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**Datasheet for the decision
of 13 September 2024**

Case Number: T 1932/22 - 3.2.01

Application Number: 13180589.7

Publication Number: 2837533

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B60T8/172, B60T8/1755,
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B60T13/74, F16D55/22,
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F16D65/18

Language of the proceedings: EN

Title of invention:
A method of adjusting a brake

Patent Proprietor:
Meritor Heavy Vehicle Braking Systems (UK) Limited

Opponent:
Knorr-Bremse
Systeme für Nutzfahrzeuge GmbH

Headword:

Relevant legal provisions:

RPBA 2020 Art. 12(4), 12(6)

EPC Art. 54, 83, 123(2), 84, 56

Keyword:

Novelty - main request (no) - auxiliary request 1 (no)

Sufficiency of disclosure - enabling disclosure (yes)

Amendments - extension beyond the content of the application
as filed (no)

Claims - clarity after amendment (yes)

Inventive step - auxiliary request 2 (yes) - non-obvious
combination of known features

Late-filed facts - should have been submitted in first-
instance proceedings (yes)

Decisions cited:

Catchword:



Beschwerdekammern
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Case Number: T 1932/22 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 13 September 2024

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
23 June 2022 concerning maintenance of the
European Patent No. 2837533 in amended form.**

Composition of the Board:

Chairman G. Pricolo
Members: A. Wagner
 S. Fernández de Córdoba

Summary of Facts and Submissions

I. The appeals by the patent proprietor and the opponent are directed against the decision of the opposition division to maintain the European Patent No. 2837533 in amended form on the basis of auxiliary request 1.

II. In its decision, the Opposition Division held among others that the patent as granted met the requirements of Article 100(b) EPC, but that the subject-matter of claim 1 was not new over the cited prior art. The objections raised under Article 123(2), 84, 54 and 56 EPC against auxiliary request 1 were found not to be convincing.

In order to come to these conclusions the opposition division considered, among others, the following documents:

E1: DE 10 2011 013 593 A1

E16: DE 103 05 702 A1

III. Oral proceedings by videoconference were held before the Board on 13 September 2024.

IV. The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained as granted (main request), or, as an auxiliary measure, that the patent be maintained on the basis of one of the auxiliary requests 1 to 12, filed with the statement of grounds of appeal.

The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked.

V. The patent as granted comprises two independent claims.

Claim 1 is directed to a method and reads as follows
(feature numbering according to the impugned decision):

A A method of adjusting a brake, the method including the steps of:

B providing a mechanically operated brake including friction material,

C providing a rotor,

D providing an adjuster for adjusting a running clearance between the friction material and the rotor,

E providing a sensor system for determining a likelihood of a braking event, and

F determining a temperature of a brake component,

G determining a desired running clearance based on the temperature, and

H upon a determination of a change in the likelihood of a braking event operating the adjuster to adjust the running clearance of the brake to the desired running clearance.

Claim 15 is a device claim and reads - with the feature numbering according to the impugned decision - as follows:

I Brake system

II including a mechanically operated brake including friction material,

III a rotor,

IV an adjuster for adjusting a running clearance between the friction material and the rotor,

V a sensor system for determining a likelihood of a braking event,

VI the sensor system being operable to selectively operate the adjuster to adjust the running clearance of the brake upon a determination of an increased likelihood of a braking event **and/or**

VII wherein the sensor system being operable to selectively operate the adjuster to adjust the running clearance of the brake upon a determination of a decreased likelihood of a braking event, and

VIII wherein the brake system includes a sensor system for determining a temperature of a brake component,

IX the sensor system being operable to selectively operate the adjuster to adjust the running clearance of the brake towards a desired running clearance based on the temperature.

In claim 1 of **auxiliary request 1**, the following feature is added between features C and D:

X1 providing an actuator for applying and releasing the brake

Accordingly, claim 15 includes the following feature

between features III and IV:

X2 an actuator for applying and releasing the brake

Auxiliary request 2 is based on auxiliary request 1 wherein in claim 1 and claim 15 the following feature is added between features D and E, between features IV and V respectively:

X3 wherein the adjuster is a distinct component from the actuator.

