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**Datasheet for the decision
of 4 July 2019**

Case Number: T 1966/17 - 3.3.05

Application Number: 10808266.0

Publication Number: 2465597

IPC: B01D53/26, F16J15/06, B60T17/00

Language of the proceedings: EN

Title of invention:
STRUCTURE FOR AN EXTERNAL COVER OF AN AIR-DRYING DEVICE

Patent Proprietor:
Nabtesco Automotive Corporation

Opponent:
Knorr-Bremse
Systeme für Nutzfahrzeuge GmbH

Headword:
Air-drying device/Nabtesco

Relevant legal provisions:
EPC Art. 23(3), 108, 54, 123(2), 84, 112(1)(a)
RPBA Art. 12(2), 13(1)
EPC R. 80, 139

Keyword:

Objection of partiality - not admitted
Admissibility of appeal - (yes)
Novelty - main request (no)
Amendments - auxiliary requests 1, 2, 4, 6, 7 - allowable (no)
Claims - clarity - auxiliary requests 3 and 5 (no)
Late filed auxiliary request 8 - request clearly allowable
(yes)
Referral to the Enlarged Board of Appeal - (no)

Decisions cited:

G 0002/88, G 0001/05, T 0971/10, T 0657/11, T 0926/12,
T 0184/13

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 1966/17 - 3.3.05

D E C I S I O N
of Technical Board of Appeal 3.3.05
of 4 July 2019

Appellant 1:
(Patent Proprietor)

Nabtesco Automotive Corporation
JA Kyosai Building
7-9, Hirakawacho 2-chome
Chiyoda-ku
Tokyo 102-0093 (JP)

Representative:

Grünecker Patent- und Rechtsanwälte
PartG mbB
Leopoldstraße 4
80802 München (DE)

Appellant 2:
(Opponent)

Knorr-Bremse
Systeme für Nutzfahrzeuge GmbH
Moosacher Str. 80
80809 München (DE)

Representative:

Wende, Christian Werner
DTS Patent- und Rechtsanwälte
Schneckenbühl und Partner mbB
Marstallstraße 8
80539 München (DE)

Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
7 July 2017 concerning maintenance of the
European Patent No. 2465597 in amended form.**

Composition of the Board:

| | |
|-----------------|-----------|
| Chairman | E. Bendl |
| Members: | G. Glod |
| | O. Loizou |

Summary of Facts and Submissions

I. The appeals of the patent proprietor (appellant 1) and of the opponent (appellant 2) lie from the decision of the opposition division finding that European patent No. EP 2 465 597 B1 in amended form on the basis of then auxiliary request 5 met the requirements of the EPC.

Claim 1 of the patent as granted is as follows:

"1. A structure of an external cover (16) of an air drying apparatus (12) that includes an outer case (13) and a base (15) which is housed in the outer case (13), a drying case (14) which has a large-diameter cylindrical body (14A) and a small-diameter cylindrical body (14B) formed integrally with the large-diameter cylindrical body (14A), the drying case (14) includes a desiccant (17) filled in the large-diameter cylindrical body (14A), and the base (15) is fixed to a lower end of the drying case (14) and that has an inlet port (15c) and an outlet port (15a) for compressed air; and that is fixed by swaging an outer edge to a lower end of the outer case (13),

characterized in that

the external cover (16) includes:

a rising piece (16a) that is inserted into and engaged with an inlet port (15c) of the base (15) for compressed air;

a first slope (16g) that is formed at an intermediate position between the rising piece (16a) and a bottom (16f);

an outer vertical wall (16h) that is formed so as to rise from the bottom (16f);

a top face (16j) formed at an upper end of the outer vertical wall (16i);

*an inner vertical wall (16i) that is formed opposite to the outer vertical wall (16i);
a circular-arc portion (16k) that is formed at a lower end of the inner vertical wall (16i);
a second slope (16n) formed at a position on the circular-arc portion (16k) that corresponds to an intermediate position of a height (H1) of the external cover (16) and a position of a predetermined height (H2) from a lower end face (16m);
an outermost vertical wall (16q) that is formed so as to fall from the second slope (16n) by way of the circular arc portion (16k); and
a sealing agent (21) that is fitted to an indentation (16b) defined by the outer vertical wall (16h), the top face (16j), and the inner vertical wall (16i)."*

II. The following documents cited in the impugned decision are of relevance here:

D3: US 2006/0123743 A1
D4: DE 10 2004 059 508 B3
D5: WO 2004/103509 A2
D6: WO 01/52973 A1

III. With the statement of grounds of appeal, appellant 1 submitted a main request and auxiliary requests 1 to 5.

Claim 1 of the **main request** differs from claim 1 of the patent as granted in that two reference signs have been changed (underlined).

