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**Datasheet for the decision
of 8 June 2018**

Case Number: T 1516/14 - 3.2.04

Application Number: 07793848.8

Publication Number: 2046132

IPC: A22C21/04, A22B5/08

Language of the proceedings: EN

Title of invention:
DEVICE AND METHOD FOR SCALDING POULTRY

Patent Proprietor:
Marel Stork Poultry Processing B.V.

Opponent:
Linco Food Systems A/S

Headword:

Relevant legal provisions:
EPC Art. 100(b), 83, 112

Keyword:

Sufficiency of disclosure - (yes)

Grounds for opposition - fresh ground for opposition (yes)

Referral to the Enlarged Board of Appeal - (no)

Remittal to the department of first instance - (yes)

Decisions cited:

G 0010/91, G 0002/93

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 1516/14 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 8 June 2018

Appellant: Marel Stork Poultry Processing B.V.
(Patent Proprietor) Handelstraat 3
5831 AV Boxmeer (NL)

Representative: Patentwerk B.V.
P.O. Box 1514
5200 BN 's-Hertogenbosch (NL)

Respondent: Linco Food Systems A/S
(Opponent) Vestermøllevej 9
8380 Trige (DK)

Representative: Stork Bamberger Patentanwälte PartmbB
Meiendorfer Strasse 89
22145 Hamburg (DE)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 26 May 2014
revoking European patent No. 2046132 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman A. de Vries
Members: J. Wright
C. Schmidt
G. Martin Gonzalez
T. Bokor

Summary of Facts and Submissions

I. The appellant-proprietor lodged an appeal, received 11 July 2014, against the decision of the Opposition Division posted on 26 May 2014 revoking European patent No. 2046132 pursuant to Article 101(3) (b) EPC. The appeal fee was paid at the same time. Their statement setting out the grounds of appeal was filed on 6 October 2014.

II. Opposition was based, *inter alia*, on insufficiency of disclosure (Article 100(b) EPC with Article 83 EPC).

The Opposition Division held that the above ground for opposition prejudiced the maintenance of the patent as granted, while claims amended according to auxiliary requests likewise failed to meet the requirements of Article 83 EPC.

III. Oral proceedings before the Board were duly held on 8 June 2018.

IV. The appellant-proprietor requests that the decision under appeal be set aside and the patent maintained as granted, in the alternative, according to a first auxiliary request, that the decision under appeal be set aside and the case remitted to the first instance for decision on the remaining grounds of opposition, or as second auxiliary request that the patent be maintained with claims according to the auxiliary request filed with letter dated 6 October 2014, or according to a third auxiliary request that the decision under appeal be set aside and the case remitted to the first instance for consideration of the remaining opposition grounds in respect of the set of claims of the second auxiliary request.

The respondent-opponent requests that the appeal be dismissed.

V. The independent claims according to the main request (as granted) read as follows:

"1. Device (1, 20, 30) for scalding poultry (9, 25, 32, 50, 83, 92), comprising:

- a conditioning space (2, 21, 34, 70) for composing a scalding medium,

- a processing space (7, 22, 31, 80, 90) provided with transport means (8, 33, 52) which define a transport path (81, 91) for the poultry (9, 25, 32, 50, 83, 92) leading through the processing space (7, 22, 31, 80, 90), and

- dispensing means (10, 24, 40, 41, 42, 43, 53, 54, 57, 58, 85, 86, 87, 88, 89, 93, 94) for the scalding medium connecting the conditioning space (2, 21, 34, 70) to the processing space (7, 22, 31, 80, 90),

the device (1, 20, 30) is for scalding poultry (9, 25, 32, 50, 83, 92) comprising a full plumage, characterized in that

the conditioning space (2, 21, 34, 70) is for composing a partially or almost fully saturated scalding medium with a dew point lying in the range of [49-61]°C and not exceeding the wet bulb temperature, and

the dispensing means (10, 24, 40, 41, 42, 43, 53, 54, 57, 58, 85, 86, 87, 88, 89, 93, 94) is provided with at least one outlet opening (10, 43, 53, 54, 87, 88) which is directed toward the transport path (81, 91) and with which the composed scalding medium is carried from the conditioning space (2, 21, 34, 70) into the transport path (81, 91), as a result of which liquid from the scalding medium condenses onto the poultry (9, 25, 32, 50, 83, 92)".

"13. Method for scalding poultry (9, 25, 32, 50, 83, 92), comprising the processing steps of:
A) composing a scalding medium;
B) carrying into a processing space (7, 22, 31, 80, 90) pouhry [sic] (9, 25, 32, 50, 83, 92) for scalding; and
C) supplying the scalding medium to the processing space (7, 22, 31, 80, 90), whereby the scalding medium is partially or almost fully saturated when contacting the poultry and composed with a dew point lying in the range of [49-61]°C and not exceeding the wet bulb temperature;
the poultry (9, 25, 32, 50, 83, 92) are carried in the processing space (7, 22, 31, 80, 90) comprising full plumage, and
the scalding medium is supplied to the processing space (7, 22, 31, 80, 90) such that at least one jet of the scalding medium is formed which is directed at the poultry (9, 25, 32, 50, 83, 92)".

VI. The appellant-proprietor argued as follows:

Sufficiency of disclosure

The invention as claimed in the patent as granted is sufficiently disclosed. In particular, the feature "and not exceeding the wet bulb temperature" in claims 1 and 13 refers back to the immediately preceding "dew point" feature. Since the dew point temperature can never exceed the wet bulb temperature, this aspect of the invention is sufficiently disclosed.

Added subject matter

No agreement is given for the introduction of the added subject matter ground for opposition under Article 100(c) with 123(2) EPC.

Referral of a question to the Enlarged Board of Appeal
The referral of a question to the Enlarged Board of Appeal is not justified, as the question is not relevant to the case.

Remittal

The Board of appeal should deal with all outstanding issues if these are in favour of the appellant-proprietor. If not, the case should be sent back to the opposition division.

VII. The respondent-opponent argued as follows:

Sufficiency of disclosure

The invention as claimed in the patent as granted is insufficiently disclosed. It is ambiguous because the feature "and not exceeding the wet bulb temperature" can be read in two ways. The skilled person would reject both of these as impossible, so the invention is insufficiently disclosed.

Added subject matter

Claim 1 as granted adds subject matter extending beyond the application as filed.

Referral of a question to the Enlarged Board of Appeal
In assessing sufficiency of disclosure, the Board has merely assessed whether the claim has an internal logic and is syntactically correct. The Enlarged Board of appeal should decide whether sufficiency of disclosure can be reduced to such an examination because this is a point of law of fundamental importance.

Remittal

The Board of Appeal should deal with all outstanding issues. Due to the interpretation of the disputed feature which demonstrates that the feature is technically superfluous, it becomes evident that the subject matter of claims 1 and 13 is manifestly not new or lacking in inventive step. Therefore, little effort would be required for the Board to reach a conclusion favourable to the appellant-opponent. However, all of the objections already raised are maintained.

Reasons for the Decision

1. The appeal is admissible.
2. Background

The invention relates to a device and method for scalding poultry so that plucking of feathers becomes easier (see published patent specification, paragraphs [0001], [0002] and claims 1 and 13).

According to the invention, a scalding medium of gas partially/nearly saturated with a liquid is prepared and this is blown onto the birds where it condenses (see specification, paragraphs [0005] and [0010]).

3. Main request, claims 1 and 13, sufficiency of disclosure, Article 100(b) with 83 EPC
- 3.1 The impugned decision found the invention as defined in claims 1 and 13 to be insufficiently disclosed because they define the irreconcilable requirements that the scalding medium is at the same time saturated and not saturated (see reasons, point 13.1.3). As will now be explained, the Board takes a different view and

considers that the invention according to claims 1 and 13 is sufficiently disclosed.

- 3.2 The respondent-opponent considers that the authentic English text of claim 1 contains an ambiguity in that, according to a first possible reading, the feature "and not exceeding the wet bulb temperature" might refer back to the dew point, whereas in line with a second possible reading, the feature might refer back to the scalding medium itself, in other words draw comparison to the actual or dry bulb temperature of the medium.

