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**Datasheet for the decision
of 23 July 2018**

Case Number: T 2267/14 - 3.2.04

Application Number: 06023608.0

Publication Number: 1922935

IPC: A22C21/00

Language of the proceedings: EN

Title of invention:

Apparatus for taking down poultry from shackles

Patent Proprietor:

Linco Food Systems A/S

Opponent:

Marel Stork Poultry Processing B.V.

Headword:

Relevant legal provisions:

EPC Art. 123(2), 123(3)

Keyword:

Amendments - added subject-matter (yes) - broadening of claim
(yes)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 2267/14 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 23 July 2018

Appellant: Linco Food Systems A/S
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 10 October 2014
revoking European patent No. 1922935 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman C. Heath
Members: J. Wright
E. Frank

Summary of Facts and Submissions

- I. The Appellant-Proprietor lodged an appeal, received on 9 December 2014, against the decision of the Opposition Division posted on 10 October 2014 revoking European patent No. 1922935 pursuant to Article 101(3)(b) EPC. The appeal fee was paid simultaneously. The statement setting out the grounds of appeal was received on 20 February 2015.

- II. Opposition was filed against the patent as a whole and based *inter alia* on Article 100(c) with Article 123(2) EPC for added subject matter. The Opposition Division held that this ground prejudiced the maintenance of the patent as granted and the auxiliary requests on file did not meet the requirements of the EPC, either. The Opposition Division therefore decided to revoke the patent.

- III. In the appeal proceedings, the Board considered the following document, filed with the appellant-proprietor's grounds of appeal:

P11: "Load control for overhead conveyor systems" (amongst other articles), Linco Journal, Denmark, Issue 2/2003

- IV. Oral proceedings were duly held before the Board on 23 July 2018.

- V. The appellant-proprietor requests that the decision under appeal be set aside and the patent be maintained as granted (Main Request), or in the form of one of Auxiliary Requests 1 - 12, all filed with the grounds of appeal.

The respondent-opponent requests that the appeal be dismissed.

VI. The wording of claim 1 of the main request (as granted) is as follows:

"An apparatus (2) for taking down poultry (10) suspended by the legs (12) in shackles (6) of an overhead conveyor (4) for delivery in specific receiving positions such as receptacles arranged below said overhead conveyor (4), said apparatus (2) comprises a mechanical member for pushing said legs (12) of said poultry (10) laterally out from said shackles (6), said mechanical member comprises a pivotally arranged arm member (14), characterized in, that said arm member (14) being provided with an arched end part (16), said arm member (14) by means of electrically operated motor means (30) being adapted to pivot between an inactive position, where said arched end part (16) is positioned outside the path of movement of said legs (12) of said poultry (10) - when suspended in said shackles (6) - and an active position, where said arched end part (16) is positioned in the path of movement of said legs (12) of said poultry (10) - when suspended in said shackles (6), so that in said active position said legs (12) of said poultry can (10) be forced laterally out from said shackles (6) by a combined pattern of motion and speed profile of said arched end portion (16) of said arm member (14) and the force of movement of said shackles (6) of said overhead conveyor (4)".

Claim 1 of auxiliary requests 2 to 4 and 6 to 12, as with the main request, contain the feature "in said active position said legs (12) of said poultry can (10) be forced laterally out from said shackles (6) by a

combined pattern of motion and speed profile of said arched end portion (16) of said arm member (14) and the force of movement of said shackles (6) of said overhead conveyor (4)".

In auxiliary requests 1 and 5, the above feature, worded "in said active position...of said overhead conveyor (4)" is replaced by a feature worded as follows (with deletions and additions vis-à-vis granted claim 1 emphasised by the Board in strike-through and underlining):

"(6), so that in said active position said legs (12) of said poultry (10) ~~can be~~ are forced laterally out from said shackles (6) by ~~a combined pattern of motion and speed profile of said arched end portion (16) of said arm member (14)~~ and the force of movement of said shackles (6) of said overhead conveyor (4).

