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**Datasheet for the decision
of 15 May 2012**

Case Number: T 2432/10 - 3.2.07
Application Number: 05011542.7
Publication Number: 1602580
IPC: B65B 5/10, B65B 21/18
Language of the proceedings: EN

Title of invention:
Semiautomatic boxing machine

Patentee:
Marchesini Group S.p.A.

Opponent:
KHS GmbH

Headword:
-

Relevant legal provisions:
EPC Art. 56, 100(c), 113(1), 114(2)
RPBA Art. 13(1)(3)

Keyword:
"Violation of right to be heard: no"
"Late-filed document: admitted"
"Late-filed objection under Article 100(c) EPC in respect of a specific feature: admitted"
"Amendments (1st auxiliary request): allowed"
"Inventive step (1st auxiliary request): yes"

Decisions cited:
-

Catchword:
-



Case Number: T 2432/10 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 15 May 2012

Appellant: KHS GmbH
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 9 November 2010
rejecting the opposition filed against European
patent No. 1602580 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: H. Meinders
Members: K. Poalas
I. Beckedorf

Summary of Facts and Submissions

- I. The appellant (opponent) lodged an appeal against the decision of the opposition division to reject its opposition against the European patent No. 1 602 580.
- II. Opposition had been filed against the patent as a whole based on Articles 100(a) EPC (lack of novelty and inventive step) and 100(c) EPC (unallowable amendments).

The opposition division found that the grounds of opposition under Articles 100(a) and (c) EPC do not prejudice the maintenance of the patent as granted.

- III. The following documents are mentioned in the present decision:

D1: DE 29 20 128 C (filed together with the notice of opposition),

D6: EP 0 569 689 A (filed together with the grounds of appeal).

- IV. Oral proceedings took place before the Board on 15 May 2012.

(a) The appellant requested that the case be remitted to the department of first instance and that the appeal fee be reimbursed, alternatively, that the decision under appeal be set aside and that the European patent No. 1 602 580 be revoked.

(b) The respondent (patent proprietor) withdrew - its main request filed with letter of 27 June 2011,

- all of its auxiliary requests filed with letter of 12 March 2012, and

- its second auxiliary request filed during the oral proceedings

to be replaced by its first auxiliary request filed during the oral proceedings.

It requested that in setting aside the decision under appeal the patent be maintained on the basis of the following documents:

description: columns 1, 2 and 5 of the patent as granted,

columns 3 and 4 as filed during the oral proceedings,

claims: 1 to 8 as filed during the oral proceedings as first auxiliary request,

figures: 1 to 5 of the patent as granted.

V. Independent claim 1 according to the first auxiliary request reads as follows (amendments over claim 1 as granted have been struck through):

"Semiautomatic boxing machine, using erected boxes, with the lower flaps folded to define a closed bottom, and with the respective upper flaps (20) substantially spread out and oriented upwards, so as to define an inlet section (22) for the introduction of articles (4), the boxing machine including:

first conveying means (1), which receive and move a plurality of said erected boxes (2), substantially aligned;

a work station (3) situated along said first conveying means (1), the first conveying means (1) being operable to allow each of said erected boxes (2) to dwell in

said work station (3);
second conveying means (41), which receive and move a plurality of articles (4);
abutments means (50) connected to said second conveying means (41) near its terminal portion, said second conveying means (41) conveying said articles (4) toward said abutment means (41) so that a row of articles (4) is formed against the abutment means (50);
a storage plate (42), situated beside said second conveying means (41);
said boxing machine being characterized in that it further includes manipulating means (6) displaceable above said first (1) and second (41) conveying means and above said storage plate (42) said manipulating means (6) being operable in step relation with the first (1) and second (41) conveying means for being positioned above said row of articles (4) formed on the second conveying means (41) against said abutments means (50), the manipulating means (6) picking up the row of articles (4) from the second conveying means (41) with the second conveying means (41) continuing to operate in a continuous manner so as rows of articles (4) are formed periodically against the abutments means (50), the manipulating means (6) ~~either placing each row of articles (4), picked up from the second conveying means (41), into an erected box (2) dwelling in said work station (3) to form a layer of articles (4), or~~ placing each row of articles (4), picked up from the second conveying means (41) onto said storage plate (42) until a layer of articles (4) is formed thereon, the manipulating means (6) then transferring the layer of articles (4) from the storage plate (42) to an erected box (2) dwelling in said work station (3)".

