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D E C I S I O N
of 7 December 2000

Case Number: T 0478/99 - 3.2.4

Application Number: 89904968.8

Publication Number: 0401307

IPC: A62B 7/00

Language of the proceedings: EN

Title of invention:
Crew oxygen mask with pneumatic comfort adjustment

Patentee:
BE Intellectual Property, Inc.

Opponent:
INTERTECHNIQUE SA

Headword:
-

Relevant legal provisions:
EPC Art. 107
EPC R. 20(3), 61

Keyword:
"Admissibility of the appeal - yes"
"Public prior use - no"

Decisions cited:
T 0194/86, T 0300/86, T 0870/92

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0478/99 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 7 December 2000

Appellant: (Opponent)
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Decision under appeal: **Interlocutory decision of the Opposition Division of the European Patent Office posted 30 March 1999 concerning maintenance of European patent No. 0 401 307 in amended form.**

Composition of the Board:

Chairman: C. A. J. Andries
Members: R. E. Gryc
H. Preglau

Summary of Facts and Submissions

I. Appellant I (opponent) and appellant II (patentee) each lodged an appeal, received at the EPO respectively on 30 April and 9 June 1999, against the interlocutory decision of the Opposition Division, dispatched on 30 March 1999, which maintained the patent No. 0 401 307 in an amended form.

The appeal fees were paid simultaneously and the statements setting out the grounds of appeal were received at the EPO respectively on 26 July 1999 for appellant I and on 30 July 1999 for appellant II.

II. The opposition was filed against the patent as a whole and based on Article 100(a), (b) and (c) EPC. The Opposition Division held that these grounds for opposition did not prejudice the maintenance of the patent (in the version submitted as auxiliary request for all the designated states and based on the claims granted originally solely for DE, FR, GB, IT, NL and SE) having regard in particular:

- to an alleged public prior use in the form of demonstrations made by G. Gutman in October 1987 on the premises of respectively Boeing at Seattle and United Airlines at Denver, said prior use being supported by declarations of G. Gutman (dated 9 April 1995), J. Kaletta (Affidavit dated 26 April 1995), M. Kossowsky (dated 2 June 1995), J. Overstreet (dated 2 June 1995) and L. Erxleben (undated)

and mainly,

- to the following documents filed by appellant I:

D1: FR-A-1 506 342 and

D2: EP-A-0 288 391 (filed prior to the priority date of the patent in suit and published after that date).

During the opposition proceedings, appellant II filed in particular declarations of J. C. Cannon (dated 7 July 1997), E. Ross (dated 7 April 1997), D. Coughlin (dated 8 April 1997), K.D. Warner (dated 9 April 1998), E. Ross (dated 13 April 1998) and H. Alguard (dated 8 December 1998).

III. In his statement setting out the grounds of appeal, appellant I (opponent) contended that the subject-matter of Claim 1 accepted by the opposition division was anticipated by the embodiment represented on Figure 4A of D2 which, in his opinion, also disclosed means for automatically decreasing the pressure as claimed in Claim 1. Moreover, he was of the opinion that to replace a manual action by an automatic one could not be an invention if the provided emergency means are already known and used in the same emergency conditions.

Appellant I alleged that, for the subject-matter of independent Claim 8, no counterpart could be found either in the application as originally filed or in the priority documents, so that Claim 8 would infringe Article 123(2) EPC and could not enjoy the benefit of the priority date of the application. Therefore, according to appellant I, the disclosure of D2 could be opposed to the subject-matter of Claim 8 which could

not be considered as inventive since doubling the springs in a valve assembly was common knowledge for the skilled person.

Appellant I was moreover of the opinion that, for the skilled persons attending the demonstration on the premises of Boeing at Seattle in 1987, the provision of two springs in the valve assembly presented would have been obvious.

In subsequent statements, appellant I argued that the appeal of appellant II (patentee) was not admissible since appellant II transferred his rights before the date of filing of his appeal and was not anymore proprietor of the patent at that date.