Thus, the skilled person may read the claim to define that the scalding medium has a temperature, that is a dry bulb temperature, not exceeding the wet bulb temperature. Alternatively, they may read that the dew point of the scalding medium has a dew point lying in the range of [49-69°] and that this dew point is defined as not exceeding the wet bulb temperature. It is not disputed that the latter (dew point not exceeding the wet bulb temperature) is always true for a fluid-vapour/gas medium: the dew point of a non-saturated (fluid-vapour/gas) medium is always lower than the wet-bulb temperature, whereas, when the medium is saturated, the dew point and wet bulb temperatures are equal. Therefore, the dew point never exceeds the wet bulb temperature.

The respondent-opponent goes on to argue that the skilled person would dismiss the second reading (dew point not exceeding wet bulb temperature), because, as this is something that is always true, a psychrometric inevitability, it cannot distinguish the invention from the prior art. A feature making no contribution to the invention would be without purpose and therefore illogical. This, they argue, is all the more true for

the present claim 1 because the feature was introduced in examination with the intention of rendering the invention distinct from the prior art. Thus, this interpretation would serve no purpose in defining the invention, but merely leave a gap in the definition of the invention. Since this cannot be what was intended when the patent was granted, the skilled person would reject this interpretation of the feature as illogical and not credible.

This, so the respondent-opponent argues, inevitably leads the skilled person to the first interpretation of the above feature, namely that the scalding medium has a temperature, that is a dry bulb temperature, not exceeding the wet bulb temperature. This condition can only be fulfilled if the fluid-vapour/gas is saturated (when wet and dry-bulb temperatures are equal). Thus, the claimed subject matter contains the unresolvable contradiction of the scalding medium being both saturated and non-saturated, so the invention as claimed cannot be carried out.

3.3 The Board agrees with the respondent-opponent that the wording "and not exceeding the wet bulb temperature" could in its present position in the wording of claim 1 refer back to either the scalding medium or the dew point, so is ambiguous. The skilled person who is intent on making technical sense of the claims reads them with synthetical propensity, that is by building up rather than tearing down, taking into account the whole disclosure of the patent (Case law of the Boards of Appeal, 8th edition 2016, II.A.6.1). Faced with such an ambiguity, they will look to the entire specification, (description, drawings and claims), to interpret the feature. Nowhere else in the patent will they find the precise wording used in claim 1. This is

not disputed. The wet bulb temperature is only mentioned in paragraph [0005], but there the discussion is neither of the scalding medium (dry bulb temperature) nor of the dew point not exceeding the wet bulb temperature. Rather, according to the description, "the temperature of the poultry in the processing space will also not exceed the wet bulb temperature, at least as long as the skin has not dried up as a result of evaporation or as long as the liquid on the skin is not heated any further". It is undisputed that in relation to the poultry this statement makes perfect technical sense. The Board concludes that the contradictory interpretation according to which the (dry bulb) temperature of the scalding medium does not exceed the wet bulb temperature finds no support elsewhere in the patent.

However, the corresponding feature in the independent method claim 13 reads: "whereby the scalding medium is partially or almost fully saturated when contacting the poultry and composed with a dew point lying in the range of [49-61]°C and not exceeding the wet bulb temperature". In the Board's view, the syntax of this feature has the "and not exceeding the wet bulb temperature" unambiguously referring back to the preceding "dew point" with which the medium is composed, rather than the scalding medium itself. Thus this would point to the second reading of the above feature in claim 1 (dew point not exceeding wet bulb temperature) being the correct reading. Therefore the patent does elsewhere, namely in claim 13, provide support for a reading in which it is the dew point that should not exceed the wet bulb temperature.

The skilled person finds nothing in the whole disclosure that supports the contradiction inherent in

the first reading, or indeed anything that would directly support the first reading in some other manner. On the other hand, he does find support for the second reading. The Board can but conclude that for this reason, the skilled person would reject the contradictory reading of the claim in favour of the other reading.

- 3.4 The Board does not share the respondent-opponent's view that the skilled person would reject the second reading of the relevant claim feature (dew point not exceeding wet bulb temperature) as being illogical or not credible, as it does not contribute anything to the invention.