VI. The appellant's arguments can be summarised as follows:

Right to be heard - Article 113(1) EPC

Claim 1 as granted includes two alternatives. According to section 4.2 of the minutes of the oral proceedings before the opposition division these two alternatives have not been treated separately in the discussion concerning inventive step. The opposition division did not take into consideration the second alternative but it closed the inventive step discussion during the oral proceedings immediately after the first alternative had been discussed and after deliberation announced its finding concerning inventive step without giving the appellant (then opponent) the opportunity to orally present arguments against the second alternative.

Thus the appellant's right to be heard as far as it concerns the second alternative of claim 1 as granted has been violated by the opposition division.

The case has therefore to be remitted to the department of first instance and the appeal fee has to be reimbursed.

Admittance of the objection under Article 100(c) EPC into the appeal proceedings in respect of the technical feature "storage plate" of claim 1

The ground of opposition under Article 100(c) EPC was already raised with the notice of opposition and therefore the raising of the additional objection

concerning the "storage plate" cannot be regarded as a fresh ground of opposition.

The objection concerning the "storage plate" was raised at the earliest moment in the appeal proceedings, namely with the grounds of appeal, and the "storage plate" was in any case an issue in the objection under Article 100(c) EPC in connection with the omission of the "forming station" from claim 1, see page 3, item iii of the impugned decision. It is also not a "new fact".

Thus, the objection under Article 100(c) EPC in respect of the technical feature "storage plate" of claim 1 should be admitted into the appeal proceedings.

Admittance of document D6 into the appeal proceedings

The filing of D6 together with the grounds of appeal is the appellant's reaction to the impugned decision.

On the basis of a *prima facie* consideration of D6 it is clear that this document substantiates the appellant's assertions concerning *inter alia* lack of inventive step of the subject-matter of claim 1 as granted.

Thus, D6 should be admitted into the appeal proceedings.

Amendments - Article 100(c) EPC

a) "work station situated along said first conveying means"

Paragraphs [0026] and [0044] to [0046] of the published

patent application refer to the specific embodiment shown in figure 3 having the work station 3 situated at the end of the first conveying means 1.

There is no information in the originally filed application that the work station may be positioned at any arbitrary selected position "along" the first conveying means, i.e. at a middle point or at the beginning of said first conveying means. A positioning of the work station at the beginning of the first conveying means would even contravene the teaching of figure 1 showing the means for taping the lower flaps of the boxes being positioned before the work station.

b) *"manipulating means displaceable above said first and second conveying means and above said storage plate"*

Claim 5 as originally filed and paragraph [0033] of the published patent application refer to the way of operating the manipulating means and require that the manipulating means have to be displaced along the cartesian axes X, Y orthogonal to the feeding direction W. This limitation is not present in claim 1 as granted.

c) *"forming station"*

There is no information in the originally filed application that the forming station consists only of the abutments means and the storage plate.

d) *"storage plate situated beside the second conveying means"*

According to paragraph [0035] of the published patent application the storage plate is substantially coplanar with the second conveying belt, whereby the term "substantially" refers to structural tolerances. This limitation is missing in claim 1.

Admittance of the respondent's first auxiliary request into the appeal proceedings

The respondent's request has been filed at the proceedings, i.e. at a very late stage of the appeal proceedings; it could have been filed in reply to the Board's preliminary opinion within the indicated period. This late-filed request should not be admitted into the appeal proceedings.

