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**Datasheet for the decision  
of 10 October 2007**

**Case Number:** T 1102/05 - 3.2.01

**Application Number:** 97115257.4

**Publication Number:** 0826578

**IPC:** B62D 33/063

**Language of the proceedings:** EN

**Title of invention:**

Apparatus for moving a tractor cab relative to a tractor body

**Patentee:**

CATERPILLAR INC.

**Opponent:**

Fuchs-Bagger GmbH & Co. KG

**Headword:**

-

**Relevant legal provisions:**

EPC Art. 56

RPBA Art. 10b(1) and (3)

**Keyword:**

"Inventive step (no)"

"Admissibility of auxiliary request (no)"

**Decisions cited:**

-

**Catchword:**

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Case Number: T 1102/05 - 3.2.01

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.01  
of 10 October 2007

**Appellant:** CATERPILLAR INC.  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 16 June 2005  
revoking European patent No.0826578 pursuant to  
Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** S. Crane  
**Members:** C. Narcisi  
S. Hoffmann

## Summary of Facts and Submissions

- I. The European patent No. 0 826 578 was revoked with the decision of the Opposition Division posted on 16 June 2005. An appeal was filed against this decision by the Appellant on 26 August 2005 and the appeal fee was paid at the same time. The statement of grounds of appeal was submitted on 26 October 2005.
- II. Oral proceedings were held on 10 October 2007. The Appellant requested that the decision be set aside and the patent be maintained as granted, thus withdrawing its main request filed on 10 September 2007, or that the patent be maintained on the basis of amended claim 1 of the auxiliary request submitted during the oral proceedings. The Respondent requested that the appeal be dismissed.

Claim 1 as granted reads as follows:

"An apparatus (14) for moving a tractor cab (12) relative to a tractor body (11), containing:  
a bracket member (24) having a first end and a second end, said first end of said bracket member (24) being secured to said tractor body (11) and said second end of said bracket member (24) being spaced apart from said tractor body (11);  
a first support arm (28) having a first end and a second end, said first end of said first support arm (28) being secured to said tractor cab (12) and said second end of said first support arm (28) being secured to said second end of said bracket member (24); and  
a hydraulic cylinder (26) having a first end (26b) and a second end (26a), said first end (26b) of said

hydraulic cylinder (26) being secured to said tractor cab (12) and said second end (26a) of said hydraulic cylinder (26) being secured to said second end of said bracket member (24), characterized in that said hydraulic cylinder (26) being at a minimum extension when said tractor cab (12) is moved to a raised position relative to said tractor body (11), and said hydraulic cylinder (26) is at a maximum extension when said tractor cab (12) is moved to a normal position relative to said tractor body (11)."

Claim 1 according to the auxiliary request reads as follows:

"A tractor (10) having a tractor cab (12) which is movable relative to a tractor body (11), a frame member (16) mounted in said tractor body (11) and cab riser apparatus (14) for moving a tractor cab (12) relative to a tractor body (11), containing:

a bracket member (24) having a first end and a second end, said first end of said bracket member (24) being secured to said tractor body (11) and said second end of said bracket member (24) being spaced apart from said tractor body (11);

a first support arm (28) having a first end and a second end, said first end of said first support arm (28) being secured to said tractor cab (12) and said second end of said first support arm (28) being secured to said second end of said bracket member (24);

a second support arm (30) having a first end and a second end, said first end of said second support arm (30) being secured to said second end of said bracket member (24);

a hydraulic cylinder (26) having a first end (26b) and a second end (26a), said first end (26b) of said hydraulic cylinder (26) being secured to said tractor cab (12) and said second end (26a) of said hydraulic cylinder (26) being secured to said second end of said bracket member (24), characterized in that said hydraulic cylinder (26) being at a minimum extension when said tractor cab (12) is moved to a raised position relative to said tractor body (11), and said hydraulic cylinder (26) is at a maximum extension when said tractor cab (12) is moved to a normal position relative to said tractor body (11), said tractor (10) being characterized by:

- a first mounting member (44) secured to said frame (16); said bracket (24) for supporting the cab riser apparatus thereon; and
- a second mounting member (42) secured to said bracket (24), and means for securing said first mounting member (42) to said second mounting member (44), and said first mounting member includes a first flange (44) having a substantially circular shape; and said second mounting member includes a second flange (42) having a substantially circular shape, and including a plurality of bolts (47) which are positionable within said plurality of first apertures and said plurality of second apertures, and wherein the first mounting member (44) and the second mounting member (42) are secured to one another at a first orientation and can be separated and resecured to each other at a second orientation which is different from the first orientation."