In the Board's view the skilled person approaches a claim from a purely technical viewpoint, not the patent technical or patent legal viewpoint of the patent professional. That a feature may not contribute to an invention because it merely expresses the technically obvious does not make it illogical or not credible in a purely technical sense. Naturally, from the point of view of an opponent or a diligent examiner patentability cannot credibly rely on such a feature, but that is not relevant to the question under consideration.

In the Board's view the the skilled person, exactly because they are first and foremost interested in making technical sense of a claim, will on first reading always reject a technically non-sensible reading in favour of a sensible one if they have to choose between different possible readings. According to established jurisprudence (see Case Law of the Boards of Appeal, 8th edition, 2016 (CLBA), II.A.6.1, and the decisions cited therein), when considering a

claim, the skilled person thus rules out interpretations which are illogical or which do not make technical sense. For them, a reading that results in a technical impossibility (scalding medium must be both saturated and non saturated) is technically non-sensible, i.e. technically illogical or not credible. It may be that when they read the claim in the light of the whole disclosure they may revise that first reading, because for example the description clearly supports the technically non-sensible reading. That is not the case here, where as stated there is no support anywhere else in the patent for the technically non-sensible reading that scalding temperature does not exceed wet bulb temperature.

In particular, from their technical knowledge of psychrometry, the skilled person is familiar with the well established and generally known meanings of the terms "dew point" and "wet bulb temperature" and they know from their general knowledge that the dew point temperature never exceeds the wet bulb temperature, because it is an inherent psychrometric condition of a fluid-vapour/gas medium. Therefore, in the Board's view, the second reading of the relevant claim feature makes perfect technical sense as always true and is both technically logical and credible, whereas the first reading clearly is not.

In the present case, as already explained, the above interpretation makes perfect technical sense and is logical, indeed it cannot be otherwise. Thus it will not be rejected by the skilled person as being an impossible interpretation of the relevant feature.

3.5 In conclusion the above feature is to be interpreted according to the second reading, namely as defining

that the dew point of the partially or almost fully saturated scalding medium has a dew point lying in the range of [49-61]°C and that this dew point does not exceed the wet bulb temperature (of the scalding medium).

3.6 The Board must therefore examine, based on this interpretation, whether the invention is sufficiently disclosed. Article 83 EPC requires that the European patent application shall disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. In accordance with established jurisprudence, as summarised in G 2/93, point 4, "in order to meet the requirements of Article 83 EPC, a European patent application [European patent in Article 100(b)] must therefore contain sufficient information to allow a person skilled in the art, using his common general knowledge, to perceive the technical teaching inherent in the claimed invention and to put it into effect accordingly."

3.7 Thus, the consideration as to whether or not a particular feature distinguishes the claimed subject matter from the prior art, or indeed whether or not it is merely a statement of something that is inherently true, plays no role in assessing sufficiency of disclosure. Nor is it for the Board to speculate as to why a particular feature was added to the claim in examination proceedings. The subjective intentions of the patentee are relevant for the purposes of interpreting the claims only to the extent that these intentions are explicitly formulated in and therefore derivable from the patent specification itself. In short, the Board must assess whether the skilled person can carry out the invention from the information in the

patent and the skilled person's general knowledge alone.

3.8 As already explained, the dew point temperature of a fluid-vapour/gas medium never exceeds the wet bulb temperature. Therefore, far from the skilled person being unable to carry out the aspect of the invention defined by this particular feature, they can but achieve this feature when composing a partially or almost fully saturated scalding medium as the claim requires. Therefore, this aspect of the invention is sufficiently disclosed.

3.9 Claim 13

Method claim 13 defines, inter alia, that "the scalding medium is partially or almost fully saturated when contacting the poultry and composed with a dew point lying in the range of [49-61]°C and not exceeding the wet bulb temperature...".

As already stated previously the formulation in claim 13 is unambiguous as regards the dew point not exceeding the wet bulb temperature. For the same reasons as apply to claim 1, the Board finds that this aspect of the invention is sufficiently disclosed.

3.10 At the oral proceedings before the Board (see minutes, page 2), the respondent-opponent no longer argued that the invention as defined by the remaining features of claims 1 and 13 could not be carried out by the skilled person. Thus, the respondent-opponent was of the opinion that, in respect of these features, the subject matter of claims 1 and 13 was sufficiently disclosed. The Board shares this opinion.

3.11 Therefore, from the above, the Board comes to the conclusion that the invention as claimed in claims 1 and 13 as granted is sufficiently clear and completely disclosed for it to be carried out by the skilled person.

4. In their reply to the appeal (see letter of 9 April 2015, section 1.2) the respondent-opponent raises the issue of added subject matter vis-à-vis granted claim 1. This amounts to the introduction of a fresh ground for opposition in appeal (Article 100(c) with 123(2) EPC). According to G 10/91 (see Headnote, point 3 and Reasons, point 18) such a fresh ground can only be introduced with the agreement of the patent proprietor. This agreement has not been given (see the appellant-proprietor's letter of 2 May 2018, third page), therefore, the Board does not have the power to consider this issue.

5. Request of the respondent-opponent for referral of a question to the Enlarged Board of Appeal

5.1 Article 112 EPC provides for the possibility of referring questions of law to the Enlarged Board "in order to ensure uniform application of the law or if a point of law of fundamental importance arises" (paragraph (1)).

In the present case the respondent-opponent has asked for referral of a question concerning the assessment of sufficiency of disclosure under Article 83 EPC. The question can be summarised as: whether the assessment for the clear and complete disclosure of an invention, so that it can be carried out, under Article 100 (b) EPC (Article 83 EPC), may be reduced to the assessment of merely an internal logic and/or the correct syntax

of a claim, so that the overall teaching of the patent as a whole, in particular the problem to be solved, can be disregarded?

5.2 As already explained, the jurisprudence concerning how sufficiency of disclosure is to be assessed (see point 3.6 above) is well established and is uniformly applied. Nor does the Board depart from this in the present case. In particular, the Board does not rely solely on internal logic or syntax of the claim to arrive at its conclusion.

5.3 In the present case, the Board has established that the invention as claimed in the independent claim 1 can be carried out by analysing the features of claim 1 in the context of the whole patent. In so doing the Board has moreover approached the claim as does the skilled person to make technical sense of it, using the general knowledge of the skilled person. Therefore, the question proposed for referral is not relevant to the case in hand.

5.4 In the light of the above, the Board concludes that there is no justification for referring the question posed to the Enlarged Board of Appeal.

6. Remittal

6.1 In accordance with Article 111(1) EPC, second sentence, the Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution.

Since the main purpose of the appeal proceedings is to give the losing party a possibility to challenge the

decision of the opposition division on its merits (see G 10/91, point 18), remittal in accordance with Article 111(1) EPC is normally considered by the Boards in cases where the opposition division issues a decision solely upon a particular issue and leaves other substantive issues undecided.

6.2 As explained above, the only reason for rejecting the main request was the consideration of the opposition ground of insufficient disclosure. The decision did not consider the opposition grounds of novelty and inventive step raised under Article 100(a) EPC having regard to various documents and an alleged public prior use (see notice of opposition, pages 5 to 8), all these objections being maintained in appeal proceedings.

6.3 Although both parties have requested that the Board deal with all outstanding issues, in both cases this was conditional on the Board finding in favour of the respective party and without consideration of the arguments and evidence adduced against inventive step. The Board can of course not honour both requests. Both parties do in fact request remittal if the arguments and evidence against inventive step are to be examined. At the oral proceedings before the Board the respondent expressly stated that he would not withdraw them. Consequently, the parties' relevant request is for remittal.

6.4 Furthermore, examination of novelty and inventive step involves consideration of various prior art documents and an alleged public prior use, potentially with the hearing of a witness. This would go far beyond the primary purpose of these appeal proceedings, essentially, that of reviewing the impugned decision's finding that the invention according to claims 1 and 13

as granted was insufficiently disclosed. The Board therefore sees no reason to depart from the parties' relevant request for remittal.

6.5 For these reasons, the Board decided not to deal with the issues of novelty and inventive step of the patent as granted, but to remit the case to the opposition division for further prosecution.

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. Magouliotis

A. de Vries

Decision electronically authenticated