Claim 1 according to the first auxiliary request - Inventive step, Article 56 EPC

a) Considering the teaching of D1 alone

The person skilled in the art starting from the boxing machine known from D1 and seeking to solve the problem of achieving a continuous running of the bottle conveyor also in cases where the latter is running at lower speed or irregularly, would provide a storage plate for an intermediate storage of the bottles without exercising an inventive activity. In such a case it would be further obvious to the person skilled in the art that the manipulating means would have to be displaceable above both said conveyors and the storage plate.

b) Considering the teaching of D1 in combination with

the teaching of D6

The person skilled in the art seeking to provide the boxing machine known from D1 with an intermediate storage possibility for the bottles as described above would discover in D6 the teaching of providing a storage plate for the bottles, see claim 13; column 8, lines 34 to 40; figure 5, and also the teaching of providing manipulating means for the bottles displaceable above the first and second conveyors 7, 8, 3 as well as the storage plate. The skilled persons would then apply the above-mentioned teaching of D6 to the boxing machine known from D1 and would arrive to a boxing machine according to claim 1 without exercising an inventive activity.

VII. The respondent argued essentially as follows:

Right to be heard - Article 113(1) EPC

No arguments have been presented by the respondent on this issue.

Admittance of the objection under Article 100(c) EPC into the appeal proceedings in respect of the technical feature "storage plate" of claim 1

The appellant raised with its grounds of appeal a new objection which goes beyond the facts discussed in the notice of opposition. This objection could have been raised much earlier, i.e. with the notice of opposition, and further it cannot be considered as a proper reaction to the negative decision of the opposition division, because claim 1 of the patent

remained unchanged.

Furthermore, the appellant did not give any reason for the lateness of this objection.

Therefore, it should not be admitted.

Admittance of document D6 into the appeal proceedings

The filing of D6 only at the appeal stage cannot be considered as a proper reaction of the appellant to the decision of the opposition division, since claim 1 remained unchanged during the opposition proceedings.

In D6 the bottles are singularly removed from a first crate according to their type and then singularly inserted into different crates according to their type without intermediate storage. Furthermore, the gripping bell in D6 is so constructed to be able to pick up only a single bottle and the surface between the camera and the illuminating means is provided only to allow a short deposit of a single bottle to be tested.

Thus, D6 is not prima facie highly relevant and should not be admitted into the appeal proceedings.

Amendments - Article 100(c) EPC

a) "work station situated along said first conveying means"

As can be seen in figure 1 the box, which is stopped and kept dwelling by the first conveying means for receiving the articles from the manipulating means, has

still a further part of its advancing path to be completed and this further path is present to have the box remain in contact with the first conveying means. There is in any case the first conveying means which further makes the box advance after it has been filled with the articles, see paragraph [0044].

This means that the box, in order to be filled with the articles, does not need to necessarily be placed at the end of the first conveying means, as argued by the appellant.

The skilled person guided by the information disclosed in figure 1 and paragraph [0029] of the published patent application would always position means for taping the lower flaps of the boxes before the work station, independently of the precise position of the work station along the first conveying means.

b) "manipulating means displaceable above said first conveying means and second conveying means and above said storage plate"

According to paragraph [0033] of the published patent application the manipulating means is only **preferably** operated along Cartesian axes X,Y orthogonal to the feeding direction W.

Consequently, this feature does not need to be present in claim 1 as granted.

c) "forming station"

Since all the information in the originally filed application regarding the "forming station" is fully included in claim 1, the replacement of the wording "forming station" by the wording relating to the abutment means, storage plate and second conveying means in said claim does not generate subject-matter extending beyond the content of the application as originally filed.

d) "storage plate situated beside the second conveying means"

Only the essential features of the storage plate have to be included into the independent claim 1. The use of the term "substantially" in paragraph [0035] of the published patent application in connection with the aspect of co-planarity between the storage plate and the second conveying belt makes evident that "co-planarity" is not an essential aspect or characteristic of the "storage plate".

Admittance of the respondent's first auxiliary request into the appeal proceedings

The filing of the first auxiliary request during the oral proceedings had been announced in advance in the last sentence of the respondent's letter dated 12 March 2012. Said letter was the respondent's reaction to the Board's preliminary opinion annexed to the summons to oral proceedings.