III. The Appellant's arguments may be summarized as follows:

The problem-solution approach has to be applied for the assessment of inventive step according to the established case law of the Boards of Appeal. In the present case, the actual technical problem to be solved by the invention does not consist, as stated in the decision of the Opposition Division, in finding an alternative geometrical arrangement of the tractor cab riser apparatus, but instead in providing a cab riser configuration having an improved stability and ease of handling, and including the possibility of being retrofitted onto existing tractor frames (see patent specification, paragraphs [0009], [0011], [0032], [0042] and [0051]). If E2 (DE-A-44 43 170) is regarded as closest prior art, as done by the Opposition Division, then it is noted that the difference between the subject-matter of granted claim 1 and the disclosure of E2 resides in that E2 does not show at least (i) "said first end of said hydraulic cylinder being secured to said tractor cab". In addition, the technical problem mentioned in E2 is different from the technical problem underlying the invention, since E2 clearly aims at providing a movable tractor cab which can be moved with respect to the tractor body such as to have an increased flexibility and range of movement. Consequently the lower support arms 24,26 in fig. 1 of E2 cannot be considered as being equivalent to the bracket member 24 of the invention, since this bracket member due to its structure evidently ensures more stability than the support arms 24,26 of E2 which have been conceived in order to solve a different technical problem. The above feature (i) likewise leads to an increased stability during the raising movement of the

tractor cab and allows to compensate for vibrations. The combination of E2 and E1 (EP-A-641 708) would not be obvious for the skilled person but is clearly the result of an ex post facto analysis. E1, as is the case for E2, also does not mention the problem of the invention and does not give any hint to improve stability of the cab riser apparatus or to provide an apparatus which can be retrofitted on existing tractor cabs. Thus, even if the skilled person "could" combine E2 and E1, it has not been demonstrated that he actually "would" combine these documents.

The Appellant's auxiliary request is to be considered as admissible since it is the sole auxiliary request of the Appellant and since the Appellant should be given a fair chance to amend its patent. The representative did not have a possibility to discuss the matter with his client until shortly before the oral proceedings, when his client came to Munich to attend them. Moreover, the auxiliary request was the result of the discussion during the oral proceedings, where several arguments relating to inventive step were discussed in depth for the first time.

- IV. The Respondent set out that both E1 and E2 belong to the same technical field of the invention. E2 clearly shows that the hydraulic cylinder is "at a minimum extension when said tractor cab is moved to a raised position relative to said tractor body" according to granted claim 1. Moreover the lower support arms 24,26 of the cab riser apparatus in E2 are to be regarded as a "bracket" within the meaning of claim 1 since the "bracket" is not further defined in the claim and since these support arms undoubtedly ensure the same degree

of stability as obtained by the bracket 24 described in the patent specification. Therefore, the only difference between E2 and the subject-matter of claim 1 resides in that claim 1 additionally includes said feature (i). Further, as was correctly pointed out in the contested decision, the underlying technical problem of the invention consists in looking for an alternative geometrical configuration of the cab riser apparatus. It would be obvious for the skilled person that said first end of the hydraulic cylinder may be secured at another position than is shown in figure 1 of E2, depending on the given requirements of each specific case. Such a different configuration is described in E1, which shows in fig. 2 a hydraulic cylinder having a first end secured to the tractor cab as stated by said feature (i). The implementation of this technical measure in the cab riser apparatus of E2 would further provide the advantage of simplifying the construction of the apparatus, since the additional point of attachment 76 (E2, fig. 1) on the support arm 22 for said first end of the hydraulic cylinder would be dispensed with. For these reasons, the customary practice of the skilled person would lead in an obvious manner to the combination of E2 and E1. Finally, the object of the invention as indicated by the Appellant cannot possibly be considered as being correct since said feature (i) does not contribute to increasing stability of the cab riser apparatus or to providing an apparatus which can be retrofitted on existing tractor bodies.

The Appellant's auxiliary request cannot be deemed to have been filed in response to the discussion in the oral proceedings, since the prior art documents and the



arguments which have been relied upon were already introduced and discussed during the opposition proceedings. As a result, since the Appellant already had an opportunity to file auxiliary requests up to the deadline set by the Board in the annex to the summons to the oral proceedings, there is no apparent reason why it should be given a further opportunity at such a late stage of the proceedings, given that the subject of the oral proceedings was not any different from the issues on which the contested decision is based and which were previously discussed in writing during the appeal proceedings. The Respondent would be seriously disadvantaged if the Appellant were allowed to introduce an auxiliary request at the present stage of the proceedings since the present auxiliary request clearly includes subject-matter differing substantially from that of the requests previously on file and which the Respondent's representative was not expected and was not prepared to deal with. Therefore the Appellant's auxiliary request should be held to be inadmissible.

### **Reasons for the decision**

1. The appeal meets the requirements of Articles 106 to 108 EPC in conjunction with Rule 64 EPC and is therefore admissible.
2. Document E2 undisputedly represents the closest prior art and the Board also agrees with the parties to the extent that the subject-matter of granted claim 1 differs from E2 in that it additionally includes said feature (i) stating that "said first end of said

hydraulic cylinder being secured to said tractor cab".  
The subject-matter of granted claim 1 is therefore new.

3. For the assessment of inventive step it is preliminarily noted that in the judgement of the Board, as far as the "bracket" is concerned, no difference is derivable between the subject-matter of claim 1 and the disclosure of E2. In particular, the lower support arms 24, 26 in figure 1 of E2 are indeed to be regarded as a "bracket" within the meaning of claim 1, since they perform the same function of the bracket of claim 1, i.e. firmly and stably securing and supporting the upper cab riser apparatus comprising the upper support arms 20,22 in figure 1 of E2. No further definition of the term "bracket" is given in claim 1. Hence, the only difference between granted claim 1 and E2 consists of said feature (i).
  
4. The person skilled in the art would know that in the design of a known cab riser apparatus such as disclosed in E2, the location of the point at which the first end of the hydraulic cylinder is secured is not left to chance but, on the contrary, is accurately determined in order to comply with the technical requirements of the specific case under consideration. In particular, it is evident that in the apparatus of E2 the position at which the first end of the hydraulic cylinder is secured to the support arm 22 (see fig. 1 in E2) can be varied along the same and can move all the way long until it reaches the end of the support arm 22 fixed to the tractor cabin. This possibility is indeed explicitly shown for instance in figure 2 of E1, where the first end of the hydraulic cylinder is fixed to the rear side (E1, figure 2, reference sign 13) of the

tractor cabin. It is particularly noted that according to this specific configuration of E1, the provision of an additional pin joint and an additional fixation point for the first end of the hydraulic cylinder can be dispensed with, since said first end can be directly secured to the tractor cabin through the same attachment point of the support arm, hence allowing to simplify the construction. Thus, depending for instance on aspects and quantities such as turning moment, amplitude and speed of rotational movement of the support arms or complexity of the construction involved, the skilled person will choose in each specific case the appropriate location to secure said first end of the hydraulic cylinder to the cab riser apparatus. The specific choice according to feature (i) of claim 1 thus belongs to customary practice of the skilled person, as confirmed by E1, and therefore cannot justify the presence of an inventive step (Article 56 EPC).

5. The fact that the geometrical configuration of the cab riser apparatus of claim 1 possibly leads to improved stability, due to feature (i), as alleged by the Appellant, cannot change the above conclusions. The effect of said feature (i) on the stability of the cab riser apparatus was contested by the Respondent, submitting during the oral proceedings that this effect, if any at all, would be anyway insignificant. However, as was also conceded by the Respondent, said feature (i) would lead to an increase, though small, of the turning moment of the hydraulic cylinder, due to an increase of the effective lever arm of the parallelogram linkage mechanism formed by the two support arms of the cab riser apparatus. In addition, since the force of the

hydraulic cylinder, as a consequence of feature (i), is now applied essentially at the same point of the linkage mechanism where the load of the tractor cab is acting, possible oscillations, vibrations or wobbling movements of the load are expected to be, at least partly, compensated more effectively through the direct action of the hydraulic cylinder. Be that as it may, whether or not these effects would be noticeable at all and of any significance, is not relevant to the outcome of the present discussion of inventive step since these considerations lie anyway within the framework of normal analysis by a person skilled in the art when designing a cab riser apparatus of the kind as known from E2, and figure 2 of E1 clearly demonstrates that a geometrical configuration of the cab riser apparatus including said feature (i) is one among various, common configurations which would be envisaged by the skilled person according to his customary practice.

6. The admissibility of an auxiliary request filed by a party after it has filed its grounds of appeal or reply is decided according to Article 10b (1) RPBA at the Board's discretion. The discretion shall be exercised in view of inter alia the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy. To begin with, the Appellant filed its auxiliary request during oral proceedings, even though with the summons to the oral proceedings it had been given an opportunity to file such amendments up to a time limit of one month before the date set for the oral proceedings. The Appellant actually submitted a new main request with letter dated 10 September 2007. This request was however withdrawn during the oral

proceedings. The Board sees no compelling reason why the Appellant should get a further opportunity to amend the patent. In particular, it is noted that the prior art, facts and arguments relevant to the decision and discussed during the oral proceedings were already known to the Appellant from the opposition proceedings and from the written submissions during the appeal proceedings. Therefore it cannot be fairly stated that the auxiliary request was presented in response to and was occasioned by the discussion during the oral proceedings before the Board. The Appellant's further justifications for the late filing of the auxiliary request cannot be accepted either, since even if there may be no doubt that the representative did not have the opportunity to meet his client personally until shortly before the oral proceedings, it is nevertheless true that nowadays consultations and discussions are certainly possible and commonly take place via telephone, E-mail or fax.

As to the nature of the new subject-matter submitted it is noted that the independent claim of the auxiliary request is based on former dependent claims 8,9, and 12 as granted and is directed to a tractor cab including the cab riser apparatus of granted claim 1. The subject matter included into former claims 8,9,12 concentrates on said further aspect of the object of the invention as mentioned by the Appellant, i.e. providing means such that a tractor cab apparatus can be retrofitted on existing tractor bodies. This aspect of the cab riser apparatus was completely absent in claim 1 as granted, which merely stated that the bracket member of the cab riser apparatus is secured to the tractor body, and which deals exclusively with stability of the cab riser

configuration. This further aspect of the apparatus was not discussed in any depth by the parties during the opposition procedure and the decision of the Opposition Division was based exclusively on said first aspect of the apparatus as implied by claim 1 as granted. Moreover, the features according to former claim 12, which are also included in claim 1 of the auxiliary request, were objected to by the Respondent during the opposition proceedings on the grounds of insufficiency of disclosure (Article 100(b) EPC). The Opposition Division likewise did not decide on this issue, as clearly indicated in the decision. It is evident that while within the framework of the main request the issues relating to Art. 100(b) EPC constitute only a subordinate item of the discussion, since they relate exclusively to dependent claim 12, on the contrary these issues, directly concerning claim 1 of the auxiliary request, would become part of the main subject of discussion in that case.

Thus, admitting the auxiliary request into the proceedings at such a late stage would seriously disadvantage the Respondent, since claim 1 of the auxiliary request includes new subject-matter which would completely alter the framework of the debate as conducted so far before the first instance and with respect to which the Respondent had had no opportunity to prepare its case. In addition, there being no plausible justification for such a late filing, the admission of the auxiliary request would give an unwarranted advantage to the Appellant and would violate the principle of equality before the law, i.e. in this case that parties must be accorded the same procedural rights.

In view of the above it is concluded that an auxiliary request entailing the mentioned problems could not be admitted into the proceedings without an adjournment of the oral proceedings, if at all. This is however excluded by Article 10b (3) RPBA which leaves no margin for the Board to exercise its discretion. Consequently the Appellant's auxiliary request has to be rejected as inadmissible.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed

The Registrar:

The Chairman:

A. Vottner

S. Crane