As regards the public prior use, appellant I drew attention to the fact that all those present at the demonstrations by G. Gutman were skilled persons well aware of the structure and use of the masks with pneumatic harnesses manufactured by the opponent and described in particular in D1 and D2 so that, in the light of the explanations of G. Gutman, these persons were able to understand easily the improvement made on the prototype shown at the demonstration compared to said former masks simply by examining the exterior of the prototype.

Appellant I emphasized that the explanations given by G. Gutman were enabling for the skilled people attending the demonstrations and that they were made without any agreement of confidentiality between them and either Boeing and United Airlines or appellant I himself, as attested in the declarations of G. Gutman, L. Erxleben and H. Alguard. Moreover, appellant I

alleged that his commercial interest was to disseminate the invention among potential clients in view of the replacement of his previous oxygen masks with inflatable harness as described in D2.

In several further statements appellant II contradicted the allegations of appellant I and contended mainly that appellant I's interest was to keep the invention secret, that normal supplier-customer relationships were confidential, that no documentary material and no pricing were given at the demonstrations by G. Gutman and that the mask presented was solely a prototype since the product was not actually launched until three years later.

IV. Oral proceedings took place on 7 December 2000.

Appellant II filed a main request and five auxiliary requests.

Appellant I objected again against the admissibility of the appeal of appellant II on the ground that appellant II transferred the totality of his rights on the opposed patent before filing the appeal and was not thus entitled anymore to appeal.

Appellant II confirmed that the "comfort control structure" mentioned in the characterising portion of Claim 1 was part of the "inflation control means" and that, according to the invention, the intermediate pressure was selectively established in the strap element by partial reinflation and not by deflation. Some other ambiguities were clarified in Claim 1 for the contracting states DE, FR, GB, IT, NL and SE.

Appellant I acknowledged that no documentation material concerning the gas mask was available at the demonstrations run by G. Gutman. However, referring to the declaration of G. Gutman, he contended that the prototype was operated before those who were present and who were all skilled in the art. He explained that although, at the date of the demonstrations, it was known that there was no certified product immediately available and saleable, the presentation was for the purpose of attracting orders and therefore not confidential.

According to appellant I, confidentiality is achieved solely in very special conditions and depends on facts and conditions which were not present at the demonstrations of G. Gutman, the purpose of which was to disseminate the informations to every interested person. For appellant I, it was quite clear from the different submitted declarations and so-called affidavits that no confidential agreement existed between appellant II and those who were present at the demonstrations.

Appellant II contradicted the contentions of appellant I and pointed out mainly that appellant I failed to prove that the demonstrations of G. Gutman were not confidential.

V. Requests:

At the end of the oral proceedings the following requests were presented:

The appellant I requested that the decision under appeal be set aside and the patent be revoked.

The appellant II requested that the decision under appeal be set aside and that the patent be maintained on the basis of one of the requests filed during the oral proceedings. He agreed to delete lines 49 to 56 of column 2 in the description as granted taken as a basis for maintaining the patent.

VI. Independent claims of the main and auxiliary requests read as follows:

1. Main request:

A. Claim 1 for the following contracting states: AT, BE, CH, LI, LU (as filed at the oral proceedings).

"Safety apparatus (10) for use in an aeroplane or the like, comprising:

mask means (12) adapted to fit against the face of a person and including structure presenting, when so fitted, a chamber adjacent the nose and mouth region of said person for reception of a breathable gas mixture;

means (13, 16) for delivery of said breathable gas mixture to said chamber, including means (16) for delivery of pressurized oxygen thereto;

an extensible inflatable strap element (20) operably connected with said mask means (12); and

inflation control means (36, 38, 44, 52, 90, 68, 70) operatively interconnecting said oxygen delivery means (16) and said strap element (20) for selective, oxygen flow induced shifting of the

strap element (20) between an extended position permitting ready donning of the mask (12) and a retracted position wherein the strap element (20) tightly engages the head of the person and the mask means (12) is caused to tightly engage the wearer's face,

characterized in that the inflation control means further comprises a comfort control structure (30, 66, 58) for selectively establishing by partial reinflation and maintaining the strap element (20) at an intermediate pressure between the pressure therein at said extended and retracted positions thereof whereby the pressure exerted by the strap element (20) against the wearer's head is lessened as compared by the pressure exerted thereby in said retracted position, said comfort control structure (30, 66, 58) having means (66, 58) for maintaining said intermediate strap pressure without manual manipulation of said comfort control structure (30, 66, 58)."