The first auxiliary request being directed to only the second alternative of claim 1 as granted does not raise any new issues, as it was also present in claim 1 as granted.

Neither the appellant nor the Board can have been taken by surprise by the filing of the first auxiliary request and therefore it should be admitted into the appeal proceedings.

*Claim 1 according to the first auxiliary request -
Inventive step, Article 56 EPC*

a) Considering the teaching of D1 alone

In the boxing machine of D1 the abutments at the end of the bottle conveyor allow that the bottles can arrive at the end of the bottle conveyor and accumulate one after the other in a row. Thus the skilled person will not be worried about the fact the box could arrive with a lower speed or at irregular intervals because the presence of the abutment means and the continuous operation of the bottle conveyor already allow to temporarily store the bottles in a row. Thus, he would not necessarily be prompted to add a storage plate for such a kind of situation.

Furthermore, no incentive can be found in D1 for providing manipulating means as claimed in claim 1.

b) Considering the teaching of D1 in combination with the teaching of D6

Since neither D1 nor D6 discloses a storage plate which can receive a row of articles, or successive rows of articles from a manipulating means to form a layer of articles thereon, nor the transfer of a layer of articles therefrom, then also the combination of the teachings of said documents cannot lead to a boxing machine according to claim 1.

Reasons for the decision

1. *Right to be heard - Article 113(1) EPC*

Under point 2 of the annex to the summons to oral proceedings the Board gave the following provisional opinion on the alleged violation of the appellant's right to be heard during the opposition proceedings:

"The appellant confirms that the discussion of novelty was held at the oral proceedings for the two alternatives of claim 1, for D1 and D2, successively. This is confirmed in the minutes and in the decision: "since claim 1 is a so called "OR-claim" both cases where (*sic*) discussed". This means that the opposition division was well aware of the presence of two alternatives in claim 1 as argued by the appellant.

The appellant argues that the opposition division during the inventive-step-discussion did not treat the two alternatives of claim 1 "explicitly" ("ausdrücklich") separately.

The issue is:

would the appellant have expected that the discussion

of inventive step followed the same procedure, without any further activity on its part without any further action on its part?

or;

if a party has concerns about this, should it not verify this before the opposition division adjourns for deliberation, or raise the issue when the result of the deliberation shows that the division did not proceed as expected?

The minutes of the oral proceedings do not show any of the above, nor has there been any request for correction of the minutes to the effect that such an objection has been made but has been overruled by the division depriving the appellant of its right to present its arguments. Such an objection, if made at the oral proceedings, would clearly have qualified as an "essential" item or a "relevant statement" for the purposes of the Rule 124 EPC to be included in the minutes.

Accordingly, the Board cannot definitively conclude that there has been a violation of the appellant's right to be heard. The consequence would be that the appeal fee would not be reimbursed and that the case would not be remitted".

The above-mentioned opinion of the Board has neither been commented on nor contested by the appellant. In the oral proceedings it also did not further wish to address this issue.

Under these circumstances, the Board having taken into consideration once again all the relevant aspects

concerning the present issue maintains its opinion expressed in said annex. Thus, it cannot definitively be concluded that the appellant's right to be heard has been violated. As a consequence the case does not need to be remitted and the appeal fee does not need to be reimbursed.

2. *Admittance of the objection under Article 100(c) EPC into the appeal proceedings in respect of the technical feature "storage plate" of claim 1*

The Board agrees with the appellant that the opposition ground under Article 100(c) EPC was already raised with the notice of opposition and that therefore the raising of the additional objection concerning the "storage plate" cannot be regarded as a fresh ground of opposition.

As to whether said objection could have been raised earlier, the Board notes that the opposition division proclaimed in its decision that the "only" constituents of the "forming station", said last being deleted in claim 1 as granted, are the "abutment means (50)" and the "storage plate (42)". The appellant then put forward at the earliest possible moment, namely with the grounds of appeal, an objection focused on said "storage plate", with supporting arguments. This objection can be seen as a "new fact" within an existing ground of opposition.

Under these circumstances the Board exercises its discretion and admits this objection under Article 100(c) EPC into the appeal proceedings in accordance with Article 114(2) EPC.

