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**Datasheet for the decision  
of 19 February 2019**

**Case Number:** T 0796/16 - 3.2.01

**Application Number:** 08806283.1

**Publication Number:** 2190775

**IPC:** B66F11/04

**Language of the proceedings:** EN

**Title of invention:**

OPERATOR CAGE

**Patent Proprietor:**

Niftylift Limited

**Opponents:**

JLG Industries, Inc.  
BlueSky Solutions Limited

**Headword:**

**Relevant legal provisions:**

EPC Art. 123(2), 123(3), 111(1)  
RPBA Art. 12(4)

**Keyword:**

Amendments - main request, auxiliary request - extension  
beyond the content of the application as filed (yes) -  
auxiliary request 2 - allowable (yes)  
Reformatio in peius - (no)  
Late-filed document - admitted (yes)  
Remittal to the department of first instance - (yes)

**Decisions cited:**

G 0001/99, T 1002/92, T 0736/99, T 1380/04, T 0406/09

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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Case Number: T 0796/16 - 3.2.01

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.01**  
**of 19 February 2019**

**Appellant:** JLG Industries, Inc.  
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**Decision under appeal:** **Interlocutory decision of the Opposition**  
**Division of the European Patent Office posted on**

8 February 2016 concerning maintenance of the  
European Patent No. 2190775 in amended form.

**Composition of the Board:**

**Chairman**            G. Pricolo

**Members:**           W. Marx

                         P. Guntz

## Summary of Facts and Submissions

- I. The appeal of the opponent 1 is directed against the decision of the opposition division to maintain European patent No. 2 190 775 in amended form on the basis of the main request filed during the oral proceedings.
- II. In its decision the opposition division held that the main request (filed with letter dated 28 October 2015 as auxiliary request 4) was amended on the basis of the originally filed application and was novel and inventive having regard, *inter alia*, to the following documents (numbering "A" used in opposition proceedings and corresponding numbering "B" as used by the appellant in its grounds of appeal):
- A1 (B2): JPH6412100U including a translation;  
A6 (B4): US4979588;  
A15 (B16): brochure of JLG-"Soft Touch" system, allegedly available in 2002;  
A16 (B17): website article reviewing the "Soft Touch" system of A15;  
A17 (B9): operation and safety manual from JLG for a variety of boom lift models.
- III. Together with its statement of grounds of appeal received on 17 June 2016 the appellant (opponent 1) filed, *inter alia*, the following document:
- B1: JPH04-65300U.
- IV. Oral proceedings before the board took place on 19 February 2019.

The appellant (opponent 1) requested that the decision under appeal be set aside and that the European patent be revoked. The objection under Article 83 EPC was no longer maintained.

The respondent (patent proprietor) requested that the appeal be dismissed or, in the alternative, that the patent be maintained in amended form on the basis of the auxiliary request filed with the letter of 15 December 2016 or on the basis of one of auxiliary requests 2 or 3 filed during the oral proceedings.

- V. Claim 1 according to the main request corresponds to claim 1 as maintained by the opposition division and reads as follows:

"An operator cage for a machine, the cage (6) comprising a base unit (22), a control console (32), a fence assembly (25) that includes a displaceable fence portion (70) comprising a hand rail or support that extends across the front of the control console (32), wherein the displaceable fence portion (70) is located adjacent the control console (32) to provide a physical barrier between an operator and the control console, a crush sensor (76) that is constructed and arranged to sense an external crush force applied to the displaceable fence portion (70), wherein the crush sensor (76) is constructed and arranged to sense an external crush force only when an external crush force applied to the displaceable fence portion (70) exceeds a predetermined value, and a control device that is constructed and arranged to prevent operation of the machine when the crush sensor (76) senses an external crush force; characterised in that the control console includes an override control that allows limited movement of the cage (6) in a direction away from an

obstruction after activation of the control device by the crush sensor sensing an external crush force that exceeds said predetermined value."

Claim 1 according to the auxiliary request filed on 15 December 2016 reads as follows (compared to claim 1 of the main request, features added are underlined):

"An operator cage for a machine, the cage (6) comprising a base unit (22), a control console (32), a fence assembly (25) that includes a displaceable fence portion (70) comprising a hand rail or support that extends across the front of the control console (32), wherein the displaceable fence portion (70) is located adjacent the control console (32) to provide a physical barrier between an operator and the control console and is constructed and arranged to be displaced only when an external crush force applied to the displaceable fence portion exceeds a predetermined value, a crush sensor (76) that is constructed and arranged to sense an external crush force applied to the displaceable fence portion (70) by sensing displacement of the displaceable fence portion, wherein the crush sensor (76) is constructed and arranged to sense an external crush force only when an external crush force applied to the displaceable fence portion (70) exceeds a predetermined value, and a control device that is constructed and arranged to prevent operation of the machine when the crush sensor (76) senses an external crush force; characterised in that the control console includes an override control that allows limited movement of the cage (6) in a direction away from an obstruction after activation of the control device by the crush sensor sensing an external crush force that exceeds said predetermined value."

Claims 1 according to auxiliary requests 2 and 3 filed during the oral proceedings have been modified in comparison to claims 1 of the main request and the auxiliary request filed on 15 December 2016, respectively, by replacing the feature

"a control device that is constructed and arranged to prevent operation of the machine when the crush sensor (76) senses an external crush force"

by the feature

"a control device that is constructed and arranged to prevent movement of the cage when the crush sensor (76) senses an external crush force".

## **Reasons for the Decision**

### *1. Amendments - main request, auxiliary request*

1.1 The main request and the auxiliary request as filed on 15 December 2016 must be rejected, since the subject-matter of claim 1 according to these requests does not comply with the requirements of Article 123(2) EPC.

1.2 In particular, the board finds that the feature  
"a control device that is constructed and arranged to prevent operation of the machine when the crush sensor senses an external crush force"  
added in claim 1 of the main request and in claim 1 of the auxiliary request presents new information to the skilled person which was not directly and unambiguously derivable from the application as filed.

Claim 1 refers to an operator cage for a machine, i.e. the machine does not form part of the claimed subject-matter. As explained in the introductory part of the



patent specification (paragraph [0001]), the operator cage may be used with a mobile elevating work platform (MEWP), but also with other machines such as forklifts or telehandlers. Therefore, multiple modes of operation of the operator cage are possible, and the machine might perform tasks or functions which need not be related to the operation of the cage.

The sole basis for the amendment is to be found on page 12 of the application as filed, reciting:

- *"switch 76 is connected to a control device (not shown) that controls or restricts operation of the machine" (page 12, lines 9-10; see also page 5, lines 24-25), and*
- *"the crush sensor senses the external crushing force and activates the control device, which then prevents further movement of the cage" (page 12, lines 14-15).*

According to claim 1 (*"the cage comprising ... a control device"*) the control device forms part of the operator cage, whereas the machine includes e.g. in case of a MPEW further parts such as a wheeled base, a boom and a lifting structure (see paragraph [0033] of the patent specification). The normal interpretation of the term "prevent" is "to stop" or "make impossible", as argued by the appellant. The amended feature which specifies a *"control device ... to prevent operation of the machine"* means that the control device communicates with the machine and stops functioning of the machine as a whole, i.e. the control device of the operator cage must send some inhibit message to the machine to prevent operation of the machine, inhibiting also functions - such as visual or acoustic alarms (as mentioned in the application as filed, 3rd paragraph on page 12) - which might not be related to actuating or

moving the operator cage. However, no basis is to be found in the application as filed for this new information provided by the amendment of claim 1. As originally disclosed, operation of the machine is only (somehow) controlled or restricted, whereas movement of the cage is prevented, i.e. only a subset of modes of operation of the machine affecting the cage's movement (such as actuating the hydraulic motors of the wheeled base or the lifting structure of the cage) might be inhibited or prevented.

The term "to prevent" is indeed narrower than the term "to control or restrict", which fully encompasses "to prevent", as argued by the respondent. The board also understands that the invention is directed to a safety system that should prevent - as a first step before allowing limited movement - any movement of the machine (of the wheeled base or of the operator cage) which could lead to an injury of the operator. However, contrary to the respondent's allegation, the amendment "*to prevent operation of the machine*" expresses not only what is obviously intended to be the invention, but provides additional information which has no basis in the application as filed, as argued above.

- 1.3 Further objections raised by the appellant under Article 123(2) EPC against claim 1 of the main request (which were to some extent considered by the respondent in filing the auxiliary request) could not convince the board. Since these objections have (at least in part) been dealt with in the contested decision and are relevant also for auxiliary request 2, the board finds it appropriate to express its view also in this regard. *Note:* When referring to the application as filed, it is referred to the WO-publication of the PCT-application.

1.3.1 As concerns the feature of "*a fence assembly (25) that includes a displaceable fence portion (70) comprising a hand rail or support that extends across the front of the control console (32)*", the appellant argues that the inclusion of this combination of features in claim 1 extended beyond the content of the application as filed and was clearly not suggested in the original application as filed.

As admitted by the appellant, claim 19 as originally filed shows a fence assembly including a displaceable fence portion. It remains to be discussed whether a "*displaceable fence portion comprising a hand rail or support that extends across the front of the control console (32)*" is also originally disclosed. The embodiments described in the application as filed either show a hand rail 70 (Figs. 12-15) or a hand rail 80 (Figs. 16, 17) that extends across the front of the control console (see also page 12, lines 1-2 and 22, as referred to by the appellant). As can be derived from these figures, hand rails 70 and 80 correspond to a displaceable portion as claimed, and the function of being displaceable is explicitly described (see e.g. page 12, last paragraph of the description as filed: "*allowing the hand rail 80 to be displaced downwards*").

The appellant's argument that the hand rail was never described as being part of the fence assembly could not be followed, since claim 1 (on the basis of claim 19 as originally filed) already specifies the displaceable fence portion to form part of the fence assembly, and the hand rail represents (see originally filed figures) the displaceable fence portion extending across the front of the control console, as required by claim 1.

Moreover, the second alternative "or a support" claimed and objected to only characterises the hand rail's function and is explicitly disclosed in the same context as specified in claim 1 (page 9, 3rd paragraph: "*hand rail 80 that extends across the front of the console. This hand rail 80 provides the operator 8 with a support*"; see also page 12, lines 1-3). Therefore, the appellant's arguments relying solely on the disclosure of the embodiment of Figure 16 and 17 (i.e. page 13, lines 3 to 4), in which the concept of the 'support' allegedly was inextricably linked to features of this embodiment, could not convince the board.

- 1.3.2 The appellant further objects to the removal of features (as underlined below) stemming from original claim 19 as filed, which formed the basis for claim 1 as amended during opposition and reads as follows:

"An operator cage for a machine, the cage comprising a base unit, a fence assembly that includes a displaceable fence portion and a crush sensor that is constructed and arranged to sense displacement of the displaceable fence portion, wherein the displaceable fence portion is constructed and arranged to be displaced only when an external crush force applied to the displaceable fence portion exceeds a predetermined value."

The appellant argues that claim 1 represented a generalisation of the originally claimed inventive concept of claim 19. As there was no other allowable 'building blocks' within the content of the application as filed for a claim to the generalised combination of features of granted claim 1, claim 1 of the patent contravened Article 123(2) EPC. The board cannot follow this view for the following reasons:

- (a) In the board's view, replacement of the term "to sense displacement of" by "to sense an external crush force", i.e. omitting the feature of sensing displacement is allowable. As originally disclosed (see page 12, 2nd paragraph of the application as filed), a sufficient downward bias force is required to overcome the bias force of a spring, i.e. displacement of the hand rail requires a certain crush force. Moreover, it is explicitly described (see page 13, first paragraph of the application as filed) that the crush sensor may be realised either by measuring displacement of the hand rail (e.g. via switch), or alternatively, by measuring an excessive crush force (using pressure sensors or strain gauges) applied to the console or hand rail or support. Therefore, contrary to the appellant's argument regarding extraction of isolated features or deletion of essential features that might be indispensable for the function of the invention, sensing of crush force is explicitly taught as an alternative to sensing displacement. Therefore, the board cannot follow the appellant that an originally disclosed combination of features has been generalised.

Moreover, the board does not follow the appellant in that a further feature from claim 20 as originally filed ("*sensing an external crush force applied to an upper portion of the fence assembly*") should have been included in claim 1, since the rather unspecific term "upper portion of the fence assembly" of original claim 20 has been replaced by "displaceable fence portion" which is even defined in claim 1 more concretely ("*displaceable fence portion comprising a hand rail or support that*

*extends across the front of the control console").* The board cannot see that a disclosed specific feature has been replaced by a broad general expression, as alleged by the appellant.

- (b) Furthermore, the appellant asserts an unallowable intermediate generalisation in view of the claim language of the patent specifying that the crush sensor senses the external crush force above a predetermined value, whereas claim 19 as originally filed recited "*wherein the displaceable fence portion is constructed and arranged to be displaced only when an external crush force applied to the displaceable fence portion exceeds a predetermined value*". However, the board finds that this amendment only shifts the focus of the claimed invention from the mechanics of the displaceable fence portion (a hand rail biased by a compression spring, which requires an external crush force exceeding a predetermined value to be displaced) to the sensor device (crush sensor sensing an external crush force exceeding a predetermined value). Since both aspects are originally disclosed (see page 12 of the application as filed), the skilled reader is not presented with new technical information. Moreover, as argued already further above, see (a), sensing of crush force is explicitly taught as an alternative to sensing displacement. Therefore, the board cannot see that such redefinition of the claimed subject-matter amounts to an unallowable intermediate generalisation, or that an essential feature or a feature indispensable for the functioning of the invention is missing, as argued by the appellant.

- 1.3.3 As regards the characterising feature of claim 1, the appellant argues again an unallowable intermediate generalisation and omission of an essential feature, since allegedly the concept of 'activation' of the control device was inextricably linked to sensing of the displacement of the hand rail. However, activation of the control device by the crush sensor when sensing an external crush force is explicitly disclosed in the application as filed (see page 12, 3rd paragraph). The board therefore cannot see that new information should be provided by the characterising portion of claim 1. Moreover, as argued already further above, omission of the sensing of displacement does not present an issue under Article 123(2) EPC either.
- 1.3.4 Finally, the appellant objects to the omission in claim 1 of the term "in use" (as originally disclosed in claim 21 as filed: "*to provide in use a physical barrier*") when specifying the displaceable fence portion to be "*located adjacent the control console to provide a physical barrier between an operator and the control console*". The board cannot see a problem under Article 123(2) EPC in this respect. Claim 1 represents a product claim (relating to an operator cage), and the additional term "in use" would not specify further the physical barrier between an operator and the control console. The board follows the respondent in that the term "in use" is superfluous and does not affect the scope of claim 1, as the barrier is present even when the machine is not in use. Moreover, the "operator" mentioned in claim 1, which does not represent a structural feature of the claim, already takes into account the "use"-aspect of the claimed subject-matter.

2. *Auxiliary request 2*

2.1 Auxiliary request 2 was filed during the oral proceedings in order to meet the objection under Article 123(2) EPC with regard to the feature "*to prevent operation of the machine*" (see point 1.2).

2.2 The appellant raised the following objections in this regard:

- Auxiliary request 2 could have been filed earlier in view of the preliminary opinion in the board's communication. In particular, it was not easy to judge on the allowability of the new request, as the scope of the claim had been changed.
- There was still a problem under Article 123(2) EPC, as the two passages on page 12 of the application as filed (lines 9-11 and 13-15) were inextricably linked.
- As claim 1 of auxiliary request 2 now only referred to the control signal of the cage (and not of the machine), it would put the appellant in a worse position, which was not allowable in view of the prohibition of *reformatio in peius* (G 1/99). In particular, the narrowest limitation should be included (see T 1380/04) as disclosed by the linked passages on page 12 of the application as filed.

2.2.1 As regards the issue of *reformatio in peius* in case of the opponent being the sole appellant, the Enlarged Board of Appeal has identified in decision G 1/99 (OJ EPO 2001, 381) the criteria to be applied in cases such as the present case, i.e. where the patent proprietor files during appeal proceedings an auxiliary request deleting an inadmissible amendment that was allowed by the opposition division.



The appellant's objection in this respect suggests that replacing in claim 1 of auxiliary request 2 the term "*to prevent operation of the machine*" by the originally disclosed feature "*to prevent movement of the cage*" might not be a further limitation of the scope of the patent as amended (first criterion in G 1/99; such restriction would not contravene the principle of the prohibition of a *reformatio in peius*).

Following the appellant that the amended feature of claim 1 of auxiliary request 2 ("*a control device that is constructed and arranged to prevent movement of the cage*") only specifies a control by the control device (of the cage) with respect to the cage, the control might not rely on an exchange of information with the machine, assuming that control and, in particular, movement of the cage independent from the operation of the machine is possible. This would mean that the scope of protection might have been shifted by the amended feature. However, in this case the amendment provided by auxiliary request 2 satisfies the second criterion defined in G 1/99, according to which an amendment introducing an originally disclosed feature has to be within the limits of Article 123(3) EPC when extending the scope of the patent as maintained. Article 123(3) EPC refers to the scope of protection of the patent as granted, which in the present case does not yet include the feature of a control device or control in reaction to the crush sensor sensing an external crush force. Therefore, further specifying a control device of the cage and its function in comparison to granted claim 1 only provides a further restricted scope of protection and thus satisfies the requirements of Article 123(3) EPC.

The appellant, by referring to decision T 1380/04, also argues that it was required to include the narrowest limitation. In the case dealt with in T 1380/04, removal of a terminology was not required and constituted an inadmissible amendment, as amendments were available which could be introduced to limit the scope of the patent as maintained. However, in the present case the term "to prevent operation of the machine" is not disclosed in the application as filed and has to be removed (see above point 1.2), i.e. limitation by introducing further features cannot solve the problem under Article 123(2) EPC.

- 2.2.2 The appellant's allegation that two passages in the application as filed (page 12, lines 9-11 and 13-15) which related to the control device were inextricably linked, i.e. that the amendment according to auxiliary request 2 constituted an unallowable intermediate generalisation, could not convince the board.

The first passage describes that switch 76 is connected to a control device and specifies the function of the control device rather vaguely ("*controls or restricts operation of the machine*"). In the second passage, this function is defined more precisely ("*prevents further movement of the cage*"), thereby specifying that the control is done in a particular way, as argued by the respondent. The board cannot see that these passages are inextricably linked so that further features have to be included in amended claim 1 according to the auxiliary request 2 to satisfy the requirements of Article 123(2) EPC.

- 2.2.3 As regards the point in time of filing auxiliary request 2, it is noted that the issue to be solved by filing this request (and also a further amendment) had

been decided by the opposition division in favour of the respondent. With its grounds of appeal, numerous objections under Article 123(2) EPC were raised regarding different amendments in claim 1, not all of which were dealt with in the contested decision. Thus, several routes for filing auxiliary requests were opened depending on the board's judgement of each amendment. A communication of the board pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA, OJ EPO 2007, 536) sent out three weeks prior to the date scheduled for oral proceedings did not yet contain a binding opinion.

Moreover, even assuming a change in scope of claim 1 of auxiliary request 2 as argued by the appellant, judging on the allowability of the new request (see above points 2.2.1, 2.2.2) turned out to be neither complex nor required adjournment of the oral proceedings.

2.3 Taking into account this course of events (see point 2.2.3) and that the additional issues raised during the oral proceedings (see also points 2.2.1 and 2.2.2) could easily be discussed, the board finds that filing of auxiliary request 2 during the oral proceedings was a legitimate and timely reaction, respecting the need for procedural economy and not raising complex issues to be discussed. The board therefore exercised its discretion and admitted auxiliary request 2 filed during the oral proceedings into the appeal proceedings in accordance with Article 114(2) EPC and Articles 13(1) and (3) RPBA.

### 3. *Admission of document B1 into the appeal proceedings*

3.1 Document B1 was filed by the appellant for the first time with its statement setting out the grounds of

appeal. A contentious issue between the parties was whether B1 could and should have been filed earlier. Pursuant to Article 12(4) RPBA, the board has the power to hold inadmissible facts, evidence or requests which could have been presented or were not admitted in the first-instance proceedings. According to the established case law, a strong indication not to admit new evidence into the appeal proceedings is that the document fails to be *prima facie* more relevant than those already in the proceedings.