VII. The appellant-proprietor argued as follows:

The last feature of granted claim 1 does not represent an extension of subject matter beyond the application as filed because it is implicitly disclosed in the application as filed. In particular, when the claimed apparatus takes down a single poultry, the arm member could not move fast enough for it not to be moving as the poultry is taken down. Therefore it is implicitly disclosed that the motion of the arm's arched end portion contributes to forcing the poultry laterally out of its shackles. The same applies to the auxiliary requests that have this feature. In other requests the feature is removed, so these no longer contain added subject matter.

VIII. The respondent-opponent argued as follows:

The last feature of granted claim 1 is added subject matter. The application consistently discloses the arm is not moving when poultry is taken down. The feature is not implicitly disclosed, in particular because there are no speed or spacing restrictions in the application as filed which would make it inevitable that such an apparatus must operate, when taking down a single poultry, with the arm, and its arched end portion, in motion.

Auxiliary requests having this feature fail for the same reasons. Those that delete the feature broaden the scope of protection beyond the patent as granted so fail under Article 123(3) EPC.

Reasons for the Decision

1. The appeal is admissible
2. Background

The patent relates to an apparatus for taking down poultry suspended by the legs in shackles of an overhead conveyor (published patent specification, paragraph [0001]). According to the patent (see specification, paragraphs [0002]), known apparatuses have pushing means that push the poultry legs laterally out from the shackles. The pushing means carry out this lateral movement very quickly in order not to be hit by the speeding shackles. This limits the working capacity of the apparatus.

3. Main request, added subject matter

3.1 In accordance with established jurisprudence of the Board's of appeal (see Case Law of the Boards of Appeal, 8th edition, 2016 (CLBA), II.E.1.2.1, and the decisions cited therein), any amendment to the parts of a European patent application or of a European patent relating to the disclosure (the description, claims and drawings) is subject to the mandatory prohibition on extension laid down in Art. 123(2) EPC and can therefore, irrespective of the context of the amendment made, only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of these documents as filed.

With respect to implicit disclosure of features (see CLBA, II.E.1.2.2), just as with explicit disclosures, the standard applied is the direct and unambiguous disclosure of a feature. In this context "implicit disclosure" means disclosure which any person skilled in the art would objectively consider as necessarily implied in the explicit content.

3.2 Granted claim 1, as claim 1 as originally filed, defines an apparatus for taking down poultry suspended by the legs in shackles of an overhead conveyor. The apparatus comprises a mechanical member for pushing said legs of said poultry laterally out from said shackles and having a pivotally arranged arm member with an arched end part. The arm member is adapted to pivot between an inactive position, where the arched end part is positioned outside the path of movement of said legs and an active position, where the arched end part is positioned in the path of movement of said legs of the poultry - when suspended in the shackles.

3.3 However, whereas claim 1 as originally filed defined that "in said active position said legs of said poultry being forces [sic] laterally out from said shackles by the force of movement of the shackles or said over-head conveyor", in granted claim 1 the feature is amended to read "in said active position said legs (12) of said poultry can (10) be forced laterally out from said shackles (6) by a combined pattern of motion and speed profile of said arched end portion (16) of said arm member (14) and the force of movement of said shackles (6) of said overhead conveyor (4)."

The impugned decision found that this amendment had no basis in the application as filed and therefore the requirements of Article 123(2) EPC were not fulfilled (see decision, point 2.1.1). The Board agrees with this finding.

3.4 In the following, reference is made to the application as published, unless stated otherwise.

3.5 It is not in dispute that the application as filed does not explicitly disclose the amended feature (forced laterally out by combined pattern of motion and speed profile of said arched end portion (16) of said arm member (14)....).

3.6 As already shown, in original claim 1, rather than a combined movement of the arched end portion of the arm member contributing to forcing the poultry out of their shackles, it is only the force of movement of the shackles or overhead conveyor that forces the poultry out.

3.7 Original claim 2 (see also description, paragraphs [0008] and [0013]) defines a control unit adapted to

determine a pattern of motion and/or speed profile of said arm member. However, neither claim 2 nor the corresponding parts of the description explicitly say that this pattern of motion contributes to taking down the poultry.

