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Datasheet for the decision of 20 October 2021

Case Number: T 0493/18 - 3.2.04

Application Number: 13162935.4

Publication Number: 2687101

IPC: A22C21/00, B65G47/84

Language of the proceedings: EN

Title of invention:
Processing apparatus for poultry comprising one or more transfer units

Patent Proprietor:
Meyn Food Processing Technology B.V.

Opponent:
Marel Stork Poultry Processing B.V.

Headword:

Relevant legal provisions:
EPC Art. 100(b), 83
EPC R. 103(1)(a)

Keyword:
Substantial procedural violation - (no)
Sufficiency of disclosure - (no)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 0493/18 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 20 October 2021

Appellant: (Patent Proprietor)	Meyn Food Processing Technology B.V. Westeinde 6 1511 MA Oostzaan (NL)
Representative:	Van Breda, Jacobus Octrooibureau Los & Stigter B.V. Weteringschans 96 1017 XS Amsterdam (NL)
Respondent: (Opponent)	Marel Stork Poultry Processing B.V. Handelstraat 3 5831 AV Boxmeer (NL)
Representative:	EP&C P.O. Box 3241 2280 GE Rijswijk (NL)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 12 February 2018 revoking European patent No. 2687101 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	A. de Vries
Members:	J. Wright
	T. Bokor

Summary of Facts and Submissions

I. The appeal was filed by the appellant (patent proprietor) against the decision of the opposition division to revoke the patent in suit.

During the opposition proceedings, the opponent raised the ground for opposition under Article 100(b) EPC (insufficiency of disclosure).

II. The opposition division decided that the patent did not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

III. In a communication in preparation for oral proceedings the Board set out its preliminary opinion on the relevant issues. Oral proceedings before the Board were duly held on 20 October 2021.

IV. The appellant (patent proprietor) requests that the decision under appeal be set aside and maintenance of the patent as granted, and reimbursement of the appeal fee.

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

V. Claim 1 of the main request reads as follows:

"Processing apparatus (1) for poultry comprising one or more transfer units (2) placed intermediate and conveying poultry from a first line to a subsequent second line, wherein both the first line and the second line are selected from the group comprising a

slaughtering line (3), an evisceration line (4), a chilling line (5), a sorting line (6), a cutup line (7, 8) and/or another type of line or lines, wherein each transfer unit (2) is embodied with a circulating support (9) onto which a plurality of transfer means (10) are mounted that in a not obstructed situation do not carry out a relative movement with respect to the support (9), yet in an obstructed situation are able to move relative to the support (9), and that the circulating support (9) is arranged to convey the transfer means (10) between a supply station (3.1; 4.1; 5.1; 6.11, 6.12) at the side of the first line and a discharge station (4.0; 5.0; 6.0; 7.0; 8.0) at the side of the second line and vice versa, characterized in that the circulating support (9) comprises material that is magnetically conductive and that the transfer means (10) are provided with at least one magnet (11) so as to induce eddy currents in the circulating support (9) that counteracts relative motion between the transfer means (10) and the circulating support (9)".

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

E1: Wikipedia - Eddy Current article - last modified on 13 February 2016 and filed 9 March 2016.
E2: Magnetic properties of Materials - http:// info.ee.surrey.ac.uk/Workshop/ advice/coils/mu/, dated 23 March 2016 and filed 8 March 2018
E3: Official journal of the European Union of 19 January 2008, pages L16/1 to L16/3, "Council regulation (EC) No 41/2008 of 14 January 2008"
E4: Official journal of the European Union of 27 August 2005, pages L223/1 to L223/26, "Council regulation (EC) No 1371/2005 of 19 August 2005"

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

The opposition division's decision was flawed because it contains a substantial procedural violation.

The invention according to claim 1 is sufficiently disclosed. The term magnetically conductive means magnetically permeable. The idea behind the invention is to use magnetically permeable material for a circulating support to concentrate the flux from a magnetic field to induce eddy currents in the support and so provide an eddy current braking effect. Although the greater the magnetic permeability the greater this effect, it would be sufficient to use a material through which magnetic flux can simply pass. Therefore the skilled person would be able to select a suitable material for the support from their general knowledge.

VIII. The respondent-opponent's arguments can be summarised as follows:

The opposition division did not commit a substantial procedural violation.

Even if magnetically conductive means magnetically permeable, the invention is insufficiently disclosed because the skilled person would not know what particular magnetic permeability was required for the circulating support.

Reasons for the Decision

1. The appeal is admissible.

2. Alleged substantial procedural violation

In its communication in preparation for the oral proceedings (see section 3), the Board gave the following preliminary opinion on this matter:

3.1 In the Board's opinion, in reaching its decision, the opposition division did not commit a substantial procedural violation.

3.2 The issue of sufficiency of disclosure turned on the interpretation of the term "magnetically conductive" from the outset of the opposition proceedings (see notice of opposition of the respondent-opponent of 9 March 2016).

3.3 The opposition division presented its opinion on the matter to the parties in its communication of 30 March 2017, page 2. There, the opposition division noted that definitions of the term "magnetic conductivity" found in the Internet contradicted that provided in E2.

3.4 The parties had the opportunity to reply to this opinion in writing, as indeed the appellant-proprietor did in its letter of 29 May 2017.

According to the undisputed minutes (see annexe to the communication of 12 February 2018, page 1), the issue of sufficiency of disclosure was likewise discussed at the oral proceedings. Therefore, the parties had an

opportunity to present their cases orally on this issue.

3.5 In this regard, each party is responsible for its own presentation, it is not the responsibility of the opposition division to structure a party's presentation. Therefore, neither the fact that the appellant-proprietor considered the reference to different explanations of the term "magnetic conductivity" being available in the Internet in the division's communication a "subordinate point", nor the absence of prompting by the opposition division to discuss the issue means that it was given no opportunity to present its case on this matter.

3.6 Turning now to the impugned decision, the opposition division considered that the skilled person would not know the meaning of magnetically conductive, so would not be able to select a material having this property (cf. impugned decision, reasons 2.7 and 2.10).

3.7 According to established jurisprudence parties are not entitled to advance indications of all reasons for a decision in detail, see Case Law of the Boards of Appeal, 9th edition 2019, V.B.4.3.5. In this case, the division had in its communication noted previously that the Internet provided different conflicting definitions. In its decision it then cited specific examples to illustrated this argument, without mentioning how magnetic conductivity is defined in these citations, let alone attaching any significance to particular definitions. Therefore, in the Board's view, the opposition division's associated argument is not a new argument presented for the first time in its decision but boils down to the argument first presented in its communication of 30 March 2017, page 2 that

merely referred to the Internet in general (the term magnetic conductivity is ambiguous) and to which, as already explained, the parties had the opportunity to comment.

3.8 Moreover, in reaching its decision, the opposition division appears to have taken into account the arguments of the proprietor in respect of documents E3 and E4 (see impugned decision, grounds, points 2.5 and 2.9). Without prejudice to the question as to whether the opposition division's technical assessment of these documents was correct, the Board does not agree with the appellant that a procedural violation occurred: The opposition division took E3 and E4 into account, considered the appellant-proprietor's argument based thereon (magnetic conductivity means magnetic permeability), found the argument not convincing and concluded that the invention was insufficiently disclosed.

3.9 For all these reasons, the Board does not consider that the opposition division committed a substantial procedural violation, and therefore the Board considers a reimbursement of the appeal fee is not equitable under Rule 103(1)(a) EPC.

2.1 In the absence of any written or oral argument from the parties on this aspect of the communication, the Board sees no reason to deviate from its preliminary position. Therefore, the Board confirms that the opposition division did not commit a substantial procedural violation, and that the request for reimbursement of the appeal fee must be rejected.

3. Background

The invention (see published patent specification, paragraph [0001]) relates to a processing apparatus for poultry having a transfer unit between processing lines. Such transfer units are known. They have a circulating support onto which a plurality of transfer means are mounted. The transfer means can either operate in a non-obstructed state when they do not move relative to the circulating support [by applying a brake] or in an obstructed state when relative movement between support and transfer means can occur [by releasing the brake].

4. Sufficiency of disclosure

According to the patent (see published patent specification, paragraph [0006]), essentially, the processing line of the invention differs from conventional ones in that the transfer units are provided with magnets and eddy currents are induced in the circulating support to counteract relative motion between the transfer means and the circulating support, in other words to brake their relative movement.

4.1 The Board agrees with the parties that the skilled person will understand that eddy current braking is a central idea of the invention. As such, eddy current braking and the physics behind it belong to the skilled person's general knowledge. For instance, a Wikipedia article on the subject (see E1 page 1 and page 2, first 5 paragraphs with the first two figures) explains that eddy currents are induced in an electrical conductor that is subjected to a changing magnetic field. For example, when an electrically conductive plate moves

into or out of an external magnetic field, eddy currents are induced in the plate. These produce a magnetic field that opposes the external field and thus generate a force that retards the plate's motion. This is how the skilled person understands an eddy current brake to work.

4.2 Turning now to claim 1, the characterising portion requires that the circulating support comprises *magnetically conductive* material and that the transfer means are provided with at least one magnet so as to induce eddy currents in the circulating support [...].

4.3 Thus, having the circulating support comprise *magnetically conductive* material is one of just two explicit characterising features which together induce eddy currents in the circulating support. In order to carry out the invention, the skilled person must be able to select a suitable *magnetically conductive* material.

4.4 It is not disputed that the patent does not offer a definition for the term *magnetically conductive*. It is used in paragraphs [0006], [0016] and claim 1 without further explanation. The opposition division considered (see impugned decision, sections II 2.9 and 2.10) that the term was not to be found in a technical handbook and moreover, that it had a multitude of possible interpretations.

4.5 The appellant proprietor has consistently argued, making reference to E2, E3 and E4 amongst other documents, that the usual meaning of magnetically conductive is *magnetically permeable*, and that the skilled person would interpret it in this way in the claim. The Board finds this plausible. Although the

term appears not to be a recognised term in classical physics, E2 (see pages 1 and 7), which is an introduction to magnetic materials, explains that *magnetic permeability* can be thought of as "conductivity" for magnetic flux. As to E3 and E4, the Board is not convinced that EU anti-dumping regulations on certain types of silicon electric steel products are a primary source of technical information for the notional skilled person, let alone a legally binding source concerning the correct terminology for defining properties of materials. Nevertheless, the Board accepts that documents E3 and E4 (see points 6 and 7, resp. point 15) equate magnetic conductivity with magnetic permeability when categorising steel products as being of "high conductivity or high permeability grades" (vs. regular grades).

4.6 Armed with this interpretation (magnetically conductive means magnetically permeable) the skilled person must select a suitable material if they are to carry out the invention. In principle all materials, and even vacuum, have measurable magnetic permeability. However, the feature requires more than merely measurable permeability. Rather, the permeability must be *so as to induce eddy currents*. So to implement the feature the skilled person must know, either from the patent or their general knowledge, what particular magnetic permeability would be suitable to induce eddy currents for the invention to work. Here lies the problem.

4.7 The patent itself merely teaches (paragraphs [0006], [0016] and claim 1) to use magnetically [permeable] material, without giving any examples of a suitable magnetic permeability or a suitable material. So the skilled person would find no hint there as to what

magnetic permeability might be suitable to induce eddy currents and so carry out the invention.

Nor does the Board consider that the skilled person would know this information from their general knowledge. In the field of eddy current brakes, the Board is not aware of any evidence which might point to any role played by the magnetic permeability of a material in which eddy currents are to be induced. At most, E1 (see page 1, last three paragraphs and page 2, 5th paragraph and page 3, paragraph titled *Electromagnetic braking)* discloses to use a metal plate moving through a magnetic field to provide an eddy current braking effect and stresses that the plate must be [electrically] conductive, for example a heavy copper plate (page 3). However, it does not suggest that the plate should have a particular magnetic permeability.

4.8 At the oral proceedings, the appellant-proprietor argued (without reference to the patent or any evidence) that the idea behind the invention was to concentrate the flux from the external magnetic field to induce eddy currents. To this end, so the argument went, the material of the circulating support should have a high relative magnetic permeability μ_r (relative to that of a vacuum).

4.9 E2 gives examples of materials exhibiting higher relative permeability μ_r (see table bridging pages 5 and 6), with values of μ_r ranging from 8 (for ferrite) to a million (for supermalloy). However, it gives no information as to how these materials might be used in an eddy current brake, nor whether they might be suitable for this use. Rather other applications are listed (see right hand column, resonant circuits, power

circuits, transformers etc.). Nor has the appellant-proprietor suggested that any of the materials listed there might be suitable for carrying out the invention.

4.10 The appellant-proprietor did however argue at the oral proceedings that it would be sufficient to provide a material through which magnetic flux can simply pass, including aluminium and copper amongst others. Thus, in the appellant-proprietor's eyes, these must have a relative permeability μ_r suitable for carrying out the invention. E2 (see paragraph bridging pages 10 and 11) does indeed list aluminium and copper as a material having, for practical purposes, the same permeability as a vacuum, that is a μ_r of 1, thus they are materials through which magnetic flux simply passes.

However, the appellant-proprietor has also argued (see appeal grounds, point 26) that the invention would not function with a plastic circulating support because the material was not magnetically conductive, i.e. not magnetically permeable. If this is so, it would render moot the appellant's assertion that it would be sufficient to provide a material for the circulating support through which magnetic flux can simply pass, such as aluminium or copper, since E2 (see top of page 11) discloses that plastic, aluminium and copper have the same relative magnetic permeability (μ_r of 1).

4.11 To sum up, the skilled person would not know from the patent what magnetic permeability the material of the circulating support should have in the claimed eddy current brake apparatus. Nor would they be able to draw on their general knowledge to fill this gap: the prior art cited only points to such a support needing to be a good electrical conductor.

Lastly, irrespective of whether the appellant-proprietor's explanation as to how the invention functions is proven, the appellant has not explained what magnetic permeability would be suitable for carrying out the invention. In this regard, the materials the appellant-proprietor has suggested might be suitable for the circulating support include aluminium and copper, yet their suitability in terms of magnetic permeability, appears to be contradicted by other arguments of the appellant.

4.12 For these reasons, the appellant-proprietor's arguments have not convinced the Board that the skilled person would know what magnetic permeability the material of the circulating support should have. Thus, they would not be able to choose a suitable material. Therefore, the Board considers that the opposition division (see impugned decision, sections II 2.10 and 2.11) was right to find that the invention was insufficiently disclosed (Article 83 EPC).

5. The Board concludes that the appellant's request for reimbursement of the appeal fee and its main request fail. Since there are no other requests, the Board must dismiss the appeal.

Order

For these reasons it is decided that:

1. The request for the reimbursement of the appeal fee is refused

2. The appeal is dismissed.

The Registrar: The Chairman:

G. Magouliotis J. Wright

Decision electronically authenticated