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D E C I S I O N
of 2 March 1995

Case Number: T 0019/92 - 3.2.5

Application Number: 83850037.9

Publication Number: 0086766

IPC: B29C 35/04

Language of the proceedings: EN

Title of invention:

Plant for the vulcanization of tyres

Patentee:

Elm, Hugo Verner

Opponent:

Bandag Incorporated

Headword:

-

Relevant legal provisions:

EPC Art. 54, 56, 114(2)

EPC R. 63(1)

Keyword:

"Novelty and inventive step (yes)"

"Document relied upon by a party for the first time at the oral proceedings not taken into consideration"

"Cost for oral proceedings and taking of evidence"

"Forged evidence in support of an alleged prior use"

Decisions cited:

-

Catchword:

-



Case Number: T 0019/92 - 3.2.5

D E C I S I O N
of the Technical Board of Appeal 3.2.5
of 2 March 1995

Appellant:
(Opponent) Bandag Incorporated
Bandag Center
Muscatine, IOWA 52761 (US)

Representative: Patentanwälte Wenzel & Kalkoff
Ruhrstrasse 26
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Respondent:
(Proprietor of the patent) ELM, Hugo Verner
Hjärnarpsvägen 35
S-262 07 Hjärnarp (SE)

Representative: Ström, Tore
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office dated 28 October 1991
rejecting the opposition filed against European
patent No. 0 086 766 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: C. V. Payraudeau
Members: A. Burkhart
W. D. Weiß
C. G. F. Biggio
J.-C. Saisset

Summary of Facts and Submissions

- I. The Appellant (Opponent) lodged an appeal against the decision of the Opposition Division rejecting the Opposition against the patent No. 0 086 766.

The opposition had been filed against the Claims 1 to 8 of the contested patent and based on the ground of lack of novelty with respect to state of the art which was allegedly made available to the public by prior use before the priority date of the contested patent.

During the oral proceedings held before the Opposition Division, it was established that the allegation of prior use was based on forged documents presented by a witness offered by the Opponent. The Opposition Division decided therefore that the Opponent had been unable to prove the alleged prior use, and rejected the opposition.

Moreover, the Opposition Division decided that, due to the circumstances of the case, the Opponent has to bear the costs defined in Rule 63(1) EPC caused to the Patentee by oral proceedings and taking of evidence.

- II. Oral proceedings were held before the Board of Appeal.
- (i) The Appellant requested that the decision under appeal be set aside, that the costs decision be cancelled and that the European patent No. 0 086 766 be revoked insofar as Claims 1 to 8 are concerned.
 - (ii) The Respondent (Patentee) requested that the appeal be dismissed.

(iii) Claim 1 of the contested patent reads as follows:

"1. A plant for the vulcanization of tyres, comprising an autoclave (1) having a loading opening at one end of the autoclave, which is closable in a pressure-tight manner; an internal conveyor track (4) rigidly arranged inside the autoclave in the longitudinal direction thereof for accommodating carrier means (9, 10, 11) which are movable in the longitudinal direction thereof to support a number of vulcanization units (12), each of which being provided with a compressed air connection and an evacuation connection, which by means of flexible hoses may be connected to compressed air connection nipples and evacuation nipples inside the autoclave (1); and an external conveyor device (28) arranged outside the autoclave having an external conveyor track which may be connected to the internal conveyor track arranged inside the autoclave through the aforementioned loading opening, enabling the introduction into the autoclave (1) of tyre vulcanization units (12) situated outside the autoclave and supported on the supporting devices of the conveyor track and the removal from the autoclave of vulcanized units supported on the supporting devices, characterized in that for the purpose of supplying compressed air to and evacuating air from said vulcanization units supported on the supporting devices a number of lines (21, 22, 41, 42, 44, 45) are arranged which together with the supporting devices (9, 10, 11) and the vulcanization units (12) supported thereon are movable along said internal and external conveyor tracks between a position in which they are introduced inside the autoclave and a position outside the autoclave; in that the compressed air

connection on each of the individual vulcanization units (12) is detachably connected by means of a flexible hose to a compressed air line (22, 42, 45) included in said number of lines, and in that the evacuation connection on each of the individual vulcanization units is connected by means of a flexible hose to an evacuation line (21, 41, 44) arranged separately for each vulcanization unit and included in said number of lines, said lines being detachably connected at their ends which face away from the autoclave to the compressed air connection means and to the evacuation connection means (25, 24) which are permanently arranged inside the autoclave in the immediate vicinity of its loading opening."

