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Datasheet for the decision of 7 June 2011

Case Number: T 1600/09 - 3.2.04

Application Number: 01918036.3

Publication Number: 1272029

IPC: A01K 9/00

Language of the proceedings: EN

Title of invention:
Milk feeding of young animals

Patentee:
DeLaval Holding AB

Opponent:
Octrooibureau Van der Lely N.V.

Headword:
Feeding/DELAVAL

Relevant legal provisions:
EPC Art. 123(2)

Relevant legal provisions (EPC 1973):
EPC Art. 56, 100(c)

Keyword:
"Added subject-matter (yes: main request and auxiliary requests 1 and 2)"
"Inventive step (yes: auxiliary request 3)"

Decisions cited:
T 0331/87, T 1067/97, T 0714/00, T 0025/03, T 0685/10

Catchword:
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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 1600/09 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 7 June 2011

Appellant: (Opponent)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 20 May 2009 rejecting the opposition filed against European patent No. 1272029 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman: M. Ceyte
Members: P. Petti
W. Sekretaruk

Summary of Facts and Submissions

I. An opposition filed against the European patent EP-B-1 272 029 was rejected by the opposition division with its decision dated 20 May 2009.

Granted claim 1 reads as follows:

A feed apparatus for automatic milk feeding of young animals comprising

- a first feed supply device (6, 43),
- a first milk line (23, 23c) connectable to said first feed supply device (6, 43) and further connectable to a milking machine (14) arranged for milking a plurality of animals,

wherein

- said milk line is adapted to automatically transport milk from at least a first one of said plurality of milk producing animals to said first feed supply device, **characterized in**
- a second feed supply device (6b), and
- a second milk line (23b) connectable to said second feed supply device (6b) and further connectable to the milking machine (14), wherein
- said second milk line (23b) is adapted to automatically transport milk from at least a second one of said plurality of milk producing animals to said second feed supply device (6b); and

– said first feed supply device (6, 43) is accessible to young animals that are different from those to which said second feed supply device (6b) is accessible.

II. The opponent (hereinafter appellant) lodged an appeal against this decision on 27 July 2009 and simultaneously paid the appeal fee. The grounds of appeal were received on 17 September 2009.

III. Oral proceedings took place on 7 June 2011.

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

The respondent (patent proprietor) requested that the appeal be dismissed (main request) or that the decision under appeal be set aside and the European patent be maintained in the amended form on the basis of auxiliary requests 1 or 2, filed with letter dated 9 April 2010, or on the basis of auxiliary requests 3 or 4, filed with letter dated 9 April 2010 and amended during the oral proceedings on 7 June 2011.

V. Claim 1 of auxiliary request 1 reads as follows:

A feed apparatus for automatic milk feeding of young animals comprising

– a first feed supply device (6, 43),
– a first milk line (23, 23c) connectable to said first feed supply device (6, 43) and further connectable to a milking machine (14) arranged for milking a plurality of animals,

wherein

- said milk line is adapted to automatically transport milk from at least a selected first one of said plurality of milk producing animals to said first feed supply device, **characterized in**
- a second feed supply device (8b), and
- a second milk line (23b) connectable to said second feed supply device (6b) and further connectable to the milking machine (14), wherein
- said second milk line (23b) is adapted to automatically transport milk from at least a selected second one of said plurality of milk producing animals to said second feed supply device (6b); and
- said first feed supply device (6, 43) is accessible to young animals that are different from those to which said second feed supply device (6b) is accessible, wherein said animals are different in that those to which the first feed supply device is accessible are distinguishable from those to which the second feed supply device is accessible.

Claim 1 of auxiliary request 2 reads as follows:

A feed apparatus for automatic milk feeding of young animals comprising

- a first feed supply device (6, 43),
- a first milk line (23, 23c) connectable to said first feed supply device (6, 43) and further

connectable to a milking machine (14) arranged for milking a plurality of animals,

wherein

- said milk line is adapted to automatically transport milk from at least a first one of said plurality of milk producing animals to said first feed supply device, **characterized in**
- a second feed supply device (6b), and
- a second milk line (23b) connectable to said second feed supply device (6b) and further connectable to the milking machine (14), wherein
- said second milk line (23b) is adapted to automatically transport milk from at least a second one of said plurality of milk producing animals to said second feed supply device (6b),
- said first feed supply device (6, 43) is accessible to young animals that are different from those to which said second feed supply device (6b) is accessible, and said first feed supply device (6, 43) is arranged in a first enclosed area, and said second feed supply device (6b) is arranged in a second enclosed area, said first and second enclosed areas being separated from each other, and young animals housed in the first enclosed area being distinguishable from young animals housed in the second enclosed area.