VI. The appellant's (patent proprietor's) arguments relevant to the present decision may be summarized as follows:

Sufficiency of disclosure - all requests

The opposition division was right in concluding that the patent provided sufficient information for the skilled person to put the invention into practice. The skilled person understood features E and H in such a way that the likelihood of a braking event and a change in this likelihood was determined based on the parameter detected by the sensor system. For feature H, there was no need to define a limit value for a change in likelihood as alleged by the opponent. A change in likelihood as such was all that was required to operate the adjuster.

Main request - novelty over E1

The conclusion of the opposition division that the subject-matter of claim 1 as granted lacked novelty over E1 was wrong. With regard to feature H, the opposition division referred to the sport mode

disclosed in paragraph [0011] of E1. However, E1 did not directly and unambiguously disclose that with the switch to the sport mode the likelihood of a braking event would change or would be indicated. Furthermore, the likelihood of a braking event could increase as well as decrease when switching to the sport mode - depending on the driver. The use of the sports mode could thus not provide a useful or consistent indication of a change in the likelihood of a braking event.

Additionally, no sensor system for determining a likelihood of a braking event in conjunction with the sports mode was disclosed. The selection of the sport mode was simply initiated by the driver.

Auxiliary request 1 - novelty over E1

It was clear from the claim wording that the actuator defined in feature X1, and the adjuster defined in feature D, were two separate entities. In contrast, the actuator 20 disclosed in E1 was used both for braking and for adjusting the running clearance.

Auxiliary request 2 - Article 123(2) EPC

The amendments made to claim 1 and claim 15 did not result in an intermediate generalisation. Features X1 and X2 found basis in paragraphs [0056] and [0061] of the A1-publication of the patent in suit. Feature X3 was based on the first sentence of paragraph [0061].

Auxiliary request 2 - Article 84 EPC

Features X1 and X3 were clear. The terms "actuator" in paragraph [0056] of the A1-publication and "actuator

mechanism" in paragraph [0061] did not result in a lack of clarity as claim 1 only used the term "actuator" being the actuator 32 itself as shown in figure 1 of the contested patent. As the skilled person knew how an actuator could apply or release the brake, there was no need to add the whole kinematic chain of the mechanism from the actuator 32 to the brake pads 20, 22. These features were not essential for the claimed subject-matter.

As the term "actuator" was not synonymous for the term "actuator mechanism", it was also clear that the actuator and the adjuster could be distinct components as required by feature X3.

Auxiliary request 2 - Article 56 EPC

Claim 1 clearly required the adjuster and the actuator being distinct components. E1 - considered as closest prior art - taught away from separate components. Even if the skilled person knew from E1 (paragraph [0003]) or from their common general knowledge or E16, that separate adjuster devices to compensate for abrasion existed, E1 pointed out some disadvantages of these devices (paragraph [0004]) which were eliminated by the arrangement of just one component for actuating and for adjusting. The subject-matter of claim 1 and claim 15 were thus not rendered obvious by the combination of E1 with common general knowledge or with E16 or by the combination of E16 with E1.

Furthermore, it was requested to not admit

- the document E16 submitted only during first instance oral proceedings and erroneously admitted by the opposition division;
- the attacks E1 with E16 or with common general knowledge, both raised for the first time during first

instance's oral proceedings;

- the attack E16 with E1 submitted for the first time in appeal.

The auxiliary requests were filed in August 2020, while oral proceedings took place in May 2022. There was thus plenty of time for filing E16 or submitting the attacks for inventive step before the oral proceedings.

VII. The appellant's (opponent's) arguments relevant to the present decision may be summarised as follows:

Sufficiency of disclosure - all requests

Feature E was not sufficiently disclosed. The "likelihood" was just an estimation based on experience. The patent did not disclose a single method for determining the likelihood of a braking event but only mentioned multiple unlinked features like position sensor, acceleration sensor, face recognition, lane departure warning system, collision avoidance system, etc. How exactly these features were involved in the determination of a likelihood of a braking event remained open. Furthermore, the patent did not define any threshold when the adjuster actually was operated (feature H). The same applied to claim 15.

