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**Datasheet for the decision
of 5 March 2009**

Case Number: T 1070/06 - 3.2.04

Application Number: 00927673.4

Publication Number: 1180930

IPC: A01M 7/00

Language of the proceedings: EN

Title of invention:
Improved trailer-mounted atomizer

Patentee:
C.I.M.A. S.P.A.

Opponent:
V.M.A S.r.l.

Headword:
Atomizer/CIMA

Relevant legal provisions:
EPC Art. 123, 54, 111(1)

Keyword:
"Intermediate generalisation (allowable)"
"Novelty (auxiliary request 4): no"
"Novelty (auxiliary request 7): yes"
"Remittal"

Decisions cited:
T 0582/91, T 1067/97, T 0714/00

Catchword:
-



Case Number: T 1070/06 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 5 March 2009

Appellant: C.I.M.A S.P.A.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 26 May 2006
revoking European patent No. 1180930 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: P. Petti
T. Bokor

Summary of Facts and Submissions

- I. The European patent No. 1 180 930 was revoked by the opposition division in its decision dated 26 May 2006.

According to this decision, document DE-C-3 316 128 (D16), which was not submitted in due time, was admitted into the opposition proceedings, while a written declaration (D15) by Mr Testori was not admitted.

- II. The patent proprietor (hereinafter appellant) lodged an appeal against this decision on 10 July 2006 and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 26 July 2006.

- III. With the grounds of appeal the appellant requested as main request cancellation of the decision under appeal and maintenance of the patent as granted. He also filed six auxiliary requests 1 to 6 ("Rev. 1" to "Rev. 6") and submitted a request for apportionment of costs.

By letter dated 21 February 2007 the opponent (hereinafter respondent) filed the Standard "CUNA NC 438-06" dated 16 November 1987 of the Italian Ministry of Transport (D17).

- IV. Oral proceedings before the board were held on 5 March 2009.

During the oral proceedings the appellant filed auxiliary requests 7 ("Rev. 7") and 8 ("Rev. 8") and withdrew his former main request and auxiliary requests

3, 5 and 6 as well as his request for apportionment of costs.

- V. The appellant requested that the decision under appeal be set aside and the patent be maintained in amended form on the basis of the set of claims filed as auxiliary request 1 ("Rev. 1") with the grounds of appeal of 26 July 2006 or alternatively, on the basis of one of the sets of claims filed as auxiliary requests 2 ("Rev. 2") or 4 ("Rev. 4") with the grounds of appeal, or on the basis of one of the sets of claims filed as auxiliary requests 7 ("Rev. 7") or 8 ("Rev. 8") during oral proceedings before the board. By his letter dated 26 July 2006 he also requested that document D16 be rejected as late-filed.

The respondent requested that the appeal be dismissed. During oral proceedings he withdrew a former request to have document D15 introduced into the proceedings.

Both parties requested that the case be remitted to the department of first instance for further prosecution.

- VI. Claim 1 of auxiliary request 1 (new main request) reads as follows:

"1) Trailer-mounted atomizer meant to be towed with a tractor, comprising a spreading apparatus (1) fed from a tank (3) and a trailer (4) with a towing drawbar (5), the tank (3) being fixed directly onto the trailer (4), characterized in that

the towing drawbar (5) of the trailer (4) is articulated to the tractor (2) by way of the spreading apparatus (1), this latter being removably fixed to the

tractor (2) by being suspended directly to the draw-hook (7A) of said tractor, onto which it is also held by jack means (7B)."

Claim 1 of auxiliary request 2 (new first subsidiary request) reads as follows:

"1) Trailer-mounted atomizer meant to be towed with a tractor, comprising a spreading apparatus (1) fed from a tank (3) and a trailer (4) with a towing drawbar (5), the tank (3) being fixed directly onto the trailer (4), characterized in that

the towing drawbar (5) of the trailer (4) is articulated to the tractor (2) by way of the spreading apparatus (1), this latter being removably fixed to the tractor (2) by being suspended directly to the draw-hook (7A) of said tractor, onto which it is also held by jack means (7B), and in that

adjustable connection means are provided between the spreading apparatus (1) and the tractor (2) and, respectively, between the trailer (4) and the spreading apparatus (1), to make the distance between the axis of said articulated joint (6) and the axis of the rear wheels (9) of the tractor (2) at least approximately equal to the distance between the axis of said articulated joint (6) and the axis of the wheels (10) of the trailer (4)."