Claims 1 and 16 of auxiliary request 3 read as follows:

1. A feed apparatus for automatic milk feeding of young animals comprising

– a first feed supply device (6, 43),
– a first milk line (23, 23c) connectable to said first feed supply device (6, 43) and further connectable to a milking machine (14) arranged for milking a plurality of animals housed in a first area (1),

wherein

– said milk line is adapted to automatically transport milk from at least a selected one of said plurality of milk producing animals to said first feed supply device, **characterized in**
– a second feed supply device (6b), and
– a second milk line (23b) connectable to said second feed supply device (6b) and further connectable to the milking machine (14), wherein
– said second milk line (23b) is adapted to automatically transport milk from at least a selected second one of said plurality of milk producing animals to said second feed supply device (6b); and
– said first feed supply device (6, 43) is accessible to young animals that are different from those to which said second feed supply device (6b) is accessible, a liquid feed stall (5) is provided in a second area (2) wherein the liquid feed stall (5) comprises said first feed supply device (6) and the second area (2) is defined by second enclosure means (4) and is arranged to house young animals permitted to walk freely in the second area (2), and a liquid feed stall (5b) is provided in a third area (2b) wherein the

liquid feed stall (5b) comprises said second feed supply device (6b) and the third area (2b) is defined by third enclosure means (4b) and is arranged to house young animals permitted to walk about freely in the third area (2b); said animals being different in that those in the third area (2b) are distinguishable from those in the second area (2) through their age, breed, health, size, or sex.

16. A method for automatic milk feeding of young animals comprising the steps of:

- automatically milking a plurality of milk producing animals by means of an automatic milking machine (14), said animals being housed in a first area (1),
- automatically collecting milk from said plurality of milk producing animals in a milk storage tank (15) being connectable to said milking machine (14),
- automatically collecting milk from at least a selected one of said plurality of milk producing animals in a first feed supply device (6, 43) by means of a first milk line (23, 23c) being connectable between said milking machine (14) and said first feed supply device, **characterized by** the steps of:
  - automatically collecting milk from at least a selected second one of said plurality of milk producing animals in a second feed supply device (6b) by means of a second milk line (23b) being connectable between said

milking machine (14) and said second feed supply device (6b),

– giving young animals access to said first and second supply devices, wherein the young animals that are given access to said first feed supply device (6, 43) are different from those given access to said second feed supply device (6b), and

wherein

a liquid feed stall (5) is provided in a second area (2) wherein the liquid feed stall (5) comprises said first feed supply device (6) and the second area (2) is defined by second enclosure means (4) and is arranged to house young animals permitted to walk freely in the second area (2), and a liquid feed stall (5b) is provided in a third area (2b) wherein the liquid feed stall (5b) comprises said second feed supply device (6b) and the third area (2b) is defined by third enclosure means (4b) and is arranged to house young animals permitted to walk about freely in the third area (2b); said animals being different in that those in the third area (2b) are distinguishable from those in the second area (2) through their age, breed, health, size, or sex.

VI. The appellant essentially submitted that the claimed subject-matter of all requests contravened the requirements of Article 123 (2) or 100 (c) EPC and that the subject-matter of claims 1 and 16 of the third auxiliary request did not involve an inventive step having regard to D. L. Bobb, *"Mechanised Livestock Feeding"*, Oxford 1990, pages v to vii and 1185 to 192

(D10) in combination with either SU-A-539 571 (D7) or RU-C-2 132 126 (D5) or EP-A-628 244 (D1).

The respondent (patent proprietor) essentially contested the appellant's arguments.

