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**Datasheet for the decision
of 14 July 2021**

Case Number: T 0060/18 - 3.2.04

Application Number: 03021509.9

Publication Number: 1405564

IPC: A22B3/08

Language of the proceedings: EN

Title of invention:

Method and system for gas stunning of poultry for slaughter

Patent Proprietor:

Linco Food Systems A/S
MAXITECH S.R.L.

Opponent:

Marel Stork Poultry Processing B.V.

Headword:

Relevant legal provisions:

EPC Art. 123(2)
RPBA 2020 Art. 13(2)

Keyword:

Amendments - added subject-matter (yes)

Amendment after summons - exceptional circumstances (yes)

Decisions cited:

T 0823/96

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0060/18 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 14 July 2021

Appellant: Linco Food Systems A/S
(Patent Proprietor 1) Vestermøllevej 9
8380 Trige (DK)

Appellant: MAXITECH S.R.L.
(Patent Proprietor 2) Via Guido Rossa 51
25060 Cellatica (BS) (IT)

Representative: Stork Bamberger Patentanwälte PartmbB
Meiendorfer Strasse 89
22145 Hamburg (DE)

Appellant: Marel Stork Poultry Processing B.V.
(Opponent) Handelstraat 3
5831 AV Boxmeer (NL)

Representative: Patentwerk B.V.
P.O. Box 1514
5200 BN 's-Hertogenbosch (NL)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
10 November 2017 concerning maintenance of the
European Patent No. 1405564 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 5a, the patent in suit met the requirements of the EPC.

The opposition division decided, amongst other things, that the subject matter of the independent method claim (claim 1) as granted did not extend beyond the content of the application as filed but that the independent system claim of that request did.

- II. Oral proceedings were held before the Board.

- III. The appellant-opponent requested that the decision under appeal be set aside and that the patent be revoked.

The appellant-proprietor requested that the decision under appeal be set aside and the patent be maintained as granted (main request) or, auxiliarily, according to auxiliary request 0 filed with letter of 15 September 2020, or according to auxiliary request 0a filed at the oral proceedings before the Board, or according to auxiliary request 1a (patent as upheld by the opposition division), or according to one of auxiliary requests 1-6 filed with letter of 10 October 2016.

- IV. The independent (method) claim 1 of the *main request*, *auxiliary request 0* and *auxiliary request 1a* is as granted and reads as follows:

"A method for gas stunning of poultry for slaughter arriving at the poultry slaughterhouse in transport crates (6), where gas stunning of the animals is achieved while the animals are still in transport crates (6), and where the transport crates and the animals, are conveyed successively by means of conveyors (12, 14, 18, 20) through a stunning chamber (8), characterised in that an influence of the gas for stunning the animals is adjusted while the animals are within the stunning gas by shortening or lengthening a conveying time during which the animals travel within the stunning gas and adjusting a length of conveying by changing the configuration of the path of travel of the transport crates (6) on the conveyor travelled by the animals within the stunning gas within the transport crates (6) through the stunning chamber (8)".

Claim 1 of *auxiliary request 1* reads as claim 1 of the main request except that the feature "and adjusting a length of conveying by changing the configuration of the path of travel of the transport crates (6) on the conveyor travelled by the animals within the stunning gas within the transport crates (6) through the stunning chamber (8)" is replaced by the feature:

"and is adjusted by shortening or lengthening the conveying route of the transport crates (6) through the stunning chamber (8)".

Claim 1 of *auxiliary request 2* reads as for auxiliary request 1 except that the following feature is added to the end of the claim:

"wherein shortening or lengthening of the conveying time through the stunning chamber (8) is achieved by increasing or reducing a speed of the conveyors (12,

14, 18, 20), and wherein adjustment of the conveying route through the stunning chamber (8) is achieved by lowering or lifting a substantially horizontal conveyor (18) running herein, which conveyor (18) provides for the conveying of the transport crates (6) through the stunning chamber (8) within the gas for stunning between a downwards running conveyor and an upwards running conveyor".