Claim 1 of auxiliary request 4 (new second subsidiary request) reads as follows:

"1) Trailer-mounted atomizer meant to be towed with a tractor, comprising a spreading apparatus (1) fed from a tank (3) and a trailer (4) with a towing drawbar (5),

the tank (3) being fixed directly onto the trailer (4) the towing drawbar (5) of the trailer (4) being articulated to a base (11) of the spreading apparatus (1) by means of an articulated joint (6) with vertical axis, and the spreading apparatus (1) is removably fixed to the tractor (2) by being suspended to the draw-hook (7A) of said tractor, onto which it is also held by jack means (7B) characterized in that to the articulated joint (6) with vertical axis there is associated an articulated joint (18) with horizontal axis."

Claim 1 of auxiliary request 7 (new third subsidiary request) reads as follows:

"1) Trailer-mounted atomizer meant to be towed with a tractor, comprising a spreading apparatus (1) fed from a tank (3) and a trailer (4) with a towing drawbar (5), the tank (3) being fixed directly onto the trailer (4) and the towing drawbar (5) of the trailer (4) is connected to the base (11) of the spreading apparatus (1) by means of an articulated joint (6) with vertical axis, the spreading apparatus (11) being removably fixed to the tractor (2) by being suspended to the drawback (7A) of said tractor, onto which it is also held by jack means, characterized in that adjustable connection means are provided between the spreading apparatus (1) and the tractor (2) and, respectively, between the trailer (4) and the spreading apparatus (1), to make the distance between the axis of said articulated joint (6) and the axis of the rear wheels (9) of the tractor (2) at least approximately equal to the distance between the axis of said articulated joint

(6) and the axis of the wheels (10) of the trailer (4)."

Claim 1 of auxiliary request 8 (new fourth subsidiary request) reads as follows:

"1) A trailer-mounted atomizer meant to be towed with a tractor, comprising a spreading apparatus (1) fed from a tank (3) and a trailer (4) with a towing drawbar (5), the tank (3) being fixed directly onto the trailer (4), wherein the towing drawbar (5) of the trailer (4) is articulated to the tractor (2) by way of the spreading apparatus (1), this latter being removably fixed to the tractor (2) by being suspended to a draw-hook (7A) of said tractor, onto which tractor the spreading apparatus is also held by jack means (7B), the trailer (4) being articulated to the spreading apparatus by way of an articulated joint (6) with vertical axis and wherein adjustable connection means are provided between the spreading apparatus (1) and the tractor (2) and, respectively, between the trailer (4) and the spreading apparatus (1), to make a distance between the vertical axis of said articulated joint (6) and an axis of the rear wheels (9) of the tractor (2) at least approximately equal to a distance between the vertical axis of said articulated joint (6) and an axis of wheels (10) of the trailer (4), said adjustable means between the spreading apparatus (1) and the tractor (2) comprising a plurality of holes (12) formed on a base (11) of the spreading apparatus (1) to allow connecting the spreading machine in different positions, by way of a pin (13), to an end eyelet (7C) of the draw-hook (7A) of the tractor (2)."

VII. The appellant essentially submitted that the subject-matter of claim 1 of auxiliary request 1 as well as that of auxiliary request 2 did not extend beyond the content of the application as filed and the subject-matter of claim 1 of auxiliary request 4 as well that of claim 1 of auxiliary request 7 were novel over either FR-A-1 584 767 (D3) or D16.

These arguments were contested by the respondent.

Reasons for the Decision

Since the European patent was already granted at the time of the entry into force of the EPC 2000 on 13 December 2007, the transitional provisions according to Article 7 of the Act revising the EPC of 29 November 2000 and the Decisions of the Administrative Council of 28 June 2001 and of 7 December 2006, Article 2, have been applied. When Articles or Rules of the version of the EPC 1973 are cited, the year is indicated.

1. The appeal is admissible.
2. *Documents D16 and D17*
 - 2.1 The board is of the view that the opposition division has correctly exercised its discretionary power in admitting document D16 into the proceedings. This document is relevant in so far it concerns a trailer connected to a tractor by an articulated joint with vertical axis, in which the distance between said vertical axis and the axis of the rear wheels of the tractor is at least approximately equal to the distance

between said vertical axis and the axis of the wheels of the trailer.

- 2.2 Document D17 is not directly relevant for the finding of the present decision. However, this citation illustrates the common general knowledge of the skilled person in the technical field of mechanical coupling devices for trailed agricultural vehicles and as such cannot be considered as late filed.

