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**Datasheet for the decision
of 22 November 2018**

Case Number: T 0436/16 - 3.5.03

Application Number: 03007178.1

Publication Number: 1350668

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B60N2/24

Language of the proceedings: EN

Title of invention:
Arrangement of operating members for industrial vehicles

Patent Proprietor:
KABUSHIKI KAISHA TOYOTA JIDOSHOKKI

Opponent:
Linde Material Handling GmbH

Headword:
Industrial vehicle/TOYOTA

Relevant legal provisions:
EPC Art. 100(c), 123(2), 84

Keyword:
Added subject-matter (yes) - main request and auxiliary
requests 7 to 11
Clarity (no) - auxiliary request 12

Decisions cited:

Catchword:



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Case Number: T 0436/16 - 3.5.03

D E C I S I O N
of Technical Board of Appeal 3.5.03
of 22 November 2018

Appellant: KABUSHIKI KAISHA TOYOTA JIDOSHOKKI
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Respondent: Linde Material Handling GmbH
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 11 December
2015 revoking European patent No. 1350668
pursuant to Article 101(3) (b) EPC.**

Composition of the Board:

Chairman F. van der Voort
Members: T. Snell
S. Fernández de Córdoba

Summary of Facts and Submissions

- I. This appeal was lodged by the proprietor against the decision of the opposition division revoking European patent No. EP 1 350 668. In the reasons for the decision, the opposition division concluded that claim 1 of the patent as granted did not comply with Article 123(2) EPC (ground for opposition pursuant to Article 100(c) EPC). It also concluded that claim 1 of respectively auxiliary requests 1 to 6 either did not comply with Article 123(2) EPC or Article 123(3) EPC.
- II. In the notice of appeal, the proprietor (henceforth, "appellant"), requested that the decision under appeal be set aside and that the patent be maintained as granted (i.e., implicitly, that the opposition be rejected).
- III. Together with the statement of grounds of appeal, the appellant filed claims of auxiliary requests 7 to 9. Arguments were submitted in respect of the patent as granted (main request) and auxiliary requests 7 to 9.
- IV. In a reply to the statement of grounds of appeal, the opponent (henceforth, "respondent") requested that the appeal be dismissed.
- V. Oral proceedings were conditionally requested by both parties.
- VI. In a communication accompanying a summons to oral proceedings, the board gave a preliminary opinion that claim 1 of the main request comprised subject-matter extending beyond the content of the application as filed (cf. Article 100(c) EPC). It also drew attention to the fact that auxiliary requests 1 to 6 had not been

mentioned by the appellant and therefore did not appear to have been maintained. The board, *inter alia*, also raised matters concerning Article 123(2) EPC in respect of claim 1 of each of auxiliary requests 7 to 9.

VII. The appellant contested the board's arguments in a written reply dated 18 October 2018 and filed therewith new auxiliary requests 10 to 12.

VIII. Oral proceedings were held on 22 November 2018.

The appellant (patent proprietor) requested that the decision under appeal be set aside and that the opposition be rejected or, in the alternative, that the case be remitted to the department of first instance for further examination of the grounds for opposition under Article 100(a) and (b) EPC on the basis of the claims as granted, or one of the set of claims respectively of auxiliary requests 7 to 9 filed with the statement of grounds of appeal and auxiliary requests 10 to 12 filed with letter dated 18 October 2018.

The respondent (opponent) requested that the appeal be dismissed.

At the end of the oral proceedings, the chairman announced the board's decision.

IX. Claim 1 of the patent reads as follows (main request):

"An industrial vehicle comprising:

an armrest (100) extending in a front-and-rear direction of the vehicle; and

a plurality of operating members (141-144; 241-244) arranged in front of the armrest (100), at least two of the operating members each having an operating portion,

wherein the operating portions are arranged along an operational orbit of an operator's hand in a state that the operator's arm is rested on the armrest,

characterized in that

the operational orbit of the operator's hand is formed by pivoting the operator's hand around the operator's wrist and by compound movement of the operator's elbow and wrist."

- X. Claim 1 of auxiliary request 7 is the same as claim 1 as granted except that the characterising part reads as follows:

"the operational orbit of the operator's hand is formed by pivoting the operator's hand around the operator's elbow and by pivoting the operator's hand around the operator's wrist and eventually by compound movement of the operator's elbow and wrist."

- XI. Claim 1 of auxiliary request 8 is the same as claim 1 as granted except that the characterising part reads as follows:

"the operational orbit of the operator's hand is formed by compound movement of the operator's hand pivoted around the operator's elbow and the operator's hand pivoted around the operator's wrist."

XII. Claim 1 of auxiliary request 9 is the same as claim 1 as granted except that the characterising part reads as follows:

"the operational orbit of the operator's hand is formed by compound movement of the operator's elbow and wrist formed by pivoting the operator's hand around the operator's elbow and by pivoting the operator's hand around the operator's wrist."

XIII. Claim 1 of auxiliary request 10 is essentially the same as claim 1 as granted except that the final clause of the preamble reads as follows:

"wherein the operating portions are arranged in an arched line whose center is located at a predetermined reference point along the armrest along an operational orbit of an operator's hand in a state that the operator's arm is rested on the armrest,".

XIV. Claim 1 of auxiliary request 11 is essentially the same as claim 1 as granted except that the final clause of the preamble reads as follows:

"wherein the operating portions are arranged in the plane of the armrest in an arched line whose center is located at a predetermined reference point on the armrest along an operational orbit of an operator's hand in a state that the operator's arm is rested on the armrest,".

XV. Claim 1 of auxiliary request 12 reads as follows:

"An industrial vehicle comprising:

an armrest (100) extending in a front-and-rear direction of the vehicle, the armrest (100) including a base member (110) and a rest member (120) that is installed on the base member (110), a pad portion (130) being installed on the rest member (120), and including a palm pad (132) and an arm pad (134) which are configured such that an operator mainly rests his palm on the palm pad (132) and his arm on the arm pad (134); and

a plurality of operating members (141-144; 241-244) arranged in front of the armrest (100), at least two of the operating members each having an operating portion,

wherein the operating portions are arranged in an arched line (L) whose center is located at a predetermined reference point (P) on the armrest and whose radius is substantially equal to the length of the operator's arm along an operational orbit of an operator's hand in a state that the operator's arm is rested on the armrest, substantially at equal intervals, wherein the reference point (P) corresponds to a position of the operator's elbow in a state that the operator's arm is rested on the pad portion (130),

characterized in that

the operational orbit of the operator's hand is formed by pivoting the operator's hand around the operator's wrist, and by compound movement of the operator's elbow and wrist."

Reasons for the Decision

1. *Claim 1 as granted - Article 100(c) EPC*

1.1 The present patent relates to an industrial vehicle having an armrest and a plurality of "operating portions" (e.g. levers) arranged in front of the armrest. The aim of the invention is to position the operating portions such that a user can rest his arm on the armrest and comfortably operate the operating portions by movements of the elbow and wrist.

1.2 The characterising part of claim 1 reads as follows:

"the operational orbit of the operator's hand is formed by pivoting the operator's hand around the operator's wrist and by compound movement of the operator's elbow and wrist".

1.3 The appellant argued that this feature was based on paragraph [0024] of the description and claims 7 to 9 of the application as originally filed (referring to the application as published, EP 1 350 668 A2).

Paragraph [0024] reads as follows:

"In the above-described embodiment, the reference point P and the arched line L are set in a [sic] such manner that the operational orbit of the operator's hand is formed by pivoting the operator's hand around the operator's elbow in a state that the operator's arm is rested on the armrest. In alternative embodiments to the preferred embodiment, however, a reference point and an arched line are set in such manner that an operational orbit of an operator's hand is formed by pivoting the operator's hand around an operator's wrist in a state that the operator's arm is rested on the armrest. Furthermore, a reference point and an arched line are set in a such manner that an operational orbit of an operator's hand is formed by compound movement of

the operator's elbow and wrist in a state that the operator's arm is rested on the armrest."

1.4 Claims 7 to 9 of the application as filed read as follows:

"7. The industrial vehicle according to claim 1, wherein the operational orbit of the operator's hand is formed by pivoting the operator's hand around the operator's elbow."

"8. The industrial vehicle according to claim 1, wherein the operational orbit of the operator's hand is formed by pivoting the operator's hand around the operator's wrist."

"9. The industrial vehicle according to claim 1, wherein the operational orbit of the operator's hand is formed by compound movement of the operator's elbow and wrist."

1.5 Claim 1 defines two movements of the wrist, one of which is a pivoting movement (referred to in the decision under appeal as "feature a"), the other movement being a compound movement (referred to in the decision under appeal as "feature b"). This latter movement as claimed is not limited to a pivoting movement but embraces translational movements and/or a different type of pivoting movement to that first mentioned in the claim. It follows that claim 1 embraces a movement of the hand in two distinct senses: a pivoting movement of the hand around the wrist around one axis and a compound movement including movement around a different axis or a translational movement.

1.6 Neither the description nor the claims as filed provide a direct and unambiguous basis for a pivoting movement of the wrist and a compound movement over the full ambit of this feature embracing the examples given above. With regard to claims 7 to 9 as filed, these are each directly dependent on claim 1 so that no combined embodiment can be derived here. Likewise, in the description in paragraph [0024], the pivoting of the wrist is also presented as a separate embodiment to the compound movement.

1.7 The appellant argued essentially as follows:

Claim 1 has to be understood with a mind willing to understand. In this light, the skilled person reading claim 1 in the context of the entire disclosure would implicitly understand that the compound movement was a combination of the pivoting movement of the hand around the wrist and the pivoting movement of the elbow. This follows both from the logical way claims 7 to 9 as filed are structured as well as from paragraph [0024] of the description as filed. The fact that all embodiments claimed in claims 7 to 9 are mentioned in the same paragraph demonstrates the close association between them. The word "orbit" in the claim is a further indication of either an elliptical or circular path (akin to the trajectory of a planet), meaning that a translational movement is clearly not contemplated. In consequence, since the wrist movement as part of feature b) implicitly has to be understood as a pivoting movement of the hand around the wrist, feature a) is in fact redundant. It follows that no subject-matter has been added by the presence of this feature.

1.8 The board agrees that the claim should be read with a mind willing to understand. However, with respect to

Article 123(2) EPC, this means only that the claim should not be construed illogically or in manner which does not make technical sense. The embodiments embraced by the claim referred to above by the board however are neither illogical nor nonsensical. Even if the appellant's argument were accepted that the description and claims as filed imply that translational movements were not contemplated, there is no need to apply this limitation to claim 1. With respect to the term "orbit", the board does not agree that this term in the the present context must be construed narrowly as argued the appellant, since the term "orbit" has a more general meaning defining a span, reach or area of influence. The presence of this term in claim 1 therefore does not exclude there being translational movements of the wrist and/or elbow as part of the compound movement.

- 1.9 The appellant further argued that a compound movement can be a movement in two phases, contrary to what was alleged by the opposition division, which based its decision largely on an interpretation of compound movement to mean simultaneous movement. This meant that according to one possible interpretation of claim 1, feature a) was redundant.
- 1.10 The board agrees that a compound movement need not necessarily mean a simultaneous movement. However, this point is not relevant, since, where a claim embraces more than one embodiment, in order to conclude that the claimed subject-matter extends beyond the content of the application as filed it is sufficient if this applies to only one of the embraced embodiments.
- 1.11 The board concludes that claim 1 as granted comprises subject-matter extending beyond the content of the

application as filed. The board concludes that the ground of opposition pursuant to Article 100(c) EPC prejudices the maintenance of the patent.

2. *Auxiliary request 7 - claim 1 - Article 123(2) EPC*

2.1 The characterising part of claim 1 of auxiliary request 7 reads:

"the operational orbit of the operator's hand is formed by pivoting the operator's hand around the operator's elbow and by pivoting the operator's hand around the operator's wrist and eventually by compound movement of the operator's elbow and wrist."

2.2 The appellant indicated that the term "eventually" was to be construed as "in the end". This term appears to the board to be somewhat unclear in the present context. However, that notwithstanding, claim 1 requires that there are pivotal movements of the operator's hand around the elbow and of the hand around the wrist and a further compound movement of the elbow and wrist. Such a combined embodiment is nowhere disclosed in the application as filed. In this respect, essentially the same reasons apply as given in connection with the main request.

2.3 The board concludes that claim 1 of auxiliary request 7 does not comply with Article 123(2) EPC.

3. *Auxiliary request 8 - claim 1 - Article 123(2) EPC*

3.1 The characterising part of claim 1 reads:

"the operational orbit of the operator's hand is formed by compound movement of the operator's hand pivoted

around the operator's elbow and the operator's hand pivoted around the operator's wrist."

3.2 The board considers that this compound movement definition is based on an unallowable intermediate generalisation of the application as filed. Firstly, claim 9 as originally filed is more general than this feature and so does not provide a direct and unambiguous basis. Secondly, the description discloses this embodiment in more specific terms than as claimed. In this respect, having regard to paragraph [0024] of the application as published, both the pivot movement of the hand about the elbow and the pivot movement of the hand about the wrist are based on a pivot point P and an arched line L. The combined movement is also based expressly on a reference point and an arched line L (cf. col. 5, lines 30-35 of the application as published). This reference point P and the arched line L are defined earlier (cf. paragraph [0015]) in terms of P being at the centre of the arched line L whose radius is substantially equivalent to the length of the operator's arm.

3.3 Consequently, the board concludes that claim 1 of auxiliary request 8 does not comply with Article 123(2) EPC either.

4. *Auxiliary request 9 - claim 1 - Article 123(2) EPC*

4.1 The characterising part of claim 1 reads:

"the operational orbit of the operator's hand is formed by compound movement of the operator's elbow and wrist formed by pivoting the operator's hand around the operator's elbow and by pivoting the operator's hand around the operator's wrist."

4.2 The characterising part of claim 1 of auxiliary request 9 is merely a reformulation of the characterising part of claim 1 of auxiliary request 8. The same objection therefore applies, *mutatis mutandis*, as given in connection with that claim.

4.3 Consequently, the board concludes that claim 1 of auxiliary request 9 does not comply with Article 123(2) EPC either.

5. *Auxiliary request 10 - claim 1 - Article 123(2) EPC*

5.1 Claim 1 of auxiliary request 10 is amended with respect to claim 1 as granted to include, in the preamble, the feature that the operating portions are arranged "in an arched line whose center is located at a predetermined reference point on the armrest". However, the characterising part of claim 1 is essentially the same as that of claim 1 as granted.

5.2 In paragraph [0015], it is stated that the reference point L corresponds to a position of the operator's elbow and that the arched line L has a center whose radius is substantially equal to the length of the operator's arm. Since these aspects are missing from claim 1, there is no implicit requirement for the compound movement mentioned in the characterising part to comprise pivoting the operator's hand around the elbow. Instead, this compound movement may still involve a translational motion of the elbow and wrist (e.g. this could be the case if the radius were much larger than the operator's arm). This means that the same objection exists as given in connection with claim 1 as granted (cf. point 1.6 above).

5.3 Consequently, the board concludes that claim 1 of auxiliary request 10 does not comply with Article 123(2) EPC either.

6. *Auxiliary request 11 - claim 1 - Article 123(2) EPC*

6.1 Claim 1 of auxiliary request 11 differs from claim 1 of auxiliary request 10 merely in that it includes the additional feature that the operating portions "are arranged in the plane of the armrest". However, this amendment makes no difference to the objection raised in connection with claim 1 of auxiliary request 10, which therefore applies, *mutatis mutandis*.

6.2 Consequently, the board concludes that claim 1 of auxiliary request 11 does not comply with Article 123(2) EPC either.

7. *Auxiliary request 12 - claim 1 - Article 84 EPC*

7.1 Claim 1 of auxiliary request 12 contains substantial amendments as compared with claim 1 as granted. The board considers that some of the amendments give rise to objections of lack of clarity. This concerns in particular the expressions:

"such that an operator mainly rests his palm on the palm pad (132) and his arm on the arm pad (134)";

"whose radius is substantially equal to the length of the operator's arm"; and

"substantially at equal intervals".

7.2 In this respect, the terms "mainly" and "substantially" render the matter for which protection is sought

uncertain. Furthermore, in respect of the second feature, the claimed industrial vehicle is being defined partly in terms of an operator's arm which is not part of the claimed subject-matter, i.e. an industrial vehicle, and is an undefined and variable parameter. A third party could not know whether a given vehicle falls within the wording of the claim, unless the operator were sitting in the vehicle. This would lead to the situation that the very same vehicle would or would not fall within the wording of the claim merely based on the length of an operator's arm, who could be chosen at random.

7.3 The appellant argued that in such cases the vehicle industry operated on the basis of standardised human beings such as the "5% woman and the 95% man". The board found this argument unconvincing as the claim had no such limitation.

7.4 The board concludes that claim 1 of auxiliary request 12 is not clear within the meaning of Article 84 EPC.

8. *Conclusion*

As there is no allowable request, it follows that the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Rauh

F. van der Voort

Decision electronically authenticated