Claim 1 of *auxiliary request 3* reads as for the main request, except that the characterising feature is amended to read:

"characterised in that an influence of the gas for stunning the animals is adjusted while the animals are within the stunning gas by shortening or lengthening the conveying time during which the animals travel within the stunning gas, namely shortening or lengthening of the conveying time through the stunning chamber (8) is achieved by increasing or reducing a speed of the conveyors (12, 14, 18, 20), and adjusting a length of conveying by changing the configuration of the path of travel of the transport crates (6) on the conveyor travelled by the animals within the stunning gas within the transport crates (6) through the stunning chamber (8), namely adjustment of the length of conveying through the stunning chamber (8) is achieved by lowering or lifting a substantially horizontal conveyor (18) running herein, which conveyor (18) provides for the conveying of the transport crates (6) through the stunning chamber (8) within the gas for stunning between a downwards running conveyor and an upwards running conveyor".

Claim 1 of *auxiliary requests 4 and 6* reads as for the main request, except that the characterising feature is amended to read:

"characterised in that an influence of the gas for stunning the animals is adjusted while the animals are within the stunning gas by shortening or lengthening the conveying time during which the animals travel within the stunning gas and is adjusted by shortening or lengthening the conveying route of the transport crates (6) through the stunning chamber (8), wherein shortening or lengthening of the conveying time through the stunning chamber (8) is achieved by increasing or reducing a speed of the conveyors (12, 14, 18, 20), and wherein adjustment of the conveying route through the stunning chamber (8) is achieved by lowering or lifting a substantially horizontal conveyor (18) running herein, which conveyor (18) provides for the conveying of the transport crates (6) through the stunning chamber (8) within the gas for stunning between a downwards running conveyor and an upwards running conveyor, and wherein an influence of the gas for stunning the animals is adjusted by varying gas concentration at varying levels in the stunning chamber (8) with an increasing gas concentration being applied in a downwards direction in the stunning chamber (8)".

The sole independent claim of auxiliary request 0a is directed at a system and reads as follows:

"A system for gas stunning of poultry for slaughter according to the method of claim 1 comprising a first substantially horizontal conveyor (4) which receives and introduces transport crates (6) and the poultry for slaughter into a gas-filled stunning chamber (8) in which a downwards running conveyor (12) is arranged,

for successively conveying transport crates (6) downwards in the stunning chamber (8), and an upwards running conveyor (20) which is arranged for successively conveying the transport crates (6) upwards out of the stunning chamber (8), comprising a PLC control system for controlling a number of mutually dependent mechanical parameters, for shortening or lengthening a conveying time and adjusting a length of conveying of the path to travel of the transport crates characterised in that the downwards running conveyor is constituted by a number of mainly vertical conveyors (12), each comprising mutually interacting endless chain conveyors (14) with carrying means arranged for supporting opposite sides of said transport crates for downwards conveying of the transport crates (6) in the stunning chamber (8), the upwards running conveyor is constituted by a substantially vertical conveyor (20) comprising mutually interacting endless chain conveyors (14) with carrying means arranged for supporting opposite sides of said transport crates (6) for upwards conveying of these from the stunning chamber (8), and between the downwards and upwards running conveyors (12, 20) there is a second substantially horizontal conveyor (18) which provides horizontal conveying of the transport crates (6) through the stunning chamber (8), which second conveyor (18) furthermore is lifted and lowered respectively between levels with varying gas concentrations in the stunning chamber (8)".

The sole independent claim of auxiliary request 5 is directed at a system and reads as follows:

"A poultry gas stunning system for poultry to be slaughtered comprising a first substantially horizontal conveyor (4) which receives and introduces transport crates (6) and the poultry for slaughter into a gas-

filled stunning chamber (8), the gas-filled stunning chamber (8), in which a downwards running conveyor (12) is arranged, for successively conveying transport crates (6) downwards in the stunning chamber (8), and an upwards running conveyor (20) which is arranged for successively conveying the transport crates (6) upwards out of the stunning chamber (8), comprising a PLC control system for controlling a number of mutually dependent mechanical parameters for shortening or lengthening the conveying time and the conveying route of the transport crates through the stunning chamber (8), characterised in that the downwards running conveyor comprises substantially vertical conveyors (12), each comprising mutually interacting endless chain conveyors (14) which support opposite sides of said transport crates for downwards conveying of the transport crates (6) in the stunning chamber (8), the upwards running conveyor comprises a substantially vertical conveyor (20) comprising mutually interacting 25 endless chain conveyors (14) which support opposite sides of said transport crates (6) for upwards conveying of these from the stunning chamber (8), and between the downwards and upwards running conveyors (12, 20) there is a second substantially horizontal conveyor (18) which provides horizontal conveying of the transport crates (6) through the stunning chamber (8), which second conveyor (18) furthermore is lifted and lowered respectively between levels with varying gas concentrations in the stunning chamber (8), wherein said PLC control system being adapted to control by way of example the following mutually dependent mechanical parameters, speed of vertical conveyors, setting (176 seconds), number of transport crates in stunning zones, setting (tunnel) (10 pcs.), cycle between crates in stunning zone, setting (17.6 seconds), number of chickens per crate, setting (43 pcs.), speed of

slaughtering line, setting (148 animals/minute), speed cycle between crates in stunning zone, actual (17.4 seconds), speed of slaughtering line, actual (142 animals/minute)".

- V. The appellant-opponent's arguments can be summarised as follows: Common to all independent method claims, albeit variously worded, is the feature that an influence of the gas is adjusted while the animals are within the stunning gas by adjusting conveyor path length. This adds subject matter extending beyond the application as filed. Similarly, in the independent system claims of those requests having no method claim the feature of a PLC control system for shortening or lengthening the conveying route of the transport crates extends beyond the application as filed.
- VI. The appellant-proprietor's arguments can be summarised as follows: The claims of all requests do not contain added subject matter.

Reasons for the Decision

1. The appeals are admissible.
2. Background

The present invention relates to a method and system for gas stunning poultry just before they are slaughtered (see published patent specification, paragraphs [0001] and [0002]). The main aim of the invention is to optimise the stunning process (see published patent specification, paragraph [0009]).

The main issue of this decision is added subject matter. Unless otherwise stated, references are to the published patent application.

3. Main request, claim 1, added subject matter
- 3.1 Claim 1 as originally filed defines that *the influence of the gas for stunning the animals is adjusted by shortening or prolonging the conveying time and/or the conveying route of the said transport crates through the stunning chamber.*
- 3.2 During examination leading to grant, the feature was amended to read: *an influence of the gas for stunning the animals is adjusted while the animals are within the stunning gas by [...] adjusting a length of conveying by changing the configuration of the path of travel of the transport crates.* In the decision under appeal (see reasons point 2.2.3) the opposition division found that this amendment did not add subject-matter. The Board disagrees with this finding.
4. It is not disputed that the feature is clear. What is adjusted is the influence of the gas, and this adjustment is made *while* the animals are within the stunning gas. This is done by inter alia adjusting a length of the conveying path. The question of added subject matter hinges on whether there is an original disclosure for adjusting the conveyor path length *whilst* the animals are in the gas.
5. The appellant-proprietor has argued that the feature has a basis in paragraphs [0004] and [0008] of the application as filed. Leaving aside the question as to whether paragraph [0004] relates to the invention (paragraphs [0002] to [0006] come under the heading

prior art), it discloses (as summarised by the Board) that: To optimise stunning, certain parameters (listed in paragraph [0003] as system capacity, size and number of birds per crate and their condition) must be continuously considered prior to and during gas stunning of the poultry, and it is necessary to continuously apply the most advantageous parameters to achieve optimum gas stunning of the actual chicken flock at any time.

5.1 *Continuously* applying the most advantageous [stunning] parameters and optimising stunning *at any time* may well point to a continuous adjustment of some stunning parameters, including *while* animals are in the stunning gas, as the appellant-proprietor has argued (cf. impugned decision, page 4, lines 2 to 4).

5.2 However, the question to be answered is whether it is originally disclosed to adjust the *particular* stunning parameter of conveying path length while the animals are in the gas. In this respect, paragraph [0004] is silent. Indeed, it does not mention any specific stunning parameter, and the path length is only one of several (for example, conveying time and gas concentration).

Moreover, the next paragraph - [0005] - points to the conveying time, if anything, being continuously adjusted. The paragraph explains that: *to optimise these parameters different periods of stunning time can be used, but variations in the gas concentration [...] must also be taken into account, depending on the transport route length [...]*. Thus, whilst the periods of stunning time can change, the length of the route is a parameter which must be *taken into account*, not continuously adjusted.

5.3 Turning now to paragraph [0008] in the section "Brief description of the invention", this opens by mirroring the characterising feature of the original claim (gas influence adjusted by shortening or prolonging the conveying time and/or route). Thus, here again it is not disclosed that the path length is adjusted *while* the animals are in the stunning gas. The paragraph continues by explaining that it is especially important to consider the welfare of the animals before they reach slaughter and that if this is not optimum, it will be easy to prolong or shorten the conveying time and/or conveying route.

5.4 The Board does not agree with the appellant-proprietor's argument that this implies an operator looks into the stunning chamber and visually checks the animals' condition and adjusts the conveyor route length *while* the animals are in the chamber. At most, the passage says the stunning condition (too light or strong) should be observed *before slaughter*. In the Board's view, a normal reading of this would not be to make observations whilst stunning is in progress, but rather when stunning is ended in order to evaluate the birds' stunned condition just before slaughter. Nor does the application suggest elsewhere that the operator is located in direct proximity to the pit, that it might be open or transparent at the top, or that it has observation means.

5.5 The description of the detailed embodiments corroborates this reading: after leaving the stunning chamber, the stunned animals are unloaded from their crates (see paragraph [0022]). The next paragraph (paragraph [0023]) explains what adjustment should be made according to the animals' stunning condition, thus

implicitly, observations are made *after* the animals have left the stunning chamber. Therefore, it cannot be directly and unambiguously inferred from paragraphs [0004] and [0008] that the path length adjustment is made *while* the animals are in the stunning chamber.

5.6 The appellant-proprietor has also asserted that overall stunning throughput (number of birds per minute, say) must match the constant value of the subsequent slaughtering line. It then reasons that adjusting the stunning time (the time a bird spends in the stunning chamber = distance it travels in the stunning chamber divided by the its speed of travel) with birds in the stunning chamber- is possible only by adjusting the path length through the stunning chamber whilst birds are in it if a constant throughput is to be maintained. The Board disagrees.

5.7 It may well be that the number of birds per minute throughput of the stunning system must match that of the slaughter line. However, unlike the slaughter line in which birds are hung from a conveyor in shackles and conveyed one by one, in the stunning system birds are conveyed in crates (see paragraphs [0021] and [0022]). The numbers of birds per crate and the number of crates in the stunning system at a given time can be set (cf. paragraph [0027]). For example a plurality of downward conveyors may be provided to adjust conveying time (see paragraph [0025] and claim 5, first characterising feature with figure 1). Thus the time an individual bird spends in the stunning pit can be increased by simply slowing down travel through the stunning pit, the throughput (of the stunning pit) being held constant by then increasing the number of birds being conveyed through the pit. In this regard the Board is unconvinced that because the crates are closely spaced

and tightly packed to achieve optimal, maximum capacity the system would not allow any such variation. It agrees rather with the appellant-opponent that such conveying systems are normally designed with over capacity as a buffer for (upward) fluctuations in input. Therefore, for a constant throughput of birds per minute, the time birds are stunned can be adjusted without changing the path length. It follows that, even if the original application were to disclose adjusting stunning time *while* birds are in the stunning chamber (the Board sees no explicit disclosure thereof) such an adjustment would not necessarily imply a simultaneous adjustment of the conveyor path length.

- 5.8 From the above, the Board finds no direct and unambiguous disclosure of the conveying path length being adjusted while birds are in the stunning chamber in the application as filed. Thus, the subject matter of the main request extends beyond the application as filed, Article 123(2) EPC. Therefore, the main request must fail.
6. The independent method claim 1 of auxiliary requests 0, 1, 1A (as upheld), 2, 3, 4, and 6 has the same feature (adjusting conveying length while animals are in the stunning gas) as the main request, albeit formulated in different ways. Therefore, these requests fail for the same reasons as apply to the main request.
7. Admittance of auxiliary request 0A

Auxiliary request 0a was filed at oral proceedings before the Board. Its admittance is therefore subject to the Board's discretion afforded by Article 114(2) EPC and Article 13(2) RPBA 2020.

This request deletes all method claims from current auxiliary request 0 discussed above leaving only its independent system claim. Auxiliary request 0 was filed in response to an objection of extension of protection (Art 123(3) EPC) against system claim 5 of a previous auxiliary request 0, restoring to that claim the feature of the granted claim that had been deleted. Admissibility of that request was not an issue and indeed had not been raised. The only issue is whether the amendment by deletion of the method claims is justified by exceptional circumstances. The Board finds that it is, as it is in response to the Board's conclusion at the oral proceedings that the method claims added subject matter, thereby departing from its positive opinion in its communication (cf. section 2). The deletion of all method claims manifestly rendered all objections to the method claims moot without introducing new issues. The Board considered these circumstances to be exceptional and therefore decided to admit auxiliary request 0a into the proceedings pursuant to Article 13(2) RPBA 2020.