3. *Auxiliary requests 1 and 2 (Article 123(2) EPC)*

- 3.1 Amended claim 1 of both these requests contains the additional feature that the spreading apparatus is removably fixed to the tractor "by being suspended **directly** to the draw-hook (2) of the tractor" (emphasis added).

The term "directly" cannot be found in the application as filed in the context of the connection between the tractor and the spreading apparatus.

According to claim 3 of the application as filed, the spreading apparatus is removably fixed to the tractor by being suspended to the draw-hook of the tractor.

The connection between spreading apparatus and tractor described in the application as filed - in relation with Figures 1 and 4 - consists of a plurality of holes formed on the base of the spreading apparatus and of a pin which can be engaged into one of these holes as well as into the end eyelet of the lower draw-hook of the tractor 2. Thus, according to this specific embodiment, the spreading apparatus is connected to the

tractor by means of a separate pin. It follows that the spreading apparatus is not suspended directly but rather indirectly with the aid of the pin. In any case, the added feature that the spreading apparatus is fixed to the tractor "by being suspended directly" is not directly and unambiguously derivable from the originally filed application.

- 3.2 The appellant submitted that the added feature is intended to mean that the spreading apparatus is suspended to the draw-hook of the tractor without intermediate members other than the connecting means.

The wording "suspended directly" means what it says, namely that the spreading apparatus is suspended to the draw hook of the tractor without the use of any intermediate members. Obviously the use of "suspended directly" gives no cause to understand also the more restrictive wording "suspended without any intermediate members other than the connecting means".

- 3.3 Therefore, amended claim 1 of each of the auxiliary requests 1 and 2 contravenes the requirements of Article 123(2) EPC, so that these requests have to be rejected.

4. *Claim 1 of auxiliary request 4 (novelty)*

- 4.1 Document FR-A-1 584 767 (D3) discloses (see particularly Figure 2) a trailer-mounted atomizer meant to be towed by a tractor, comprising a spreading apparatus ("pulvérisateur") fed from a tank 42 and a trailer with a towing drawbar, the tank 42 being fixed directly onto the trailer. The towing drawbar of the

trailer is articulated to a chassis 34, which constitutes the support of the spreading apparatus, by means of an articulated joint with vertical axis. The spreading apparatus is removably fixed to the tractor by being suspended - via its chassis 34 - to the drawhook (i.e. to the lower links of the conventional three point linkage 35) of said tractor and is also held onto the tractor by jack means (i.e. by the upper link of the conventional three point linkage 35). The chassis 34 can be considered as forming part of the spreading apparatus.

Moreover, Figure 2 of D3 shows a trailer having a towing drawbar with a square or rectangular cross-section which is connected at its end to a connecting element comprising a first portion having a rounded cross section, a fork end ("chape") 44 and a circular element protruding from the first portion into the space formed by the forks of the fork end 44, which is connected to the chassis 34 by means of a vertical pin. The skilled person - who generally knows that the hitch between a tractor and a trailer must allow not only movements about a vertical axis but also about a horizontal axis - would immediately realize that towing drawbar of the trailer shown in Figure 4 is articulated to the chassis 34, not only by means of a first articulated joint with vertical axis but also by a second articulated joint with horizontal axis.

4.2 In this respect, the appellant essentially submitted the following arguments:

- The chassis 34 of D3 is an universal support for agricultural apparatuses which does not form part

of the spreading apparatus, and thus does not constitute the "base (11)" of the spreading apparatus according to claim 1. In D3, the base of the spreading apparatus is constituted by a plate ("plaque de montage" 2) which is mounted to the chassis 34 by means of bolts 32, as shown in Figure 2.

- The towing drawbar of the trailer shown in Figure 2 is not provided with a second articulated joint with horizontal axis because it has a square cross section.

4.2.1 The board cannot accept these arguments for the following reasons:

- In D3, the function of the chassis 34 shown in Figure 2 is to maintain the spreading apparatus in an upright position as well as to allow the spreading apparatus to be connected to the tractor and to the trailer. Therefore, the chassis 34 is part of the spreading apparatus. Claim 1 does not specify how the base 11 is connected to the remaining portion of the spreading apparatus. Therefore, the chassis 34 also constitutes the base of the spreading apparatus in the meaning of claim 1.
- As explained before, the towing drawbar of the trailer of D3 has not only a portion having a square cross section but also a further portion having a circular cross section.

4.3 Therefore, the subject-matter of claim 1 lacks novelty (Article 54(1) EPC, 1973) over D3 so that auxiliary request 4 has to be rejected.

5. *Admissibility of the auxiliary requests 7 and 8*

5.1 During oral proceedings before the board, it was discussed whether the amendments leading to claim 1 of former auxiliary request 3 contravened Article 123(2) EPC. In this respect, an objection concerning the additional feature (in claim 1 of former auxiliary request 3) that the towing drawbar (5) of the trailer is "articulated to the tractor (2) by way of an articulated joint (6)" was raised for the first time during oral proceedings. In particular, the board raised the objection that the above mentioned additional feature represented an unallowable generalisation of the disclosed feature that the towing drawbar is "connected **to the base (11)** of the spreading apparatus (1) by means of an articulated joint (6) **with vertical axis**".

In response to this objection, the appellant withdrew his former auxiliary requests 3 and 6 and submitted the auxiliary requests 7 and 8.

5.2 Claim 1 of auxiliary request 7 requires the towing drawbar of the trailer to be "connected to the base (11) of the spreading apparatus (1) by means of an articulated joint (6) with vertical axis". Therefore, since the submission of auxiliary request 7 represented a clear response of the appellant to objections raised for the first time during the oral proceedings, the

board decided to admit this request into the proceedings.

- 5.3 The filing of auxiliary request 8, in replacement of the then existing auxiliary request 6, was not a reaction of the appellant to objections raised during the oral proceedings since this auxiliary request 6 was withdrawn without having been discussed.

Moreover, although claim 1 of auxiliary request 8 refers to "a base (11) of the spreading apparatus", it does not require the towing drawbar of the trailer to be connected to the base of the spreading apparatus by means of the articulated joint with vertical axis.

Thus, amended claim 1 of this request would have been open to the same objections of added subject-matter which were raised during the oral proceedings against claim 1 of former auxiliary request 3.

Therefore, the board decided not to admit auxiliary request 8 into the proceedings.

6. *Auxiliary request 7 (amendments)*

- 6.1 Claim 1 of this request differs from granted claim 1 in that the features

- (a) "the towing drawbar (5) of the trailer is connected to the base (11) of the spreading apparatus (1) by means of an articulated joint (6) with vertical axis",

(b) "the spreading apparatus (1) is removably fixed to the tractor (2) by being suspended to the draw-hook (7A) of said tractor, onto which it is also held by jack means"

have replaced the following features in granted claim 1, respectively

(a') "the towing drawbar (5) of the trailer is articulated to the tractor (2) by way of the spreading apparatus (1)",

(b') "the spreading apparatus (1) is removably fixed to the tractor (2)".

Moreover, the features of granted claim 4 have been added into claim 1 of the auxiliary request 7.

6.2 Feature (a)- in so far as it refers to the base (11) of the spreading apparatus and to the articulated joint (6) - is more specific than feature (a'). Therefore, this feature introduces a further limitation which does not extend the scope of the claim over that of granted claim 1. The same applies to feature (b).

Therefore, these amendments do not contravene the requirement of Article 123(3) EPC.

6.3 Features (a) and (b) correspond to the features of claim 3 of the application as filed. The features of granted claim 4 correspond to those of claim 4 of the application as filed.

6.3.1 In this respect, the respondent submitted that claims 3 and 4 of the application as filed are dependent on claim 2. Therefore, since amended claim 1 does not specify the features of claim 2, it defines a combination of features not disclosed in the application as filed.

6.3.2 The board cannot accept these arguments for the following reasons:

The additional features of claim 2 concern the transmission of motion from the tractor to the spreading apparatus, while the additional features of claims 3 and 4 relate to the connection of the spreading apparatus to the tractor and to the trailer. There is thus no functional or structural relationship between the features of claim 2 and those of claims 3 and 4. Therefore, the isolation of the additional features of claims 3 and 4 from their combination with the features of claim 2 - when adding them to claim 1 - represents an allowable intermediate generalisation, see also the Case Law Book, 5th edition 2006, III.A.1.1. (T 714/00, T 1067/97 and T 582/91).

It follows that amended claim 1 of auxiliary request 7 does not contravene the requirements of Article 123(2) EPC.

7. *Auxiliary request 7 (novelty)*

7.1 Document D3 does not disclose any adjustable connection means as defined in the characterising portion of claim 1.

7.1.1 In this respect, the respondent essentially submitted the following arguments:

- (a) The terms "at least approximately equal" are unclear because of the words "at least" and thus may define distances which may be equal to or different from each other. For this reason, the features concerning the adjustable connection means (in the characterising portion of claim 1) do not constitute any limitation. Thus, the claimed-subject matter lacks novelty over D3.
- (b) The tires of the trailer as well as those of the tractor of the apparatus of D3 can be considered as being adjustable means in so far as an adjustment of the pressure of the tires of the tractor or of the trailer would produce an adjustment of distance between the vertical axis of the articulated joint and the axis of the wheels of the tractor or of the trailer, respectively. Also for these reasons, the claimed-subject matter lacks novelty over D3.

7.1.2 The board cannot accept these arguments for the following reasons:

- (a') Obviously the terms "at least approximately equal" are only aimed at making it clear that it is not necessary that the two distances in question should be rigorously equal and that substantially equal distances will suffice to achieve the effect sought.

(b') In document D3, the tires of the tractor or those of the trailer do not constitute connection means between the spreading apparatus and the tractor or the trailer, respectively. Furthermore, the skilled person would not perceive the tires as being "adjustment means" for adjusting a distance as claimed. A construction of the term "adjustment means" can clearly not encompass any object which is capable of changing a dimension. This argument is clearly based upon an *ex post facto* analysis of D3.

7.1.3 Therefore, the subject-matter of claim 1 of auxiliary request 7 is novel over D3.

7.2 Document D16 (see particularly Figures 1 and 2) discloses a trailer-mounted agricultural implement meant to be towed by a tractor 10, in which a tank is fixed directly onto a trailer 12, the trailer being provided with a towing drawbar 24 which is connected to a support ("Dreipunktbock") 22 by means of an articulated joint with vertical axis C, the support 22 being removably fixed to the tractor by being suspended to the draw-hook 18 of said tractor and it also held by jack means 20, wherein the connection between the tractor 10 and the support 22 and, respectively, between the trailer 12 and the support 22 is such that the distance between the vertical axis C of said articulated joint and the axis of the rear wheels of the tractor is at least approximately equal to the distance between the vertical axis C of said articulated joint and the axis of the wheels of the trailer.

Moreover, having regard to column 3, lines 55 to 61 of D16, the support 22 is suitable for carrying the agricultural implement.

D16 does not disclose the features that the agricultural implement is an atomizer comprising a spreading apparatus fed from the tank. Moreover D16 neither discloses an adjustable connection means provided between the spreading apparatus and the tractor capable of adjusting the distance between the vertical axis C of the articulated joint and the axis of the rear wheel of the tractor nor refers to an adjustable connection means provided between the spreading apparatus and the trailer capable of adjusting the distance between said vertical axis C and the axis of the wheels of the trailer.

7.2.1 In this respect, the respondent essentially submitted the following arguments:

- (a) Since D16, in column 2, lines 24 to 31, refers to a tractor whose draw-hook is connected to a support supporting a spreading apparatus ("Spritzgerät"), it is implicit that the apparatus represented in Figures 1 and 2 of D16 is provided with an atomizer mounted on the support 22.
- (b) Since the trailer represented in Figures 1 and 2 of D16 has to be connected to different tractors having different sizes, the skilled person would immediately understand that the device disclosed in D16 is provided with adjustable connection means as defined in the characterising portion of claim 1.

7.2.2 The board cannot accept these arguments for the following reasons:

(a') The passage in D6, column 2, lines 24 to 31 clearly relates to a tractor connected to a support carrying the whole atomizer (i.e. spreading apparatus and tank), without being provided with a trailer upon which a tank is mounted. This passage merely concerns a prior art device which is different from the invention illustrated in Figures 1 and 2 of D16. Therefore, the prior art device and the device of Figures 1 and 2 cannot be combined when assessing inventive step.

(b') D16 does not suggest the idea that the trailer represented in Figures 1 and 2 has to be connected to different tractors. Moreover, it has to be noted that claim 1 requires not only an adjustable connection means capable of adjusting the distance between the vertical axis of the articulated joint and the axis of the rear wheels of the tractor but also a further adjustable connection means capable of adjusting the distance between said vertical axis and the axis of the wheels of the trailer.

7.2.3 Therefore, the subject-matter of claim 1 of auxiliary request 7 is novel over D16.

8. *Remittal*

In the present case the decision under appeal does not deal with the issue of inventive step.

Given that both parties had requested that the case be remitted to the opposition division for further prosecution, the board in exercising its discretion according to Article 111(1) EPC, 1973 decided to remit the case to the opposition division, in particular for consideration of the issue of inventive step having regard to claim 1 of auxiliary request 7 ("Rev. 7").

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The Registrar:

The Chairman:

G. Nachtigall

M. Ceyte