- 3.8 Likewise, the feature is not explicitly disclosed in any other parts of the original description.
- 3.8.1 The description first explains the invention in the words of original claim 1 (see paragraph [0004]), and then states (see paragraph [0007]) that "the working capacity of the apparatus according to the invention is not restricted by the actual working speed of any known laterally pushing out mechanism (cf. description, paragraph [0002]), because instead the actual working speed of the inventive apparatus is directly effected by the force of movement of the shackles or the force of movement of said overhead conveyor". Thus, consistent with original claim 1, the invention is presented to the skilled person as being to use the force of movement of the shackles/overhead conveyor, not a lateral pushing out mechanism.
- 3.9 The detailed description of the embodiment tells the same story. There (see paragraph [0020]) the arm member can turn between at least two positions, inter alia a first position (Figures 1 and 2) where the arched outer end portion 16 of said arm member is placed in the path of movement of the legs of the poultry suspended in their shackles. In this position (see paragraph [0021]), the legs of the poultry 10 are pushed or lifted out from said shackles 6 by the force of movement of the shackles or the overhead conveyor.

- 3.10 The description goes on to explain (see paragraphs [0022] and [0023]) how the apparatus can be used to take down batches of poultry of a certain total weight. In this context (see paragraph [0024]), "before" a certain poultry or a certain group of poultry arrives at the apparatus, the arm member is swung to the first position for taking down the next arriving poultry or group of poultry needed to make up the batch. In other words the arm member is parked in (a first or active) position before a poultry to be taken down arrives.
- 3.11 Thus, the application as filed presents the skilled person with a consistent picture of poultry being taken down from the shackles by the force of movement of the shackles or overhead conveyor as the poultry reaches the arched end portion of an arm member that has already been placed in a (first or active) position, not by a combined pattern of motion and speed profile of the arm member's arched end portion and the force of movement of said shackles (6) of said overhead conveyor, as the disputed feature of granted claim 1 requires.
- 3.12 If the subject matter of claim 1 as granted is not to extend beyond the application as filed, the disputed feature must be implicitly disclosed. The Board finds no such implicit disclosure.
- 3.13 In particular, the Board is not convinced that the skilled person would directly and unambiguously derive the disputed feature from the application as filed when considering the speed of operation of the machine, the spacing of the poultry on the overhead conveyor and the fact that poultry taken down are to be batched, also in the light of the skilled person's general knowledge, as the appellant-proprietor has argued.

According to this argument, the skilled person, reading the application as filed in the light of their common general knowledge, understands that there are inevitably circumstances when the arm member is moving (thus its arched end part has a certain motion and speed profile) as the poultry is taken down so that, under these circumstances, the poultry is inevitably forced laterally out from said shackles as claimed. In other words, the application as filed necessarily implies that the poultry can be forced laterally out of the shackles in the way defined by the last feature of claim 1.

3.14 It is true that the application as filed (see paragraph [0032]) discloses processing about 150 chickens per minute, that is 1 every 0.4 seconds. This means that, when working at such a speed, if it is necessary to remove just one poultry rather than a group together, as indeed is foreseen in the application when assembling batches (see column 4, lines 39 to 43), then the arm member, with its arched end portion, must move from the second or inactive position (see paragraph [0025]) to its first or active position (see paragraph [0024]) and back again within 0.4 seconds. Turning now to the issue of how far apart poultry are spaced, the application as filed gives no indication as to the distance separating poultry. Figures 1 to 3 show only a single poultry carcass. The application is likewise silent as to any consequence, in terms of their spacing, of shackles being "interconnected" (see paragraph [0018]). Whether or not it might be general knowledge to hang them a few centimetres apart, as the appellant-proprietor argues can be seen in the photograph of a conveyor in document P11 (see page 10), this on its own is not a direct and unambiguous

disclosure that they must be so hung in the apparatus of the application as filed. They could also be further apart.

3.15 It follows that, in the Board's opinion, with regard to operating speed and spacing of poultry, at best the skilled person could derive from the application as filed that the apparatus, when operating at the speed indicated in paragraph [0032], must be able to take down a single poultry in 0.4 seconds.