*"1. [...] a top face (16j) formed at an upper end of the outer vertical wall (16h);
an inner vertical wall (16i) that is formed opposite to the outer vertical wall (16h); [...]."*

Claim 1 of **auxiliary request 1** has been amended compared to the main request as follows:

"1. [...] a circular-arc portion (16k) that is formed at a lower end of the inner vertical wall (16i); a rising portion (16r) that rises from the circular-arc portion (16k); a second slope (16n) that is formed at a position on the circular-arc portion (16k) that corresponds so as to extend from an upper end of the rising portion (16r), wherein the position of the upper end of the rising portion (16r) is set at to an intermediate position of a height (H1) of the external cover (16) and a position of which corresponds to a predetermined height (H2) from a lower end face (16m); [...]."

Claim 1 of **auxiliary request 2** has been amended compared to the main request as follows:

"1. [...] a circular-arc portion (16k) that is formed at a lower end of the inner vertical wall (16i); a vertical portion (16r) that rises from the circular-arc portion (16k); a second slope (16n) that is formed so as to extend from an upper end of the vertical portion (16r), wherein the position of the upper end of the vertical portion (16r) is set at formed at a position on the circular-arc-portion (16k) that corresponds to an intermediate position of a height (H1) of the external cover (16) and a position of which corresponds to a predetermined height (H2) from a lower end face (16m); [...]."

Claim 1 of **auxiliary request 3** has been amended compared to the main request as follows:

"1. [...] a position of a predetermined height (H2) from a lower end face (16m), the predetermined height (H2) being set to about one-half of the height (H1) of the external cover (16); [...]."

Claim 1 of **auxiliary request 4** has been amended compared to the main request as follows:

"1. [...] a circular-arc portion (16k) that is formed at a lower end of the inner vertical wall (16i); a vertical portion (16r) that rises from the circular-arc portion (16k), wherein a position of the upper end of the vertical portion (16r) is in the middle of the height (H1) of the external cover (16);
a second slope (16n) that is formed so as to extend from the vertical portion (16r) formed at a position on the circular-arc portion (16k) that corresponds to an intermediate position of a height (H1) of the external cover (16) and a position of a predetermined height (H2) from a lower end face (16m); [...]."

Claim 1 of **auxiliary request 5** has been amended compared to the main request as follows:

"1. [...] a circular-arc portion (16k) that is formed at a lower end of the inner vertical wall (16i); a vertical portion (16r) rises from the circular-arc portion (16k) and is formed integrally with the inner vertical wall (16i), wherein a position of the upper end of the vertical portion (16r) is at a predetermined height (H2) from a lower end face (16m) be set to about one-half the height (H1) of the external cover (16),
and wherein an angle of inclination (θ_2) which a back surface of the second slope (16n) forms with a back surface of the outermost vertical wall (16q) is set to about 45°;
a second slope (16n) that is formed so as to

~~*extend from the upper end of the vertical portion (16r) formed at a position on the circular-arc portion (16k) that corresponds to an intermediate position of a height (H1) of the external cover (16) and a position of a predetermined height (H2) from a lower end face (16m); [...]."*~~

- IV. In the communication pursuant to Article 15(1) RPBA, the board was of the preliminary opinion that none of the requests then on file met the requirements of the EPC.
- V. By letter of 2 April 2019, appellant 1 submitted auxiliary requests 6 to 8.

Claim 1 of **auxiliary request 6** has been amended compared to the main request as follows:

"1. [...] a circular-arc portion (16k) that is formed at a lower end of the inner vertical wall (16i); a vertical portion (16r) rising from the circular-arc portion (16k) and formed integrally with the inner vertical wall (16i); a second slope (16n) formed at a position on the circular-arc portion (16k) that corresponds to an intermediate position of a height (H1) of the external cover (16) and a position of a predetermined height (H2) from a lower end face (16m), the predetermined height (H2) being set to one-half of the height (H1) of the external cover (16); [...]."