3. *Admittance of document D6 into the appeal proceedings*

The Board considers the filing of D6 together with the grounds of appeal as the appellant's reaction to the opposition division's decision.

On the basis of a *prima facie* consideration of D6 there may be an arguable case that this document substantiates the appellant's assertions concerning *inter alia* lack of inventive step of the subject-matter of claim 1 as granted.

Under these circumstances the Board exercises its discretion and admits D6 into the appeal proceedings in accordance with Article 114(2) EPC.

4. *Amendments - Article 100(c) EPC*

4.1 *"work station situated along said first conveying means"*

4.1.1 The originally filed application mentions that the box has to be received by the first conveying means, that the box has to be made to move forward by the first conveying means, that the box has to be stopped and kept dwelling by the first conveying means for allowing its filling and then, after the box has been filled with the articles, that it has to be further made to move forward by means of the same first conveying means which move and transfer the filled box toward the outlet of the machine, see paragraphs [0026] and [0038] to [0044] of the published patent application. This disclosure does not require that there is a technical

necessity that the box is stopped and kept dwelling only at the end of the first conveying means.

4.1.2 The appellant argues that the boxing machine shown in figure 1 has means 17 for taping the lower flaps of each box 2 positioned before the working station 3, see paragraph [0016] of the published patent application. A positioning of the work station "along" the first conveying means, as claimed now in claim 1, encompasses *inter alia* a positioning of the work station at the middle or even at the beginning of the first conveying means. A positioning at the middle of the conveying means makes technically no sense. A positioning at the beginning of the first conveying means would mean a positioning before the means 17 for taping the lower flaps of the box, which again would technically make no sense. It therefore, by necessity, must be at the end.

4.1.3 The Board considers that the skilled person extracts from figure 1 and paragraph [0029] of the published patent application the clear teaching that the means for taping the lower flaps of the boxes has to be positioned before the work station. Therefore, in case the skilled person would position the work station along the first conveying means at a place other than the end position of said conveying means, he would automatically foresee a space before the workstation for the means 17 for taping the lower flaps of the boxes, avoiding thereby any kind of technically meaningless constructions. Further, the first conveying means moving the boxes can in any case include the rollers shown in figure 1 as following downstream of the side belts 1, making the work station placed along the first conveying means.

4.1.4 From the above the Board concludes that the amendment related to the work station situated "along" the first conveying means is directly and unambiguously derivable from the originally filed application.

4.2 *"manipulating means displaceable above said first conveying means and second conveying means and above said storage plate"*

4.2.1 Originally filed claims 1, 2 and 3 relating to the presence of the abutment means and the storage plate, said claims forming the basis for claim 1 as granted, do not require that the manipulating means has necessarily to be displaced only along Cartesian axes X,Y which have to be orthogonal to the feeding direction of the first and second conveying means. This specific kind of displacement has been the subject of further dependent claims.

4.2.2 Furthermore, at paragraph [0032] of the published patent application it is stated that the machine has also manipulating means for picking up groups of articles and releasing them into corresponding boxes dwelling in the work station. In this paragraph there is also no compulsory teaching that the manipulating means has to be displaced along Cartesian axes X, Y which have further to be orthogonal to the feeding direction. Moreover, in the following paragraph [0033] it is stated that the manipulating means is **preferably** operated along Cartesian axes X,Y orthogonal to the feeding direction W.

4.2.3 Consequently, the feature that the manipulating means is operated along Cartesian axes X,Y orthogonal to the feeding direction W does not necessarily need to be present in claim 1 as granted.

4.3 *"forming station"*

4.3.1 The Board is satisfied that all the information in the originally filed application regarding the "forming station" is fully included in claim 1 and that thus, when claim 1 is read in its entirety as the combination of the features relating to the presence of the abutment means and the storage plate with the features relating to the operation of the manipulating means in connection with the presence of said abutment means and said storage plate, together with the description of the operation of the second conveying means in the originally filed application, the replacement of the wording "forming station" by the wording relating to the abutment means, storage plate and second conveying means does not generate subject-matter extending beyond the content of the application as originally filed.

4.4 *"storage plate situated beside the second conveying means"*

The Board follows the respondent's argument that only the essential features of the storage plate have to be included into claim 1 and that it is therefore not compulsory to include the term "coplanar" into claim 1. The term "substantially" is used in connection with the aspect of co-planarity between the storage plate and the second conveying belt, see paragraph [0035] of the published patent application. As the co-planarity is

not essential it is evident that this further aspect or characteristic of the feature "storage plate", need neither figure in the claim. The co-planarity is in any case not an issue due to the mobility of the manipulating means along the vertical Y-axis.

4.5 From the above follows that the ground of opposition according to Article 100(c) EPC does not hold.

5. *Admittance of the respondent's first auxiliary request into the appeal proceedings*

Claim 1 as granted is an "either .or"-claim for a machine "capable" of "two alternative uses". The Board found during the oral proceedings that the machine according to claim 1 as granted, "capable" of the "first alternative use", did not involve an inventive step. Thereupon the respondent filed the first auxiliary request with claim 1 being directed only to the machine according to claim 1 as granted "capable" of the "second alternative use".

The Board notes firstly, that although said first auxiliary request had not been filed in the written proceedings before or at the beginning of the oral proceedings, the filing of such a request during the oral proceedings had been announced in the last sentence of the respondent's letter dated 12 March 2012, said last being the respondent's reaction to the Board's preliminary opinion annexed to the summons to oral proceedings. It notes further that since said second alternative was in any case part of claim 1 as granted, it does not concern new subject-matter. It further was an appropriate reaction to the course of

the oral proceedings which could not have taken the appellant by surprise. It does not add any complexity to the case and both the Board and the appellant could deal with it without adjournment of the oral proceedings.

The Board exercises therefore its discretion under Article 13(1) and (3) RPBA and admits the respondent's first auxiliary request into the appeal proceedings.

6. *Claim 1 according to the first auxiliary request:
Inventive step – Article 56 EPC*

6.1 Considering the teaching of D1 alone

6.1.1 The appellant argues that the boxing machine according to claim 1 differs from the one known from D1 in that it comprises a storage plate which can be used for receiving single rows of bottles and manipulating means capable of displacing itself back and forwards between the first conveying means and the storage plate with one row of bottles at a time and then picking up a layer of bottles from the storage plate and transfer it to the box. This storage plate allows an intermediate storage of (a) row(s) of bottles intended to be stored in an erected box. Next to the continuously running bottle conveyor 18 of D1 the existence of a storing plate allows the continuous running of the bottle conveyor 18 also in cases where the box conveyor 10 has not yet provided a box, because of lower speed or irregular movement. Thus, the person skilled in the art seeking to solve the problem of achieving a continuous running of the bottle conveyor also in cases where the box conveyor is running at lower speed or irregularly,

would provide a storage plate for an intermediate storage of the bottles without exercising an inventive activity. In such a case it would be further obvious to the person skilled in the art that the manipulating means would have to be displaceable above both said conveyors and the storage plate.

6.1.2 The Board cannot follow the above-mentioned argumentation of the appellant for the following reasons:

6.1.3 Firstly, the boxing machine according to claim 1 differs from the boxing machine known from D1 in that it is provided with a storage plate for receiving rows of articles until a layer is formed thereon, and also in that it is provided with manipulating means capable of picking up a single row of articles at a time as well as of a layer of articles, whereby said manipulating means is displaceable above the first conveying means, above the second conveying means and above the storage plate for:

- picking up a single row of articles, when displaced above the second conveying means;
- releasing the single row of articles picked up from the second conveying means, when displaced above the storage plate;
- picking up a layer, when displaced above the storage plate;
- releasing the layer picked up from the storage plate into the box, when displaced above the first conveying means.

6.1.4 These differentiating features allow the boxing machine according to claim 1 to deal not only with bottles, as

it is the case of the machine known from D1, but also with other kind of articles, different from the bottles in shape, size and structure (i.e. soft articles as the case may be with packs of paper napkins/serviettes, packs of diapers, etc., or blister packages) which require to be grouped before they are inserted into a box. This allows high versatility in the box filling, independently from the type of the treated articles, see column 2, lines 40 to 44 of the patent in suit.

6.1.5 Secondly, if the crates are conveyed in the machine of D1 with a lower speed or if they arrive irregularly there is no problem to be solved, because the abutments at the end of the bottle conveyor allow the bottles to arrive at the end of the bottle conveyor and accumulate one after the other in a row. Further, when all the three rows of gripping elements of the gripping head of D1 have picked up their corresponding row of bottles, the gripping head is further displaced in such a manner that the three rows of bottles are put inside the crate and then it moves back to its initial position above the bottle conveyor. During that time, a row of bottles longer than a row of 4 bottles may be formed without problem against the abutment means at the end of the bottle conveyor; it does not affect the correct functioning of the machine.

6.1.6 It is therefore evident that the skilled person will not be worried about the fact that the crate could arrive with a lower speed or with a delay because the presence of the abutment means and the continuous operation of the bottle conveyor already allow to temporarily store the bottles one after the other, thus he would not necessarily be prompted to think about the

addition of a storage plate for such a kind of situation.

6.1.7 Furthermore, the gripping head of D1 is designed to move only back and forward between the bottle conveyor and the crate conveyor in a certain manner. After a first row of bottles has been picked up by the first row of the gripping elements of the gripping head, this first row, just after having been picked up, cannot be directly placed into the crate because the gripping head first picks up - one after the other - two more rows of bottles before moving to the crate in which the layer of bottles is to be placed.

When the gripping head has picked up a row of bottles with a corresponding row of gripping elements, the gripping head is moved upwards only to such a level (figure 5) that the bottles still remain well below the level of the guiding rails. The existing mechanism also prevents that the gripping head can move in a direction beyond the bottle conveyor.

Thus, installing a storage plate and having it store row(s) of bottles would require an extensive redesign of the machine of D1, contrary to its originally envisaged functioning.

The argument of the appellant is therefore based on hindsight.

6.1.8 For the above-mentioned reasons the Board considers that the teaching of D1 alone cannot lead the person skilled in the art in an obvious manner to the subject-

matter of claim 1.

- 6.2 Considering the teaching of D1 in combination with the teaching of D6
- 6.2.1 The appellant argued further that the person skilled in the art seeking to provide the machine known from D1 with an intermediate storage possibility for the bottles would discover in D6 the teaching of providing a storage plate for bottles, said storage plate being positioned next to the second conveyor 3, see claim 13; column 8, lines 34 to 40; figure 5. D6 also provided the teaching of providing manipulating means for the bottles displaceable above the first and second conveyors 7, 8, 3 and the storage plate. The skilled person would therefore apply the above-mentioned teaching of D6 to the machine known from D1 to solve the problem discussed and would arrive at a machine according to claim 1 without exercising an inventive activity.
- 6.2.2 The Board can neither follow this argument, for the following reasons:
- 6.2.3 The Board considers that the manipulating means displaceable above the first conveyors 8, 9 and the second conveyor 3 as well as the storage plate of the machine of D6 is not capable of picking up **a row of bottles**, nor is the storage plate capable of successively receiving **single rows of bottles** until a layer of bottles is formed thereon.
- 6.2.4 The application of this teaching of D6 would not only still require an extensive redesign of the machine of

D1, as already discussed in point 6.1.7 above, it would also not lead to a boxing machine according to claim 1.

- 6.3 From the above the Board concludes that the subject-matter of claim 1 involves an inventive step and meets therefore the requirements of Article 56 EPC.

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 with the order to maintain the patent on the basis of the following documents:

description: columns 1, 2 and 5 of the patent as granted,
columns 3 and 4 as filed during the proceedings,

claims 1 to 8: as filed as first auxiliary request during the oral proceedings,

figures 1 to 5: of the patent as granted.

The Registrar:

The Chairman:

A. Counillon

H. Meinders