B. Claim 1 and independent Claim 8 for the following contracting states: DE, FR, GB, IT, NL, SE (as filed at the oral proceedings).

Claim 1: "Safety apparatus (10) for use in an aeroplane or the like, comprising:

mask means (12) adapted to fit against the face of a person and including structure presenting, when so fitted, a chamber adjacent the nose and mouth region of said person for reception of a breathable gas mixture;

means (13, 16) for delivery of said breathable gas mixture to said chamber, including means (16) for delivery of pressurized oxygen thereto;

an extensible inflatable strap element (20) operably connected with said mask means (12); and

inflation control means (36, 38, 44, 52, 90, 68, 70) operatively interconnecting said oxygen delivery means (16) and said strap element (20) for selective, oxygen flow induced shifting of the strap element (20) between an extended position permitting ready donning of the mask (12) and a retracted position wherein the strap element (20) tightly engages the head of the person and the mask means (12) is caused to tightly engage the wearer's face;

the inflation control means further comprising a comfort control structure (30, 66, 58) for selectively **establishing by partial reinflation** and maintaining the strap element (20) at an intermediate pressure between the pressure therein at said extended and retracted positions thereof whereby the pressure exerted by the strap element (20) against the wearer's head is lessened as compared by the pressure exerted thereby in said retracted position, said comfort control structure (30, 66, 58) having means (66, 58) for maintaining said intermediate strap pressure without manual manipulation of said comfort control structure (30, 66, 58); means (74) for automatically decreasing the pressure within strap member (20) in the event of a predetermined decrease in ambient pressure conditions to thereby cause the

mask means (12) to more tightly engage the wearer's face, said means (74) including a rod (88) shiftable in response to automatic actuation of said pressure-decreasing means (74), and said means (74) further comprising

a valve assembly (76, 78, 80) including passageway-defining structure (80), a valve member (78) normally closing said passageway-defining structure (80) and operatively coupled with said rod (88) for movement of the valve member (78) away from said passageway-defining structure (80) to decrease said pressure within said strap member (20) upon shifting of the rod (88), and spring means (76) for urging said valve member (78) towards said passageway-defining structure (80)."

Claim 8: "Safety apparatus (10) for use in an aeroplane or the like comprising:

mask means (12) adapted to fit against the face of a person and including structure presenting, when so fitted, a chamber adjacent the nose and mouth region of said person for reception of a breathable gas mixture; means (13, 16) for delivery of said breathable gas mixture to said chamber, including means (16) for delivery of pressurized oxygen thereto; an extensible inflatable strap element (20) operably connected with said mask means (12); and

inflation control means (36, 38, 44, 52, 90, 68, 70) including structure (38) defining a chamber in communication with respective inlet and outlet passages (68, 70) and receiving a shiftable valve

member (36, 52), said inflation control means (36, 38, 44, 52, 90, 68, 70) operatively interconnecting said oxygen delivery means (16) and said strap element (20) for selective, oxygen flow induced shifting of the strap element (20) between an extended position permitting ready donning of the mask (12) and a retracted position wherein the strap element (20) tightly engages the head of the person and the mask means (12) is caused to tightly engage the wearer's face;

the inflation control means further comprising a comfort control structure (30, 66, 58) for selectively establishing by partial reinflation and maintaining the strap element (20) at an intermediate pressure between the pressure therein at said extended and retracted positions thereof whereby the pressure exerted by the strap element (20) against the wearer's head is lessened as compared by the pressure exerted thereby in said retracted position, said comfort control structure (30, 66, 58) having means (66, 58) for maintaining said intermediate strap pressure without manual manipulation of said comfort control structure (30, 66, 58), which safety apparatus further comprises a pair of springs (46, 56), both situated within said chamber-defining structure (38) and operatively engaging said valve member (36, 52)."

2. Auxiliary requests 1 to 4 (as filed at the oral proceedings):

2.1 Claims 1 for the contracting states AT, BE, CH, LI, LU respectively DE, FR, GB, IT, NL, SE of the

auxiliary requests 1 to 4 filed at the oral proceedings are respectively identical to claims 1 of the main request for the corresponding contracting states.

2.2 Independent claims 8 for the contracting States DE, FR, GB, IT, NL and SE of the auxiliary requests 1 to 4 each comprise the same following feature as Claim 8 of the main request for the same contracting states:

"which safety apparatus further comprises a pair of springs (46, 56), both situated within said chamber-defining structure (38) and operatively engaging said valve member (36, 52)".

3. Auxiliary request 5 (as filed at the oral proceedings):

The independent claims 1 of the two sets of 13 respectively 7 claims of the fifth auxiliary request filed at the oral proceedings for the Contracting States AT, BE, CH, LI, LU respectively DE, FR, GB, IT, NL, SE are identical to the corresponding one of the main request for the same Contracting States (see section VI 1A and VI 1B above). These Claims 1 are the sole independent claims of the fifth auxiliary request.

Reasons for the Decision

1. Admissibility of the appeals.

1.1 The appeal of appellant I is admissible.

1.2 As regards the appeal of appellant II, it should be recalled that the specific requirements concerning the person entitled to appeal (appellant) are contained in Article 107, first sentence, EPC. This provision requires that the appellant was a party to the first instance proceedings and that he is adversely affected by the decision under appeal. These requirements are fulfilled by appellant II.

The more general question whether a proprietor may remain party to opposition or appeal proceedings before the EPO after he has assigned the patent to another person is answered by Rules 20(3) and 61 EPC according to which a transfer of the patent shall have effect vis-a-vis the EPO only at request and on production of documents that the transfer has taken place (see T 870/92, section 3.1, first paragraph). Since, in the present case, the registration of the transfer of the patent had still not been requested at the date of filing of appellant II's appeal, appellant II was entitled to exercise the rights of the proprietor. Also with respect to this condition the appeal of appellant II is admissible.

2. *Alleged public prior use*

2.1 According to the established case law of the Boards of Appeal of the EPO (see for example Decisions T 194/86 and T 300/86), in order to establish whether the gas mask described in D2 has been made available to the public before the priority date of the opposed patent and, therefore, whether it can be considered to form part of the state of the art in the meaning of Article 54(2) EPC, the following general questions must be answered with certainty:

a. on which date the alleged public prior use occurred?

b. what was exactly used? and

c. under what circumstances the alleged use occurred (i.e. in particular where did the alleged public prior use took place and whether a secrecy agreement existed with those who were present at the presentation)?

All the answers to the above questions must be proven unequivocally.

2.2 The questions concerning the date (question a) and the place (question c) of the alleged public prior use can be answered without any doubt, particularly since, in paragraph 3 of the patentee's statement setting out the grounds of appeal, appellant II himself acknowledged that the presentation of a gas mask were effected by G. Gutman at the premises of respectively Boeing and United Airlines on 14 to 15 October 1987. Also the Board has no reason to doubt this.

2.3 As regards the question of confidentiality (question c) at the aforementioned demonstrations, the following must be pointed out:

In his declaration of 9 April 1995, G. Gutman stated that no confidentiality was required at said demonstrations since: "le but de la réunion étant d'inciter BOEING à l'adoption du masque "confort" sur ses longs courriers." (page 3, last sentence).

Although M. R. Kaletta did not attend the demonstrations, he confirmed Gutman's contention in his

affidavit of 26 April 1995 and to justify lack of confidentiality he explained that the presentation was "for the purpose of attracting orders" (section 8 of the Affidavit). However, M. R. Kaletta being employed by Scott Aviation, had to handle the information, which he got from the firm EROS representing the opponent's firm, as confidential (sections 2 and 10 of his Affidavit; sections 3 and 7 of the declaration of G. Gutman).

John Overstreet, who attended both demonstrations at the premises of Boeing and United Airlines, also stated in his declaration of 2 June 1995 that no confidentiality was required (sections 3 and 5 of his so-called Affidavit. However, also J. Overstreet, being employed by Scott Aviation had to handle the information as confidential (see above).

Moreover, according to the declaration of L. Erxleben, who was employed by Boeing, the presentations made by G. Gutman were commercial demonstrations and L. Erxleben has never heard of any request by appellant I that the information be confidential.

Although three of the above-mentioned declarations were from people being in connection with appellant I, it can be reasonably assumed that no confidentiality was required at the presentations made by G. Gutman in October 1987.

However, no express release of confidentiality has been proven. Furthermore, an ex-Boeing employee (D. Coughlin) and a Boeing employee (H. Alguard) made the following statements:

- "at Boeing, both the company and the employees to whom the disclosures were made, would have regarded the demonstration as confidential" (see the declaration of D. Coughlin dated 8 April 1997, last sentence) and,

- "it was our usual and standard practice within the Boeing Material organization to treat as confidential and proprietary information gained through a supplier's demonstration of its product" (see the declaration of H. Alguard dated 8 December 1998, section 3).

These declarations of Boeing-employees are in contradiction to the statement of L. Erxleben who also was a Boeing-employee at the time of the demonstration.

Therefore, in the light of the foregoing, the sole absence of an explicit request of confidentiality is not sufficient for concluding with certainty that there was no confidentiality at the demonstrations because secrecy may result from an ethical conduct of the employees of big companies like Boeing and United Airlines (see in particular the declaration of D. Coughlin).

Moreover, the abovementioned declarations of G. Gutman, M. R. Kaletta and L. Erxleben about the commercial aspect of the demonstrations which suggest that those who were present were encouraged to disseminate the informations are contradicted by the facts that the presented mask was still a prototype under development and not at a stage of being commercialised, so that no pricing was mentioned and no documentary material was available at the demonstrations and that the following

contention of appellant II: "the product was not actually launched until three years later" (see appellant II's statement of grounds of appeal) was not contradicted by appellant I.

As a matter of fact, the Board considers that the purpose of the demonstrations seemed to be rather to obtain from the potential customers an "input on the desirability of the concept and suggestions on how it might be improved", as stated in section 3 of D. Coughlin's declaration of 8 April 1997, than to attract orders.

For all the abovementioned reasons, the essential question of confidentiality cannot be considered as properly and undoubtedly answered by the parties so that, with respect to this essential point, no conclusion can be drawn with certainty by the Board.

2.4 Consequently, the Board considers this alleged public prior use not to be proven and thus not to be comprised in the state of the art.

2.5 Independently of the fact that said prior use might or might not be incorporated in the state of the art, the following must be remarked as regards the content of the disclosure made during the presentation of the mask (question b). G. Gutman who made the demonstrations of October 1987 and was therefore in the best position to identify what has been actually disclosed, has made the following statements in his declaration of 9 April 1995:

- see page 2, section 4, third paragraph:

"Il m'a ensuite présenté le harnais modifié. Ce dernier, démuni de son couvre face, est encore disponible à IN. Une photographie récente, prise après remontage du couvre face, constitue l'annexe 2. Il s'agit d'une maquette en état de fonctionnement, mais non commercialisable du fait que les modifications avaient été faites à la main. La constitution était celle donnée en Figure 3 de la demande de brevet FR ultérieurement déposée sous le N° 87 05682 (annexe 3)", and

- see page 3, section 11, second paragraph:

"Cette présentation a été faite le mercredi 14 octobre 1987 en utilisant la maquette que j'avais apportée, à l'aide d'une bouteille d'oxygène sous pression fournie par John Overstreet".

Since, in Gutman's declaration there is absolutely no indication that the model used for the demonstration mentioned on page 3 and the model mentioned on page 2 might be different, it seems reasonable to assume that G. Gutman referred to the same model and that, according to G. Gutman himself, its structure was as represented on Figure 3 of patent FR-A-2 614 208 (8 705 682) which corresponds to D2 (which refers to 8 705 682 as priority document). In that case, the prototype presented at the demonstrations would have had no means for selectively establishing by partial **re**inflation an intermediate strap pressure and no means for maintaining said intermediate pressure without manual manipulation.

Such an assumption seems to be confirmed by the following statement at the end of the declaration of

L. Erxleben (which was prepared by the patent attorney of appellant I):

"For the comfort position, partial deflation to a variable level depending on the position of the cam occurred",

which acknowledges that the intermediate pressure for the comfort position of the prototype presented at the demonstrations was obtained by partially **de**flating the strap of the harness and not, according to Claim 1 of the opposed patent, by partially **in**flating the strap element.

Therefore, the safety apparatus according to the invention and the mask presented by G. Gutman on October 1987, appear to be structurally different by the fact that they function differently.

3. *The state of the art*

The alleged public prior use being not considered as comprised in the state of the art, said state of the art brought forward during the oral proceedings comprises solely the safety gas masks described in D1 (Article 52(2) EPC) and D2 (Article 52(3)(4) EPC for the designated contracting states DE, GB, IT, NL and SE).

4. *Main request and auxiliary requests 1 to 4*

As already stated in sections VI 1B and VI 2.2 above, the independent Claims 8 for the following contracting states: DE, FR, GB, IT, NL, SE of the main and auxiliary requests 1 to 4 comprise the same following

feature:

"which safety apparatus further comprises a pair of springs (46, 56), both situated within said chamber-defining structure (38) and operatively engaging said valve member (36, 52)".

In WO-A-89/07961 (see from page 6, line 27 to page 7, line 17 and Figures 2, 4 and 5) the springs (46, 56) are described and represented as components of a shiftable valve assembly 28 composed of a supply plunger, a first helical compression spring, a comfort plunger and a second helical compression spring, all of these cooperating components being functionally not dissociable from each other and being aligned in a bore in the aforementioned order from the left toward the right when viewing Figures 2, 4 and 5 of the application. The "pair of springs" being not disclosed in the application in its generality as an entity as such but solely in combination with the other components of the shiftable assembly 28, the mere introduction in claims 8 of the main request and auxiliary requests 1 to 4 of such an entity extracted and isolated from the assembly 28 infringes the requirements of Article 100(c), 123(2) EPC.

Therefore, the introduction of the feature "pair of springs" into the independent claims 8 was not allowable and the corresponding main request and auxiliary requests 1 to 4 based on these claims 8 must be refused.

5. *Fifth request*

5.1 Claim 1 for the contracting states: AT, BE, CH, LI and

LU.

5.1.1 Modifications:

Claim 1 of auxiliary request 5 differs from Claim 1 as granted as follows:

- Column 9, line 36 of the specification:

  The sentence: "in that the inflation control means further comprises a" has been added between the words "characterized" and "comfort", the word "by" having been deleted.

  This modification makes clear that the comfort control structure is a component of the inflation control system or means for inflating the strap element (see Figures 2, 4 and 5).

- Column 9, lines 37 to 38:

  The following expression: "by partial reinflation" has been added between the words "establishing" and "and maintaining" in order to clarify and restrict the meaning of the word "establishing".

  These two modifications are supported by the description and Figures 2, 4 and 5 of WO-A-89/07961 and they limit the protection conferred. Therefore, they fulfill the requirements of Article 123(2) and (3) EPC and are allowable.

5.1.2 Novelty (Article 54 EPC).

Against this Claim 1 appellant I raised no novelty objection. The Board also has no reason to doubt the novelty of the subject-matter of claim 1.

5.1.3 Inventive step (Article 56 EPC).

Appellant I objected solely lack of inventive step in view of the alleged public prior use made by G. Gutman in October 1987. Since that alleged public prior use has been considered not to be comprised in the state of the art (see section 2.4 above), appellant I's objection is not valid anymore.

D2 being a document that also can not be considered for assessing inventive step (Article 56 EPC, second sentence), the subject-matter of Claim 1 must be declared inventive within the meaning of Article 56 EPC in the absence of a relevant state of the art, since D1 does not provide a person skilled in the art with a teaching which could lead him to the claimed subject-matter.