8. Auxiliary request 0a, claim 1, added subject matter
- 8.1 Claim 1 of this request defines a PLC control system for controlling a number of mutually dependent mechanical parameters, for shortening or lengthening a conveying time and adjusting a length of conveying of the path to travel for the transport crates. It is said to be based, at least partly, on a combination of original claims claim 5 and 7. The latter defines a PLC (programmable logic controller) control system for controlling a number of mutually dependent mechanical parameters exemplified by: the speed of vertical conveyors, number of transport crates in stunning zones, cycle between crates in stunning zone, number of

chickens per crate, and the speed of the slaughtering line, but does not mention the length of the conveyor path. The question of added subject matter thus turns on whether the application as filed elsewhere discloses that the PLC control system is for, that is specially adapted for, adjusting *the length of conveying path*. The Board considers it does not.

- 8.2 According to established jurisprudence (see Case Law of the Boards of Appeal, 9th edition, 2019 (CLBA) 1.10.1) a generic term does not disclose a specific term. Therefore, the specific mechanical parameter of the adjusting *length of conveyor path* is not disclosed by the general term *mechanical parameters* in original claim 7. Nor is this adjustment one of the specific examples given in original claim 7. Therefore, the feature is not explicitly disclosed in the original claim set.
- 8.3 In the Board's view, there is likewise no explicit disclosure of the feature in the description. A PLC control system for controlling a number of mutually dependent mechanical parameters is mentioned in paragraph [0016] and the table of paragraph [0027]. The parameters mentioned correspond to those listed in original claim 7.
- 8.4 Therefore, the amendment (PLC adjusts the length of conveyor path) would only be justifiable if it were implicit in other passages of the application as filed or from the overall context. As with explicit disclosure the standard applied is the direct and unambiguous disclosure of a feature. In this context, implicit disclosure should not be construed to mean matter that would be rendered obvious from the explicit content but rather that it is the clear and unambiguous

consequence of what is explicitly mentioned (see CLBA, II.E.1.3.3, and for example T823/96, reasons 4.5).

- 8.5 As already mentioned, in the original disclosure, the PLC control system controls a number of mutually dependent mechanical setting parameters (see paragraph [0016]). According to the next paragraph, if one setting changes, the other settings are changed correspondingly. The paragraph continues with an example of large birds that fit fewer per crate, which means more crates per minute will need to pass through the stunning chamber as the slaughtering line runs at a constant speed, whilst, being larger, the birds require a longer stunning time and longer conveying route.
- 8.6 In the Board's view, for the example given (and indeed other situations) it might well be that the PLC would need to take into account the actual conveying path length in order to correctly control and set the mechanical parameters for optimum stunning (cf. paragraph [0005]). However, at most this would only mean that the PLC control system was adapted to *know* (cf. paragh [0024] - position sensors), but not necessarily adjust, the conveying path length.
- 8.7 Moreover, although it may well be that adjusting the conveyor path length requires some kind of control means (though the application does not mention this), it is not inevitable that this task would be performed by the PLC controller defined in the application as filed, however obvious this might be. Rather, just as the gas parameters are separately controlled (see paragraph [0020], last sentence) so too could the conveying route be adjusted by means of a separate controller, one that was not necessarily a PLC controller. For example, the control task of raising

and lowering the horizontal conveyor to adjust the path length cf. paragraphs [0011] and [0023]) could be performed under the control of a manually operated switch or similar circuitry.

8.8 Therefore, the Board finds that the amendment (PLC control system for adjusting a length of conveying) adds subject matter extending beyond the application as filed, Article 123(2) EPC.

9. Auxiliary request 5, claim 1 added subject matter

Claim 1 defines, amongst other things, a PLC control system for shortening or lengthening the conveying route. This boils down to adjusting the length of the conveying route. Therefore, the subject matter of claim 1 extends beyond the application as filed for the reasons explained above for auxiliary request 0a.

10. From all of the above, the Board concludes that all the proprietor's requests fail, as the independent claim 1 of each extends beyond the content of the application as filed. As neither the patent as granted nor as amended meets the requirements of the EPC must be revoked, Article 101(3)(b) EPC.

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