading edge 24 of the scraper blade is defined as "Spitze", and therefore in the context of a - scraper - blade seems to imply a sharp penetrating action that result in an incision in the sense of "a cut made in something" according to Merriam Webster definition. Moreover, in the direction of movement of the carcass relative to the scraper blades 23 the edges 24 thereof move closer to the ribs of the breast, and therefore effect incisions extending at least "almost to" the ribs....

Since the 1st auxiliary request retains the same wording of claim 1 as granted, the same conclusion concerning novelty would also appear to hold for this auxiliary request."

As is apparent from the above, in the Board's preliminary opinion the question of novelty vis-à-vis D10 hinged on whether or to what extent the edge of the scraper blades 23 of D10 was able to make incisions extending at least "almost to" the ribs, and observed that the edge 24 operate a sharp penetrating action that results in an incision. In its letter announcing its non-attendance at the oral proceedings, the appellant has not addressed the Board's provisional comments. The Board does not see any reason to deviate from this opinion and the reasoning given therein. Therefore, for the reasons as set out in its communication of 13 July 2018, and quoted here above the Board concludes that the subject-matter of claim 1 according to the main request as well as the identical

claim 1 according to the first auxiliary request lacks novelty with respect to D10.

3. Second and Third auxiliary request - added subject-matter

In relation to the features added in claim 1 according to these requests the Board in its preliminary opinion regarding this issue, made the following statements:

"In claim 1 of the 2nd and 3rd auxiliary request the following features are added:"the incision is made essentially perpendicular to the ribs along the breast side of the shoulder joint by a circular cutter driven by a motor". Basis for this amendment has been proposed to be found in figures 6 and 7 and paragraph 23 of the B1 publication corresponding to paragraph 37 of the published application. Since the amendment incorporates some but not all of features clearly visible in the figures, and also contained in the cited passage, the allowability of this intermediate generalisation is to be assessed, whereby according to established case law the introduction of isolated features from a given context (intermediate generalisation) is justified and allowable only in the absence of any clearly recognisable functional or structural relationship among the features of the specific combination (see Chapter II.E.1.7 on Article 123(2) EPC, 8th edition, 2016).

In this respect the Board observes that apart from the circular cutters, figures 6 and 7 depict many other features that are visible in these figures such as the three circular blades having a particular orientation with respect to the carcass and translation direction.

Furthermore neither figure 6 or 7 nor paragraph 23 (paragraph 37 of the published application) appear to show the ribs, and even less a cutting direction with respect to them."

The appellant also failed to submit any substantive comment on the preliminary opinion of the Board concerning the issue of added subject-matter. The Board does not see any reason to deviate from this opinion and the reasoning given therein as repeated above.

The Board adds that, as also noted by the respondent opponent, figures 6 or 7 do not depict the ribs in the schematic representation of the front half 58 of the poultry. Due to the schematic representation of the outer appearance of the poultry the exact position of the ribs located therein cannot be directly and unambiguously derived. The related passage of the description is also silent on any orientation of the blades of the rotary cutters 70 with respect to the front half 58 of the poultry, less so the ribs located deeper under its skin. Absent any direct and unambiguous disclosure of the incision being made "essentially perpendicular" to the ribs, the subject-matter of claim 1 contains subject-matter extending beyond the content of the application as filed.

For the above reasons the Board concludes that claim 1 according to the second and third auxiliary requests is not allowable under Article 123(2) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

G. Magouliotis A. de Vries

Decision electronically authenticated