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Datasheet for the decision of 16 January 2019

Case Number: T 1479/14 - 3.2.07

Application Number: 03799893.7

Publication Number: 1581427

IPC: B65B25/06, B65B35/24

Language of the proceedings: EN

Title of invention:
FILL AND PACKAGING APPARATUS

Patent Proprietor:
Formax, Inc.

Opponent:
GEA Food Solutions Germany GmbH

Headword:

Relevant legal provisions:
EPC Art. 56
RPBA Art. 13(3)

Keyword:
Inventive step - (yes)
Late-filed argument - adjournment of oral proceedings would have been required (yes)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1479/14 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 16 January 2019

Appellant: (Patent Proprietor)	Formax, Inc. 9150 191st Street Mokena, Illinois 60448 (US)
Representative:	Beier, Ralph V. Bezold & Partner Patentanwälte - PartG mbB Akademiestraße 7 80799 München (DE)
Respondent: (Opponent)	GEA Food Solutions Germany GmbH Im Ruttert 35216 Biedenkopf-Wallau (DE)
Representative:	Wolff, Felix Kutzenberger Wolff & Partner Waidmarkt 11 50676 Köln (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 6 May 2014 concerning maintenance of the European Patent No. 1581427 in amended form.**

Composition of the Board:

Chairman	I. Beckedorf
Members:	K. Poalas
	V. Bevilacqua

Summary of Facts and Submissions

I. The patent proprietor (appellant) lodged an appeal in the prescribed form and within the prescribed time limit against the interlocutory decision of the opposition division maintaining European patent No. 1 581 427 in amended form.

II. Opposition had been filed against the patent as a whole based on Article 100(a) EPC (lack of novelty and inventive step).

III. The opposition division found that the subject-matter of claim 1 of the patent as granted as well as of auxiliary request 1 does not involve an inventive step, but that the subject-matter of the independent claim 1 of the auxiliary request 2 filed with letter dated 9 August 2013 meets the requirements of the EPC.

IV. The Board issued a communication pursuant to Article 15(1) RPBA with its preliminary opinion on the appeal case. According to the Board's review of the decision under appeal and its assessment of the parties' written submissions during the appeal proceedings, the appeal was preliminarily considered allowable on the basis of the patent as granted.

V. Oral proceedings before the Board took place on 16 January 2019.

The patent proprietor finally requested

that the decision under appeal be set aside and that the patent be maintained as granted (sole request).

The opponent (respondent) finally requested

that the appeal be dismissed.

For further details from the oral proceedings, in particular the matters discussed with the parties and the parties' statements on procedural matters, reference is made to the minutes thereof.

The decision was given at the end of the oral proceedings.

VI. The following documents are referred to in the present decision:

E2 : EP 0 798 242 A;
E3 : EP 0 104 142 A;
E4 : DE 25 16 583 A.

VII. The independent claim 1 according to the main request, i.e. according to the patent as granted, reads as follows:

"An apparatus for filling food product drafts into packages, comprising:
a supply of open top containers arranged in rows and carried by an elongated web (63) of film and movable by said web (63) into a fill station (61); and
a shuttle conveyor (52) having a retractable and extendable conveying surface (80), said conveying surface (80) arranged above said fill station (61) and having an end region (100) extendable or retractable to a position arranged to deposit food product drafts into said containers of a first row by said conveying surface (80), said conveying surface (80) extendable or

retractable to reposition said end region (100) to a position arranged to deposit food product drafts carried on said conveying surface (80) into said containers of a second row;
wherein said shuttle conveyor (52) is configured to fill plural rows of containers while said web (63) is stationary in said fill station (61), and said shuttle conveyor (52) is configured to advance from a retracted position to an extended position to fill a new first row of a group of empty containers while said web (63) advances to locate a succeeding plural row of containers in said fill station (61); or
wherein said shuttle conveyor (52) is configured to fill plural rows of containers while said web (63) is stationary in said fill station (61), and said shuttle conveyor (52) is configured to retract from an extended position to a retracted position to fill a new first row of a group of empty containers while said web (63) advances to locate a succeeding plural row of containers in said fill station (61)".

VIII. The patent proprietor's essential lines of arguments in the appeal proceedings, as far as they are relevant for this decision, can be summarised as follows:

The skilled person starting from E2 as closest prior art and seeking to increase the through put and to simplify the sealing of the food products would not be led by its common general technical knowledge or one of the teachings of E3 and E4 to the subject-matter of claim 1 without exercising an inventive activity.

Given that the patent proprietor was taken by surprise by the opponent's submission for the fist time during the oral proceedings of an inventive step attack based on the combination of the teaching of document E4 with

the teaching of document E2, said amendment of the opponent's case by way of a new lack of inventive step attack should not be admitted into the appeal proceedings according to Article 13(3) RPBA.

The party's arguments are dealt with in detail in the Reasons for the Decision.

IX. The opponent's essential lines of arguments in the appeal proceedings, as far as they are relevant for this decision, can be summarised as follows:

Starting from E2 as closest prior art and seeking to provide an alternative for the trays used in E2 the skilled person would be led by its general technical knowledge or one of the teachings of E3 and E4 to the subject-matter of claim 1 without the exercise of an inventive activity.

Due to its relevance, the late filed new inventive step attack based on the combination of the teaching of document E4 with the teaching of document E2 should be admitted into the appeal proceedings.

The party's arguments are dealt with in detail in the Reasons for the Decision.

Reasons for the Decision

1. *Admittance into the proceedings of the inventive step attack based on the combination of the teaching of document E4 with the teaching of document E2*

1.1 In accordance with Article 12(2) RPBA "the statement of grounds of appeal and the reply shall contain a party's complete case. They shall set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld and should specify expressly all the facts, arguments and evidence relied on".

1.2 Article 13(1) RPBA leaves it to the discretion of the Board to admit amendments to a party's case after it has filed its grounds of appeal or reply. Aspects to be looked at when exercising the discretion are according to Article 13(1) RPBA *inter alia* the complexity of the new subject-matter, the current state of the proceedings and the need for procedural economy.

1.3 An even stricter criterion is applied to amendments sought to be made after oral proceedings have been arranged. According to Article 13(3) RPBA these amendments "shall not be admitted if they raise issues which the Board or the other party or parties cannot reasonably be expected to deal with without adjournment of the oral proceedings." Thus, the parties' right to be heard and/or procedural economy take precedence over other considerations.

1.4 The objection of lack of inventive step based on the combination of the teaching of document E4 with the teaching of document E2 was raised by the opponent for

the first time in the appeal proceedings during the oral proceedings before the Board.

1.5 Lack of inventive step was dealt with in the decision under appeal and in the opponent’s reply to the appellant's statement setting out the ground of appeal starting from E2 as representing the closest prior art. E4 was used in the appeal proceedings by the opponent in respect with certain information in document E2 for the use of an elongated web of film in order to carry and move the trays 5. Also in its communication according to Article 15(1) RPBA, the Board considered that the combination of the teaching of E2, said last representing the closest prior art, with the general technical knowledge of the person skilled in the art or with one of the teachings of E3 and E4 does not deprive the subject-matter of claim 1 from inventive step. Even after having been informed by said communication about the Board’s preliminary opinion, the respondent refrained from presenting any other lack of inventive step attack until the day of the oral proceedings. Thus, in the Board's view, the patent proprietor had every reason to believe that lack of inventive step was no longer pursued in the appeal proceedings starting from E4 or from any other document of the present proceedings.

1.6 Moreover, the opponent conceded at the oral proceedings that the relevance of such an inventive step attack based on the combination of the teaching of document E4 with the teaching of document E2 only occurred to it during preparation for oral proceedings. Therefore, in the Board's view, it cannot be expected that the patent proprietor would have foreseen the objection of lack of inventive step based on the combination of the teaching of document E4 with the teaching of document E2 and had

prepared counter-arguments in this respect.

1.7 Considering all the circumstances of the present case, the Board concludes that the patent proprietor's right to be heard with regard to said new lack of inventive step attack would have been respected only if the oral proceedings were adjourned or the case was remitted to the opposition division in order to allow the patent proprietor adequate consideration of the opponent's objection.

1.8 Consequently, applying Article 13(3) RPBA, the Board did not admit into the appeal proceedings the respondent's new line of attack and did not allow the respondent to further present its new lack of inventive step attack based on the combination of the teaching of document E4 with the teaching of document E2.

2. *Claim 1 - inventive step, Article 56 EPC*

Closest prior art

2.1 The Board considers the apparatus disclosed in E2 as representing the closest prior art. E2 discloses thereby a supply (transfer conveyor 6) of open top containers (trays 5) and a shuttle conveyor (shuttling retractable plate 9). The transfer conveyor 6 of E2 is aligned perpendicular to the shuttling retractable plate 9. Each tray 5 is a single open container. A single line of open containers, as depicted by the linear arrangement of trays 5 on transfer conveyor 6 of E2, cannot qualify as a supply of open top containers arranged in rows. Accordingly, at least the feature of claim 1 that the open top containers arranged in rows are carried by an elongated web of film and are movable

by said web of film into the fill station is not known from E2.

Distinguishing features

2.2 Accordingly, the subject-matter of claim 1 differs from the apparatus known from E2 at least in that it comprises a supply of open top containers arranged in rows carried by an elongated web of film and movable by said web into the fill station (see also second complete paragraph on page 4 of the impugned decision).

Effect

2.3 The Board follows the patent proprietor's arguments and considers that these distinguishing features provide an increase of the through put and simplify the sealing of the food products.

Problem to be solved

2.4 The problem to be solved can therefore be seen in the increasing of the through put and the simplification of the sealing of the food products of the apparatus known from E2.

Obviousness

2.5 Therefore, the question at stake is whether the skilled person starting from E2 as closest prior art and seeking to solve the above-mentioned problem would combine its general technical knowledge or one of the teachings of E3 and E4 with the teaching E2 and would arrive via such a combination at the subject-matter of claim 1 without the exercise of an inventive activity.

Combination of the teaching of E2 with the common general technical knowledge of the skilled person

2.6 The opponent argues that the statement between lines 56 and 58 of column 13 of E2 that "food products can be mounted on a predetermined position of a tray, a container or the like that has projections and recesses on the surface" hints the skilled person to an object having projections and recesses, whereby said object carries the food products like the trays 5 of E2. The opponent argues further that it is well known to the person skilled in the art from its general technical knowledge that such objects are made from web of film, that the combination of said projections and recesses would result to open top containers arranged in rows and that the skilled person by replacing the trays known from E2 with such objects would arrive at the subject-matter of claim 1 without the exercise of an inventive activity. As evidence for the common general technical knowledge of the skilled person the opponent refers to E4.

2.7 The Board notes that the specific disclosure of a single, specific patent document, the disclosure of E4 in the present case, cannot be considered as evidence that said disclosure belongs to the common general technical knowledge of the person skilled in the art. Furthermore, there is no teaching in E4 that the trays of E2, which are transferred by transfer conveyor 6, can be replaced by the three cup-shaped recesses 9 disclosing rows 2 of the continuous conveyor belt 10 of E4. This would result in the incompatible simultaneous presence of the transfer conveyor 6 of E2 having on its top the continuous conveyor belt 10 of E4.

2.8 For a replacement of both the transfer conveyor 6 and the trays 5 by the continuous conveyor belt 10 of E4, as further argued by the opponent, no hint exists in E2 or E4.

2.9 Furthermore, the opponent qualifies the replacement of the trays 5 known from E2 by open top containers carried and movable by an elongated web of film as trivial. It presented no evidence for this allegation contested by the appellant. In the absence of any evidence, the Board considers the above-mentioned argument of the opponent as an unsubstantiated allegation which does not need to be taken into consideration when assessing inventive step.

2.10 As stated above, the opposition division considered in the impugned decision that the subject-matter of claim 1 differs from the apparatus known from E2 in that it has a supply of **open top containers arranged in rows** (**feature a**) and carried by an **elongated web of film** into a fill station (**feature b**), see third paragraph from the bottom of page 4.

2.11 Based on the statement between lines 56 and 58 of column 13 of E2 that "food products can be mounted on a predetermined position of a tray, a container or the like that has projections and recesses on the surface" the opposition division stated that said statement teaches the skilled person that the tray can have an array of recesses forming a plurality of containers, such that separate portions of food can be placed in each container. It concluded therefore that "should the skilled person wish to be able to package portions in separate containers, the skilled person would regard it as a normal design procedure to combine these features, that is to say to **replace a single tray with a**

plurality of containers in rows with the apparatus already known from E2, so arriving at the subject-matter of claim 1 without the use of an inventive step" (emphasis added by the Board). This means that according to the opposition division the skilled person would arrive at the above-mentioned first differentiating **feature a** without the exercise of an inventive activity. No argument as to why the skilled person would arrive at the above-mentioned second differentiating **feature b** without the exercise of an inventive activity is to be found in the impugned decision, nor has it been submitted by the opponent.

2.12 For the above-mentioned reasons, the person skilled in the art starting from the apparatus known from E2 and seeking to solve the problem mentioned under point 2.4 above would not be led by its common general technical knowledge to the subject matter of claim 1 without the exercise of an inventive activity.

Combination of the teaching of document E2 with the teaching of document E3

2.13 The opponent considers the open top containers organized as rows of three open top containers in a tray 41, 42 on a conveyor belt 40 depicted in figures 3 and 4 of E3 as being open top containers carried by an elongated web of film and argues that the statement between lines 56 and 58 of column 13 of E2 hints the skilled person to replace the trays of E2 by said group of open top containers depicted in figures 3 and 4 of E3.

2.14 The Board cannot see why the general teaching of the statement between lines 56 and 58 of column 13 of E2 that instead of a tray a similar container having

projections and recesses on its surface hints the skilled person directly and unambiguously to the group of three of six open top containers depicted in figures 3 and 4 of E3.

2.15 But even if, for the sake of argument, the skilled person would replace the trays known from E2 by the groups of open top containers depicted in figures 3 and 4 of E3, it would not have arrived at the subject-matter of claim 1, since claim 1 requires further that said open top containers should be movable by said web of film. This is shown or taught neither in E2 nor in E3, since the open top containers are movable by the corresponding conventional conveyor belts 6 and 40.

2.16 For the above-mentioned reasons, the person skilled in the art starting from the apparatus known from E2 and seeking to provide an alternative to the line of trays known from E2 would not be led by the teaching of E3 to the subject-matter of claim 1 without the exercise of an inventive activity.

Combination of the teaching of document E2 with the teaching of document E4

2.17 The opponent considers the three cup-shaped recesses 9 arranged in rows 2 on the continuous conveyor belt 10 of E4 as open top containers carried by an elongated web of film and argues that the statement between lines 56 and 58 of column 13 of E2 hints the skilled person to replace the trays of E2 with said rows 2 of the continuous conveyor belt 10 of E4 having three cup-shaped recesses 9.

2.18 The Board cannot see why the general teaching of the statement between lines 56 and 58 of column 13 of E2

that instead of a tray a similar container having projections and recesses on its surface hints the skilled person directly and unambiguously to the rows 2 of the continuous conveyor belt 10 of E4 having three cup-shaped recesses 9.

2.19 But even if, for the sake of argument, the skilled person contemplated to replace the single trays 5 known from E2 carried and moved by the conventional transfer conveyor 6 by rows 2 of the continuous conveyor belt 10 of E4 having three cup-shaped recesses 9, i.e. by sections of the continuous conveyor belt 10, it would immediately recognise the incompatibility of such a combination. Such a replacement requires to position on the top of the conveyor belt 6 of E2 the sections (rows 2) of another conveyor belt, namely of the conveyor belt 10 of E4. The skilled person would therefore refrain from such a replacement.

2.20 For the above-mentioned reasons, the person skilled in the art starting from the apparatus known from E2 and seeking to solve the above-mentioned problem to the line of trays known from E2 would not be guided by the teaching of E4 to the subject-matter of claim 1 without the exercise of an inventive activity.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is maintained unamended.

The Registrar: The Chairman:

G. Nachtigall I. Beckedorf

Decision electronically authenticated