Claim 1 of **auxiliary request 7** has been amended compared to the main request as follows:

"1. [...] a circular-arc portion (16k) that is formed at a lower end of the inner vertical wall (16i); a vertical portion (16r) that rises from the circular-arc

portion (16k) and is formed integrally with the inner vertical wall (16i), wherein a position of the upper end of the vertical portion (16r) is in the middle of the height (H1) of the external cover (16); a second slope (16n) that is formed so as to extend from the vertical portion (16r) formed at a position on the circular arc portion (16k) that corresponds to an intermediate position of a height (H1) of the external cover (16) and a position of a predetermined height (H2) from a lower end face (16m); [...]."

Claim 1 of **auxiliary request 8** corresponds to auxiliary request 5, except that "about" has been deleted twice from the newly introduced features.

"1. [...] from a lower end face (16m) be set to ~~about~~ one-half the height (H1) of the external cover (16), and wherein an angle of inclination (θ) which a back surface of the second slope (16n) forms with a back surface of the outermost vertical wall (16q) is set to ~~about~~ 45°; a second slope (16n) [...]."

VI. Oral proceedings took place on 4 July 2019. After the board had given its opinion on the admissibility of the appeal and on the admission of auxiliary request 8 into the appeal proceedings, appellant 2 raised a partiality objection against the three members of the board. After the board had given its opinion on all the claim requests of appellant 1, appellant 2 requested in accordance with Article 112(1)(a) EPC, that the following question be referred to the Enlarged Board:

"Hiermit stellen wir den Antrag nach Art. 112(1) a) EPÜ auf Befassung der Großen Beschwerdekammer wegen der Sicherung der einheitlichen Rechtsprechung und wegen der grundsätzlichen Bedeutung, da der Hauptantrag im

Einspruchsverfahren nicht zur Entscheidung gestellt und dort zurückgezogen wurde, was nach diesseitiger Auffassung einen Verzicht darstellt, daher steht die Zulassung im Widerspruch zu T 926/12, T 23/10 und R 13/11. Von grundsätzlicher Bedeutung ist, inwieweit ein R. 80 EPÜ Problem durch die Beschwerdekammer unter Heranziehung des Art. 139 EPÜ korrigiert werden kann, und ob nicht insoweit R. 80 EPÜ als *lex specialis* Vorrang zu genießen hat."

(Free translation by the board: "We hereby request, pursuant to Article 112(1) (a) EPC, that the Enlarged Board be concerned [with the following question] in order to ensure the uniform application of the law and due to its fundamental importance, because the [present] main request was not submitted for decision in opposition proceedings, but was withdrawn, which in our view amounts to an abandonment [of this request] and its admission therefore is inconsistent with [the decisions] T 926/12, T 23/10 and R 13/11. It is of fundamental importance as to how far a Rule 80 EPC problem can be corrected by the board pursuant to Article 139 EPC and whether in that regard Rule 80 EPC prevails as *lex specialis*.")

VII. The arguments of **appellant 2** relevant to the present decision can be summarised as follows:

The board was partial, since appellant 1's appeal was clearly inadmissible. Article 12(2) RPBA did not give the board any discretion. The board wrongly applied said article.

By admitting auxiliary request 8, the board also wrongly applied Rule 80 EPC.

Appellant 1's appeal was clearly inadmissible, since appellant 1 filed as the main request in appeal a request that had been withdrawn during the oral proceedings before the opposition division. It no longer relied on the request on which the decision was based. In addition, all the requests were clearly inadmissible, since they violated Rule 80 EPC in view of the change of the reference sign of the outer vertical wall.

The reasoning of the opposition division still applied to the main request and auxiliary requests 1 to 4. Auxiliary request 5 was not allowable in view of the wording "about", which was not clear. Auxiliary requests 6 and 7 did not fulfil the requirements of Article 123(2) EPC.

Auxiliary request 8 should not be admitted into the proceedings, since the objection relating to "about" was already under discussion before the opposition division. Said request should have been presented at the latest with the reply to the appeal. Auxiliary request 8 not only included the deletion of "about", but also the repositioning of the part relating to the angle. It was prima facie not allowable, since it did not fulfil the requirements of Rule 80 EPC.

There was diverging case law concerning the admissibility, so a referral to the Enlarged Board was required.