Reasons for the Decision

1. The appeal is admissible.

2. *Main request and auxiliary requests 1 and 2 (added subject-matter)*

2.1 The subject-matter of granted claim 1 and that of claim 1 according to auxiliary requests 1 and 2 differ from claim 1 taken in combination with claim 16 of the application as filed (WO-A-01/76357) inter alia by the added feature:

– "said first supply device (6, 43) is accessible to young animals that are different from those to which said second feed supply device (6b) is accessible".

According to established case law (see e.g. T 1067/97, T 714/00, T 25/03 or T 685/10), it is normally not admissible under Article 123 (2) or 100 (c) EPC to extract isolated features from a set of features that have originally been disclosed in combination. This will only be justified if there is no clearly recognizable functional or structural relationship between these features.

Figure 2 of the application as filed shows an arrangement for feeding young animals which includes a first area 1, a second area 2 and a third area 2b. The second area 2, which is "defined by enclosure means 4", is "arranged to house calves permitted to walk about freely in the second area" and the third area 2b, which is "defined by enclosure means 4b", is "arranged to house calves permitted to walk about freely in the third area". In the second area 2 there is a feed stall 5 comprising a first feed supply device 6, while in the third area 2b there is a feed stall 5b comprising a second feed supply device 6b (see page 11, lines 3 to 14 in conjunction with page 6, lines 12 to 25). It is also stated that "[t]he calves arranged to be housed in the third area may be calves of a different age than" and that "[a]lternatively the calves in the third area are distinguishable from those in the second area in other manner" (see page 12, lines 4 to 8).

Thus, the added feature that the first supply device is accessible to young animals that are different from those to which the second supply device is accessible is disclosed in combination with the set of features defining the embodiment of Figure 2. The added feature cannot be isolated from this set of features, since there is a clear functional relationship between this added feature and the existence of second and third areas (2, 2b) defined by respective enclosure means (4, 4b), each area (2, 2b) being provided with a respective feed stall (5, 5b) comprising the respective first feed supply device (6, 6b) and arranged to house calves which can freely move within the respective enclosed area. Lifting this feature out of this context

and adding it in isolation to claim 1 therefore represents a generalization of the specific structural and functional context in which this feature originally appears.

2.1.1 The board does not find convincing the respondent's argument that the amendment has a basis in the above quoted passage on page 12, lines 4 to 8 in so far as the presence in this passage of the terms "may be" and "[a]lternatively" makes it clear that not all the specific features are necessary to achieve the result defined by the added feature, because the terms "may be" and "[a]lternatively" do not relate to the specific features which permit the result to be achieved but to how the young animals housed in a second enclosed area may be distinguished from those housed in the third enclosed area.

2.2 The feature "at least a selected one" of said plurality of milk producing animals present in the independent claims as originally filed has been deleted from claim 1 of main and second auxiliary requests.

According to established case law (see T 331/87, OJ EPO 1991, 22 - see also Guidelines, C-VI, 5.3.10), amendments that remove features from an independent claim as originally filed are only allowable under Article 123 (2) EPC if the skilled person would directly and unambiguously recognize that:

i) the feature in question was not explained as essential in the application as filed,

ii) the feature is not indispensable for the function of the invention in the light of the technical problem it serves to solve and

iii) the replacement requires no real modification of other features to compensate for the change.

If any one of the conditions i) to iii) is not met, the amended claim does not comply with Article 123 (2) or 100(c) EPC.

In the present case, the conditions i) and ii) above are not fulfilled:

– The selection of the milk producing animals is essential for the solution of the problem referred to in the application as filed (page 3, lines 5 to 19) which essentially consists in automatically feeding young animals from a selected one of a plurality of cows. Different milk can also be fed to different groups of young animals so that each young animal can be given milk with the most appropriate composition.

– The selection of the milk producing animals is also explained in the application as filed as essential (see e.g. page 11, line 30 to page 12, line 3: "By such an arrangement it is possible to automatically transport milk from a **selected one** of a plurality of cows from the milking machine 14 to the feed device 6 and to automatically transport milk from a **second selected one** of a plurality of cows from the milking machine 14 to the feed device 6b"; emphasis added).

2.2.1 The respondent's argument that granted claim 1 as well as claim 1 of auxiliary request 2 inevitably imply that the milk producing animals have to be selected is not convincing, because the selection requires some specific means, in particular identification means, to identify a cow approaching the milking station.

2.3 The board therefore concludes that the ground for opposition according to Article 100 (c) EPC 1973 prejudices the maintenance of the patent in view of the subject-matter of the main, first and second auxiliary requests.

3. *Auxiliary request 3 (added subject-matter)*

3.1 Claim 1 of this request differs from claim 1 of the application as filed in that the following features have been added:

a) said plurality of (milk producing) animals are "housed in a first area (1)"

b) the apparatus comprises "a second supply device (6b), and a second milk line (23b) connectable to said second supply device (6b) and further connectable to the milking machine (14), wherein said second milk line (23b) is adapted to automatically transport milk from at least a selected second one of said plurality of milk producing animals to said second supply device (6b),

c) "said first supply device (6, 43) is accessible to young animals that are different from those to

which said second feed supply device (6b) is accessible",

d) "a liquid feed stall (5) is provided in a second area (2) wherein the liquid feed stall (5) comprises said first feed supply device (6) and the second area (2) is defined by second enclosure means (4) and is arranged to house young animals permitted to walk freely in the second area (2), and a liquid feed stall (5b) is provided in a third area (2b) wherein the liquid feed stall (5b) comprises said second feed supply device (6b) and the third area (2b) is defined by third enclosure means (4b) and is arranged to house young animals permitted to walk about freely in the third area",

e) "said animals being different in that those in the third area (2b) are distinguishable from those to the second area (2) through their age, breed, health, size or sex".

Claim 16 differs from independent claim 25 of the application as filed in that the features d) and e) as well as the following features have been added:

a') "said animals being housed in a first area (1)",

b') "automatically collecting milk from at least a selected second one of said plurality of milk producing animals in a second feed supply device (6b) by means of a second milk line (23b) being connectable between said milking machine (14) and said second feed supply device (6b)",

c') "giving young animals access to said first and second supply devices, wherein the young animals that are given access to said first supply device (6, 43) are different from those given access to said second feed supply device (6b)".

3.2 Feature a) or a') is derivable from the application as filed, page 1, lines 22 and 23.

Feature b) has a basis in claim 16 of application as filed. Feature b'), which defines a method step corresponding to the apparatus feature b), can be derived from claim 16 in combination with the characterising portion of claim 25 which defines an analogous method step relating to the first feed supply device (6).

Features c) and c') in combination with features d) and e), respectively, have a basis in page 11, lines 3 to 17 in combination with page 6, lines 12 to 29 and Figure 2.

3.3 The appellant essentially submitted that feature c) (or c')) is disclosed in the application as filed in combination with not only features d) and e) but also further features shown in Figure 2 and referred to in the application as filed on page 11, lines 18 to 29, in particular to the features relating to the valves (33, 24), the level sensors (26, 26b) and the feedback lines (27, 27b). Isolating feature c) or c') from its combination with these further features would represent an unallowable intermediate generalisation of the specific embodiment of Figure 2.

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

– According to feature c), the first supply device is accessible to young animals that are different from those to which the second supply device is accessible. It is clearly recognizable that the accessibility of the first and second supply devices to young animals is not inextricably linked in terms of function or structure with valves (33, 24), level sensors (26, 26b) and the feedback lines (27, 27b) described in the embodiment of Figure 2. Thus, feature c) can be extracted in isolation from these features without infringing the requirements of Article 123 (2) or 100 (c) EPC. The same applies to feature c') in independent claim 16.

3.4 Therefore, the amendments made in claims 1 and 16 of auxiliary request 3 of auxiliary request 3 do not contravene the requirements of Articles 100 (c) EPC 1973 and 123 (2) EPC.

4. *Auxiliary request 3 (inventive step)*

4.1 Document D10 discloses (see particularly the paragraph headed "*Automatic Group Calf Feeder*", pages 188 to 191 and Figure 5.10 on page 190) a liquid feed apparatus for automatic feeding of young animals (calves) comprising

– a first feed supply device which is provided in a second area defined by second enclosure means and arranged to house young animals permitted to walk freely in said second area (the first feed supply

device being provided with a nipple for enabling sucking of liquid feed),

- a first milk line connectable to said first supply device and further connectable to a feeder unit provided in a first area and adapted to automatically transport milk from the feeder unit to said first feed supply device,
- a second feed supply device provided in a third area defined by third enclosure means and arranged to house young animals permitted to walk freely in said third area (the second feed supply device being provided with a nipple for enabling sucking of liquid feed),
- a second milk line connectable to said second supply device and further connectable to the feeder unit and adapted to automatically transport milk from the common feeder unit to said second feed supply device,
- said first feed supply device being accessible to young animals that are different from those to which said second feed supply device is accessible, said young animals being different in that those in the third area are distinguishable from those in the second area through their age or size.

The feeder unit of D10, which comprises a milk substitute powder hopper, a water tank and a mixing vessel, is common to first and second feed supply devices.

D10 also refers - in the context of a semi-automatic feeding system - to the possibility of feeding the calves with milk, in alternative to milk substitute (see the paragraph headed "Milk/Milk Substitute Reheater-feeder", pages 187 and 188).

4.2 The apparatus according to claim 1 essentially differs from D10 in that:

A) the first milk line is connectable to a milking machine arranged for a plurality of animals housed in a first area and is adapted to automatically transport milk from at least a selected one of said plurality of milk producing animals to said first supply device, and

B) the second milk line is connectable to the milking machine and is adapted to automatically transport milk from at least a selected second one of said plurality of milk producing animals to said second supply device.

The method of claim 16 essentially differs from D10 by the steps of:

C) automatically milking a plurality of milk producing animals by means of an automatic milking machine, said animals being housed in a first area,

A') automatically collecting milk from at least a selected one of said plurality of milk producing animals in the first feed supply device by means of a second milk line connectable between the milking machine and the second feed supply device,

B') automatically collecting milk from at least a selected second one of said plurality of milk producing animals in the second feed supply device by means of a second milk line connectable between

the milking machine and the second feed supply device.

4.3 In accordance with the distinguishing features A) and B) (as well as features A'), B') and C)), the milk yielded from a selected (first) animal is supplied to a first group of young animals, while the milk yielded from a selected second animal is supplied to a second (different) group of young animals. Thus, these distinguishing features make it possible to selectively supply fresh milk to different groups of young animals.

Therefore, the technical problem to be solved by the invention as claimed in claims 1 and 16 may be seen in providing an apparatus and method for automatic feeding of young animals which allow for flexible and selective feeding of young animals with fresh milk.

4.4 The claimed solutions (claims 1 and 16) are both based upon the idea of feeding a first group of young animals with milk produced by a first selected milk producing animal and a different group of young animals with milk produced by a second selected animal, wherein the first group is prevented from being fed with milk of the second selected milk producing animal and the second group is prevented from being fed with milk of the first selected milk producing animal.

4.4.1 In this respect, the appellant submitted that claim 1 - in so far as it does not refer to a three way valve (33) ensuring that the milk extracted by the milking machine is selectively transported to either the first (6) or the second (6b) feed supply device - also encompasses an apparatus in which milk obtained from either a first

selected or a second milk producing animal is supplied to both feeding devices, i.e. to both groups of young animals.

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

– Features A and B in claim 1 (as well as features A' and B' in claim 16) refer to "at least a selected one of said ... animals" and "at least a selected second one of said ... animals". These features in combination with the features concerning first and second milk lines (23, 23b), second and third enclosed areas (2, 2b) and first and second feed supply devices (5, 5b) define a one-to-one correspondence between the selected milk producing animals, the respective milk lines (23, 23b) and the respective feed supply devices (6, 6b) so as to ensure that young animals in the second enclosed area (2) have access only to the first feed supply device and those in the third enclosed area (2b) have access only to the second supply device (6b). This provides the advantage that the supply of milk to two different groups of young animals is performed selectively. This construction of the claim is consistent with the patent specification in so far it describes (see paragraph [0061] in conjunction with Figure 2) an apparatus provided with a three way valve 33 ensuring that the milk from the selected is transported either to the first supply device (6) or to the second one (6b) and not to both supply devices. The arrangement of a three way valve (33), however, only represents one of several possibilities of selectively transporting to

either the first group or the second group of young animals.

– The claim construction submitted by the appellant deprives the features concerning the selection of at least two milk producing animals and the presence of two separate feed supply devices of their logical technical meaning and does not solve the technical problem of selectively feeding young animals with fresh milk.

4.5 None of the documents cited by the appellant discloses or suggests the claimed solutions.

D7 discloses a feed apparatus for milk feeding of young animals comprising a feed supply device provided with a reservoir (9) and a nipple (10) for enabling sucking of milk and a milk line connectable to said feed supply device and to milking aggregates (1) arranged for milking a plurality of animals, wherein the milk line is adapted to transport milk from a milk producing animal to the feed supply device. Even if it were to be assumed - as submitted by the appellant - that the feed apparatus is provided not only with a plurality of milk aggregates but also with a plurality of nipples, it cannot be derived from D7 that the access to certain nipples is restricted to one group of calves, while the access to other nipples is restricted to another group of calves.

D5 discloses a feed apparatus for milk feeding of young animals comprising a feed supply device comprising a reservoir (13) and a nipple (14) for enabling sucking of milk, the feed apparatus being associated with a

milk machine (6), a milk line (20) being connected to the feed supply device and to the milking machine (6), wherein the milk line is adapted to transport milk from a cow to the feed supply device so that a calf may be fed with milk. This feed apparatus is used for extracting colostrum: a cow that has recently given birth to a calf is milked in a calving box so that at the same time with milking the calf drinks colostrum from its mother. Since this feed apparatus comprises only one feed supply device, D5 cannot suggest selectively feeding young animals with fresh milk.

D1 discloses a method of and an apparatus for milking animals in which the milk extracted by a milking machine is automatically separated according to its quality or composition and collected in different containers. This citation does not disclose a method or an apparatus for milk feeding young animals. Therefore, also D1 cannot suggest selectively feeding young animals with fresh milk.

4.5.1 In this respect, the appellant submitted the following arguments:

– In D10 the common feeder unit is also used to feed fresh milk to the young animal. In this case, the vessel of the common feeder unit has to be replenished manually with fresh milk. Thus, starting from D10, the technical problem to be solved is to provide an apparatus and a method in which the replenishment of the vessel is carried out automatically.

- D1 teaches that the milk extracted from the milk producing animals by the milking machine is automatically separated and collected in different compartments (7, 7') of a milk tank (6). The skilled person confronted with the problem of automatically replenishing the vessel of the feeder unit of D10 would replace the feeder unit with the milk tank provided with separate compartments and thus arrive at a the claimed apparatus or method without exercising any inventive skill.

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

– As has been explained, the objective problem to be solved by the invention defined in claims 1 and 16 concerns the flexible selective feeding of young animals. This problem is not addressed in D1 in so far as it does not concern a feeding system for young animals. Therefore, the skilled person confronted with this problem would not consider D1.

– Moreover, starting from D10 in which the feeder unit supplies the same liquid feed to all groups of young animals present in the enclosed areas provided with the feed supply devices, the skilled person wishing to solve the problem of automatically replenishing the vessel of the feeder unit would have no need to replace this vessel with the milk tank provided with different compartments of D1 in so far as the solution of this problem would only require that the milking machine of D1 is directly connected to the vessel of D10.

4.6 With regard to inventive step the appellant submitted with the grounds of appeal further arguments based also upon DE-T-69 600 305 (D2), GB-A-2 162 736 (D6) and *"Dairy Cattle"*, 1985, pages 331, 332 and 387 (D9). These arguments are irrelevant for the findings of the present decision because they relate to granted claims 1 and 20. In any case, none of D2, D6 or D9 discloses or suggests the idea upon which the claimed solutions are based.

4.7 Therefore, the subject-matter of claim 1 as well as that of claim 16 involve an inventive step (Article 56 EPC 1973).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the opposition division with the order to maintain the European patent with the following documents:

Claims: 1-23 filed as auxiliary request 3 by letter dated 9 April 2010 and amended during the oral proceedings before the board,

Description: columns 3, 4, 9 filed during the oral proceedings
columns 1, 2, 5, 6, 7, 8 and

Drawings: figures 1-3 of the patent specification.

The Registrar: The Chairman:

G. Magouliotis M. Ceyte