Internal distribution code:
(A) [ ] Publication in OJ
(B) [ ] To Chairmen and Members
(C) [ ] To Chairmen
(D) [X] No distribution

Datasheet for the decision
of 9 November 2010

Case Number: T 1868/07 - 3.2.04

Application Number: 96935665.8

Publication Number: 0869708

IPC: A01J 5/007

Language of the proceedings: EN

Title of invention:
A method of milking and a milking

Patentee:
DeLaval Holding AB

Opponent:
GEA Farm Technologies GmbH
Maasland N.V.

Headword:
Special mode/DELAVAL

Relevant legal provisions:
EPC Art. 54, 56

Relevant legal provisions (EPC 1973):
-

Keyword:
"Novelty for one claimed alternative (no)"
"Inventive step for a further claimed alternative (no)"

Decisions cited:
-

Catchword:
-

Europäisches
Patentamt

European
Patent Office

Office européen
des brevets

Beschwerdekammern   Boards of Appeal   Chambres de recours

Case Number: T 1868/07 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 9 November 2010

Appellant: (Patent Proprietor)	DeLaval Holding AB P.O. Box 39 S-147 21 Tumba (SE)
Representative:	Berglund, Stefan Bjerkéns Patentbyra KB Östermalmsgatan 58 SE-114 50 Stockholm (SE)
Respondent: (Opponent 1)	GEA Farm Technologies GmbH Siemensstrasse 25-27 DE-59199 Bönen (DE)
Representative:	Schütte, Hartmut BSB Anwaltskanzlei Am Markt 2 (Eingang Herrenstrasse) D-59302 Oelde (DE)
Respondent: (Opponent 2)	Maasland N.V. Weverskade 10 NL-3155 PD Maasland (NL)
Representative:	Corten, Maurice Jean F.M. Octrooibureau Van der Lely N.V. Weverskade 110 NL-3147 PA Maassluis (NL)

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 13 September 2007 revoking European patent No. 0869708 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: M. Ceyte
Members: P. Petti
          C. Heath

C4942.D

Summary of Facts and Submissions

I.   The opposition division, by its decision dispatched on
      13 September 2007, revoked the European patent
      No. 0 869 708, against which two oppositions had been
      filed.

II.   The proprietor (hereinafter appellant) lodged an appeal
      against this decision on 8 November 2007 and
      simultaneously paid the appeal fee. A statement setting
      out the grounds of appeal was received on 7 January
      2007.

III. Oral proceedings before the board were held on
      9 November 2010.

IV.   The appellant requested that the decision under appeal
      be set aside and the patent be maintained either on the
      basis of amended claims 1 to 6 filed as a main request
      by letter dated 5 October 2010 or on the basis of one
      of the three auxiliary requests filed with the same
      letter.

      The respondents (opponents I and II) requested that the
      appeal be dismissed.

V.   Claim 1 of the main request reads as follows:

      "1. A method of milking animals by the use of at least
      one milking apparatus comprising teatcups and applying
      means provided to apply automatically the teatcups to
      the teats of the animal, said method comprising the
      following steps:

C4942.D

operating the milking apparatus in a normal mode of
operation during a first milking procedure for each
animal at a milking occasion, wherein the applying
means in said normal mode of operation follows a normal
search algorithm for finding the teats and applying the
teatcups to the teats,

automatically determining when the milking of a teat of
an animal during said first milking procedure does not
succeed, wherein the milking does not succeed if the
applying means does not find a predetermined number of
the teats or does not succeed in applying the teatcups
to said predetermined number of the teats,

recording the teat and the animal for which the milking
of said first milking procedure did not succeed,

completing the milking of the other teats of the animal
in said normal mode during said milking occasion, for
which teats milking does succeed, and

automatically operating the milking apparatus in a
special mode of operation during a following second
milking procedure of said teat after a certain period
of time, for which the milking did not succeed in the
first milking procedure, wherein said special mode of
operation follows a more sophisticated search algorithm
than said normal mode, which increases the probability
that the applying means finds all the teats of an
animal."

Claim 1 of the first auxiliary request differs from
claim 1 of the main request by the additional feature

"wherein the special mode of operation takes place at a later milking occasion".

Claim 1 of the second auxiliary request reads as follows:

"1. A method of milking animals by the use of at least one milking apparatus comprising teatcups and applying means provided to apply automatically the teatcups to the teats of the animal, said method comprising the following steps:

operating the milking apparatus in a normal mode of operation during a first milking procedure for each animal at a milking occasion, wherein the applying means in said normal mode of operation follows a normal search algorithm for finding the teats and applying the teatcups to the teats,

automatically determining when the milking of a teat of an animal during said first milking procedure does not succeed, wherein the milking does not succeed if the applying means does not find a predetermined number of teats or does not succeed in applying the teatcups to said predetermined number of the teats,

recording the teat and the animal for which the milking of said first milking procedure did not succeed,

completing the milking of the teats of the animal in said normal mode during said milking occasion, for which teats milking does succeed, and

automatically operating the milking apparatus in a special mode of operation during a following second milking procedure of said teat after a certain period of time, for which the milking did not succeed in the first milking procedure, wherein the special mode of operation takes place a certain time interval after the milking according to the normal mode, and wherein said special mode of operation follows a more sophisticated search algorithm than said normal mode, which increases the probability that the applying means finds all the teats of an animal."

Claim 1 of the third auxiliary request differs from claim 1 of the second auxiliary request by the additional feature "wherein the special mode of operation takes place at a later milking occasion".

VI.   The appellant essentially submitted that the claimed subject-matter was novel and involved an inventive step over document EP-A-191 517 (D1).

The respondents essentially submitted that claim 1 of all requests covered three alternatives, in particular a first alternative according to which it is determined that the milking is successful for all the teats of the animal and a further alternative according to which it is determined that the milking is unsuccessful for all the animal's teats. These two alternatives were clearly derivable from D1 and therefore the claimed subject-matter was not patentable over this prior art document.

Reasons for the Decision

1.   The appeal is admissible.

2.   *The claimed subject-matter*

        Claim 1 of all requests encompasses three operating
        alternatives:

  i)   A first operating alternative, when the animal's
        milking is successful for all the teats. The
        milking is only operated in the normal mode and
        the applying means follows a normal search
        algorithm for finding the teats and applying the
        teat cups to the teats of the animal.

  ii)   A second operating alternative performed when the
        milking of at least one of the animal's teats but
        not all of them is unsuccessful. This second
        alternative comprises the following claimed steps
        of

        -       recording the teat(s) and the animal for
                which the milking in the normal operating
                mode did not succeed,

        -       completing the milking of the other teats of
                the animal in the normal operating mode, for
                which teats the milking did succeed, and

        -       automatically operating the milking
                apparatus in a special mode of operation
                during a following second milking procedure.

iii) A third operating alternative performed when the milking of all the animal's teats does not succeed. In this case all the steps of the second operating mode are carried out, except the above step of "completing the milking of the other teats ...", because the milking of all the animals teats did not succeed.

Contrary to the appellant's submissions, the three operating alternatives are mutually exclusive. The "claimed" method is restricted to performing one of them, the two others being excluded, depending on whether the animal's milking is successful for all the teats, partially successful or entirely unsuccessful. These three alternatives cannot be combined: if the first operating alternative (normal mode of operation) applies, neither the second nor the third alternative can be performed, because in the normal mode the animal's milking is successful for all the teats.

The Board therefore interprets claim 1 of all requests as an "OR" claim defining three alternatives, either the first (normal mode of operation) or the second or the third operating alternative. Thus if one alternative is not patentable over the cited prior art, the whole claim must fall without it being necessary to consider whether other claimed alternatives could possibly be patentable over the cited prior art.

3. *Novelty and inventive step*

3.1 Dl discloses a milking apparatus comprising a milking cluster with teat cups (29) and applying means provided to apply automatically the teat cups (29) to the teats

of the animal, each teat cup (29) being provided with a
sensor (33) which automatically determines whether the
applying means does not succeed in applying a teat cup
to the respective teat (see particularly Figures 1 and
2; page 13, lines 6 to 9).

The milking machine is provided for performing milking
in the "normal mode of operation". If the milking
cluster is correctly attached to the teats, then the
milking operation is switched on (see claim 2). The
normal mode of operation in D1 also follows a normal
search algorithm for finding the teats for attaching
the teat cups to the teats. It follows that the first
operating alternative covered by method claim 1 of all
requests lacks novelty in view of D1.

Having regard to the third operating alternative, D1
discloses the steps of

—   automatically determining when the milking of all
        the animal's teats does not succeed, wherein the
        milking does not succeed if the applying means
        does not succeed in applying the teat cups to said
        teats (see particularly page 17, lines 4 to7),

—   recording the result that the attachment of the
        teat cups to the udder of the animal is not
        successful, i.e. recording the animal for which
        the milking does not succeed during said first
        milking procedure (see particularly page 2, lines
        24 to 29),

—   after a certain period time automatically
        operating the apparatus in a special mode of

operation during a following milking procedure of
the animal for which the milking did not succeed,
wherein said "special mode of operation" follows a
more sophisticated search procedure than said
normal mode, which increases the probability that
the applying means finds all the teats of an
animal, said special mode of operation comprising
repetition of said normal search procedure a
predetermined number of times (see particularly
page 13, lines 11 to 16),

—   readjusting the milking apparatus at the next
milking occasion, i.e. at a later milking occasion
of the animal, the milking apparatus being
operated in the readjusted mode, i.e. in a special
mode which will follow a more sophisticated search
algorithm than the normal mode and increase the
probability that the applying means finds all the
teats of an animal (see particularly page 2, lines
29 to 32).

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

—   Dl does not disclose the features that the special
mode of operation follows a more sophisticated
algorithm than the normal mode. In particular,
since Dl does not make it clear what the
readjustment would imply, the readjustment would
be a permanent readjustment of the milking
apparatus with respect to the animal concerned and
would be used in the following milkings as a part
of the normal mode.

—   Moreover, Dl does not differentiate between a
      normal mode of operation and a special mode in so
      far as it proposes the repetition of the
      attachment of the teat cups during one and the
      same milking occasion.

The board does not find these arguments convincing for
the following reasons:

—   D1 discloses that means are present for
      readjusting the milking implement on the basis of
      data recorded by the computer (page 2, lines 24 to
      32). As a consequence, on the next milking
      occasion, the milking apparatus will automatically
      operate in a mode which is different from the
      previous normal mode using a normal search
      algorithm and, thus, can be regarded as a special
      mode of operation.

—   Claim 6 of all requests defines a special mode of
      operation as comprising a "repetition of the
      search algorithm a predetermined number of terms".
      In D1, in case the teat cup attachment fails, one
      or more trials are made to attach the milking
      cluster with the teat cups to the udder, and thus
      the search algorithm is also repeated at least one
      time.

3.1.2 The respondents submitted that Dl implicitly discloses
       the step of "recording the teat and the animal for
       which the milking ... did not succeed", in so far as
       each of the teat cups of the milking apparatus of Dl is
       provided with its own sensor for detecting whether the
       teat cup has been connected correctly to the teat. The

information of a sensor is transmitted to the control
unit where it has to be at least temporarily recorded.

The board does not find this argument convincing for
the following reasons:

Indeed, each of the teat cups of Dl is provided with a
sensor capable of detecting whether the applying means
did not succeed in applying the teat cup to a
respective teat, each sensor 33 being connected to a
control unit 35 by means of a wire 47 (see page 18,
lines 26 to 29; Figure 2). However, this does not
clearly and unambiguously disclose that the information
from each sensor is separately recorded - even
temporarily - in the control unit.

3.1.3   Therefore, the third operating alternative defined in
        claim 1 of all requests, which third alternative is
        performed when the animal's milking is unsuccessful for
        all the animal's teats, is novel over Dl.

3.2   It is not disputed that Dl represents the closest prior
        art. Having regard to the considerations above, the
        third operating alternative defined in claim 1 of all
        requests, differs from the method of Dl by the step of
        recording the teats for which the milking did not
        succeed.

3.2.1   This distinguishing step - in the context of an
        operating alternative in which it is determined that
        milking does not succeed for all the teats of the
        animal - allows the identification of the animals for
        which milking did not succeed in the normal mode and
        thus has a functional relationship with the step of

operating the milking apparatus in a special mode at a
later milking occasion.

However, in the method of Dl the step of recording that
the attachment of the milking cluster did not succeed
also permits the animals which were not successfully
milked in the normal mode to be identified so that they
may be milked in a special mode at a later milking
occasion.

Therefore, the problem to be solved may be seen as to
provide an alternative solution to the problem of
identifying the animal for which milking in the normal
mode did not succeed.

Starting from the method of Dl, which comprises the use
of a milking apparatus comprising teat cups provided
with an individual sensor for determining whether the
applying means does not succeed in applying the teat
cups to the respective teats, it would be obvious for a
skilled person - on the basis of his common general
knowledge - to modify the known method in such a way
that the information of each individual sensor is
recorded.

In this respect, it has to be noted that the appellant
did not indicate any particular advantage which may be
achieved with respect to the closest prior art by the
step of individually recording the teats for which the
milking did not succeed, in the context of an operating
alternative which is performed when the animal's
milking does not succeed for all the teats of the
animal.

3.3   As the first operating alternative defined in claim 1
        of all requests is not novel over prior art document D1
        and the third operating alternative also defined in
        claim 1 is obviously derivable from D1, the subject-
        matter of claim 1 of all requests is not patentable
        within the terms of Articles 54 and 56 EPC.

        Therefore, the Board concludes that the opposition
        ground of lack of patentability (Article 100(a) EPC)
        prejudices maintenance of the patent as amended (main
        request and auxiliary requests 1 to 3).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

G. Magouliotis   M. Ceyte