VIII. The arguments of **appellant 1** can be summarised as follows:

The objection of partiality was not admissible.

Appellant 1's appeal was clearly admissible, since the statement of grounds set out the reasons why the decision was incorrect. The correction of the reference sign was based on Rule 139 EPC. The scope of the claim was not changed as set out in Rule 43(7) EPC.

None of the cited documents directly and unambiguously disclosed a circular-arc portion that was formed at a lower end of the inner vertical wall, a second slope formed on the circular-arc portion, or an outermost vertical wall that was formed so as to fall from the second slope by way of a circular-arc portion. These documents only showed a freeform curvature.

The features introduced in claim 1 of each of auxiliary requests 1, 2 and 4 to 8 found a basis on page 13 (second full paragraph) in combination with the paragraph bridging pages 5 and 6 of the application as filed. It was evident from said passages that the features recited there were not linked together.

The amendment made in claim 1 of auxiliary request 3 was based on page 12, first full paragraph of the application as filed.

In line with the Guidelines F-IV, 4.7.1 (November 2018), the term "about" was clear.

Auxiliary request 8 was a response to the board's communication and was clearly allowable. The correction of the reference sign was based on Rule 139 EPC and put the reference signs in line with the added features. Auxiliary request 8 should be admitted into the proceedings.

The request for a referral to the Enlarged Board was late filed and not admissible, since it was not relevant for the decision.

IX. At the end of the oral proceedings, the requests were as follows:

Appellant I (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the claims of the main request, or, in the alternative, of one of auxiliary requests 1 to 5, all requests filed with its statement of grounds of appeal, or one of auxiliary requests 6 to 8 filed with the letter dated 2 April 2019.

Appellant II (opponent) requested that the decision under appeal be set aside and that the patent be revoked. Moreover, it objected to all the board members pursuant to Article 24(3) EPC because of suspected partiality, and requested referral to the Enlarged Board of Appeal within the meaning of Article 112(1)(a) EPC.

Reasons for the Decision

1. Article 24(3) EPC - Partiality objection
 - 1.1 The objection of partiality pursuant to Article 24 EPC was raised by appellant 2 after the board had given its opinion that appellant 1's appeal was admissible and that auxiliary request 8 was admitted into the proceedings (see minutes of 4 July 2019, page 2/4).
 - 1.2 According to Article 24(3) EPC, members of a Board of Appeal or the Enlarged Board of Appeal may be objected

to by any party for one of the reasons mentioned in Article 24(1) EPC, or if suspected of partiality. According to Article 24(3), second and third sentences, EPC, an objection shall not be admissible if, while being aware of a reason for objection, the party has taken a procedural step.

Such an objection must be also sufficiently substantiated in order to be admissible (Case Law of the Boards of Appeal of the EPO, 8th edition, 2016, III.J.3.3).

- 1.3 In the present case, appellant 2 based its objection on its assertion that the board had wrongly applied Article 12(2) RPBA and Rule 80 EPC respectively, and only raised this objection after an extensive discussion of these topics and when it realised that the board's opinion did not concur with its own view regarding the admissibility of the appeal and the admission into the appeal proceedings of auxiliary request 8. The board understands this objection, such that the allegedly wrong interpretation of the cited provisions could only mean to appellant 2 that the board had to be biased. In other words, expressing an opinion different from appellant 2's for these specific questions was only possible if the board was biased.

Appellant 2, in suspecting all the board members of partiality simply because they do not agree with its submissions and because they expressed a different opinion cannot support its allegation of partiality. To the contrary, such reasoning cannot be considered to be based on the objective criteria relating to partiality as indicated in G 01/05 of 7 December 2016 (Reasons, 20).

For this reason alone, i.e. the lack of substantiation, the objection of partiality is inadmissible.

1.4 Notwithstanding the above, appellant 2 as any other party to the appeal proceedings must bear in mind that the board might have a view other than its own. Since the admissibility of the appeal was not questioned by the board in its communication pursuant to Article 15(1) RPBA, appellant 2 had already an indication that the board did not see any problem of admissibility. Also, during the oral proceedings and, prior to the board's announcement of its view, appellant 2 did not object to partiality. Therefore, appellant 2 was already aware at this time of the board's alleged wrong interpretation of the law. Appellant 2 did not, as required by Article 24(3) EPC, raise an objection of partiality, but undertook further procedural steps such as attending the oral proceedings, filing a letter dated 25 June 2019, and participating in the discussion during the oral proceedings on the topics at issue.

1.5 Consequently, in view of the timing of raising it and the insufficient substantiation, the objection of partiality is rejected as inadmissible.

2. Article 108 EPC - Admissibility of the appeal

The appeal is considered admissible for the following reasons:

2.1 For an appeal to be admissible, it has to comply with the requirements of: (1) Article 108, (2) Rule 99(2) and (3) Rule 101(1) EPC, the latter making reference to the aforementioned (1) and (2).

(1) Article 108, third sentence, EPC, requires that

"Within four months of notification of the decision, a statement setting out the grounds of appeal shall be filed in accordance with the Implementing Regulations."

As to the content of the statement of grounds, Article 12(2) RPBA requires that "The statement of grounds of appeal and the reply shall contain a party's complete case. They shall set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld and should specify expressly all the facts, arguments and evidence relied on."

(2) Rule 99(2) EPC states that "In the statement of grounds of appeal the appellants shall indicate the reasons for setting aside the decision impugned, or the extent to which it is to be amended and the facts and evidence on which the appeal is based."

(3) Rule 101(1) EPC states that "If the appeal does not comply with Articles 106 to 108, Rule 97 or Rule 99, paragraph 1(b) or (c) or paragraph 2, the Board of Appeal shall reject it as inadmissible."

It is established case law that amended claims can be filed as (main) request on appeal (Case Law of the Boards of Appeal of the EPO, 8th edition, 2016, IV.E. 2.6.5 b)). In such a case, it needs to be substantiated why the amended claims overcome the reasons for the decision.

2.2 In the present case, claim 1 of the main request filed with appellant 1's statement of grounds of appeal differed from claim 1 of the main request underlying the impugned decision only in that a reference sign was changed twice. Therefore, the scope of the claim has

not changed (Rule 43(7) EPC). In the statement of grounds of appeal, appellant 1 indicated under point II why it considered the amendments of the filed requests to be allowable, why claim 1 of each of auxiliary requests 3 and 5 was clear (point III), why the priority was validly claimed (point IV), why novelty was given (point V), and why it considered inventive step to be met (point VI). Thus, it covered all the points of the impugned decision and extensively substantiated why it considered that the decision had to be put aside, thereby fulfilling the requirements of Article 12(2) RPBA. Since the grounds of appeal must enable the board to assess whether the impugned decision is correct or not, such requirement is met in the present case.

2.3 It is also established case law that the admissibility of an appeal can only be assessed as a whole (Case Law of the Boards of Appeal of the EPO, 8th edition, 2016, IV.E.2.6.9). So even if the reasoning concerning the main request were to be considered insufficient - in view of the short reasoning in point II.1 of the statement of grounds of appeal of appellant 1 - the reasoning concerning one of auxiliary requests 1 to 4 which were all rejected by the opposition division would nevertheless be considered sufficient to understand why the amendments made should be considered allowable.

2.4 The fact that the main request was withdrawn before the opposition division (see minutes of the oral proceedings before the opposition division, point 1.4) and resubmitted before the board of appeal does not concern the admissibility of the appeal, but the admissibility of said request under Article 12(4) RPBA (see for example T 184/13, Reasons, 1.1). In the

present case, the board did not have to decide on the admissibility of the main request and auxiliary requests 1 to 7, since said requests failed on other grounds (see below). A request which has been withdrawn can, as a rule, if admitted by the department or board hearing the case, be reintroduced to the proceedings, whereas a request which has been abandoned cannot be resubmitted at a later stage (T 926/12, Reasons, 1). In the present case, appellant 1 never indicated that it had abandoned the current main request. Its reintroduction into the proceedings is thus possible.

Main request

3. Article 54 EPC

3.1 Appellant 1 was of the opinion that the features "*a circular-arc portion (16k) that is formed at a lower end of the inner vertical wall (16i); a second slope (16n) formed at a position on the circular-arc portion (16k) that corresponds to an intermediate position of a height (H1) of the external cover (16) and a position of a predetermined height (H2) from a lower end face (16m); an outermost vertical wall (16q) that is formed so as to fall from the second slope (16n) by way of the circular arc portion (16k);*" were not directly and unambiguously derivable from the prior art. These were the only features under debate. It was uncontested that the other features of claim 1 were disclosed in at least D3.

3.2 The expression "*a second slope (16n) formed at a position on the circular-arc portion (16k) that corresponds to an intermediate position of a height (H1)*" cannot be restricted to the meaning that the second slope necessarily starts on the circular arc.

This interpretation is in line with paragraph [0036], wherein the second slope is formed from the vertical portion. There it is made clear that the second slope is formed so as to extend from the vertical portion. The indicated expression (in italics) is to be understood as meaning that a second slope has to be present at an intermediate position of a height H1, and that said slope is in the vicinity of the circular arc, but not necessarily directly adjacent.

- 3.3 In the decision under appeal, the opposition division gave the "circular-arc portion" its broadest possible interpretation (Reasons, 16.4). The board concurs with the opposition division, since the size (angular extension) of the circular-arc portion is not defined. Consequently, the term "circular-arc portion" cannot be distinguished from a freeform curvature.
- 3.4 D3 discloses in Figure 1 a structure of an external cover that contains a slope 4 formed at the intermediate position as required by claim 1 of the present request. This slope rises from a curvature that is considered to be a circular-arc portion in view of the broad interpretation as explained before. The outermost vertical wall is preceded by another curvature that also qualifies as a circular-arc portion in view of the broad interpretation. Consequently, all the features listed under debate are directly and unambiguously derivable from D3.
- 3.5 D3 anticipates the novelty of the subject-matter of claim 1, so the main request must fail.
4. Since the main request fails on novelty, the question of admissibility of this request under Article 12(4) RPBA did not need to be debated.

Amendments of auxiliary requests 1 to 7

Auxiliary request 1

5. Article 123(2) EPC

The feature "a rising portion (16r) that rises from the circular-arc portion (16k)" introduced in claim 1 of auxiliary request 1 originates from lines 14 and 15 of the description as filed. However, it is only disclosed that the portion that rises from the circular-arc portion is vertical, since the portion 16r is always identified as "vertical portion". There is no basis for the omission of the feature "vertical". The paragraph bridging pages 5 and 6 does not disclose a rising portion that rises from the circular-arc portion. Consequently, the requirements of Article 123(2) EPC are not fulfilled and this request must fail.

Auxiliary request 2

6. Article 123(2) EPC

6.1 The basis for this amendment is allegedly on page 13, lines 14 and 15, of the application as filed. Although it has now been specified that the portion that rises from the circular-arc portion is vertical, it is evident from the original disclosure that the paragraph on page 13 (lines 13 to 26) relates to a specific embodiment from which the features cannot be extracted as desired. It is the combination of all the features presented in that paragraph that allows the problem formulated in lines 23 to 26 of said paragraph to be solved. There is no indication that the fitted sealing member 21 could also be held in a state of pressure

contact at all times with a less specific structure than the one disclosed in said paragraph. This is also in line with the disclosure in the paragraph bridging pages 5 and 6, since the angle of inclination θ_2 is also disclosed as being 45° prior to explaining the problem solved (page 6, lines 1 to 4). It cannot be argued that said angle relates to the preferred embodiment of claim 2 as indicated on page 5 (line 24), since the original claim 2 not only defined the angle of inclination θ_2 , but also the angle of inclination θ_1 . The angle of inclination θ_2 is directly linked to the posed problem.

- 6.2 The first paragraph on page 4 relates to the prior art and its deficiencies and does not relate to the combination of features present in claim 1.
- 6.3 The features included in claim 1 of this request are therefore extracted from the specific embodiment described in the second paragraph on page 13.
- 6.4 This generalisation in claim 1 is not directly and unambiguously derivable from the application as filed, thus the requirements of Article 123(2) EPC are not met.

Auxiliary request 3

- 7. Article 84 EPC

The expression "about" is in the present context not clear for the following reasons:

- 7.1 The purpose of claims under the EPC is to enable the protection conferred by the patent to be determined (G 02/88, Reasons, 2.5 and Case Law of the Boards of

Appeal of the EPO, 8th edition, 2016, II.A.1.1). The skilled person has to know the borders of the claim.

7.2 The board disagrees with appellant 1's reference to the Guidelines, in particular F-IV, 4.7.1. For the board, the cited passage of the Guidelines indicates that the claims, when terms such as "about", "substantially" or "approximately" are present, should be read in the same way as if these terms were not present.

7.3 The skilled person knows that every indication concerning structures or parameters is always to be understood as including variations within tolerances that are usual in the manufacture of a claimed apparatus or in the execution of a claimed process.

7.4 In the present case, it is evident to the skilled person that the manufacture of the external cover will inevitably lead to acceptable variations in the height H1. As a consequence, the use of the term "about" in combination with "one-half" in claim 1 at issue suggests that deviations which are larger than those accepted tolerances are included. Since there is no explanation of what the deviations might be, the term becomes vague and undefined, with the result that it is no longer possible to determine the extent of protection conferred by the claim. This is also in line with T 971/10 (Reasons, 1.3), which related to the term "substantially".

It is not accepted that the expression "about one-half" does not provide in the present case a meaning going beyond the meaning of "one-half". The expression "about" should rather allow the meaning of "one-half" to be interpreted as broadly as possible to be able to argue the exact borders of the claim. This does not

serve the purpose of Article 84 EPC. If "about" has no meaning going beyond the normally accepted tolerances, it is very surprising to this board that its presence in claim 1 has been debated so extensively.

7.5 In view of these considerations, the Guidelines F-IV, 4.7.2 are to be applied, where the following is stated: "If the application suggests that the use of terms such as "about", "approximately" or "substantially" extends either the interval claimed by a value and/or range outside the error margins of the measurement system or the structural unit beyond the manufacturing tolerances, however, the use of such a word suggests that deviations are included which are larger than those accepted tolerances, then the wording becomes vague and undefined, i.e. the application does not fulfil the requirements of Art 84 [...]."

7.6 In the present case, the requirements of Article 84 EPC are not fulfilled.

Auxiliary request 4

8. Article 123(2) EPC

The features included are extracted from the second paragraph on page 13 without including the angle of inclination θ_2 . As laid out for auxiliary request 2, this is contrary to Article 123(2) EPC. This also applies here.

Auxiliary request 5

9. Article 84 EPC

The objection made for the third auxiliary request is still valid. In addition, the same reasoning applies to the expression "about 45°".

The requirements of Article 84 EPC are not fulfilled.

Auxiliary requests 6 and 7

10. Article 123(2) EPC

The features included in these requests are also extracted from the second paragraph on page 13 without including the angle of inclination θ_2 . As laid out for auxiliary request 2, this is contrary to Article 123(2) EPC. This also applies here.

Admission into the appeal proceedings of auxiliary requests 1 to 7

11. In view of the reasoning stated above regarding the amendments of claim 1 of each of auxiliary requests 1 to 7, the question of their admissibility needs not be debated.

Auxiliary request 8

12. Article 13(1) RPBA

This request was submitted on 2 April 2019 as a reaction to the communication pursuant to Article 15(1) RPBA. Its admission is at the board's discretion.

The clarity objection had already been raised during the oral proceedings before the opposition division, but since the opposition division did not see a problem of clarity, there was no need at that time to file an amended claim.

Although the request could have been filed in reply to appellant 2's statement of grounds of appeal, the board admits it into the proceedings since the amendment is only minor, is easy to deal with and cannot come as a surprise to appellant 2. The repositioning of the feature relating to the angle of inclination θ_2 compared to claim 1 of then auxiliary request 5 held allowable by the opposition division was already present in current auxiliary request 5. It does not alter the meaning of said feature and does not give rise to a new problem. The deletion of "about" compared to auxiliary request 5 leads to a request that is clearly allowable for the reasons set out below, so it is admitted into the proceedings.

13. Rule 80 EPC

13.1 The amendments made in claim 1 clearly intend to overcome appellant 2's objections, e.g. on inventive step - see appellant 2's grounds of appeal, item cc) i) and appellant 1's reply, item VI.6. The only point of debate is whether the additional change of the reference signs of the outer vertical wall from 16i to 16h is allowable under Rule 80 EPC. The board is of the opinion that this amendment is allowable for two reasons:

13.2 The features added contain the reference sign 16i relating to the inner wall. To avoid a contradiction and a possible clarity objection resulting therefrom,

an adaptation of the reference signs of the outer vertical wall already present in claim 1 was necessary. This amendment of the reference sign is clearly occasioned by and linked to the other amendments made.

- 13.3 Moreover, this change of reference sign can also be considered as a correction pursuant to Rule 139 EPC, where provision and the specific requirements defined therein apply independently from Rule 80 EPC (T 657/11, Reasons, 3.2 to 3.4). It was not disputed by appellant 2 that the correction is obvious in the sense that it is immediately evident that nothing else would have been intended other than what is offered as the correction.

14. Article 123(2) EPC

The requirements of Article 123(2) EPC are met, since claim 1 now includes all the features disclosed in combination in the second paragraph of page 13 of the application as filed. No mention is made there of the angle of inclination θ_1 , and the board sees no reason why the two angles of inclination θ_1 and θ_2 should be related and should both be 45° in order to solve the problem listed in that paragraph.

15. Article 84 EPC

The term "about" having been deleted, the requirements of Article 84 EPC are met.

16. Article 54 EPC

Novelty of this request was neither objected to nor debated by appellant 2. The board sees no reason to

take a different stance. The requirements of Article 54 EPC are met.

17. Article 56 EPC

The requirements of Article 56 EPC are met for the following reasons.

- 17.1 The invention relates to a structure of an external cover of an air-drying apparatus.
- 17.2 D3 is the closest prior art, since the external cover includes a first and a second slope. D5 and D6 do not disclose an external cover having a second slope.
- 17.3 The problem to be solved is to improve the durability of the cover (paragraphs [0011] and [0016] of the patent).
- 17.4 The solution proposed is a structure according to claim 1 characterised in that the cover includes a vertical portion (16r) that rises from the circular-arc portion (16k) and is formed integrally with the inner vertical wall (16i), wherein a position of the upper end of the vertical portion (16r) is at a predetermined height (H2) from a lower end face (16m) being set to about one-half the height (H1) of the external cover (16), and wherein an angle of inclination (θ_2) which a back surface of the second slope (16n) forms with a back surface of the outermost vertical wall (16q) is set to about 45°.
- 17.5 It is accepted that the problem is solved, since said structure allows a constant force from the outside to be exerted on the sealing member.

- 17.6 Appellant 2 did not provide any arguments against inventive step of this request. The board sees no reason to take a different stance from the opposition division in the appealed decision, since the prior art neither shows and/or teaches such a configuration, nor renders it obvious.
- 17.7 Similar considerations apply when starting from D4, which is the priority document of D3.
18. Article 112(1)(a) EPC - Referral to the Enlarged Board of Appeal
- 18.1 At the end of the oral proceedings, after the chairman had announced that the board considered that the set of claims of auxiliary request 8 meets the requirements of the EPC, appellant 2 filed a request for referral to the Enlarged Board of Appeal under Article 112(1)(a) EPC (see point VI). In particular, appellant 2's request consists of two parts:
- (a) Since the main request was withdrawn in opposition proceedings, appellant 2 considers this to be an abandonment (waiver) and its admission into the proceedings is inconsistent with case law.
 - (b) Rule 80 EPC as *lex specialis* prevails over Article 139 EPC.
- 18.2 It is established case law that the referred question must be relevant to reach a decision on the appeal in question (Case Law of the Boards of Appeal of the EPO, 8th edition, 2016, IV.F.2.3.3). This clearly does not apply here; the board already came to a conclusion without the need for a referral, since all the questions under debate (see above) could be answered while relying on established, non-conflicting case law. Regarding the issue of admitting the main request into

the proceedings, it had for the reasons stated above (lack of novelty of the subject-matter of claim 1 of the main request) not to be decided (see paragraph 4 above).

Appellant 2 also argued that referral is of fundamental importance to answer the question if a Rule 80 EPC problem can be corrected pursuant to Article 139 EPC and whether in that regard Rule 80 EPC prevails as *lex specialis*. No substantiation has been given from appellant 2 to support this argument, so for this reason alone the board sees no need for referral. In addition, in the present case, Rule 139 EPC applies independently from Rule 80 EPC (see paragraph 13.3).

18.3 Therefore, the request for referral to the Enlarged Board of Appeal is rejected.

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 in amended form on the basis of the claims of auxiliary request 8 as filed with the letter dated 2 April 2019 and a description to be adapted.

The Registrar:

The Chairman:



C. Vodz

E. Bendl

Decision electronically authenticated