5.2 Claim 1 for the contracting states: DE, FR, GB, IT, NL and SE

5.2.1 Modifications:

The same modifications as described in section 5.1.1 above have been made in Claim 1 for the contracting states: DE, FR, GB, IT, NL and SE.

In addition, column 12:

- line 10: the word "and", between the words "face" and "a rod", has been replaced by the words: "said

means (74) including"; and

- line 13: the phrase "which safety apparatus further comprises a" has been replaced by the following: "and said means (74) further comprising a".

These modifications clarify the claim and are supported by the description and Figures 2, 4 and 5 of WO-A-89/07961 (see page 8, line 8 to 19 and from page 12, line 30 to page 13, line 9). These modifications therefore satisfy the requirements of Article 123 EPC and are allowable.

5.2.2 Novelty (Article 54 EPC)

The alleged public prior use by G. Gutman in October 1987 being not comprised in the state of the art (see section 2.4 above), no novelty objection can be raised on this basis. On the contrary, for the contracting states (DE, GB, IT, NL and SE - not FR) designated in both the patent in suit and D2 (Article 54(3)(4) EPC), the latter can be considered for assessing novelty of the subject-matter of Claim 1.

The comparison between the apparatus claimed in Claim 1 and the gas mask disclosed by D2 shows the following differences:

- The apparatus of Claim 1 comprises means for delivery a breathable gas mixture and means for delivery of pressurised oxygen (see Claim 1, column 11 of the specification, lines 33 to 36) which is operatively interconnected with the strap element for selective oxygen flow in the strap

(see Claim 1, column 11, lines 41 to 43) whereas, in D2, it seems that the strap is inflated by the breathable gas of the regulator (see D2: column 1, lines 30 to 33) i.e. a mixture of air and oxygen (that means that there is a direct communication between the strap on the one hand and a reservoir of pressurised oxygen on the other hand).

- Also, as already pointed out in section 2.5 above, it is clear from the description corresponding to Figure 2A of D2 (see column 4, lines 27 to 33) that the comfort control structure of the known mask establishes and maintains the intermediate pressure in the strap element of the harness by partial deflation of the strap through the calibrate valve 32 whereas, according to the invention, the pressure for the comfort position is obtained by partially inflating the strap element.

- Moreover, the emergency system of the mask of D2 for use in the event of a drop of pressure in the cabin (see Figure 4A) comprises a valve 52 associated to a sealed bellow device (capsule altimétrique) but no spring means as according to the apparatus of claim 1 and, even if such a bellow device may be considered as an equivalent to spring means, it is a constant practice of the EPO's Boards of appeal not to consider equivalents when assessing novelty. Therefore, in comparison with the sole relevant prior art disclosed by D2, the subject-matter of Claim 1 is novel in the meaning of Article 54 EPC. This is also the case with respect to the available prior art.

5.2.3 Inventive step (Article 56 EPC)

Since neither the not proven public prior use nor D2, which is a document within the meaning of Article 54(3)(4) EPC for the designated contracting states DE, GB, IT, NL and SE, can be considered to be comprised in the state of the art for assessing inventive step, the subject-matter of Claim 1 does not follow plainly and logically from the state of the art and involves an inventive step in the meaning of Article 56 EPC. The Board furthermore sees *prima facie* no reason why a person skilled in the art would be guided to the claimed subject-matter.

6. *Conclusion*

For the foregoing reasons, the Board considers that the reasons stated by appellant I did not prejudice the maintenance of the patent in the amended version submitted as a basis for the fifth auxiliary request filed at the oral proceedings.

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 in the following version:

Claims: 1 to 13 for the designated contracting states AT, BE, CH, LI and LU and

claims 1 to 7 for the designated contracting states DE, FR, GB, IT, NL and SE of the fifth auxiliary request as filed during the present oral proceedings.

Description: columns 1 to 9 as granted with the lines 49 to 56 of column 2 being deleted;

Drawings: Figures 1 to 5 as granted.

The Registrar: The Chairman:

G. Magouliotis C. Andries