3.16 The appellant-proprietor's argument for a direct and unambiguous disclosure of the disputed feature hinges (apart from the alleged proximity of the poultry) on the assertions that the apparatus as claimed must work at the speed defined in paragraph [0032] and that a pivotally arranged arm member according to the invention would not be able to move from an inactive position, where the arm's arched end part was positioned outside the path of movement of legs of poultry, to an active position where the arched end part was positioned in the path of movement of poultry legs, but not yet touching them, and back to the inactive position after the poultry is taken down, within 0.4 seconds. Therefore, so the argument goes, it is necessarily implied that the arm is moving as the poultry are taken down from the shackles. In other words it is implicit that the motion and speed of the arm member's arched end portion contribute to forcing the poultry out of its shackles.

3.17 The Board first notes that claim 1 as granted does not define how fast shackles are moving, they could move slowly. By the same token, shackles could be widely spaced. Therefore, the Board sees no speed or spacing limitation in granted claim 1 that could lead to the

conclusion that the arm member of the invention must be in motion when a poultry is taken down. Rather, the claimed apparatus could always take down a single poultry (or the first of a group) by being parked in the (first or active) position before the poultry arrives, as indeed is described throughout the application as filed, see for example paragraph [0024] again.

3.18 Furthermore, even if the apparatus were defined in claim 1 as operating at the speed indicated in paragraph [0032] and the shackles closely spaced as argued by the appellant-proprietor (to which the Board disagrees), the application as filed does not disclose what the maximum speed of the pivoting arm is. It is merely said (see paragraph [0007]) that the working capacity of the apparatus according to the invention is only dependent on the speed of rotation of the pivoting arm member. Nor has the appellant-proprietor provided any evidence to show what the maximum speed of such an arm might be, let alone demonstrated that it cannot move from its inactive to its active position and back in less than 0.4 seconds, however close or far apart the shackles might be. Therefore, the assertions on which the appellant-proprietor's argument rest have not been proven to be valid.

3.19 In summary, the arguments of the appellant-opponent have not convinced the Board that it is necessarily implied in the application as filed that the pivoting arm is in motion as an individual poultry (or the first of a group) is taken down off its shackles. Therefore, there is no direct and unambiguous disclosure that the apparatus for taking down poultry according to the application as filed is such that poultry can be forced laterally out from said shackles by a combined pattern

of motion and speed profile of the arm member's arched end portion and the force of movement of said shackles of the overhead conveyer.

3.20 In view of the foregoing, the Board can but confirm the finding of the impugned decision that claim 1 as granted adds subject matter extending beyond the application as filed, Article 123(2) EPC.

4. Auxiliary requests 2 to 4 and 6 to 12

4.1 Claim 1 of auxiliary requests 2, 3, 4 and 6 to 12 all contain the same amendment "combined pattern of motion and speed" as granted claim 1, dealt with in detail above. Therefore, these requests all add subject matter extending beyond the application as filed for the same reasons as apply to granted claim 1.

4.2 Auxiliary requests 1 and 5

According to Art. 123(3) EPC the European patent may not be amended in such a way as to extend the protection it confers.

Claim 1 of auxiliary requests 1 and 5 deletes the feature added to the main request and discussed above (poultry (10) can be forced laterally out from said shackles (6) by a combined pattern of motion and speed profile of said arched end portion (16) of said arm member f14) and....).

The Board notes that the word "can" in granted claim 1 defines that the apparatus can, i.e. has the capability to, force poultry out by the action of the arm's arched end portion when in motion, whether or not it always operates in this way. So here the word "can" is not

used in the sense that the apparatus can operate in one mode or another mode as alternatives (where the deletion of one of these modes would narrow rather than broaden the scope of protection).

Claim 1 of auxiliary requests 1 and 5 defines a different apparatus which is no longer restricted to one having this capability. Therefore, the amendment is not merely the deletion of an optional feature but one that broadens the extent of protection vis-à-vis that conferred by the patent as granted. Therefore claim 1 of these requests does not meet the requirements of Article 123(3) EPC.

5. Since none of the requests on file are allowable, the Board confirms the decision of the Opposition Division to revoke the patent.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Magouliotis

C. Heath

Decision electronically authenticated