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**Datasheet for the decision
of 11 October 2019**

Case Number: T 1311/17 - 3.2.04

Application Number: 08742803.3

Publication Number: 2142001

IPC: A22B3/08

Language of the proceedings: EN

Title of invention:

SYSTEM AND METHOD FOR STUNNING POULTRY WITH GAS

Patent Proprietor:

Praxair Technology, Inc.

Opponents:

Nordischer Maschinenbau
Rud. Baader GmbH + Co. KG
Marel Stork Poultry Processing B.V.

Headword:

Relevant legal provisions:

EPC Art. 108, 123(2)
EPC R. 99(2)
RPBA Art. 12(4)

Keyword:

Admissibility of appeal - statement of grounds
Amendments - allowable (yes)

Decisions cited:

T 0760/08

Catchword:



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Chambres de recours

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Case Number: T 1311/17 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 11 October 2019

Appellant: Praxair Technology, Inc.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 16 March 2017
revoking European patent No. 2142001 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman A. de Vries
Members: G. Martin Gonzalez
 C. Heath

Summary of Facts and Submissions

- I. The appellant-proprietor lodged an appeal, received on 12 May 2017, against the decision of the Opposition Division posted on 16 March 2017 revoking European patent No. 2 142 001 pursuant to Article 101(3)(b) EPC, and simultaneously paid the appeal fee. The statement of grounds of appeal was received on 26 July 2017.
- II. Two oppositions were filed based on the grounds of Article 100(a) EPC for lack of novelty and lack of inventive step, Article 100(b) EPC for insufficiency of disclosure and Article 100(c) EPC for added subject-matter.

The opposition division held that the patent as granted and according to the auxiliary request 1 of 11 January 2017 contained subject-matter extending beyond the contents of the originally filed documents. The division did not admit an auxiliary request filed during the oral proceedings before it.

- III. The appellant-proprietor requests that the decision under appeal be set aside and that the patent be maintained based on one of auxiliary requests 1 - 8 (numbered thus, with no main request), all filed with the grounds of appeal, or to remit the case to the first instance for further prosecution.

The respondent-opponents request that the appeal be dismissed as inadmissible or not to admit any of the newly filed requests and dismiss the appeal, or to remit the case to the first instance for further prosecution.

IV. The independent claim 1 according to the first auxiliary request reads as follows:

"A method for controlled atmosphere stunning and killing of poultry comprising the steps of:
(i) loading one or more batches of poultry in a stunning chamber;
(ii) sealably enclosing the one or more batches of poultry in the stunning chamber to isolate the atmosphere proximate the poultry;
(iii) introducing a gaseous mixture to the isolated atmosphere to stun the one or more batches of poultry at a first concentration level or range and forcibly recirculating the isolated atmosphere within the stunning chamber for a first prescribed duration;
(iv) introducing additional gaseous mixture to the isolated atmosphere to a second concentration level or range and forcibly recirculating the isolated atmosphere around the stunning chamber for a second prescribed duration;
(v) introducing additional gaseous mixture to the isolated atmosphere to a third concentration level or range and forcibly recirculating the isolated atmosphere around the stunning chamber for a third prescribed duration sufficient to kill the poultry;
(vi) forcibly exhausting the gaseous mixture from the isolated atmosphere; and
(vii) advancing the killed poultry from the stunning chamber."

V. The appellant-proprietor argued as follows:

The appeal is admissible. Auxiliary request 1 is also admissible and its subject-matter does not extend beyond the contents of the originally filed documents. Since novelty and inventive step have not been

discussed so far, remittal to the opposition division is justified.

VI. The respondent-opponents argued as follows:

The appeal is not admissible since the statement of grounds does not set out any reasons why the impugned decision would be wrong. It consequently does not satisfy the requirements of Article 108 EPC, due to lack of sufficient substantiation. Auxiliary request 1 is also not admissible under Article 12(4) RPBA. Moreover its subject-matter extends beyond the contents of the originally filed application documents.

