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D E C I S I O N
of 14 March 2002

Case Number: T 0850/98 - 3.3.2

Application Number: 91116843.3

Publication Number: 0535268

IPC: A23C 19/097

Language of the proceedings: EN

Title of invention:

Process of making acceptable mozzarella cheese without aging

Patentee:

LEPRINO FOODS COMPANY

Opponent:

Golden Food Products Ltd
MD Foods amba

Headword:

Process of making mozzarella/LEPRINO FOODS COMPANY

Relevant legal provisions:

EPC Art. 123, 84, 113(2)

Keyword:

"The appellant had no objection against the set of claims under consideration"

Decisions cited:

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Catchword:

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Case Number: T 0850/98 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 14 March 2002

Party of rights: Golden Food Products Ltd
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 23 June 1998
rejecting the opposition filed against European
patent No. 0 535 268 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: J. Riolo
Members: M. Ortega Plaza
S. U. Hoffmann

Summary of Facts and Submissions

- I. European patent No 535 268 based on application No. 91 116 843.3 was granted on the basis of 22 claims.

Claim 1 as granted read:

"1. A process of manufacturing a mozzarella variety of cheese comprising the following steps:

- (a) heating, kneading, and stretching a cheese curd made from pasteurized cow or water buffalo milk having a fat content in the range of 1.5 to 3.5 weight percent until it is a homogeneous, fibrous mass of heated, unripened mozzarella variety cheese having a moisture content in the range of 45 to 60 weight percent and a milkfat content of at least about 30 weight percent (dried solid basis);
- (b) cooling the heated cheese in cold brine; and
- (c) removing the cooled cheese from the brine;

characterized in that (i) said steps (a) through (c) are controlled so that the cooled cheese removed from the brine has a combined moisture and wet milkfat content of at least about 70 weight percent, and (ii) said cheese is frozen within about 48 hours after being removed from the brine, thereby obtaining without aging a mozzarella variety cheese having acceptable baking properties."

- II. The Opposition Division rejected the opposition under Article 102(2) EPC.

The Opposition Division took the view that none of the grounds for opposition, in particular those under Article 100(a) EPC (novelty and inventive step) and under Article 100(b) EPC (sufficiency of disclosure), prejudiced the maintenance of the patent as granted.

Moreover, as regards sufficiency of disclosure, the opponent withdrew the grounds relating to Article 83 EPC during the opposition procedure.

- III. The appellant (opponent 02) lodged an appeal against the decision of the Opposition Division.
- IV. The opponent 01 did not intervene in the appeal proceedings.
- V. Oral proceedings were held before the Board on 14 March 2002. At the beginning of the oral proceedings the respondent filed a new set of claims. This set of claims concerns 21 claims.

Claim 1 read:

"1. A process of manufacturing a mozzarella variety of cheese comprising the following steps:

(a) heating, kneading, and stretching a cheese curd made from pasteurized cow milk having a fat content in the range of 1.5 to 3.5 weight percent until it is a homogeneous, fibrous mass of heated, unripened mozzarella variety cheese having a moisture content in the range of 45 to 60 weight percent and a milkfat content of at least about 30 weight percent (dried solid basis);

(b) cooling the heated cheese in cold brine; and

(c) removing the cooled cheese from the brine;

characterized in that (i) said steps (a) through (c) are controlled so that the cooled cheese removed from the brine has a combined moisture and wet milkfat content of at least about 70 weight percent, and (ii) said cheese is frozen within about 2 hours after being removed from the brine, thereby obtaining without aging a mozzarella variety cheese having acceptable baking properties."

Claims 2 to 19 are dependent process claims, claim 20 relates to the use of a cheese that has been manufactured by the process of claim 1 and claim 21 is a dependent use claim.

VI. The appellant announced that it had no objection to the maintenance of the patent on the basis of the sole request as filed during the oral proceedings before the Board.

VII. The appellant (opponent 02) requested that the decision under appeal be set aside and declared that it had no objection against the maintenance of the patent on the basis of the sole request filed by the respondent (patentee) during the oral proceedings.

The respondent requested that the decision under appeal be set aside and that the patent be maintained on the basis of the sole set of claims filed during the oral proceedings.

Reasons for the Decision

1. The appeal is admissible.
2. The appealed decision is set aside, since the patentee no longer agreed with the text of the set of claims as granted, ie it requested the maintenance of the patent in amended form based on the set of claims as filed during the oral proceedings before the Board (Article 113(2) EPC).
3. Articles 123 and 84 EPC

Claim 1 was restricted with respect to claim 1 as granted by deletion of the alternative "water buffalo milk" in step (a) and by restriction of the period for freezing the cheese defined in point (ii). The said period was specified as "within about 2 hours", ie claim 7 as granted (identical to claim 7 as originally filed) was incorporated into claim 1.

The references to previous claims were corrected in claims 2 to 21.

It is apparent from the above that the amendments made to the claims meet the requirements of Articles 123(2) and (3) and Article 84 EPC.

Moreover, the appellant did not object to the amendments made to the claims.

4. *Novelty and inventive step*

The Opposition Division accepted novelty and inventive step for the broader claims as granted.

The subject-matter claimed in the set of claims under consideration is neither known nor rendered obvious by the state of the art. This has not been contested by the appellant.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance with the order to maintain the patent on the basis of the sole set of claims filed during the oral proceedings and the description is to be adapted thereto.

The Registrar:

The Chairman:

A. Townend

J. Riolo