3.2 The submissions of the parties in this respect can be summarised as follows:

3.2.1 The respondent objected to the late filing of B1 and submitted that it should not be admitted into appeal proceedings in view of the following circumstances:

Claim 1 of the patent as maintained was identical to claim 5 of auxiliary request 3 as filed on 24 September 2014, which was based on claims 1 and 3 of the auxiliary request filed on 26 April 2013, which in turn was based (with only minor amendments) on claim 19 of the application as filed. Therefore, the direction taken by the proprietor had been clear from quite early in opposition proceedings. The opponent had responded in full to the auxiliary request on 11 November 2013, submitting evidence and arguments regarding the novelty and inventive step. Therefore, document B1 could and should have been found earlier.

Moreover, claim 1 as maintained during opposition was based primarily on the features of claims 1 and 3-7 of the patent as granted, with only few additional features taken from the description. The most important features of the invention had therefore been clear from

the date of grant of the patent. If the opponent had failed to submit evidence during the opposition period, it should not be permitted to file that evidence now in appeal proceedings. It was irrelevant that the preliminary opinion of the opposition division was unfavourable to the proprietor. The requirements indicated in T 1002/92 were not met, according to which late-filed evidence should be admitted into appeal proceedings only very exceptionally, and only if *prima facie* the evidence was likely to affect the validity of the patent. In particular, B1 did not disclose an override control as claimed. Although B1 allowed a movement away from the obstruction, the normal meaning of "override control" required a 2-step process, i.e. a conscious decision made by the operator (the operator physically pressing the override control) after activation of the control device by the crush sensor. Moreover, a novelty objection as presented by the opponent could not be based on a combination of features taken from different machines, namely the prior art machine shown in Figure 3 of B1 and the new machine shown in Figures 1 and 2.

- 3.2.2 While admitting that document B1 was late filed, the appellant requests admission of B1 into the appeal proceedings on the basis that B1 was *prima facie* relevant to the validity of the patent. On detailed inspection, it transpired that B1 was potentially novelty-destroying for claim 1 of the patent as amended and more relevant than B2. At the least B1 was useful to provide further support for the inventive step attacks previously raised in combination with B2. B1 clearly showed a cut-off of the hydraulic line by the restriction valve 22 so that operation of the machine was prevented. As B1 stated (page 7, 2nd paragraph) that it was possible to move the wheeled vehicle in a

safe direction, a decision was clearly made, which for the skilled person implied that there must be some override control.

According to the appellant, document B1 could not reasonably have been presented previously, and filing of B1 was occasioned by the contested decision. Inventive step arguments against features corresponding to those that were ultimately included in the patent as maintained had been raised by the opponent before the oral proceedings on the basis of B2 and B9 (A1 and A17 from the opposition proceedings). In particular in its submission of 10 December 2014, it was submitted that independent claim 5 of the main request (on which claim 1 as maintained during opposition was based) lacked an inventive step in view of a combination of A1 and A15 and/or A1 and A17. The opposition division had agreed with those arguments, not least in their summons to oral proceedings dated 23 April 2015 (see paragraph 2.1.4). However, the opposition division had reversed its preliminary opinion in the oral proceedings and issued an adverse decision, taking the view that documents B2 and B9 were not compatible. Accordingly, additional search became necessary in reaction to the reasoning in the contested decision (see T 736/99).

Specifically, B1 had been found attempting to find prior art to support the previously presented inventive step arguments with respect to the use of B9 (A17), to thereby fill gaps exposed in the previous arguments, with respect to the override control aspect of claim 1 (presented as main request for the first time during oral proceedings), which was allowable under T 406/09.

3.3 Taking into account the course of opposition proceedings, the board sees no reason for exercising

its discretion under Article 12(4) RPBA not to admit document B1 into the appeal proceedings.

- 3.3.1 The override control aspect of claim 1 stems from dependent claim 7 as granted, which is dependent on granted claim 1 and at least claim 6. In its notice of opposition, the opponent (appellant) argued lack of novelty over document A6 (B4 in appeal proceedings) in respect of granted claims 1, 6 and 7.

This aspect was also present in claims 1 and 3 of the auxiliary request filed on 26 April 2013, and in claim 1 of the patent as maintained, which was identical to claim 5 of auxiliary request 3 filed on 24 September 2014, as argued by the respondent, or basically (except for the additional characterisation of the limited movement allowed by the override control to be "in a direction away from an obstruction") even to claim 5 of the main request filed the same date. In view of the filing of these requests by the patent proprietor later in opposition proceedings, further evidence A15 or A17 was filed by the opponent to support a lack of an inventive step (starting from A1) of the override control aspect.

- 3.3.2 As argued by the appellant, the opposition division followed (in its preliminary opinion of 23 April 2015) the opponent's view of lack of inventive step of independent claim 5 of the main request filed on 24 September 2014, having regard to document A1 (B2) in combination with A17 (B9).

Moreover, according to the contested decision (see point 6), the opposition division indeed acknowledged that documents A15 and A17 had been filed in response to the "override control" added to the granted subject-

matter. Contrary to the preliminary opinion of the opposition division, the opponent's inventive step objection combining A1 (B2) and A17 (B9) was then rejected on the ground that the skilled person would not combine documents A1 and A17 (see point 5.4).

3.3.3 In view of this course of events, the board agrees with the appellant that it could not have been reasonably expected to file further evidence already in first-instance proceedings, as argued by the respondent. Therefore, the filing of document B1 with its grounds of appeal is considered to be a legitimate reaction of the appellant to the contested decision in which the the opposition division changed its view when judging on inventive step.

3.4 Furthermore, irrespective of whether B1 was filed in due time (as in T 406/09, in which case assessing of relevance could be dispensed with) or has to be considered as belated (as in T 736/99), the board finds that B1 appears *prima facie* more relevant to the novelty and/or inventive step of at least claim 1 than any other document already in the proceedings.

Contrary to the respondent's argument as regards the appellant's novelty objection on the basis of B1, the board takes the view that features of the prior art machine according to Figure 3 of B1 and those of the machine according to Figures 1 and 2 of B1 can be combined. The description of the preferred embodiment of the invention as shown in Figures 1 and 2 in B1 refers to an aerial-lift industrial vehicle as shown in B1 in Figure 3, as explicitly stated on page 5, line 3. Thus, all the features of the preamble of claim 1 seem to be disclosed in B1. It is explicitly stated in B1 (paragraph bridging pages 6 and 7) that further travel



of the machine is prevented when movement of a bar member, due to a worker making contact with an obstacle, is detected. Moreover, the board finds that document B1 shows at least by way of a functional description ("*possible to move the wheeled vehicle in a safe direction*") that limited movement of the cage in a direction away from an obstruction is allowed in B1, which is more than what is known from other documents which are in the proceedings, such as B2. Whether this disclosure is novelty-destroying to the subject-matter of claim 1 needs not to be answered in the course of a *prima facie* evaluation of document B1.

3.5 In view of the foregoing, the board finds that B1 is *prima facie* more relevant than what is already on file and might change the outcome of the case when it comes to the discussion of novelty and/or inventive step. Therefore, document B1 is admitted into the appeal proceedings.

#### 4. *Request for remittal*

4.1 Having admitted document B1 into appeal proceedings, the respondent requested that the case be remitted back to the opposition division for further consideration in accordance with the established case law on admission of a potentially novelty-destroying document. The request for remittal was also supported by the appellant during oral proceedings.

4.2 Although the EPC does not guarantee the parties an absolute right to have all the issues in the case considered by two instances, it is well recognised that any party may be given the opportunity of two readings of the important elements of a case. The essential function of an appeal is to consider whether the

decision issued by the first-instance department is correct. Hence, a case is normally referred back if essential questions regarding the patentability of the claimed subject-matter have not yet been examined and decided by the department of first instance.

- 4.3 In the present case, the respondent is faced with a new case concerning a document which is *prima facie* more relevant to novelty and/or inventive step of the claims than other documents already in the proceedings.

Therefore, the board considers it appropriate to remit the case to the first instance for further prosecution in accordance with Article 111(1) EPC, so as to allow the respondent to receive a reasoned decision taking B1 into account.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution on the basis of claims 1 to 9, submitted as auxiliary request 2 during the oral proceedings.

The Registrar:

The Chairman:



T. Buschek

G. Pricolo

Decision electronically authenticated