Main request - novelty over E1

The opposition division correctly referred to the selection of the sport mode as described in E1, paragraphs [0011] and [0015] and claim 5. In case the driver selected the sport mode, the running clearance was reduced to reduce the reaction time of the brakes. Therewith features E and H of claim 1 were disclosed. The same applied to claim 15 which was also not new over E1.

Auxiliary request 1 - novelty over E1

The claim wording did not exclude that the actuator and the adjuster were provided as just one component as shown in E1, figure 1.

Auxiliary request 2 - Article 123(2) EPC

Even if a literal basis for the amendment X1 might be found, paragraphs [0056] to [0061] of the A1-publication referred to the specific embodiment shown in the figure. The actuator 32 was disclosed as being a mechanically operated actuator (paragraph [0057]) and was structurally and functionally linked to an actuator rod 34 engaging an end of an operating lever 30, an operating shaft 26 and a thrust assembly 24A. This was also apparent from paragraph [0061], wherein the term "actuator" and the term "actuator mechanism" seemed to be used as synonyms. The actuator mechanism, and thus the actuator, included the complete kinematic chain such that all linked features needed to be inserted in claim 1.

With regard to feature X3, paragraph [0061] of the A1-publication of the patent in suit used the wording "the adjuster mechanism", not "the adjuster". The "adjuster mechanism" comprised several components as described in paragraph [0055]. As these components were missing in the claim, the amendment resulted in an unallowable intermediate generalisation.

Auxiliary request 2 - Article 84 EPC

The term "actuator" was to be understood as "actuator mechanism". Otherwise it was not clear how the actuator alone could apply or release the brake as defined in

feature X1. However, claim 1 lacked essential features of the kinematic chain, i.e. an actuator rod 34 engaging an end of an operating lever 30, an operating shaft 26, roller 28 and the thrust assembly 24A. Additionally, it was not clear how the adjuster could be a distinct component from the actuator as the thrust assembly 24A of the adjuster was at the same time part of the kinematic chain of the actuator mechanism (figure 1 of the patent in suit).

Auxiliary request 2 - Article 56 EPC

The opposition division correctly admitted E16 into the proceedings as being prima facie relevant. E16 disclosed in paragraphs [0006, 0007] that a separate, independent adjuster mechanism was advantageous. Furthermore E16 disclosed in figure 1 a brake system with such a separate adjuster (screw 17, nut 15). Providing the adjuster separately from the actuator was thus part of the skilled person's common general knowledge and was also known from E16.

Starting from E1:

Claim 1 differed from E1 only in feature X3. The argument of the opposition division that E1 would not include any hint was wrong as the problem was to find an alternative. For providing an alternative a hint was not necessary.

Applying the teaching of E16 - seen as general knowledge or seen as secondary document - to E1 would prompt the skilled person to provide the adjuster separately from the actuator 20.

Starting from E16:

Claim 1 differed from E16 in features E to H. The problem was to find a suitable control for adjusting

the running clearance. The solution as proposed in claim 1 was obvious seen in combination with E1.

Reasons for the Decision

1. Sufficiency of disclosure - all requests

1.1 The Board confirms the opposition division's conclusion that the invention is disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

1.2 The objected features are features E and H, in particular the "likelihood of a braking event" and its determination.

1.3 While the appellant (opponent) argued that the patent did not provide any method for determining the likelihood of a braking event and that the likelihood was just an estimation based on experience, the Board agrees with the patent proprietor that the skilled person understands from the application as a whole and with a mind willing to understand what is meant with features E and H.

1.3.1 The Board follows the appellant (opponent) in so far that the determination of the likelihood of a braking event and the determination of a change thereof is a vague feature. A likelihood only says that something may happen, not that it actually will happen and there is indeed no directly measurable physical value for the likelihood or a change in likelihood.

1.3.2 However, from the description of the patent, it becomes clear that the "likelihood" is based on daily life experiences of a driver's behaviour in certain

situations or under certain circumstances. In the patent in suit, the likelihood itself is not measured. Instead, indirect parameters are monitored which might influence the brake behaviour of the driver. Examples are given in the description of the patent in suit, e.g. in paragraphs [0060] to [0071]. The selection of these parameters is based on assumptions, e.g. that under wet or icy conditions it might be necessary to brake sooner, such that the likelihood can be determined by a sensor system that detects the ambient conditions relative to the vehicle (paragraph [0067]). A change of these indirect parameters is equated with a change in the likelihood of a braking event.

1.4 Consequently, with the examples given in the patent in suit, the invention can be put in practice by a person skilled in the art.

2. **Main request - novelty over E1**

2.1 The Board confirms the opposition division's findings that the method of claim 1 of the main request is anticipated by E1 (decision, points 31 to 34).

2.2 Disputed are the features E and H. The Board agrees with the findings of the opposition division that the sport mode disclosed in E1, paragraph [0011], constitutes a possible indirect parameter that is monitored to determine the likelihood of a braking event. As the use of the sport mode can influence the brake behaviour of the driver, in E1, the running clearance is reduced when sport mode is selected to provide a quicker response of the brakes. The switch to sport mode constitutes a change in the likelihood of a braking event, in reaction to which the adjuster ("actuator 20") adjusts the running clearance according

to feature H.

- 2.3 The appellant (patent proprietor) disputed that the sport mode provides a useful indication of a change in the likelihood of a braking event.

However, in accordance with point 1.3.2 above, also the parameters mentioned in the patent in suit can not reliably and unequivocally predict a change in likelihood. Considering e.g claim 12 of the patent in suit, the sensor system may only include a rain sensor. When it starts raining and the streets are getting wet, the likelihood of a braking event may change or not - depending on the driver and e.g. the actual speed. Also the example given in paragraph [0062] of the patent (camera with face recognition that can recognise when the driver becomes drowsy) can or can not lead to a change in likelihood of a brake event - dependent on several factors.

Thus, the quality of what can be determined by the parameters mentioned in the patent in suit with regard to the likelihood of a braking event is the same as that which can be determined by monitoring the driving mode in E1.

- 2.4 With regard to feature E, the patent proprietor argued that the selection of sports mode initiated by the driver did not implicitly require a sensor system.

However, according to E1, paragraph [0011], upon selection of the sports mode, the running clearance is reduced. Thus, the actuation of the adjuster ("actuator 20") must be triggered somehow - as argued by the opponent. Consequently, inherently, there must be a kind of a sensor system that detects the switch to

sports mode. On the basis of such a detection signal, the actuator 20 is activated.

2.5 Thus, both disputed features E and H of claim 1 are disclosed in E1. The same applies mutatis mutandis to claim 15.

3. **Auxiliary request 1 - novelty over E1**

3.1 Auxiliary request 1 corresponds to the patent as maintained by the opposition division. Contrary to the opposition division's findings (decision, points 41 to 43), the Board judges that auxiliary request 1 does not meet the requirements of Article 54 EPC.

3.2 In claim 1, the method step "*providing an actuator for applying and releasing the brake*" is added (feature X1).

3.3 The Board does not agree with the appellant's (patent proprietor's) argument that from the claim wording it was clear that two separate components for the adjuster and the actuator were provided. Instead features D and X1 are purely functional and it is not excluded that both functions are included in just one component.

3.4 As in E1 an adjuster according to feature D and an actuator according to feature X1 are embodied by the actuator 20 which provides the function of applying/releasing the brake and of adjusting the running clearance (paragraphs [0014] and [0015]), the subject-matter of claim 1 of auxiliary request 1 is still anticipated by E1.
The same applies mutatis mutandis to the the subject-matter of claim 15.

4. **Auxiliary request 2**

4.1 Auxiliary request 2 is based on auxiliary request 1. In claim 1 and claim 15, it is added that "*the adjuster is a distinct component from the actuator*" (feature X3).

4.2 As the opposition division understood the wording of claim 1 of auxiliary request 1 already as defining the adjuster and the actuator as distinct components, the findings and arguments in the impugned decision with regard to auxiliary request 1 also apply to auxiliary request 2.

4.3 **Article 123(2) EPC**

4.3.1 The Board confirms the opposition division's conclusion that the amendments X1 and X2 introduced with auxiliary request 1 meet the requirements of Article 123(2) EPC and further judges that the additional amendment X3 of auxiliary request 2 does not introduce added subject matter.

4.3.2 Basis for the amendments can be found in paragraphs [0056] and [0061] of the A1-publication of the patent in suit.

4.3.3 With regard to features X1 and X2, the appellant (opponent) was of the opinion that the actuator was only disclosed in combination with the specific embodiment and thus with the kinematic chain of actuation as shown in figure 1 of the patent in suit.

However, the Board agrees with the opposition division that a brake system as described in the patent in suit implies an actuator according to feature X1 or X2. Therefore the features of the specific embodiment can

be seen as not inextricably linked to the actuator 32.

Contrary to the appellant's (opponent's) opinion, in the patent in suit, the term "actuator" is not used as a generic term for the complete kinematic chain but clearly is presented as being the actuator 32 attached to the kinematic chain (paragraph [0055, 0056]). This teaching is not changed by the term "the actuator mechanism" which is used only once in the entire specification in paragraph [0061], in particular as the claims only use the term "actuator", not the term "actuator mechanism".

- 4.3.4 With regard to feature X3, the appellant (opponent) objected that in paragraph [0061], the literal wording was "*the adjuster mechanism*" which comprised according to paragraph [0055] "*a thrust assembly 24A and an adjuster system operable to change the length of the thrust assembly.*".

The Board does not see any need to add the thrust assembly and the adjuster system to claim 1 and agrees with the patent proprietor that the terms "adjuster" and "adjuster mechanism" are used interchangeably throughout the description, see e.g. paragraph [0059] of the patent (lines 13, 14): "*the adjuster 24 is operated to adjust the running clearance.*" and paragraph [0061]: "*The adjuster mechanism 24 performs the function of adjusting (in particular the running clearance) of the brake.*"

As the adjuster was already in claim 1 as originally filed, the original application provides basis to an adjuster without the further features mentioned in paragraph [0055].

- 4.3.5 The requirements of Article 123(2) EPC are thus met.

4.4 **Article 84 EPC**

4.4.1 The opposition division held that claim 1 and claim 15 of auxiliary request 1 meet the requirements of Article 84 EPC (decision, point 40). The findings equally apply to auxiliary request 2. The Board confirms these findings.

4.4.2 While the appellant (opponent) argued that the term "actuator" had to be understood as being synonymous to the term "actuator mechanism" used in paragraph [0061] of the A1-publication of the patent in suit - as otherwise it was unclear how an actuator alone could apply and release the brakes-, the Board agrees with the appellant (patent proprietor) that in the patent in suit, the term "actuator" is not used as a generic term for the complete kinematic chain (see point 4.3.3 above) and that the features of the kinematic chain from the actuator 32 to the brake pads are not essential for the claimed subject-matter.

4.4.3 The invention refers to the adjustment of the running clearance with an adjuster which is separate from the actuator. As the actuator is separate, the specific embodiment of the kinematic chain from the actuator to the brake pads is not essential for the claimed subject-matter. Furthermore, the skilled person is familiar with solutions as to how an actuator applies and releases the type of brakes described in the patent in suit.

4.4.4 Based on the conclusion that the term "actuator" does not include the complete kinematic chain but is the actuator which is attached to the kinematic chain, the argument of the appellant (opponent) that the thrust assembly 24A of the adjuster 24 was part of the

kinematic chain (figure 1) and thus, in contradiction to feature X3, not a component separate from the actuator, is unfounded.

4.4.5 Claims 1 and 15 are thus clear.

4.5 Inventive step starting from E1

4.5.1 The Board confirms the findings of the opposition division that a claim with two separate components for the adjuster and the actuator is not rendered obvious over the combination of E1 with common general knowledge or with E16 (decision, points 44, 45 and 49, 50).

4.5.2 It is undisputed that claims 1 and 15 differ from E1 by feature X3. The appellant (opponent) formulated the problem to be solved as to provide an alternative.

4.5.3 According to the appellant (opponent), the provision of two components for the actuator and the adjuster was known from the prior art, such that feature X3 was just an obvious design option. Alternatively, feature X3 was known from E16, paragraphs [0006, 0007]: "*Hier liegt der wesentliche Vorteil unabhängig gesteuerter Verschleißnachstellsysteme, die z. B. mittels elektromotorischem Antrieb bei Verwendung einer geeigneten Steuerelektronik realisierbar sind. Die Idee des elektrischen Nachstellmotors zum Antrieb der Nachstelleinrichtung (N) der Scheibenbremse hat sich an sich bewährt.*"

Applying the general knowledge or the teaching of E16 to E1 would prompt the skilled person to provide the

adjuster separately from the actuator 20.

- 4.5.4 The Board is not convinced. While it can be agreed that the skilled person knows brake systems with two separate components for the adjuster and the actuator - be it from their common general knowledge or from E16 - it is noted that these known adjusters are only used to re-adjust the running clearance to a constant clearance to compensate abrasion, see e.g. E16, claim 1 (*"Nachstellvorrichtung mit elektromotorischem Antrieb zum Ausgleich von Bremsbelagverschleiß durch Nachstellen des Lüftspieles der Scheibenbremse"*).

E1, paragraph [0003], refers exactly to these kind of adjusters (*"[...] das Lüftspiel mittels einer Nachstelleienrichtung eingestellt [...]", "Die Einstellung erfolgt dabei auf einen konstanten vorgegebenen Sollwert[...]"*).

To improve the brake efficiency, E1 teaches to not only use the clearance adjustment for re-adjusting the running clearance to a constant clearance, but also to consider the drive mode, the operational state of the vehicle, dirt or ice or the temperature. Depending on the conditions, the whole clearance is reduced to zero, but afterwards the clearance has to be increased to a maximum. The entire clearance distance is used alternatively for adjustment - to react to different environmental or driving conditions. To achieve this, E1 proposes to use the actuator not only for applying the brake but also for clearance adjustment. The arrangement of E1 is a specific solution to a problem that has arisen from the known systems with a separate adjuster for abrasion compensation. Therefore the skilled person would have no motivation to introduce feature X3 into the brake system of E1.

4.5.5 Even if the skilled person would consider E16 when trying to find an alternative arrangement, the Board agrees with the opposition division (decision, point 50) that the skilled person would replace the brake system of E1 entirely with the one of E16, including the control device. However, the control device of the brake system of E16 is not configured to sense any information external to the brake. E16 aims to be independent of external electronic systems arranged outside the disc brake (paragraphs [0012] and [0027]). The adjuster of E16 only can readjust the running clearance after a braking event, after a preset number of brake events, after a certain time of braking or at preset time intervals (paragraph [0034]). None of these parameters seem to be suitable to determine a change in the likelihood of a braking event.

4.5.6 Consequently, neither the attack E1 with common general knowledge nor the attack E1 with E16 is convincing. Therefore, the admissibility issues raised by the appellant (patent proprietor) can be left aside.

4.6 Admission of the attack E16 with E1

4.6.1 Regarding the attack E16 with E1, raised for the first time in appeal, the parties at the oral proceedings referred to the arguments provided in writing and did not make any further submission. The Board has thus no reason to deviate from its preliminary assessment of this issue as set out in the communication according to Article 15(1) RPBA which is herewith confirmed as follow:

4.6.2 As requested by the appellant (patent proprietor), the Board does not admit the attack E16 with E1 under Article 12 (6) 2nd sentence RPBA. It is noted that E16

is a patent document of the opponent themselves and was filed during first instance's oral proceedings. At the latest at the oral proceedings before the opposition division, the attack starting from E16 should have been submitted.

5. Description

It was undisputed that the description needs to be adapted to claim 1 of auxiliary request 2. The parties agreed to a remittal to the opposition division for the adaptation of the description.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent with the claims according to the auxiliary request 2 submitted with the statement of grounds of appeal and a description to be adapted thereto.

The Registrar:

The Chairman:



M. Schalow

G. Pricolo

Decision electronically authenticated