Reasons for the Decision

1. Admissibility of the appeal

1.1 For the appeal to be admissible, a statement of grounds of appeal shall be filed (Article 108 EPC, third sentence) in which:

"the appellant shall indicate the reasons for setting aside the decision impugned, or the extent to which it is to be amended, and the facts and evidence on which the appeal is based" (Rule 99(2) EPC).

1.2 According to established case law of the Boards of Appeal, since the admissibility of an appeal can only be assessed as a whole, it is enough that the requirements of Article 108, third sentence, EPC are fulfilled at least in respect of one request, see Case Law of the Boards of Appeal, 9th edition 2019 (CLBA), V.A.2.6.8.

Moreover, it is not an absolute requirement for admissibility that the appellant should attack the opposition division's decision. Where amended claims have been filed, an appeal may also be admissible if sufficient reasons are given in the statement of grounds why the amendments are considered apt to remedy the deficiencies identified by the opposition division, see CLBA, V.A.2.6.5.c).

- 1.3 As sole reason for revoking the patent the impugned decision held (reasons 14.4) that claim 1 as granted and of a previously filed auxiliary request 1 "did not require anymore that the gaseous mixture is introduced at first and second concentration levels to stun the poultry". This objection, as quoted in reasons 14.1.b) of the decision, would result from the omission in step (iii) of granted claim 1 of the feature that the gaseous mixture is introduced "to stun the one or more batches of poultry".

With auxiliary request 1, the appellant-opponent amends granted claim 1 to reintroduce the term "to stun the one or more batches of poultry" in step (iii) of the claim. The appellant-proprietor further explicitly refers in their statement of grounds, page 2, section 1, to reasons 14.4 of the impugned decision. They submit in this regard that the cancellation of the above term "has been objected by both opponents as well as by the Opposition Division". The appellant-proprietor goes on in the statement of grounds by stating that, "[T]he re-introduction of the cancelled term is... to render the objections moot." The appellant-opponent submits, in other words, that they address the division's added subject-matter objection by reintroducing the omitted feature identified by the opponents and the division.

1.4 Therefore, at least for the first auxiliary request filed with the statement of grounds, the appellant-proprietor sets out the reasons why they consider that the amendments are apt to remedy the added subject-matter deficiency identified by the opposition division. Since this deficiency was the sole reason to revoke the patent, the appellant's reasons in the statement of grounds (if convincing) would be sufficient for setting aside the decision impugned, thereby fulfilling the above provisions of Article 108 EPC in conjunction with Rule 99(2) EPC, namely that the appellant shall indicate the reasons for setting aside the decision impugned, without the need for further substantiation. The requirements of Article 108, third sentence, EPC are therefore fulfilled for the first auxiliary request.

1.5 The respondent-opponents submit that the statement of grounds is very brief, without sufficient substantiation in respect of what the amendments are and why they overcome the division's objections and that the appeal consequently is inadmissible, as was also found in **T 760/08**. The Board is not convinced by this argument. Indeed, as also explained in CLBA, V.A. 2.6.3.d), third paragraph, in **T 760/08** it was not the brevity of the statement of grounds but mainly the fact that as a result of contradictions and inexactitudes in it, it was left to the Board to make sense of it. In the present case, though short, the explanation given by the appellant-opponent is clear and sufficiently substantiated, since, as explained above, it coherently addresses the only objection for revoking the patent in the decision, thereby enabling the Board to immediately understand why the appellant considers that the

decision should be set aside in the sense of Rule 99(2) EPC.

1.6 As otherwise all formal requirements are met, the Board concludes that the appeal complies with the provisions of Article 108 EPC and Rule 99 EPC, and that therefore the appeal is admissible.

2. First auxiliary request - Admissibility

2.1 The appellant-proprietor files this request for the first time with the statement of grounds of appeal. The admission of the new request is thus at the discretion of the Board, Article 12(4) RPBA.

In this regard the main question to be addressed is whether such a new request could and should have been submitted already in first instance. According to established case law, this issue relates to the question of whether the presenting party (the appellant-proprietor in the present case) could have been expected to present its request in the first-instance proceedings in the circumstances of the specific case, see CLBA, V.A.4.11.3.d).

Accordingly, and contrary to the submissions of the appellant-opponent 2, "clear allowability" is not the decisive criterion for the admission of new requests filed for the first time with the statement of grounds.

2.2 In the present case, the opposition proceedings developed as follows. The opponents raised, with the notices of opposition, a number of added subject-matter, insufficiency, novelty and inventive step objections. The proprietor responded to the objections in good time by way of argument, which in the Board's

understanding is a legitimate way to defend their case. In the summons dated 6 July 2016, the opposition division merely listed the issues to be discussed, namely added subject-matter for the reasons raised by the opponents, sufficiency of disclosure, the validity of the priority claim, novelty over E1, E2, E7 to E13 and inventive step over the combination of the documents given by both opponents. Only for sufficiency of disclosure did the division express its preliminary opinion that the invention was sufficiently disclosed, without further substantiation. The opponent 2 filed further submissions in respect of sufficiency of disclosure with letter of 7 December 2016, while opponent 1 filed further arguments in respect of different added subject-matter objections and also in respect of sufficiency, novelty and inventive step objections, with letter of 13 January 2017.

In the light of the above, it cannot be said that the appellant-proprietor during the first-instance written proceedings had received a clear indication that the now disputed added subject-matter objection was a key issue for the validity of the granted claims. On the contrary, this only became clear during oral proceedings on 15 February 2017.

- 2.3 It was also during these oral proceedings before the opposition division, within the limited time available in the circumstances, that the appellant-proprietor made an attempt to find a wording of the independent claim which was acceptable to the opposition division and submitted an auxiliary request combining originally filed claims 1 and 3. This request was not admitted by the opposition division. The Board is unable to see this as a deliberate choice on the part of the appellant proprietor to avoid a ruling on the issue at

first instance. The Board rather considers such behaviour as an ordinary and bona fide attempt to defend the patent in the circumstances, bearing in mind that the patentee had to face two opponents and a number of different objections on the three grounds of opposition.

- 2.4 Only after issuance of the decision was the appellant confronted with the full reasoning of the opposition division. Subsequently, with enough time for proper consideration of their response and the knowledge of the reasoning of the opposition division, did the patentee formulate what they considered an appropriate response to the reasons given in the decision.

In the present case the first auxiliary request which, there being no main request, is in fact the appellant's primary request, as explained above attempts to address the sole reason for revoking the patent. It is therefore regarded by the Board as an appropriate and legitimate reaction of a losing party to the impugned decision.

- 2.5 The Board thus decided to admit auxiliary request 1 into the appeal proceedings.

3. Amendments - First auxiliary request

The features of new claim 1 find their basis in the combination of originally filed claims 1 and 3. Original claim 1 has been redrafted to include the further steps, defined by original claim 3, in the middle of claim 1 at their sequential method step position.

In this respect, original claim 1 required a single step (iii) of introducing a gaseous mixture to stun the poultry, whilst dependent claim 3 further required two additional gas introduction steps, the third and last one sufficient to kill the poultry. It is undisputed that from the drafting of original claims 1 and 3, the feature of original claim 1 that the introduction of the gaseous mixture is to stun the poultry, applied to all three gas introduction steps as defined by the combination of original claims 1 and 3.

- 3.1 Since the wording "to stun the one or more batches of poultry" is now only recited in the new claim under the first gaseous introduction step (iii), it remains to be ascertained whether the original feature that all gaseous introduction steps also had the effect to stun the poultry is fulfilled by the new claimed subject-matter. In the opinion of the Board, it is, for the following reasons:

The first gas introduction step of the new claim, step (iii), evidently requires stunning. Step (v) explicitly calls for killing the poultry, which necessarily includes, in the patent context, stunning the poultry, cf. paragraph 0018, final sentence, where "stun" is said "to mean bringing the poultry into a desired state of lethargy and dead". Step (iv), though it does not explicitly mention the feature, requires adding an additional amount of the same stunning gaseous mixture into the stunning chamber. Therefore, the amount of stunning gas inside the chamber, where the batch of poultry is sealably enclosed (see step (ii) of claim 1), increases with further introduction of gas, irrespective of whether the further gas is introduced at a higher or lower concentration level. The increase of stunning gas inside the stunning chamber can only

lead, in the Board's opinion, to further increasing the stunning effect inside the chamber. The Board thus concludes that the disputed stunning effect is also achieved by step (iv) of the new claim.

3.2 The respondent-opponents submit that the claim does not require the same gas composition for all steps. Hence an embodiment introducing in step (iv) a non-stunning composition such as air would fall under the scope of the new claim and would also represent added subject-matter, since that step does not fulfil the originally claimed stunning effect. The Board is however of the opinion that claim 1 in all steps requires the same gaseous mixture composition. Indeed, the amended claim 1 refers to "a" gas mixture in step (iii) and thereafter to "additional" mixture introduced to "a second concentration level", which readily implies for the skilled person a reference to the previously introduced gas mixture in the claim, thus meaning for the skilled person that it refers to a mixture of the same composition thus also having stunning effect. The Board is thus unable to find an extension of subject-matter beyond the originally filed documents in this respect.

3.3 The respondent-opponent 1 also submits that the new claim also includes embodiments where the first step (iii) or the second step (iv) of stunning gas introduction may also kill the poultry, while, according to their interpretation, this effect was disclosed only for the third gas introduction step, step (v) of the new claim. The Board is not convinced by this argument, since, as stated above in the original disclosure paragraph 0018 defines "stun" or "stunning" as also including bringing the poultry to a state of death. Therefore the skilled person, in a

contextual reading of the original claim 1, would also understand that the originally recited poultry stunning may also include killing, as is now the case in claim 1 of the first auxiliary request. The Board thus concludes that there is also no added subject-matter in this respect.

3.4 The further argument advanced by the respondent-opponent 2 that, due to the formulation in original claim 3 "the step of introducing the gaseous mixture to the isolated atmosphere *further comprising...*", the combination of original claims 1 and 3 required four gas introduction steps, is also not convincing. It is readily apparent for the skilled person reading the document with a mind willing to understand that original claim 3 specifies three sub-steps in which the gas introduction step of original claim 1 should be subdivided. The combination of original claims 1 and 3 discloses therefore for the skilled person a method with three gas introduction steps, as is also now claimed by claim 1 of the first auxiliary request.

3.5 As otherwise, the combination of features of new claim 1 finds its basis in the combination of originally filed claims 1 and 3, the Board concludes that the subject-matter of claim 1 of the first auxiliary request does not extend beyond the contents of the originally filed application.

3.6 For the above reasons, the Board is satisfied that the subject-matter of the claims according to the first auxiliary request does not contain subject-matter which extends beyond the content of the application as originally filed in the sense of Article 100(c) EPC and satisfies the requirements of Article 123(2) EPC.

4. Remittal

As noted by the Board in its communication, the opposition division has left the further substantive issues of sufficiency of disclosure, novelty and inventive step undecided. Since the main purpose of the appeal proceedings is to give the losing party a possibility to challenge the decision of the Opposition Division on its merits, the Board was of the view that, should an auxiliary request be admitted and found compliant with Article 123(2) EPC, the most appropriate course of action is to exercise its discretion under Article 111(1) EPC and remit the case for further prosecution. Absent any further submissions from the parties, the Board sees no reason to change its point of view.

Furthermore, all parties to the proceedings have also declared their agreement with this course of action.

Since the first auxiliary request has been admitted and found compliant with Article 123(2) EPC, the Board decides to exercise its discretion under Article 111(1) EPC and remit the case for further prosecution on the basis of the set of claims of the first auxiliary request filed with letter of 26 July 2017.

Order

For these reasons it is decided that:

1. **The decision under appeal is set aside.**

2. **The case is remitted to the department of first instance for further prosecution.**

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated