

Internal distribution code:

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

**Datasheet for the decision
of 18 January 2023**

Case Number: T 0084/21 - 3.2.07

Application Number: 13821759.1

Publication Number: 2935056

IPC: B65G47/244, G01K13/06,
G01K13/12, A47J37/04, A23L3/18,
A47J27/00, A47J27/62

Language of the proceedings: EN

Title of invention:
THERMAL MEASUREMENT AND PROCESS CONTROL

Patent Proprietor:
John Bean Technologies Corporation

Opponent:
Marel Further Processing B.V.

Headword:

Relevant legal provisions:
EPC Art. 123(2), 54(2)
RPBA 2020 Art. 13(2), 12(6)

Keyword:

Amendments - added subject-matter (yes)

Amendment after summons - cogent reasons (no)

Novelty - (no)

Late-filed request - should have been submitted in first-instance proceedings (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 0084/21 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 18 January 2023

Appellant: John Bean Technologies Corporation
(Patent Proprietor) 70 West Madison Street, Suite 4400
Chicago, IL 60602 (US)

Representative: AWA Sweden AB
Box 1066
251 10 Helsingborg (SE)

Respondent: Marel Further Processing B.V.
(Opponent) Handelstraat 3
5831 AV Boxmeer (NL)

Representative: EP&C
P.O. Box 3241
2280 GE Rijswijk (NL)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
18 November 2020 concerning maintenance of the
European Patent No. 2935056 in amended form.**

Composition of the Board:

Chairman I. Beckedorf
Members: V. Bevilacqua
B. Paul

Summary of Facts and Submissions

- I. An appeal was filed by the patent proprietor (appellant) against the interlocutory decision of the opposition division to maintain European patent No. 2 935 056 in amended form according to the then auxiliary request 16.
- II. The present decision refers to the following document mentioned in the appealed decision:

C1: Swedburg, C., 'Industrial Meat Ovens Cook with RFID', RFID Journal, 27 May 2011, pages 1 to 3;
- III. In preparation for oral proceedings, the Board communicated its preliminary assessment of the case by a communication pursuant to Article 15(1) RPBA 2020.
- IV. With letter dated 16 November 2022 the patent proprietor reacted thereto.
- V. Oral proceedings were held on 18 January 2022. The factual and legal situation was discussed with the parties. For further details of the course of the oral proceedings, reference is made to the minutes thereof.

The final requests of the parties were as follows:

for the patent proprietor

that the decision under appeal be set aside and
that the case be remitted to the opposition
division for further prosecution on the basis of

- the main request or auxiliary requests 1 to 6 on which the decision under appeal is based, re-filed with the statement of grounds of appeal, should the Board find they meet the requirements of Article 84 EPC and Rule 80 EPC;

alternatively on the basis of

- auxiliary requests 7 to 9 on which the decision under appeal is based, re-filed with the statement of grounds of appeal, should the Board find they meet the requirements of Article 84 EPC;
- auxiliary requests 10 to 13 on which the decision under appeal is based, re-filed with the statement of grounds of appeal, should the Board find they meet the requirements of Article 123(2) EPC;
- auxiliary requests 14 and 15 on which the decision under appeal is based, re-filed with the statement of grounds of appeal, should the Board find they meet the requirements of Article 54 EPC;

or, when setting aside the decision under appeal, that the patent be maintained in amended form according to the "new auxiliary request 16" or one of auxiliary requests 17 or 18 filed with the appellant's statement of grounds of appeal, subject to the conditions

- that the patent proprietor's new auxiliary request 16 is not meant to replace auxiliary request 16 filed during the oral proceedings before the opposition division and held in the decision under appeal to meet the requirements of the EPC and
- that all three new auxiliary requests 16 to 18 are to be treated as higher ranking than the maintained version, so that the patent in suit is

still defended and would be maintained even if the patent proprietor's appeal was to be dismissed.

for the opponent

that the appeal be dismissed.

VI. Claim 16 of the main request reads as follows (amendments shown with respect to claim 13 as originally filed, emphasis added by the Board):

"A system for thermally processing food products , comprising:

- (a) a conveyance system for conveying the food products in a stream;
- (b) a scanner for scanning all or some of the food products of the stream of food products, with the scanning data generated usable to model the physical features of the scanned food products; wherein the scanner is positioned at a location upstream from a thermal processing station of the system, a the thermal processing station operating under process parameters;
- (c) a computing device configured to, based on the scanning data, select sample food products;
- (d) a thermal measurement system for measuring the temperature of the sample food products, the temperature measurement system configured to selected from the group consisting of:
 - ~~(i) a diverter system for directing selected food products from the conveyance system to a temperature measuring station separate from the stream of food products and a temperature measurement system comprising temperature measuring instrumentation for automatically~~

~~measuring the temperature of the food products at the temperature measuring station;~~

~~(ii) automatically functionally connecting temperature sensing devices to the selected food products, said temperature sensing devices traveling with the selected food products on the conveyance system and monitoring the temperature sensed by the temperature sensing devices, including during thermal processing of the selected sample products; and~~

(e) an information transmission system for transmitting the temperature measurement data from the temperature measurement system."

VII. Claim 14 of **auxiliary request 1** corresponds to claim 16 of the main request.

Also claim 14 of **auxiliary request 2**, claim 10 of each of **auxiliary requests 3 and 4**, claim 16 of **auxiliary request 7**, claim 14 of each of **auxiliary requests 8 and 9**, claim 10 of **auxiliary request 10** and claim 10 of **auxiliary request 11** all correspond to claim 16 of of the main request.

VIII. Claim 10 of **auxiliary request 5** reads as follows (the features added with respect to claim 16 of the main request are underlined, emphasis added by the Board):

"A system for thermally processing food products, comprising:

(a) a conveyance system for conveying the food products in a stream;

(b) a scanner for scanning all or some of the food products of the stream of food products, with the scanning data generated usable to model the physical features of the scanned food products, wherein the scanner utilizes a video camera, an X-ray apparatus or

scanning in the hyperspectral range, and wherein the scanner is positioned at a location upstream from a thermal processing station of the system, the thermal processing station operating under process parameters;

(c) a computing device configured to, based on the scanning data, select sample food products; (c1) a thermal measurement system for measuring the temperature of the sample food products, the temperature measurement system configured to automatically functionally connect temperature sensing devices to the selected food products, said temperature sensing devices traveling with the selected food products on the conveyance system and monitoring the temperature sensed by the temperature sensing devices, including during thermal processing of the selected sample food products; and

(e) an information transmission system for transmitting the temperature measurement data from the temperature measurement system."

IX. Claim 10 of **auxiliary request 12** corresponds to claim 10 of auxiliary request 5.

X. Claim 8 of **auxiliary request 6** reads as follows (the features added with respect to claim 16 of the main request are underlined, emphasis added by the Board):

"A system for thermally processing food products, comprising:

(a) a conveyance system for conveying the food products in a stream;

(b) a scanner for scanning all or some of the food products of the stream of food products, with the scanning data generated usable to model the physical features of the scanned food products, wherein the scanner is positioned at a location upstream from a

thermal processing station of the system, the thermal processing station operating under process parameters;

(c) a computing device configured to, based on the scanning data, select sample food products;

(d) a thermal measurement system for measuring the temperature of the sample food products, the temperature measurement system configured to automatically functionally connect temperature sensing devices to the selected food products, said temperature sensing devices traveling with the selected food products on the conveyance system and monitoring the temperature sensed by the temperature sensing devices, including during thermal processing of the selected sample food products, wherein the location on the selected food products at which the temperature sensing devices are connected is determined by the physical characterization of the food products being conveyed on the conveyance system; and

(e) an information transmission system for transmitting the temperature measurement data from the temperature measurement system."

XI. Claim 8 of **auxiliary request 13** corresponds to claim 8 of auxiliary request 6.

XII. Claim 1 of **auxiliary request 14** reads as follows:

"A method of processing a stream of food products in a thermal processing system under operational parameters while being conveyed by a conveyance system, comprising:

(a) physically characterizing the food products being conveyed on the conveying system, wherein the food products are physically characterized by scanning;

(b) thermally processing the food products at the thermal processing station under process parameters; and

(c) determining the level of thermal processing of the food products achieved at the thermal processing station, comprising:

(i) selecting, based on said physically characterizing the food products, sample food products for temperature measurement; and

(ii) measuring the temperature of the selected sample food products by a methodology of: connecting a temperature measuring device to the selected sample food products to travel with the sample food products in the stream of food products and monitoring the temperature of the sample food products during processing in the thermal processing station."

XIII. Claim 1 of **auxiliary request 15** reads as follows (the features added with respect to claim 1 of auxiliary request 14 are underlined, emphasis added by the Board):

"A method of processing a stream of food products in a thermal processing system under operational parameters while being conveyed by a conveyance system, comprising:

(a) physically characterizing the food products being conveyed on the conveying system, wherein the food products are physically characterized by scanning using a scanner upstream a thermal processing station;

(b) thermally processing the food products at the thermal processing station under process parameters; and

(c) determining the level of thermal processing of the food products achieved at the thermal processing station, comprising:

(i) selecting, based on said physically characterizing the food products, sample food products for temperature measurement; and

(ii) measuring the temperature of the selected sample food products by a methodology of: connecting a temperature measuring device to the selected sample food products to travel with the sample food products in the stream of food products and monitoring the temperature of the sample food products during processing in the thermal processing station,

wherein based on the results of the scanning of the food products, initiating an adjustment or change to the operational parameters of the thermal processing system."

XIV. Claim 1 of **auxiliary request 16** reads as follows (the features added with respect to claim 1 of auxiliary request 15 are underlined, emphasis added by the Board):

"A method of processing a stream of food products in a thermal processing system under operational parameters while being conveyed by a conveyance system, comprising:

(a) physically characterizing the food products being conveyed on the conveying system, wherein the food products are physically characterized by scanning using a scanner upstream a thermal processing station,

wherein the scanner is not a human being;

(b) thermally processing the food products at the thermal processing station under process parameters; and

(c) determining the level of thermal processing of the food products achieved at the thermal processing station, comprising:

(i) selecting, based on said physically characterizing the food products, sample food products for temperature measurement; and

(ii) measuring the temperature of the selected sample food products by a methodology of: connecting a temperature measuring device to the selected sample food products to travel with the sample food products in the stream of food products and monitoring the temperature of the sample food products during processing in the thermal processing station, wherein based on the results of the scanning of the food products, initiating an adjustment or change to the operational parameters of the thermal processing system."

XV. Claim 1 of **auxiliary request 17** reads as follows (the features added with respect to claim 1 of auxiliary request 15 are underlined, emphasis added by the Board):

"A method of processing a stream of food products in a thermal processing system under operational parameters while being conveyed by a conveyance system, comprising:

(a) physically characterizing the food products being conveyed on the conveying system, wherein the food products are physically characterized by scanning using a scanner upstream a thermal processing station, **wherein the scanner is a video camera, an X-ray apparatus or a scanning station scanning in the hyperspectral range;**

(b) thermally processing the food products at the thermal processing station under process parameters; and

(c) determining the level of thermal processing of the food products achieved at the thermal processing station, comprising:

(i) selecting, based on said physically characterizing the food products, sample food products for temperature measurement; and

(ii) measuring the temperature of the selected sample food products by a methodology of: connecting a temperature measuring device to the selected sample food products to travel with the sample food products in the stream of food products and monitoring the temperature of the sample food products during processing in the thermal processing station, wherein based on the results of the scanning of the food products, initiating an adjustment or change to the operational parameters of the thermal processing system."

XVI. Claim 1 of **auxiliary request 18** reads as follows:

"A method of measuring the internal temperature of discrete food products thermally processed by a thermal processing system while being conveyed on a conveyance system, comprising:

(a) scanning the food products using a scanner upstream a thermal processing station;

(b) selecting, based on the scanning, sample food products for temperature measurement; and

(c) measuring the temperature of the selected food products by a methodology of connecting a temperature measuring device to the selected food products to travel with the selected food products on the conveyance system and monitoring the temperature of the sample food products during processing of the sample food products by the thermal processing system, wherein the temperature measuring device is connected to

selected sample food products by a methodology of: automatically inserting the temperature measuring device into the selected food product at a location determined by the physical characterization of the sample food product."

Reasons for the Decision

1. *Added subject-matter - Article 123(2) EPC* - main request and auxiliary requests 1 to 4 and 7 to 11
 - 1.1 The opposition division found (see decision under appeal, point 12.2.3) that claim 10 of auxiliary request 10 does not fulfil the requirements of Article 123(2) EPC.
 - 1.2 The appellant contests the above finding and argues that feature (c) in combination with feature (b) (see point VI above, where these features are clearly identified) was found in the patent in suit in paragraphs [0032], [0063] in relation to figure 1, [0092] and [0093] as well as figure 10 and paragraph [0114] (see statement of grounds of appeal, page 8, second paragraph, to page 12, first paragraph).
 - 1.3 The respondent put forward (see points 5 to 5.3 of the reply to the statement setting out the grounds of appeal) that claim 10 of auxiliary request 10 had been extended in an unallowable way and noted that this claim corresponds to claim 16 of the main request (see point 5.5).

1.4 The Board does not find the appellant's arguments convincing and agrees with the arguments of the respondent according to which these claims (**claim 16 of the main request, claim 10 of auxiliary request 10**) contain added subject-matter.

1.4.1 In point 5.1.1 of its reply to the statement of grounds of appeal, the respondent argues that paragraph [0093] of the patent in suit (page 28, lines 20 to 32, of the application as published) relates to an embodiment where temperature measurement takes place only after thermal processing. Claim 10 of auxiliary request 10 however, is directed to an embodiment where temperature sensing devices are functionally connected to the food products upstream of the thermal processing station and travel with the food products through the thermal processing station (feature (d)). This passage therefore cannot provide a basis for the combination of features (b) and (c) in claim 10 of auxiliary request 10 as they are disclosed in paragraph [0093] only in relation to a different measuring method to that of feature (d).

In addition, as also argued by the respondent, paragraph [0093] does not directly disclose that the computing device is configured to, based on the scanning data, select sample food products. It discloses only that the determination of physical attributes based on model(s) and data held in the memory portion 90 of computing device 34 "enables the ability to select specific food products for temperature measurement after being thermally processed" (see application as published, page 28, lines 28 to 29).

1.4.2 The Board further cannot follow the argument of the appellant that in paragraph [0093] it is "also clearly stated that the first scanner 18 can be used on its own or in combination with the second scanner 20" (see statement of grounds of appeal, page 9, second paragraph). In paragraph [0093] (page 28, lines 29 to 32) it is stated that

"Use of scanning information from scanner 18 in this manner may not be as accurate as employing a second scanner 20 but may be an acceptable alternative to requiring a second scanner 20, thereby to provide the benefits of the present disclosure without requiring the second scanner 20".

Therefore, this paragraph does not appear to be a basis showing that the findings of the opposition division are incorrect. A second scanner is clearly still excluded, and is the object of this embodiment.

1.4.3 Figure 10 of the application as published shows a flow diagram of a method corresponding to the system of figure 9 (see application as published, page 8, lines 9 to 10).

The Board agrees with the respondent that there is no disclosure of feature (c) in figure 10. In the figure and the description, paragraph [0114] (page 34, line 29 to page 35, line 15, of the published application), there is no direct and unambiguous disclosure of a computing device configured to, based on the scanning data, select sample food products. The computing device 334 is configured to use the scanning data to determine whether the food products have been acceptably thermally processed (figure 10) or for processing and

analysis of the scanning data to determine whether the scanned food products are of acceptable configuration (page 35, lines 2 to 6). There is no mention of the computing device being configured to select samples. As the respondent argues, in figure 10 there is no output from computing device 334 regarding selection (see reply to the statement of grounds of appeal, point 5.1.2).

Therefore, this figure and passage of the description as originally filed also do not convincingly demonstrate that the opposition division's finding was incorrect.

- 1.4.4 The further passages cited by the appellant, namely paragraphs [0032] and [0063] (paragraphs bridging pages 8 to 9 and pages 18 to 19, respectively, of the patent specification) and figure 1, do not refer to the computing device being configured to, based on the scanning data, select sample food products for temperature measurement. Paragraph [0032] does not refer to a computing device. Paragraph [0063] describes that the scanning data is analysed by computing device 34 and various actions can be taken, the list of possible actions does not include selecting sample food products to be functionally connected to temperature sensing devices before thermal processing takes place.
- 1.4.5 Regarding the opposition division's reasoning that the embodiment described in paragraph [0092] (page 28, lines 12 to 19, of the published application) required all food products to be scanned, the appellant argues that it is not necessary to limit the claim to "scanning all food products" because claim 13, as originally filed, referred to "all or some of the food

products" (see statement of grounds of appeal, page 10, first paragraph).

The Board however agrees with the respondent, that for the introduction of feature (c) into claim 10 of auxiliary request 10, the appellant relies on paragraphs [0092] and [0093]. These passages clearly indicate that all products are to be scanned by the upstream scanner (see page 28, lines 13 to 19, of the published application). Paragraph [0093] is a continuation of the embodiment described in paragraph [0092] so that the scanned food products in paragraph [0092] is understood as meaning all food products (see reply to the statement of grounds of appeal, point 5.2).

- 1.5 The appellant has therefore not convincingly shown that the opposition division's findings relating to claim 10 of auxiliary request 10, which, again, corresponds to claim 16 of the main request, are incorrect.
- 1.6 As a consequence of the above neither the **main request nor auxiliary request 10** are allowable.
- 1.7 The same conclusions apply to **auxiliary requests 1 to 4, 7, 8, 9 and 11**, each of which contains a claim corresponding to claim 16 of the main request (see point VII above).
2. *Extension of subject-matter - Article 123(2) EPC - auxiliary requests 5, 6, 12, 13*
- 2.1 **Claim 10 of each of auxiliary requests 5 and 12** corresponds to claim 16 of the main request with the following feature added thereto (see points VIII and IX above):

"the scanner utilizes a video camera, an X-ray apparatus or scanning in the hyperspectral range".

Claim 8 of each of auxiliary requests 6 and 13 also corresponds to claim 16 of the main request with the following (different) feature added thereto (see points X and XI above):

"wherein the location on the selected food products at which the temperature sensing devices are connected is determined by the physical characterization of the food products being conveyed on the conveyance system".

- 2.2 The Board already concluded that claim 16 of the main request does not fulfil the requirements of Article 123(2) EPC on the basis of amendments which are also contained in claim 10 of auxiliary requests 5 and 12 and in claim 8 of auxiliary requests 6 and 13.

When arguing compliance with the requirements of Article 123(2) EPC for these auxiliary requests the appellant however repeated the same arguments it had given for auxiliary request 10 (see statement of grounds of appeal, pages 29 to 30) and failed to explain how the added features identified above also contribute to overcome the objection of added subject matter.

Based on the above the Board concludes that the appellant failed to submit convincing arguments against the findings of the opposition division with respect to **auxiliary requests 5, 6, 12 and 13**.

3. Request for remittal - main request, auxiliary requests 1 to 13

As discussed above, neither the main request nor any of auxiliary requests 1 to 13 constitutes an allowable request on the basis of which the case could be remitted to the opposition division for further prosecution.

It is therefore neither necessary for the Board to consider whether any of these requests fulfils the requirements of Rule 80 EPC and Article 84 EPC, nor to consider the appellant's request for remittal if the Board were to deem these requirements fulfilled.

4. Auxiliary requests 14 and 15 - Novelty

- 4.1 Amendments to the appellant's case - admissibility

- 4.1.1 In the statement setting out the grounds of appeal the decision on novelty of claim 1 of auxiliary request 14 and claim 1 of auxiliary request 15 over C1 was contested only on the basis of feature a), whereby the complete discussion revolved around the issue whether the visual inspection of the food products disclosed in C1 corresponded to the step of "scanning", in accordance with the appealed decision, or not.

- 4.1.2 In its letter dated 16 November 2022 the appellant indicated that step (c)(i) of claim 1 of each of auxiliary requests 14 and 15 was a second distinguishing feature over the method disclosed in C1. This was because, so the appellant, C1 does not contain any mention of a selection based on any form of physical characterization of the food products.

4.1.3 The respondent argued that identifying feature (c) (i) as a further difference amounted to the allegation of a new fact, and that such a late amendment to the appeal's case should not be admitted into appeal proceedings.

4.1.4 The appellant replied that there was no amendment of its case at all.
This was because the distinguishing nature of feature (c) (i) was already clearly mentioned in its reply to the notice of opposition.
As this document was attached as annex A to the statement setting out the grounds of appeal, and explicitly referred to (see page 20, second paragraph of the statement setting out the grounds of appeal) the content thereof clearly constituted part of the original appellant's case.

4.1.5 The Board disagrees.

As acknowledged by the appellant, step (c) (i) is nowhere identified as a distinguishing feature with respect to C1 in the statement setting out the grounds of appeal (see in particular pages 12-19 and 30-31), in spite of the fact that this feature is clearly identified in the appealed decision as being disclosed in C1 (see point 16.3.2 and in particular the second paragraph at page 16 of the appealed decision for auxiliary request 14 and point 17.2 for auxiliary request 15).

The reference to the reply to the notice of opposition at page 20 of the statement setting out the grounds of appeal is not specific enough to allow the Board and the respondent to understand that the finding of the

opposition division that feature (c) (i) was disclosed in C1 was specifically contested by the appellant.

This is already evident from the fact this reply to the notice of opposition was drafted before the decision of the opposition division was issued.

In fact, according to the established case law (see Case Law of the Boards of Appeal (CLB), 10th edition 2022, V.A.2.6.3.h), the mere repetition of arguments presented before the opposition division cannot alone provide reasons why the decision under appeal is to be set aside.

- 4.1.6 The Board therefore concurs with the respondent who argued that the appellant's case was amended after notification of the summons to oral proceedings.

According to Article 13(2) RPBA 2020 such an amendment shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified by cogent reasons by the party concerned.

The appellant, however, did not provide any such reasons for alleging this new fact for the first time before the Board with its letter of 16 November 2022.

In the absence of any exceptional circumstances the Board concludes that this new alleged fact is not admitted into the proceedings under Article 13(2) RPBA 2020.

- 4.2 *Claim 1 of auxiliary request 14*

- 4.3 The opposition division found that the subject-matter of claim 1 of auxiliary request 14 lacked novelty over

the disclosure of document C1 (see Reasons for the decision under appeal, 16.3.2).

- 4.3.1 The appellant argues that the opposition division was incorrect as the term "scanning" could not be interpreted as including visual inspection by human beings as this would not be technically sensible and it is clear from the disclosure of the patent in suit as a whole that this term required technical means (see statement of grounds of appeal, pages 12 to 16).

The activity of "scanning" cannot be performed by a human in this technical field, also because, as explained in paragraph [004] of the patent in suit, it is very difficult for a human to identify the mass center of a food product.

As a consequence, C1, disclosing visual inspection of the food products, could not be novelty destroying.

- 4.3.2 The Board does not find these arguments convincing and follows the findings of the opposition division that "scanning" also encompasses "scrutinize or inspect visually" (paragraph bridging pages 16 and 17 of the decision under appeal).

It is established case law that the skilled person should try "with synthetical propensity, *i.e.* building up rather than tearing down, to arrive at an interpretation of the claim which is technically sensible and takes into account the whole disclosure of the patent" (see CLB, *supra*, II.A.6.1). However, it is also established case law that only technically illogical interpretations should be excluded and that the description cannot be used to give a different meaning to a claimed feature which in itself imparts a

clear, credible, technical teaching to the reader (CLB, *supra*, II.A.6.3.4).

4.3.3 The appellant argues that it would not be technically sensible for a human being to scan and select products based on physical characterisation as the claim is directed to a stream of food products and if a human being were to scan the products the system would be inaccurate and could not be trusted, in particular in a food safety critical system.

4.3.4 However, the Board concludes that, as argued by the respondent the prior art submitted, such as document C1, shows that a method which involves scanning visually by a human operator is technically possible (see the reply to the statement of grounds of appeal, point 6.1, second paragraph).

A human being is capable of identifying, for example, larger or thicker food products and selecting them as samples.

As also noted by the respondent, the identification of the "mass center" is not a claim requirement and the claim does also not limit the stream of food products to any particular speed or number of products.

Therefore, as the term "scanning" imparts a clear, credible teaching, there is no reason for the skilled person to imply features into the claim which are found only in the description. As the respondent argues, it is not relevant that the description gives a number of examples of pieces of equipment which can carry out this function as these examples do not form part of claim 1 or 6 (see the reply to the statement of grounds of appeal, point 6.1, first paragraph).

4.4 Based on the above, the appellant failed to convincingly demonstrate that the conclusions of the appealed decision on lack of novelty of claim 1 of auxiliary request 14 are not correct.

5. *Novelty - Article 54 EPC* - auxiliary request 15

5.1 The opposition division also found that the subject-matter of claim 1 of auxiliary request 15 was not novel with respect to the disclosure of C1 (reasons for the decision under appeal, 17.2).

5.1.1 The appellant submits, in addition to the above discussed arguments related to the feature "scanning", also that the expression "scanner" used in feature a) of claim 1 of this auxiliary request must be understood as a piece of equipment and not a human being.

In addition to the above arguments the appellant puts forward that claim 1 of auxiliary request 15 foresees that the scanner is upstream a thermal processing station and that there is a step of initiating an adjustment or change to the operational parameters of the thermal processing system based on the results of the scanning of the food products.

These added features clarify, so the appellant, that the only reasonable interpretation of claim 1 is that it is not a human who scans the food products.

5.1.2 The Board agrees with the opposition division and the respondent, that also the feature "scanner" has to be interpreted broadly to encompass "scrutinize or inspect visually", and that for this reason the incorrectness of the findings of the appealed decision on claim 1 of

auxiliary request 15 has not been demonstrated.

The method of claim 1 of auxiliary request 15 is also not formulated as being limited to the scanning devices disclosed in the description of the patent in suit (see decision under appeal, reasons, 17.2, third paragraph and reply to the statement of grounds of appeal, point 7.1).

The feature that the scanner is upstream a thermal processing station does not exclude human scanning, as this is exactly the position of the operator inserting the probes into the food products disclosed in document C1 (see in particular the first two lines at page 3).

The appellant also did not explain why the step of initiating an adjustment or change to the operational parameters of the thermal processing system based on the results of the scanning of the food products could not be performed by an operator at all.

Based on the above, the appellant failed to convincingly show that the conclusions of the appealed decision on lack of novelty of claim 1 of auxiliary request 15 are not correct.

6. Request for remittal - auxiliary requests 14 and 15

As discussed above, the compliance of auxiliary requests 14 and 15 with the requirements of novelty has not been demonstrated by the appellant.

These requests do not therefore constitute a basis on which the case could be remitted to the opposition division for further prosecution.

7. *Admittance into the proceedings of new auxiliary requests 16 to 18*

7.1 With its statement of grounds of appeal the appellant filed three new auxiliary requests. It is not contested by the appellant that these specific requests have been filed for the first time in appeal.

The appellant argued that these requests do not add complexity to the case and overcome the objections raised and should be admitted because they have been filed in reaction to the opposition division interpreting "scanner" as including a human being, contrary to its preliminary opinion (see statement of grounds of appeal, pages 32, page 34, penultimate paragraph to page 35, third paragraph and page 36).

7.2 The respondent requests that none of the newly filed auxiliary requests be admitted as they could and should have been submitted during opposition proceedings (reply to statement of grounds of appeal, page 1, fourth paragraph and point 2.4).

7.3 According to Article 12(6), second sentence, RPBA 2020, the Board shall not admit requests which should have been submitted in the proceedings leading to the decision under appeal unless the circumstances of the appeal case justify their admittance.

The Board does not see how the opposition division's interpretation of "scanner" and/or "scanning" at the basis of the appealed decision could have surprised the appellant and justified the filing of new requests in appeal.

The argument that "scanner" and "scanning" also encompassed human beings was already submitted in the

notice of opposition (page 2, final paragraph and page 21, final paragraph) together with objections of lack of novelty of the subject-matter of the method claims as granted based on documents C1 and S3 (points 1.3, 1.4 and 2.3).

In the annex to the summons to oral proceedings before the opposition division, the opposition division gave its preliminary opinion that claim 1 of the main request was novel with respect to documents C1 and S3 (point 2.4.2), but that it would need to be "discussed during oral proceedings whether C1 discloses clearly and unambiguously steps (a) and (b) of claim 8" (point 2.4.4).

The objection of lack of novelty was then discussed, together with the interpretation of scanning/scanner, at the oral proceedings with respect to claim 1 of auxiliary request 14.

After this discussion, and after deliberation of the opposition division on these issues, the appellant was given the chance to react thereto.

The appellant then filed two further new auxiliary requests (then auxiliary requests 15 and 16) in an attempt to overcome this objection (see minutes of the oral proceedings before the opposition division, page 3) and indeed the claims of auxiliary request 16 were found by the opposition division to be novel.

Based on the above it is not apparent why the appellant did not file present auxiliary requests 16 to 18 during the oral proceedings, together with then auxiliary request 16, on the basis of which the patent was maintained.

The Board cannot see any circumstances in the present appeal case which would have justified allowing the appellant to file auxiliary requests 16 to 18 with the statement setting out the grounds of appeal. To do so would be an extension of the opposition proceedings contrary to the primary object of appeal proceedings to review the decision under appeal in a judicial manner (Article 12(2) RPBA 2020).

Based on the above the Board decides that these newly filed auxiliary requests are not admitted (Article 12(6) RPBA 2020).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated