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**Datasheet for the decision
of 21 October 2019**

Case Number: T 1844/16 - 3.2.04

Application Number: 09764325.8

Publication Number: 2369938

IPC: A22C21/04

Language of the proceedings: EN

Title of invention:

DEVICE AND METHOD FOR SCALDING DIFFERENT PARTS OF A POULTRY
CARCASS WITH VARYING INTENSITIES

Patent Proprietor:

Marel Stork Poultry Processing B.V.

Opponent:

Nordischer Maschinenbau
Rud. Baader GmbH + Co. KG

Headword:

Relevant legal provisions:

EPC Art. 54, 56
RPBA Art. 12(2)

Keyword:

Novelty - main request (no)

Inventive step - auxiliary request (no)

Auxiliary requests - admitted (no)

Decisions cited:

T 1395/07

Catchword:



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Case Number: T 1844/16 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 21 October 2019

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
2 June 2016 concerning maintenance of the
European Patent No. 2369938 in amended form.**

Composition of the Board:

Chairman A. de Vries
Members: J. Wright
W. Van der Eijk

Summary of Facts and Submissions

- I. The appeals were filed by the appellant-proprietor and appellant-opponent against the interlocutory decision of the opposition division finding that, on the basis of the auxiliary request 3, the patent in suit (hereinafter "the patent") met the requirements of the EPC.
- II. The opposition was filed against the patent as a whole and based on, amongst other grounds, lack of novelty and inventive step, 100 (a) EPC.
- III. Oral proceedings were held before the Board.
- IV. The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained as granted, or, in the alternative, maintained on the basis of one of its auxiliary requests 1-6, filed with the statement of grounds on 10 October 2016
- V. The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked.
- VI. Claim 1 of the main request (as granted) reads as follows:

"Device (140) for scalding poultry carcasses (2) comprising a plumage, comprising:
- a processing space (1, 20, 30, 40, 50, 60, 70, 80) provided with transport means (3, 102) which define a transport path (4) for the poultry carcasses (2) leading through the processing space (1, 20, 30, 40, 50, 60, 70, 80);

- a feed of scalding medium (8, 71); and
- dispensing means (7, 9, 10; 21; 31, 32; 41, 42; 51, 52, 53; 61, 63, 64; 72, 74, 75; 82; 91, 92, 93, 94, 95, 96; 101, 103; 110, 111, 112, 113; 121, 122, 123; 130, 131, 132, 133) for the scalding medium connecting the feed of scalding medium (8, 71) to the processing space (1, 20, 30, 40, 50, 60, 70, 80) and provided with a plurality of outlet openings (10, 32, 42, 52, 53, 63, 64, 75, 84, 96, 121, 132) which are directed toward the transport path (4) and with which the scalding medium is carried into the transport path (4), wherein the dispensing means (7, 9, 10; 21; 31, 32; 41, 42; 51, 52, 53; 61, 63, 64; 72, 74, 75; 82; 91, 92, 93, 94, 95, 96; 101, 103; 110, 111, 112, 113; 121, 122, 123; 130, 131, 132, 133) can be controlled such that the scalding medium leaving the outlet openings (10, 32, 42, 52, 53, 63, 64, 75, 84, 96, 132) co-displaces with the poultry carcasses (2) moving along the transport path (4), characterized in that the dispensing means (7, 9, 10; 21; 31, 32; 41, 42; 51, 52, 53; 61, 63, 64; 72, 74, 75; 82; 91, 92, 93, 94, 95, 96; 101, 103; 110, 111, 112, 113; 121, 122, 123; 130, 131, 132, 133) for carrying the scalding medium into the transport path (4) are provided with at least one adjustable outlet opening (10, 32, 42, 52, 53, 63, 64, 75, 84, 96, 121, 132)".

Claim 1 of the first and second auxiliary requests add the following wording to the end of claim 1 of the main request: "to select the optimal direction and form of a jet of scalding medium (8,71)"

Claim 1 of the third auxiliary request reads as claim 1 of the main request but adds the following wording to the end of claim: "; and in that the dispensing means (7, 9, 10; 21; 31,32; 41,42; 51,52, 53; 61,63, 64; 72,

74, 75;82;91,92, 93, 94, 95,96; 101, 103; 110, 111, 112, 113; 121, 122,123; 130, 131, 132, 133) are provided with valves (123, 133) which can be controlled such that the outlet openings (10, 32, 42, 52, 53, 63, 64, 75, 84, 96, 121, 132) directed toward the transport path (4) can be opened and closed as desired."

Claim 1 of the fourth auxiliary request reads as for the main request but adds the following wording to the end of the claim: "to select the optimal direction and form of a jet of scalding medium (8, 71), and wherein the dispensing means (7, 9, 10; 21; 31, 32; 41,42; 51,52, 53; 61,63, 64; 72, 74, 75; 82; 91, 92, 93, 94, 95, 96; 101, 103; 110, 111, 112, 113; 121, 122, 123;130, 131, 132, 133) are provided with valves (123, 133) which can be controlled such that the adjustable outlet openings (10, 32, 42, 52, 53, 63, 64, 75, 84, 96, 121, 132) directed towards the transport path (4) can be opened and closed as desired."

Claim 1 of the fifth auxiliary request reads as for the main request, except that the following wording is added to the end of the claim: " and in that the dispensing means (7, 9,10; 21; 31,32; 41,42; 51,52, 53; 61, 63, 64; 72, 74, 75; 82; 91, 92, 93, 94, 95, 96; 101, 103; 110, 111, 112, 113; 121, 122, 123; 130, 131, 132, 133) comprise at least one displaceable outlet opening (10, 32, 42, 52, 53, 63, 64, 75, 84, 96) which is carried by a dispensing endless conveyor (100, 112), which dispensing conveyor (100, 112) is movable along a dispensing path, wherein the dispensing path lies at a fixed distance from the transport path (4) over at least a part of the transport path (4) for the poultry carcasses (2) followed by the transport means (3, 102); and in that the dispensing means (7, 9, 10; 21; 31,32; 41, 42; 51, 52, 53; 61, 63, 64: 72, 74, 75; 82; 91, 92,

93, 94, 95, 96; 101, 103; 110, 111, 112, 113; 121, 122, 123; 130, 131, 132, 133) also comprise at least one outlet opening (121, 132) arranged in stationary manner."

Claim 1 of the sixth auxiliary request reads as for the main request, except that the following wording is added to the end of the claim: "; and in that the dispensing means (7, 9, 10; 21; 31, 32; 41, 42; 51, 52, 53; 61, 63, 64; 72, 74, 75; 82; 91, 92, 93, 94, 95, 96; 101, 103; 110, 111, 112, 113; 121, 122, 123; 130, 131, 132, 133) comprise at least one displaceable outlet opening (10, 32, 42, 52, 53, 63, 64, 75, 84, 96) which is carried by a dispensing conveyor (100, 112), which dispensing conveyor (100, 112) is movable along a dispensing path, wherein the dispensing path lies at a fixed distance from the transport path (4) over at least a part of the transport path (4) for the poultry carcasses (2) followed by the transport means (3, 102) and in that the relative position of the dispensing conveyor (100, 112) and the displaceable outlet opening (10, 32, 42, 52, 53, 63, 64, 75, 84, 96) carried thereby is adjustable."

VII. In the present decision, reference is made to the following documents:

E2: WO2008/013447 A

E3: WO2006/024305 A

VIII. The appellant-proprietor's arguments can be summarised as follows:

The subject matter of claim 1 of the main request is novel with respect to E3 because E3 does not disclose adjustable outlet openings.

With respect to claim 1 of the first and second auxiliary requests, the skilled person would not combine the teachings of E3 and E2. Even if they did, selecting in particular the feature of optimising the form of a jet of scalding medium amongst the many other features disclosed would only be done with hindsight.

The subject matter of claim 1 of the third auxiliary request involves an inventive step starting from E3 with the skilled person's general knowledge. Placing valves so that they open and close the outlet openings has many advantages which are not disclosed in E3, whereas E3 teaches away from citing the valves there.

The fourth, fifth and sixth auxiliary requests should be admitted into the proceedings and the case remitted for examination by the opposition division.

IX. The appellant-opponent's arguments can be summarised as follows:

The subject matter of claim 1 of the main request lacks novelty over E3. The combination of E3 with E2 takes away inventive step of claim 1 of the first and second auxiliary requests. The subject matter of claim 1 of the third auxiliary request lacks inventive step starting from E3 with the skilled person's general knowledge. The fourth, fifth and sixth auxiliary requests should not be admitted into the proceedings since they have not been substantiated.

Reasons for the Decision

1. The appeals are admissible.
2. Background

The patent relates, amongst other things, to a device for scalding poultry carcasses (see published patent specification, paragraph [0001]). An object of the invention is to provide an improved scalding device that is readily controllable (specification, paragraph [0005]). To this end, the invention foresees (see specification, paragraph [0006] and all versions of claim 1), amongst other things, a scalding medium dispensing means with at least one adjustable outlet opening.

3. Interpretation of the term *adjustable outlet opening*

In accordance with established jurisprudence, (see Case Law of the Boards of Appeal, 9th edition, 2019 (CLBA) II.A.6.3.1 and its cited decisions, in particular, T1018/02, reasons 3.8 and T1395/07, reasons 4.0, last paragraph), the description cannot be used to give a different meaning to a claim feature which in itself imparts a clear, credible technical teaching to the skilled person.

The usual meaning of the term *adjustable* (see the Oxford English Dictionary (OED) on-line) is: capable of being adjusted (in various senses of the verb); esp. capable of being altered or modified, cf. adjusted: arranged, altered, or modified; regulated; properly ordered or positioned. Thus an "adjustable outlet opening" is an outlet opening that is adjustable in any

of these ways, without being restricted to optimising the direction and form of a jet of scalding medium (cf. published patent specification, paragraph [0006]).

4. Main request, claim 1, novelty with respect to E3

E3 discloses a device for scalding feathered poultry carcasses (see abstract with figure 3). The device has a processing space (scalding tunnel 10) through which poultry is transported on a transport path (conveyor 12).

Scalding medium produced in a lower part of the tunnel (see page 6, line 30 to page 7, line 10, page 7, lines 25 to 27 with figure 4) leaves and re-enters the chamber to be directed onto the poultry via nozzles.

Thus, E3's device has a dispensing means that (at the point of re-entry) connects a feed of scalding medium to the processing space and which is provided with a plurality of outlet openings.

Moreover, E3 discloses (see page 5, first 10 lines and page 7, line 29 to page 8, line 6 with figure 5) that the nozzles are adapted to follow the poultry as they are transported. Thus, the dispensing means is controlled so that scalding medium co-displaces with the poultry carcasses.

In the Board's view, E3's dispensing means likewise comprises an adjustable outlet opening. For example (see page 9, lines 9 to 11), figure 10 shows an assembly of scalding-medium supply pipes, upon which (see the lower part) two elongated nozzles are adjacently arranged. The nozzles are described as "pivotal slotted nozzles". The Board has no

difficulty in understanding from this passage that the nozzles, which have outlet openings (slots), can pivot on this assembly. Consequently, the angle with which they are mounted on the assembly can be adjusted. Bearing in mind *adjustable* in claim 1 has its usual meaning, E3 thus discloses *adjustable* outlet openings as claimed.

Consequently, E3 discloses all the features of claim 1. The subject matter of claim 1 therefore lacks novelty with respect to E3.

5. First and second auxiliary request, claim 1, inventive step starting from E3 with E2

5.1 Claim 1 of these requests adds to granted claim 1 the feature that the at least one adjustable outlet opening [is arranged] to select the optimal direction and form of a jet of scalding medium.

As explained above, E3 discloses pivotable, that is angularly adjustable, nozzles. This can but allow adjustment of the direction of the jet for optimising it according to prevailing conditions. Therefore, in the Board's view, the subject matter of claim 1 differs from E3 only in that the outlet openings are adjustable [such that] the *form* of the jet of scalding medium can be optimally selected.

5.2 The patent itself (see column 2, lines 15 to 19) explains that the technical effect associated with being able to select an optimal form (and direction) of the jet is that it can be modified subject to prevailing conditions. In the Board's view, this corresponds with the stated object of the invention

(see published patent specification, paragraph [0005]) of obtaining a readily controllable scalding result.

5.3 E3 already has outlet openings that are (in terms of direction) adjustable to prevailing conditions and thus allow some control over the scalding result. Therefore, in the Board's view, the objective technical problem can be formulated as: how to modify the device of E3 to achieve greater control over the scalding result.

5.4 In the Board's view, the skilled person would be aware of the document E2, since, like the invention and E3, it relates to the scalding of poultry in a processing space through which poultry are conveyed (see abstract and figure 1a).

5.5 Furthermore, the Board is not convinced by the appellant-proprietor's argument that the skilled person would consider the scalding arrangements of E3 and E2 incompatible for combination because, in E2, firstly, there is a direct contact between the space where scalding medium is produced and the processing space, secondly outlet opening (nozzles) are fixed and thirdly nozzles are not supplied via a system of pipes and valves.

In E3 (see page 7, lines 2 to 10), scalding medium is likewise produced in the processing space. In E2 (see for example, page 4, lines 7 to 13), nozzles are not only fixed but can also be movable. Furthermore (see E2, figures 3 and 7), just as in E3, nozzles may be supplied via pipes, whether or not valves are used.

Thus the Board sees no inherent incompatibility between the scalding arrangements of E2 and E3 that would prevent the skilled person from combining their

teachings. On the contrary, a glance at the figures of the two documents, for example figures 1 and 12 of E3 and figures 6 and 7 of E2 show very similar scalding chamber arrangements, with their tunnel-like processing spaces and over-head conveyors carrying poultry past outlet openings through which scalding medium is emitted. Nor would the skilled person reject the idea of combining the teaching of E2 with E3 because E2 does not disclose adjustable outlet openings as the appellant-proprietor has argued. Indeed, these are disclosed in the first two sentences of page 4 and in claim 2. The Board notes that the cited passage on page 4 of E2, a patent application by the present patentee, uses very similar if not identical wording to describe the adjustable outlet openings as the patent, see specification paragraph [0006]. The Board sees no cogent reason why it should not read this clear teaching in E2 any differently from the patent.

Therefore, the skilled person would consider combining the teachings of E3 and E2.

- 5.6 Turning again to the objective technical problem (greater control over scalding), the skilled person will immediately see that E2 (see page 3, lines 4 to 6) is particularly concerned with controlling the scalding process: "targeted condensation from jets of scalding medium leads to a controlled scalding result". E2 goes on to describe in general two ideas for achieving this. These are, firstly (see page 3, last paragraph), controlling the dew point of the scalding medium. Secondly (page 4, first paragraph), using an adjustable outlet opening, making it possible to select the optimal direction and form of the jet of scalding medium.

In the Board's view, in solving the objective technical problem, it would be obvious for the skilled person to take one of these just two general ideas and incorporate it into the arrangement of E3. In so doing, the skilled person would modify the outlet openings of E3 so that in addition to their being adjustable to optimise the *direction* of the jet (pivotable), they would also be adjustable to optimise the *form* of the jet. In view of the small number of ideas presented, to select one of these is not merely hindsight, but an obvious choice for the skilled person.

Therefore, the subject matter of claim 1 lacks inventive step starting from E3 and combined with E2.

6. Third auxiliary request, inventive step starting from E3 with the skilled person's general knowledge
- 6.1 The subject matter of claim 1 of the third auxiliary request differs from claim 1 as granted in that (in summary) the dispensing means are provided with valves for opening and closing the outlet openings.
- 6.2 As already explained, E3 discloses all feature of granted claim 1. E3 also discloses (see page 8, lines 21 to 29 and figure 8) that the dispensing means can be provided with valves, for example valves B31.00 to B31.07. However, in the Board's view, these valves cannot be controlled such that the outlet openings per se are opened and closed as desired. Rather, the valves are arranged in discharge pipes which are then directly connected with the injecting nozzles. Thus, the valves of E3 are up-stream of the openings so they do not open and close the outlet openings.

6.3 According to the patent (see published patent specification, paragraph [0012], first two sentences), the effect of providing such valves is to allow the feed of scalding medium to be turned on and off. In the Board's view, the valves of E3, up-stream of the outlet openings, can but have the same effect.

6.4 In this regard, the appellant-proprietor has argued that the skilled person reads the patent with the eyes of one who sees an improved control effect achieved by positioning the valves at the output opening. This, so they argue, is because the skilled person knows from their experience, for example with a garden hose, that more precise control of the jet is achieved when turning it off with the valve at the outlet opening than with the valve at the wall. Conversely, so the argument continues, the skilled person reading E3 sees disadvantages in positioning the valve at the outlet openings. For example, they see difficulties in placing a valve in the hostile scalding environment and adapting the valve to fit the outlet's small size, whereas neither valve size nor the scalding environment plays a role when valves are fitted upstream of the outlet opening.

6.5 In the Board's view, the skilled person takes the patent at face value (see paragraph [0012] again) when it simply states that the valves at the outlet openings can turn the feed of scalding medium on and off. In other words they see no particular advantage in positioning the valves at the outlet openings.

By the same token, the skilled person sees E3 (page 8, penultimate paragraph) as stating no more than that valves are provided in the supply line to the nozzles

(outlet openings). This is stated without any associated advantage or disadvantage.

6.6 Therefore, the skilled person does not infer any advantage or disadvantage from the patent when read in the light of the prior art associated with positioning the valve at the outlet opening as claimed. The Board consequently is unable to see in this feature more than an alternative position of the valve to having it further upstream as E3 discloses. It follows that the objective technical problem can be expressed as: how to modify the device of E3 to find an alternative position for the valve.

6.7 In the Board's view, the skilled person knows from their general knowledge that a valve for turning on and off can be placed either at the outlet opening of a fluid supply line, or further upstream. Faced with the objective technical problem, the skilled person would, as a matter of obviousness, consider the alternative of placing the valve nearer or at the outlet and relocate the valves of E3 to the outlet openings. In so doing, the skilled person would arrive at the subject matter of claim 1 without inventive skill. Therefore, the third auxiliary request must fail.

7. Fourth, fifth and sixth auxiliary requests

These requests were filed with the grounds of appeal. However, the appellant-proprietor has provided no explanation as to why the subject-matter of the independent claims of these requests should be novel and involve an inventive step with respect to the cited prior art.

Indeed, with regard to novelty and inventive step of these requests, the appellant-proprietor has merely requested (at the oral proceedings) that the case be remitted to the opposition division for consideration of these issues.

- 7.1 According to Article 12 (2) of the Rules of Procedure of the Boards of Appeal (RPBA) the statement of grounds of appeal and the reply must set out the parties' complete case. In particular, it must be set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld. Further, the Board shall take into account everything presented by the parties if and to the extent it relates to the case and meets the requirements in (2), Article 12(4) RPBA.

This means, amongst other things, that for auxiliary requests to be admitted, they have to be properly substantiated by arguments that enable the Board and the other party to understand, from the outset, why the claims are alleged to be novel and inventive, without having to make their own investigations (see the Case Law of the Boards of Appeal, (CLBA), V.A.4.12.5 and the case law cited therein).

- 7.2 In the present case, as already explained, no such arguments have been provided. Nor is it self-evident to the Board why these requests should succeed.

The appellant-proprietor has explained that the fourth auxiliary request is a combination of the first and third auxiliary requests. However, it has not explained why this combination should succeed on inventive step when the first and third auxiliary requests have failed. The fifth and sixth auxiliary requests combine

the subject matter of granted claims 1 and 2 with claims 11 and 7 respectively, and thus may raise different novelty and inventive step issues with respect to the remaining requests on file.

7.3 Nor does the absence of arguments militate in favour of a remittal. Remitting a case if requests are not substantiated as required would seem to cancel the sanction that non-compliance with the requirements Article 12(2) RPBA must have according to Article 12(4) RPBA.

7.4 For these reasons, the Board decided not to admit the appellant-proprietor's fourth to sixth auxiliary requests into the proceedings. Therefore, the request for remittal to the opposition division to decide on these requests is moot.

8. The Board concludes that the appellant-proprietor's main request and first to third auxiliary requests fail whereas their remaining requests have not been admitted. Therefore, the Board must revoke the patent.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated