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**Datasheet for the decision
of 20 September 2021**

Case Number: T 1472/18 - 3.2.07

Application Number: 12199782.9

Publication Number: 2749512

IPC: B65G47/52, B65G47/08, B65G47/31

Language of the proceedings: EN

Title of invention:
Unit and method for forming a layer of batches of groups of articles

Patent Proprietor:
Gebo Packaging Solutions Italy SRL

Opponent:
KRONES AG

Headword:

Relevant legal provisions:
EPC Art. 83, 111(1)
RPBA 2020 Art. 11, 15(1)

Keyword:

Sufficiency of disclosure - (yes)
Remittal - special reasons for remittal

Decisions cited:

T 0431/03, T 0256/87, G 0003/14

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1472/18 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 20 September 2021

Appellant: Gebo Packaging Solutions Italy SRL
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 7 May 2018
revoking European patent No. 2749512 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman I. Beckedorf
Members: S. Watson
A. Cano Palmero

Summary of Facts and Submissions

- I. An appeal was filed by the patent proprietor against the decision of the opposition division revoking European patent number 2 749 512.
- II. The opposition division found that the content of the patent in amended form according to the main request did not fulfil the requirements of Article 83 EPC.
- III. The Board indicated its preliminary opinion, in a communication pursuant to Article 15(1) RPBA 2020 on 16 March 2021, that the invention according to the claims of the main request was disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 83 EPC).
- IV. Both parties made written submissions in response to this communication, the patent proprietor with letters of 9 April 2021 and 5 July 2021, and the opponent with letter of 28 April 2021.
- V. Oral proceedings before the Board took place on 20 September 2021 at the end of which the decision was announced. For further details of the oral proceedings reference is made to the minutes thereof.
- VI. The final requests of the parties are as follows:

The patent proprietor (appellant) requests

that the decision under appeal be set aside
and
that the case be remitted to the opposition
division for further prosecution

or

that the patent be maintained in amended form on the basis of the set of claims filed as the main request or one of the first to fifth auxiliary requests, all filed with the statement of grounds of appeal,

whereby the main request and the second to fifth auxiliary requests correspond to the main request and first to fourth auxiliary requests filed during opposition proceedings on 30 November 2017.

The opponent (respondent) requests

that the appeal be dismissed

and

that the case be remitted to the opposition division for further prosecution in the event that the Board finds the requirements of Article 83 EPC to be met.

VII. The lines of argument of the parties are dealt with in detail in the reasons for the decision.

VIII. Claim 1 of the main request reads as follows (feature analysis as used by the parties):

1a A unit (1) for forming a layer (40) of at least one first batch (2a; 2b, ..., 2n) and one second batch (2b; 2a, ..., 2n) of respective first groups (3a; 3b, ..., 3n) and second groups (3a; 3b, ..., 3n), comprising:

1b - a first conveying line (5a; 5b, .., 5n) which may be fed with a first row of said first groups (3a; 3b, ..., 3n) and which outputs, in use, said first batch (2a; 2b, ..., 2n) separated from the remaining said first groups (3a; 3b, ..., 3n)

- travelling parallel to a first direction (X);
- 1c - at least one second conveying line (5b; 5a, ..., 5n) which may be fed with a second row of said second groups (3b; 3a, ..., 3n) and which outputs, in use, said second batch (2b; 2a, ..., 2n) separated from the remaining said second groups (3b; 3a, ..., 3n) travelling parallel to said first direction (X);
- 1d control means (20) configured for receiving a signal associated to a misalignment between said first batch (2a; 2b, ..., 2n) and second batch (2b; 2a, ..., 2n) along a second direction (Y) transversal to said first direction (X), and
- 1e for generating a modified first speed profile (V2a'; V2b', ..., V2n') for at least one conveyor (7a, 7b, ..., 7n; 8a, 8b, ..., 8n) of said first conveying line (5a; 5b, ..., 5n) or of said second conveying line (5b; 5a, ..., 5n), so as to recover said misalignment;
- 1f said first conveying line (5a; 5b, ..., 5n) comprising a first separating conveyor (8a; 8b, ..., 8n) which separates, in use, said first batch (2a; 2b, ..., 2n) from said remaining said first groups (3a; 3b, ..., 3n) travelling, in use, in abutting relationship;
- 1g said second conveying line (5b; 5a, ..., 5n) comprising a second separating conveyor (8b; 8a, ..., 8n) which separates, in use, said second batch (2b; 2a, ..., 2n) from said remaining said second groups (3b; 3a, ..., 3n) travelling, in use, in abutting relationship;
- 1h said control unit (20) being configured for generating said first modified speed profile (V2a'; V2b', ..., V2n') for said first separating conveyor (8a; 8b, ..., 8n) and/or a second modified speed profile (V2b'; V2a', ..., V2n') for second

separating conveyor (8b; 8a, ..., 8n), on the basis of said signal;

said unit (1) further comprising:

- 1i a third conveyor (6) fed, in use, by said first separating conveyor (8a; 8b, ..., 8n) and said second separating conveyor (8b; 8a, ..., 8n) with said first batch (2a; 2b, ..., 2n) and second batch (2b; 2a, ..., 2n) respectively;
- 1j said third conveyor (6) defining an area (4) in which said first and second batch (2b; 2a, ..., 2n) may be manipulated for forming said layer (40);
- 1k each said second separating conveyor (8b; 8a, ..., 8n) creating, in use, a relative gap (Da, Db, ..., Dn) parallel to said first direction (X) between said separated batches (2a, 2b, ..., 2n) and the remaining groups (3a, 3b, ..., 3n) of the relative row;
- 1l characterized in that said control unit (20) is configured for controlling said first separating conveyor and second separating conveyor (8a, 8b, ..., 8n) respectively on the basis of said speed of said third conveyor (6);
- 1m said gap (Da, Db, ..., Dn) depending on the shape of said layer (40) to be formed by said manipulating means (10) and on the time required by said manipulating means (10) for forming said layer (40).

IX. Claim 9 of the main request reads as follows (feature analysis as used by the parties):

- 9a A method of forming a layer (40) of at least one first batch (2a; 2b, ..., 2n) and one second batch (2b; 2a, ..., 2n) of respective first groups (3a; 3b, ..., 3n) and second groups (3a; 3b, ..., 3n), comprising the steps of:

- 9b i) feeding a first conveying line (5a; 5b,., 5n) with a first row of said first groups (3a; 3b,., 3n);
- 9c ii) separating said first batch (2a; 2b,., 2n) of said first groups (3a; 3b,., 3n) travelling parallel to a first direction (X) from the remaining said first groups (3a; 3b,., 3n) on said first conveying line (5a; 5b,., 5n);
- 9d iii) feeding a second conveying line (5b; 5a,., 5n) with a first row of said second groups (3b; 3a,., 3n);
- 9e iv) separating said second batch (2a; 2b,., 2n) of said second groups (3a; 3b,., 3n) travelling parallel to said first direction (X) from the remaining second groups (3a; 3b,., 3n) on said second conveying line (5a; 5b,., 5n);
- 9f v) generating a signal associated to the misalignment between said first batch (2a; 2b,., 2n) and second batch (2b; 2a,., 2n) along a second direction (Y) transversal to said first direction (X),
- 9g vi) generating, on the basis of said signal, a modified first speed profile (V2a'; V2b',.,V2n') for at least one conveyor (7a, 7b,., 7b; 8a, 8b,., 8n) of said first conveying line (5a; 5b,., 5n) or said second conveying line (5b; 5a,., 5n), so as to recover said misalignment;
- 9h said step i) comprises the step vii) of separating the first batch (2a; 2b,.,2n) from remaining said first groups (3a; 3b,., 3n) travelling in abutting relationship on a first separating conveyor (8a; 8b,., 8n) of said first conveying line (5a, 5b,., 5n);
- 9i said step ii) comprises the step viii) of separating said second batch (2b; 2a,.,2n) from remaining said second groups (3b; 3a,., 3n)

travelling in abutting relationship on a second separating conveyor (8b; 8a, ..., 8n) of said second conveying line (5b; 5a, ..., 5n);

9j said method further comprising the step ix) of generating said modified first speed profile (V2a'; V2b', ..., V2n') for said first separating conveyor (8a; 8b, ..., 8n) and/or a modified second speed profile (V2b'; V2a', ..., V2n') for said second separating conveyor (8b; 8a, ..., 8n), on the basis of said signal;

said method comprising the further steps of:

9k x) feeding a third conveyor (6) by said first separating conveyor (8a; 8b, ..., 8n) and said second separating conveyor (8b; 8a, ..., 8n) with said first batch (2a; 2b, ..., 2n) and said second batch (2b; 2a, ..., 2n);

9l xi) manipulating said first and second batch (2b; 2a, .., 2n) on an area (4) defined by said third conveyor (6); and

9m xii) creating a relative gap (Da, Db, ..., Dn) parallel to said first direction (X) between said separated batches (2a, 2b, ..., 2n) and the remaining groups (3a, 3b, ..., 3n) of the relative row, by means of said second separating conveyor (8a, 8b, ..., 8n);

characterized by comprising the steps of:

9n xiii) controlling said first separating conveyor and said second separating conveyor (8a; 8b, ..., 8n) on the basis of the speed of said third conveyor (6);

9o said gap (Da, Db, ..., Dn) depending on the shape of said layer (40) to be formed by said manipulating means (10) and on the time required by said manipulating means (10) for forming said layer (40).

- X. As auxiliary requests 1 to 5 do not form part of this decision it is not necessary to reproduce them here.

Reasons for the Decision

Main request, patent in amended form - Article 83 EPC

1. The opposition division found that claim 1 of the main request, in particular features 1d and 1e, did not fulfil the requirements of Article 83 EPC. The invention as claimed was in contradiction to the embodiments shown in the description and drawings. The skilled person was therefore unable to "perform the claimed invention with the information presented in the disclosure without undue burden" (see decision under appeal, point III.2.2).

Features 1d and 1e (reproduced here without reference signs) read as follows:

control means configured for receiving a signal associated to a misalignment between said first batch and second batch along a second direction (Y) transversal to said first direction (X), and

for generating a modified first speed profile for at least one conveyor of said first conveying line or of said second conveying line, so as to recover said misalignment.

The opposition division's finding of a lack of sufficiency of disclosure was based on the respondent's line of argument that feature 1d had to be interpreted as meaning that the misalignment to be recovered was a lateral displacement between batches along a direction Y, which is transversal to the transport direction X.

The opposition division found that feature 1d was grammatically clear and mathematically precise and could only be interpreted in this manner (see the decision under appeal, page 5, final paragraph).

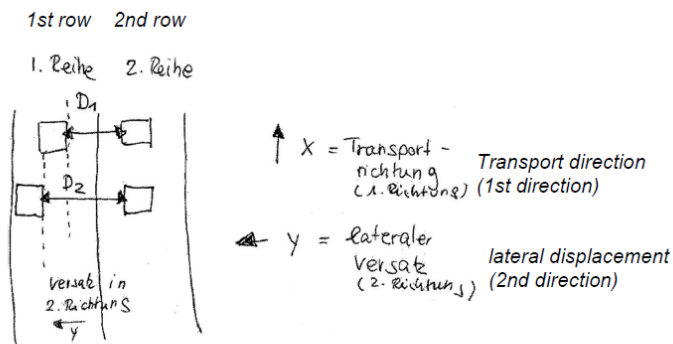
2. In its statement of grounds of appeal, the appellant argued that the decision under appeal was incorrect as the opposition division had misconstrued the meaning of the contested features.

According to the appellant, a fair interpretation of the word 'misalignment' would lead the skilled person to understand that the claims did in fact correspond to the embodiments disclosed in the description and drawings so that the claimed invention was sufficiently disclosed (see statement of grounds of appeal, point 1.3).

3. Therefore, differing interpretations of the contested features exist between the opposition division and respondent on the one hand and the appellant on the other hand.

The two interpretations can be illustrated by the following sketches from the parties:

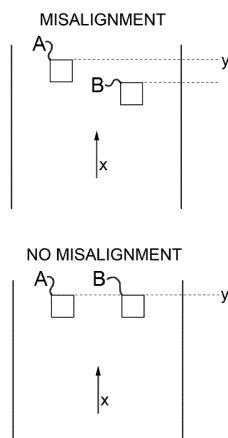
1. 'lateral displacement'



Translation by the Board

(reply to statement of grounds of appeal, page 3)

2. 'lack of alignment'



(statement of grounds of appeal, page 7)

4. It has not been contested that features 1d and 1e can be carried out if the appellant's interpretation of the claim is used, i.e. that the misalignment along the Y direction leads to a longitudinal displacement between batches in the X direction, as disclosed in the description and drawings (see reply to the statement of

grounds of appeal, page 3, third paragraph, second sentence).

However, the respondent argues that the description and drawings should not be used to interpret the claim as the features are unambiguous, technically sensible and cannot be understood in any other way (see the reply to the statement of grounds of appeal, from the paragraph bridging pages 3 and 4 to page 4, second paragraph and point II. of the submissions of 28 April 2021).

5. The Board can agree with the respondent, as argued during oral proceedings, that the phrase 'along a direction', in the present case, does not appear to be in need of any interpretation.

Whether the claim is grammatically clear or mathematically precise, as found by the opposition division, is also not at issue. A grammatically clear phrase may be ambiguous or indeed completely meaningless and, although the two directions and their relation to one another could possibly be regarded in some sense as 'mathematical', the feature as a whole cannot be assessed for 'mathematical precision'. The issue is rather a semantic one, namely what meaning does the skilled person give to the terms used in the claim.

According to the respondent, a 'misalignment' has to be understood as a measurable distance, *i.e.* a displacement or an offset.

The Board however, agrees with the argumentation of the appellant, that the skilled person could understand 'misalignment' as indicating a state of being, so that a misalignment between batches can be understood to mean that the batches are not in alignment along a

particular direction (see statement of grounds of appeal, pages 7 and 8).

The Board therefore finds the phrase 'a misalignment between said first batch and second batch along a second direction (Y) transversal to said first direction (X)' to be ambiguous. This phrase could mean a measurable displacement along direction Y or the existence of a lack of alignment along direction Y.

6. Although it is established jurisprudence that the description and drawings can be used to clarify the intended meaning of a claim, the respondent has argued that it is also established jurisprudence that there is a limit to the extent to which the description may be used for this purpose (see Case Law of the Boards of Appeal (CLB), 9th edition 2019, II.A.6.3.). Decision T 431/03 was cited by the respondent in support of this point (reply to statement of grounds of appeal, page 4, second complete paragraph).

In decision T 431/03 (Reasons, point 2.2.2) it was found that "a discrepancy between the claims and the description is not a valid reason to ignore the clear linguistic structure of a claim and to interpret it differently".

In point 2.3.2 of the cited decision (regarding a different issue), it is also stated that, "[a]s a general rule, any ambiguous text must be construed against the interest of the person responsible for drafting it (in the present case the proprietor) and in favour of the person on whom it is imposed...the term "copolymer" has to be interpreted broadly."

The current case however differs from the case decided on in decision T 431/03. Regarding the first point, the

syntax of the claim was decisive in that case, not the meaning of the words. For the second point the Board had to decide whether a feature should be interpreted more or less broadly. The present case, however, does not relate to two interpretations of a feature where one is broad and the other narrow. Instead there are two, mutually exclusive, interpretations of a phrase within the claim.

In the case at hand therefore, the skilled reader would turn to the description to determine which of the two possible, mutually exclusive, interpretations is indeed the intended one.

The description of the patent in suit discloses that the batches are "aligned along direction Y" by the control means generating modified speed profiles on the basis of distances between the foremost batch and the remaining batches "along direction X" (see published application, in particular paragraphs [0122] and [0121]). The person skilled in the art therefore interprets the claimed features according to the description and drawings and is able to carry out the claimed invention from the information contained therein.

7. The respondent also cited decision T 256/87 and argued that the skilled person in the present case cannot determine when they are working in a 'forbidden area' of the claim. This Board, however, follows the predominant opinion of the Boards of Appeal that the definition of a 'forbidden area' of a claim should not be considered as a matter related to Article 83 EPC but rather to Article 84 EPC (see CLB, *supra*, II.C.6.6.4).

As the contentious features were present in the claims as granted, an examination of the requirements of Article 84 EPC may not be carried out (G 3/14).

8. The appellant has therefore convincingly shown that the finding of the opposition division with respect to features 1d and 1e of claim 1 and the requirements of Article 83 EPC was incorrect.
9. The above reasoning applies equally to the subject-matter of claim 9.
10. In its reply to the statement of grounds of appeal (see point III.1.2), the respondent raised a further objection under Article 83 EPC.
The respondent argued that features 1m and 9o of claims 1 and 9 respectively, cannot be carried out by the skilled person.

Features 1m and 9o, which are identical, read as follows:

"said gap (Da, Db, ..., Dn) depending on the shape of said layer (40) to be formed by said manipulating means (10) and on the time required by said manipulating means (10) for forming said layer (40)".

- 10.1 The respondent brought forward the argument that the patent does not disclose how the gap depends on the shape of the layer or the time required for the layer to be formed by the manipulating means. The layer is not defined in the contested patent and there is no disclosure as to how the time to form the layer affects the gap, nor what is meant by the "time required for the layer to be formed", when the time begins and ends

and which parameters must be considered in determining the gap. It also appears that there is no connection between the size of the gap and the time required to form the whole layer as the layer appears to be made from more than one batch, as shown, for example, in figure 3.

10.2 In its communication pursuant to Article 15(1) RPBA 2020, the Board gave its preliminary opinion that this objection was not convincing for the following reasons (see point 7.2 of the communication):

"The Board is of the preliminary opinion that the skilled person is able to determine the time taken to form a layer and, depending on this time, to modify the speeds of the feeding conveyors, creating larger or smaller gaps between batches so that the batches are fed at appropriate intervals to the third conveyor for placement in the layer. In the view of the Board, the respondent, who bears the burden of proof, has not established that there are serious doubts, substantiated by verifiable facts, that, on the balance of probabilities, the skilled person, using their common general knowledge, would be unable to carry out the invention (see Case Law of the Boards of Appeal, supra, II.C.9)."

In the absence of any further arguments from the respondent, who, at the oral proceedings, solely referred to its written submissions without further oral submissions, the Board, having considered again the parties' written submissions, confirms its preliminary opinion and therefore does not find this objection convincing.

11. The claimed subject-matter according to the main request therefore fulfils the requirements of Article 83 EPC.

12. *Remittal*

Both the appellant and the respondent have requested that the case be remitted to the opposition division for further prosecution of the remaining objections raised by the opponent.

12.1 According to Article 111(1) EPC the Board may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution. Under Article 11 RPBA 2020, a Board shall not remit a case unless special reasons present themselves for doing so.

In the appealed decision in the present case, the opposition division decided only on the objection raised by the respondent under Article 83 EPC. The current main request was filed on 30 November 2017, after the summons to oral proceedings was issued by the opposition division. Therefore the opposition division has not yet given any opinion on the further objections raised by the respondent in its reply to the statement of grounds of appeal to the amended main and auxiliary requests under Articles 84 and 123(2) EPC as well as Articles 54 and 56 EPC.

Against this background, and taking into account the circumstances of this particular case, the Board is of the opinion that the further objections raised by the respondent cannot be decided upon without undue burden

(cf. explanatory notes to Article 11 RPBA 2020, Supplementary publication 2 - OJ EPO 2020, 54).

12.2 Therefore, special reasons within the meaning of Article 11, first sentence, RPBA 2020 apply, and it is appropriate to remit the present case to the opposition division for further prosecution, as requested by both parties.

Order

For these reasons it is decided that:

- 1. The decision is set aside.**
- 2. The case is remitted to the opposition division for further prosecution.**

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated