

Internal distribution code:

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

**Datasheet for the decision
of 12 November 2021**

Case Number: T 0173/17 - 3.2.04

Application Number: 07019590.4

Publication Number: 1889538

IPC: A01K5/02, G01N21/35

Language of the proceedings: EN

Title of invention:

Arrangement and method for feeding animals

Patent Proprietor:

DeLaval Holding AB

Opponent:

Octrooibureau Van der Lely N.V.

Headword:

Relevant legal provisions:

EPC Art. 76(1), 56

RPBA Art. 13(3)

Keyword:

Amendment after summons - taken into account (yes)

Amendments - added subject-matter (no)

Inventive step - (yes)

Decisions cited:

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 0173/17 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 12 November 2021

Appellant: Octrooibureau Van der Lely N.V.
(Opponent) Weverskade 110
3147 PA MAASSLUIS (NL)

Representative: Octrooibureau Van der Lely N.V.
Cornelis van der Lelylaan 1
3147 PB Maassluis (NL)

Respondent: DeLaval Holding AB
(Patent Proprietor) Box 39
147 21 Tumba (SE)

Representative: Bennett, Adrian Robert J.
A.A. Thornton & Co.
10 Old Bailey
London EC4M 7NG (GB)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 5 December 2016
rejecting the opposition filed against European
patent No. 1889538 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman J. Wright
Members: G. Martin Gonzalez
K. Kerber-Zubrzycka

Summary of Facts and Submissions

- I. The appeal was filed by the appellant (opponent) against the decision of the opposition division to reject the opposition filed against the patent in suit.
- II. Oral proceedings were held before the Board on 12 November 2021. During the oral proceedings, the appellant-proprietor withdrew its previous main request (as granted).
- III. The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked.

The appellant (opponent) further requested not to admit auxiliary requests 1 and 2 filed with letter dated 12 February 2020.

The respondent (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained on the basis of auxiliary request 1 filed with letter dated 12 February 2020, alternatively to set aside the decision under appeal and maintain the patent on the basis of auxiliary request 2 filed with letter dated 12 February 2020.

- IV. Independent claims 1 and 2 of auxiliary request 1 filed 12 February 2020 read as follows:

"1. An arrangement (12; 16) for feeding animals on a farm, characterized in that said arrangement for feeding animals comprises
- an on-farm analyzer device (13; 17) arranged to automatically analyze in-situ, on a farm, mixed solid

feed and determine various constituents in the mixed solid feed, wherein in determining the various constituents the on-farm analyzer device measures the amount of the various constituents, said analyzing being performed immediately prior to each feeding instant; and

- a feeding device (14; 18) arranged to base its feeding on the result of said analysis".

"2. A method for feeding animals on a farm, characterized by the steps of:

- automatically analyzing in-situ, on a farm, mixed solid feed on the farm by an on-farm analyzer device (13; 17), thereby determining various constituents in the mixed solid feed, wherein in determining the various constituents the amount of the various constituents is measured, said analyzing being performed immediately prior to each feeding instant; and

- feeding animals on the farm based on the result of said analysis".

V. In the present decision, reference is made to the following documents:

Parent application: WO 2005/067704 A1

D1: DE 199 40 084 A1

D4: A. Brand and others "Herd Health and Production Management in Dairy Practice", Chapter 4 - part 2, pages 234, 235, 239, 255, 260, Wageningen Pers, Wageningen, 1996.

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

The auxiliary requests 1 and 2 filed 12 February 2020 should not be admitted into the proceedings. The subject matter of auxiliary request 1 adds subject matter extending beyond the parent application. It also lacks inventive step starting from D1 in combination with the skilled person's general knowledge as exemplified by D4.

VII. The respondent-proprietor's arguments can be summarised as follows:

Auxiliary requests 1 and 2 filed 12 February 2020 are a timely response to the Board's communication so they should be admitted. The subject matter of claim 1 of auxiliary request 1 does not add subject matter. It also involves an inventive step.

Reasons for the Decision

1. The appeal is admissible.

2. Background

The invention relates to feeding farm animals (see published patent specification, paragraph [0001]). According to the patent (see published patent specification, paragraphs [0008] and [0009]), the composition of feed may vary over time. As a result, animals may be over or underfed with some constituents of the feed. An object of the invention is to provide an arrangement and method for feeding animals on a farm more precisely.

3. Admittance of auxiliary requests 1 and 2 into the proceedings

- 3.1 According to Article 13 (1) RPBA 2020, any amendment to a party's appeal case after it has filed its grounds of appeal or reply is subject to the party's justification for its amendment and may be admitted only at the discretion of the Board. The Board exercises its discretion in view of, amongst other things, the current state of the proceedings, the need for procedural economy and, in the case of an amendment to a patent, whether the party has demonstrated that the amendment, *prima facie*, overcomes the issues raised without giving rise to new objections. Moreover, in accordance with Article 13(3) RPBA 2007 with Article 25(3) RPBA 2020, amendments sought to be made after oral proceedings have been arranged shall not be admitted if they raise issues which the Board or the other party or parties cannot reasonably be expected to deal with without adjournment of the oral proceedings.
- 3.2 In the present case, the appellant-opponent (see grounds of appeal, point 2.1) objected that granted claim 1 represented an extension of subject matter with respect to the parent application because the feature "an amount of a solid feed constituent" was omitted from the claim so that other kinds of feed, such as liquid feed could be analyzed, for which there was no basis. In its communication in preparation for the oral proceedings, the Board pointed out (see section 1.2) that, not only the word *amount*, but also the first word of the above feature - *measuring* - had been omitted (cf. original claim 1) and that by replacing *measuring* by the broader feature *determining* without reference to an amount, the new claim also encompassed embodiments merely determining a presence [of a constituent] without measuring its amount.

3.3 In its letter of 12 February 2020 (see first paragraph) the proprietor argued that its amendments to the independent claims were justified because they addressed added subject matter issues raised in the communication (the omission of *measuring an amount*, amongst other things).

Prima facie, the independent claims of the new requests addressed this issue (by defining that the analyzer *measures the amount* of the various constituents), no matter what other issues the appellant-opponent might consider to be unresolved. Moreover, in the Board's view, by replacing all previous auxiliary requests that did not overcome this objection, filing the requests was procedurally economic.

Nor did the Board consider the deletion of dependent claims in both requests raised new issues, contrary to procedural economy. If anything, it simplified the procedure. In particular, the Board considered that the deletion was allowable under Rule 80 EPC. The rule requires that amendments are occasioned by a ground for opposition, even if that ground has not been invoked by the opponent. In the present case, the deletion eliminated any possible extension of subject matter or insufficiency issues (both opposition grounds) that might have arisen from the deleted claims, whether or not the appellant-opponent saw any such issues.

3.4 Regarding the timing of filing the requests, they addressed an issue (added subject matter - omission of *amounts*) which was at least not directly mentioned in the appellant-opponent's grounds of appeal, whether or not it was mentioned in the opposition notice, but first explicitly pointed out in the Board's communication. Therefore, the proprietor-respondent

could not have been expected to respond to the issue before the communication was issued. Moreover, the requests were filed more than a year prior to the oral proceedings that actually took place, irrespective of how much time was available between their filing and scheduled oral proceedings that were later cancelled. Thus, the appellant-opponent had ample time to respond to the amendments, as indeed they did in a letter of 25 August 2020. Consequently, there can be no question of the appellant-opponent not having been able to deal with the issues raised without adjournment of the oral proceedings, Article 13(3) RPBA 2007. Therefore, the requests have been timely filed.

3.5 For these reasons, the Board decided to exercise its discretion under Article 13(3) RPBA 2007 by admitting auxiliary requests 1 and 2 of 12 February 2020 into the proceedings.

4. Auxiliary request 1, filed 12 February 2020, claims 1 and 2, extension of subject matter with respect to the parent application

In this section references are to the published parent application, unless stated otherwise.

4.1 Claims 1 and 2 in combination are directed to an arrangement for feeding animals on a farm with, amongst other things, an on-farm analyzer device for measuring the amount of at least one constituent of solid feed to be fed to the animals, the measurement being made immediately prior to the animals being fed.

4.2 Claim 1 of the present request (auxiliary request 1) amends this combination by adding the features that:

The on-farm analyzer analyzes feed *automatically* and *in situ*.

- The feed is *mixed feed*.
- The analyzer determines *various* constituents (rather than at least 1) in the solid feed to be fed to animals.

4.3 The appellant-opponent argued that there is no basis in the parent application as filed for *automatically* analyzing mixed feed *immediately prior to each feeding instant* because the only original disclosure of analyzing mixed feed requires samples of the ingredients being analyzed prior to mixing rather than immediately prior to feeding. Moreover, this is not an *in situ* analysis of mixed feed but only of ingredients. The Board disagrees.

4.4 The general part of the description (see page 3, lines 9 to 21) explains that the composition of feed may vary during the day and from spot to spot in a feed storage. and this variation will affect the nutrient balance the animals receive. The description continues (page 3, last paragraph) by reinforcing the original claim idea of providing an analyzer on the farm to measure a constituent of solid feed *to be fed to the animals* and feed according to what is measured.

4.5 The Board agrees with the respondent-proprietor that, giving terms their usual meanings, *feed to be fed* means what the animals actually receive and not the ingredients of something that must first be mixed before it is fed to animals (cf. page 3, last two lines). Furthermore (see page 4, first paragraph), not just one but several constituents can be monitored [measured] immediately prior to each feeding. Moreover,

the measuring can be carried out anywhere on the farm and automatically (see page 4, lines 11 to 13).

With this in mind, the skilled person reads the next part of the description (page 4, lines 14 to 22) which explains that the invention relates to total or partial mixed ration feeding programmes. In the Board's view, the skilled person will thus understand that the general part of the description discloses the particular feed to be fed to be a mixed feed. Therefore, the Board considers that this part of the description discloses the idea of automatically analyzing mixed solid feed to be fed to animals by on-farm measuring of constituents immediately prior to each feeding instant.

- 4.6 The description of the detailed embodiments (starting on page 6 with the figure) tells the same story: An on farm analyzer 13 determines constituents of solid feed to be fed to cows. The feed may include roughage, grass, grain and corn, thus it is mixed feed. Moreover, the analyzer may measure the constituent amount immediately prior to each of the feeding instant (page 8, lines 3 to 5).
- 4.7 Against this background the skilled person reads further on (see paragraph bridging pages 13 and 14) that the particular [on-farm analyzer] devices 13 and 17 are capable of analyzing *mixed feed* and determining various constituents in the mix so that feeding can be based on the result. Thus, the passage confirms the skilled person's understanding of the invention up to there (described with reference to the analyzing devices 13 and 17), with regard to analyzing mixed solid feed, and feeding according to the result. Put another way, the skilled person will not read this

paragraph as introducing a new concept but rather as underlining that the invention that they have been reading about up to there relates to analyzing mixed feed.

- 4.8 By contrast, the idea explained in the immediately following paragraph (page 14, lines 4 to 15) is to perform measurements on *ingredients* of unmixed feed and then to mix according to what has been measured. This mixing rather than feeding according to what is measured is a new idea. Therefore, the skilled person will not read this paragraph as pertaining to the analysis of the mixed feed discussed in the previous paragraph (bridging pages 13 and 14). For this reason, the appellant-opponent's argument that analyzing mixed feed is only originally disclosed as an analysis of ingredients prior to mixing (not immediately prior to feeding), is moot.
- 4.9 As to the appellant-opponent's argument that there is no original basis for *analyzing in-situ*, the Board notes that the skilled person reads the claim giving terms their usual meaning. The meaning of *in situ* as an adverb (see Oxford English Dictionary on line OED) is: *In its (original) place; in position. Also: at the place or locality in question; at the scene of the event.* In the Board's view, since the claim relates to feeding animals on a farm, the skilled person will understand the term *in situ* to mean that the analysis is likewise done on the farm. This idea was originally disclosed in claim 1 of the parent application - the analyzer device is *on-farm*. The description (see page 9, lines 1 to 4) confirms that this is what is meant by *in situ*: The analyzer device 13 is on the farm for *in situ* measurements.

4.10 The Board concludes that there is a basis in the parent application for the subject matter of claim 1. Therefore, claim 1 meets the requirements of Article 76(1) EPC.

4.11 The features of the independent method claim (claim 2) correspond to those of claim 1, albeit expressed as method steps. Therefore, the same conclusion (no added subject matter) applies to claim 2.

5. Auxiliary request 1, claims 1 and 2, inventive step starting from D1 combined with common general knowledge as illustrated by D4

5.1 D1 (see title, abstract and figure) discloses an arrangement for feeding animals on a farm. The arrangement has a mixing wagon (*Futtermischwagen*) that mixes feed in a receptacle 2. The mixed feed (*gemischtes Futtergut*) is provided to animals via an output device (*Austrageinrichtung 7*).

D1 (see column 3, lines 10 to 24) also discloses that an analysis of the mixed feed must be known: First a basic feed mixture is produced in the receptacle 2. Then, based on the mixture's analysis and feed value tables (*Futterwerttabellen*), it can be seen how much high-quality feed must be added.

5.2 It is common ground that feed value tables are typically tables of amounts of constituents needed by particular animals for balanced feeding, for example how much protein a lactating cow needs in a day. To use such a table, it stands to reason that the farmer will need an analysis of the mixed feed they are using (for example its protein percentage) so that they know, for example, how much additional supplement to give an

animal (and indeed how much basic feed mixture to give it). D1 confirms this (see column 3, sentence beginning in line 11), explaining that the analysis of the mixed feed is used to determine how much supplement must be given to a particular cow.

- 5.3 However, D1 does not disclose the nature of the analysis, nor where or when it is carried out. Although it could be a chemical analysis made on the mixing wagon immediately prior to feeding, it is not necessarily so. A historical analysis of feed according to the same recipe carried out remote from the farm and long before the particular feeding instance, would also serve to decide how much basic feed and supplement to provide an animal (with an appropriate feed value table), albeit less precisely.

Therefore, the subject matter of claim 1 differs from D1 in that there is an on-farm analyzer device arranged to automatically analyze mixed feed and determine various constituents in the mixed feed and in that the analysis is performed immediately prior to each feeding instant.

- 5.4 The parties agree that the technical effect of these differences is more precise feeding (see published patent specification, paragraph [0009]). Therefore the objective technical problem can be formulated as how to improve the precision of D1's feeding arrangement.

- 5.5 The appellant-opponent has argued that, faced with this problem, the skilled person would apply their general knowledge - as exemplified by D4 - to adapt D1's arrangement to analyze the feed *immediately prior to each feeding instant*, as well as making the other

adaptations necessary to arrive at the claimed subject matter. The Board disagrees.

- 5.6 D4 is a book about herd health and management. The chapter cited by the appellant is entitled *Feed bunk management*, so at first sight it appears to relate to managing stored feed rather than feeding as such. However, D4 does explain (see page 234 under the heading *Feed quality*) that it is important to monitor feed quality, including dry matter content [moisture] and chemistry. D4 recommends analyzing moisture weekly (see *feed quality* section, second paragraph). Therefore, there is no disclosure or suggestion here to analyze immediately prior to each feeding instant.
- 5.7 D4 (see page 235, second paragraph) also teaches: "A chemical analysis of feed ingredients such as grass, alfalfa or corn silage should be done *whenever there is any change*. Stored feeds, such as forages, should be evaluated *just before they are fed instead of just after harvest* [emphasis added by the Board]". Since this section relates to storing, not feeding, the *change* mentioned in the first sentence of this passage can only concern changes in storage and not feeding events. Regarding the second sentence, the word *they* does not refer to animals but to the feeds. In other words, this sentence does not talk about the time when animals are fed but rather when feed is fed to animals. On the face of it, these two ideas might appear to amount to the same thing, as indeed the appellant-opponent has argued. However, the Board sees it differently. This is because the overall context of the sentence is the management of stored feed, not feed which has already been removed from a store and mixed so that animals can eat it.

From the perspective of feed which must be stored for long periods, for example over winter, *just before feed is fed* might mean a few days before the animals get to eat it. This is all the more true given that the sentence expressly contrasts analyzing *just before feed is fed* as preferable to *just after harvest*. The latter might be months before the animals actually eat the feed. In any case with stored feed needing to be first taken from the store and then mixed, *just before feed is fed* certainly does not directly and unambiguously disclose a point of time immediately prior to each feeding instant, nor indeed does it relate to analyzing mixed feed but at most only the ingredients of mixed feed.

- 5.8 Thus, the combination of D1 and the skilled person's general knowledge as exemplified in D4 would not lead the skilled person to modify D1's arrangement by having it analyze mixed solid feed immediately prior to each feeding instant as claimed. The further question of whether it would be obvious to modify D1's arrangement to analyze automatically and on the farm can be left unanswered.
- 5.9 Therefore, the subject matter of claim 1 involves an inventive step starting from D1 in combination with the skilled person's general knowledge. Since the features of the independent method claim (claim 2) correspond to those of claim 1, the same conclusion applies to claim 2.
6. No further objections were raised or are apparent against the claims according to the respondent-proprietor's highest ranking request (auxiliary request 1 filed 12 February 2020). Noting that the description has been brought into conformity with these amended

claims, the Board finds that the patent and the invention to which it relates now meet the requirements of the EPC. It concludes that the patent can be maintained in this amended form in accordance with Article 101(3)(a) EPC. Since auxiliary request 1 is allowable, there is no need for the Board to consider the auxiliary request 2.

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 patent as amended in the following version:

Description paragraphs 1-13, 17-24, 28-47, 49-41 as granted.

Description paragraphs 14-16, 25-27 and 48 as filed during the oral proceedings on 12 November 2021.

Claims 1 and 2 filed as auxiliary request 1 with letter of 12 February 2020 and figure 1 as granted.

The Registrar:

The Chairman:



G. Magouliotis

J. Wright

Decision electronically authenticated



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 0173/17 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 27 January 2022
correcting an error in the decision
of 12 November 2021

Appellant: Octrooibureau Van der Lely N.V.
(Opponent) Weverskade 110
3147 PA MAASSLUIS (NL)

Representative: Octrooibureau Van der Lely N.V.
Cornelis van der Lelylaan 1
3147 PB Maassluis (NL)

Respondent: DeLaval Holding AB
(Patent Proprietor) Box 39
147 21 Tumba (SE)

Representative: Bennett, Adrian Robert J.
A.A. Thornton & Co.
Octagon Point
5 Cheapside
London EC2V 6AA (GB)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 5 December 2016
rejecting the opposition filed against European
patent No. 1889538 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman: J. Wright
Members: G. Martin Gonzalez
K. Kerber-Zubrzycka

1. In the Order of the decision, point 2, an error was made in listing the paragraphs of the description as granted, which must be corrected.

1.1 Point 2 of the Order read as follows:

"2. The case is remitted to the opposition division with the order to maintain the patent as amended in the following version:

Description paragraphs 1-13, 17-24, 28-47, 49-41 as granted.

Description paragraphs 14-16, 25-27 and 48 as filed during the oral proceedings on 12 November 2021.

Claims 1 and 2 filed as auxiliary request 1 with letter of 12 February 2020 and figure 1 as granted".

1.2 The corrected version of point 2 of the Order reads as follows:

"2. The case is remitted to the opposition division with the order to maintain the patent as amended in the following version:

Description paragraphs 1-13, 17-24, 28-47, 49-51 as granted.

Description paragraphs 14-16, 25-27 and 48 as filed during the oral proceedings on 12 November 2021.

Claims 1 and 2 filed as auxiliary request 1 with letter of 12 February 2020 and figure 1 as granted".

The Registrar:

The Chairman:



G. Magouliotis

J. Wright

Decision electronically authenticated