- (iv) In his written and oral submissions the Appellant admitted that the sketches No. 3/6 and 4/6 presented by the Respondent with his letter filed on 17 September 1992 correspond to the vulcanization plant seen by Mr Sven Elm in the company Vulcan S.A. (Switzerland) in July 1981. The Appellant submitted, however, that the plant depicted in these sketches comprised all the features of Claim 1 of the contested patent and that, therefore, the subject-matter of Claim 1 was not new.

He also referred for the first time to the document US-A-4 269 644 which is cited in the contested patent.

With respect to the forged evidence presented by a witness for the Opponent (now Appellant) before the Opposition Division, the representative of the Appellant declared that he sincerely regretted what had happened and that he apologised for this

incident. He also presented a copy of a letter dated 28 February 1995 of the Appellant, wherein also the Appellant regrets the forgery made by the witness and points out that neither the Appellant nor his representatives had any prior knowledge that the witness had faked a piece of evidence.

The representative of the Appellant argued further that neither the Appellant nor his representative could be made responsible for fully unexpected behaviour of a witness and that, moreover, the Respondent had considerably contributed to the costs of the oral proceedings by keeping secret his knowledge of the forgery, which he admitted he had already discovered about 6 weeks before the oral proceedings. Therefore, it was not justified to impose on the Appellant the costs defined in Rule 63(1) EPC caused to the Patentee by oral proceedings and taking of evidence before the Opposition Division.

(v) The Respondent argued essentially as follows:

The vulcanization plant depicted in the sketches Nos. 3/6 and 4/6 did not comprise the features of the characterising part of Claim 1 of the contested patent and therefore, this prior art vulcanization plant was not suitable for solving the problems mentioned in the patent specification in column 2, lines 44 to 61 and in column 3, lines 8 to 27.

The late submitted document US-A-4 269 644 should not be taken into consideration by the Board in application of Article 114(2) EPC.

Concerning the costs decision taken by the Opposition Division, the Respondent maintained that the costs for the oral hearing before the Opposition Division should be borne entirely by the Appellant, since the Appellant was fully responsible for the faked evidence presented by a witness he had cited. In order to avoid the risk of collusion on behalf of the witnesses, it was reasonable for the Respondent to present the discovery of the forgery not in writing beforehand but during the oral hearing of the witnesses concerned.

The representative of the Respondent stated, however, that he has never questioned the integrity of the former representative of the Appellant who presented the case before the Opposition Division.

Reasons for the Decision

1. Late filed document.

The document US-A-4 269 644, which was cited for the first time only at the oral proceedings before the Board of Appeal, is disregarded by the Board in application of Article 114(2) EPC, since this document is obviously less relevant to the subject-matter of the contested patent than the sketches Nos. 3/6 and 4/6 representing a prior art made available to the public by use.

2. *Novelty*

The closest prior art is represented by the sketches Nos. 3/6 and 4/6 disclosing a vulcanization plant which was made public by prior use in the company Vulcan S.A. (Switzerland). This is acknowledged by both the Respondent and the Appellant.

This prior art plant comprises all the features of the preamble of Claim 1 of the contested patent. Moreover, the flexible hoses of this prior art plant, which are connected to compressed air means and evacuation means inside the autoclave, have such a length that they can be extended from the interior of the autoclave through the opening at one end thereof, so that the vulcanization units can be connected or disconnected to or from the compressed air means and evacuation means outside the autoclave via the said hoses.

However, this prior art plant does not comprise the following features of the characterising part of Claim 1 of the contested patent:

- (a) that a number of lines are arranged which together with the supporting devices and the vulcanization units supported thereon, are movable along said internal and external conveyor tracks between a position in which they are introduced inside the autoclave and a position outside the autoclave,
- (b) that the compressed air connection and the evacuation connection on each of the individual vulcanization units are detachably connected by means of a flexible hose to a compressed air line or an evacuation line, respectively, included in the number of lines,
- (c) that compressed air connection means and evacuation connection means are permanently arranged inside the autoclave in the immediate vicinity of its loading opening,
- (d) to which connection means the said lines are detachably connected at their ends facing away from the autoclave.

Therefore, the subject-matter of Claim 1 of the contested patent is new.

3. *Inventive step*

3.1 Although the flexible hoses of the prior art vulcanization plant according to the sketches 3/6 and 4/6 are made long enough so that they can be extended from the interior of the autoclave through the loading opening in order to allow the vulcanization units to be connected to or disconnected from the compressed air means and evacuation means outside the autoclave, this prior art plant has the disadvantage that during the whole connection and disconnection operation of each individual vulcanization unit, which takes a long time, the autoclave cannot be used for its proper purpose and thus the effective operation time of the autoclave is reduced to a great extent (see column 2, lines 58 to 61 of the contested patent).

3.2 This disadvantage of the prior art plant is avoided by the provision of the features (a), (b), (c) and (d) indicated under point 2 above.

The provision of these features (a), (b), (c) and (d) permits a major proportion of the connection work involved for a new batch of vulcanization units to be performed outside the autoclave (by means of the features (a) and (b)) at the same time as a batch of vulcanization units inside the autoclave is being processed in the autoclave, and permits, after completion of the processing in the autoclave, the rapid removal (by means of the features (c) and (d)) of the finished batch of vulcanization units from the autoclave, followed immediately by the loading of a pre-connected batch of vulcanization units into the autoclave and the rapid connection (again by means of

the features (c) and (d)) of the batch for the supply of compressed air and for evacuation (see column 3, lines 15 to 27 of the contested patent).

- 3.3 The Appellant was not able to present a state of the art document which would make obvious to a person skilled in the art the aforementioned features (a) to (d) of the characterising part of Claim 1 of the contested patent.

Therefore, the subject-matter of Claim 1 has to be considered as involving an inventive step in the meaning of Article 56 EPC.

4. The subject-matter of Claim 1 of the contested patent constitutes therefore a patentable invention in the meaning of Article 52(1) EPC.

The same applies to the subject-matter of the dependent Claims 2 to 8 relating to specific embodiments of the subject-matter of Claim 1.

5. The patent can thus be maintained as granted.

6. *Decision on costs*

The Opposition Division found that the most important piece of evidence, which was intended to prove that the alleged prior use had taken place before the priority date of the contested patent, had been forged by the witness offered by the Appellant.

This finding of the Opposition Division is not disputed by the Appellant. However, the Appellant and his representative reject any kind of suspicion that they had any prior knowledge that the piece of evidence was forged.

In this respect the representative of the Respondent has expressly stated that he had never doubted the good faith of the former representative - now deceased - of the Appellant so that the Board does not see any reason to question the integrity of the former and present representatives of the Appellant.

This notwithstanding, the Appellant has to be held responsible for the witness he relied upon to attempt to prove the alleged prior use and the Board considers equitable that the Appellant should bear the costs incurred by the Respondent during the oral proceedings and the taking of evidence before the Opposition Division.

The Board does not agree with the contention of the Appellant that the Respondent had considerably contributed to the costs of the oral proceedings by keeping his knowledge of the forgery secret, which he admitted he realised about 6 weeks before the oral proceedings. On the contrary, the Board shares the opinion of the Respondent that in the present case it was reasonable for him to present the discovery of the forgery not in writing beforehand but during the oral hearing of the witness concerned, in order to take the witness by surprise and to avoid any possibility of further collusion by the witnesses concerned.

Therefore, the decision on costs taken by the Opposition Division is confirmed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:



A. Townend

The Chairman:



C. Payraudeau