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D E C I S I O N
of 17 May 1994

Case Number: J 0001/93 - 3.1.1
Application Number: 92300571.4
Publication Number: 0501605
IPC: C23C 2/40, C21D 8/02, C22C 38/04

Language of the proceedings: EN

Title of invention:

Galvanized high-strength steel sheet having low yield ratio and method of producing the same

Applicant:

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Opponent:

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Headword:

Delay in the delivery of mail/KAWASAKI STEEL

Relevant legal norms:

EPC Art. 120
EPC R. 85(2)

Keyword:

"Interruption in the delivery of mail (no)"

Decisions cited:

J 0011/88, OJ EPO 1989, 433; J 0003/90, OJ EPO 1991, 550;
J 0004/87, OJ EPO 1988, 172

Catchword:

I. For the general character of an interruption in the delivery of mail under Rule 85(2) EPC it is significant that the public in general residing in an area of some magnitude, even if of limited geographical extent, is affected (J 0003/90, OJ EPO 1991, 550 followed).

II. The loss of a single mail bag may affect a number of individual addressees but not the public in general.



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Boards of Appeal

Chambres de recours

Case Number: J 0001/93 - 3.1.1

D E C I S I O N
of the Legal Board of Appeal 3.1.1
of 17 May 1994

Appellant:

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Representative:

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Decision under appeal:

Decision of the Receiving Section of the European Patent Office dated 1 September 1992 confirming that no right of priority could be claimed for application No. 92 300 571.4.

Composition of the Board:

Chairman: R. L. J. Schulte
Members: B. J. Schachenmann
G. Davis

Summary of Facts and Submissions

- I. The applicant and Appellant filed European patent application No. 92 300 571.4 on 23 January 1992, claiming priority from the Japanese patent application No. 44580/91 of 21 January 1991. The application was filed under Article 75(1)(b) EPC at the Patent Office of the UK.
- II. On 17 February 1992 the applicant submitted the following three requests to the EPO:
1. A request for the President of the European Patent Office to state, under Rule 85(2) EPC, that a period of interruption or dislocation in the delivery of mail in the United Kingdom existed from 17 January 1992 to 24 January 1992.
 2. A request under Article 122 EPC for re-establishment of rights in relation to the filing date of the European patent application referred to above.
 3. A request under Article 122 for re-establishment of rights in relation to the exercise and benefit of the priority right originated by Japanese patent application No. 44580/91.

In support of the first request it was argued that a substantial proportion of mail originating in Japan on 14 January 1992 and consigned to a private courier service for delivery in the United Kingdom was lost by the courier service and not delivered in the UK until 24 January 1992.

III. The Receiving Section, in accordance with Rule 41(3) EPC, informed the applicant on 26 February 1992 that there would be no right of priority for the application unless, within one month, the applicant indicated a corrected date lying within the year preceding the date of filing of the European Patent application.

Regarding the applicant's three requests of 17 February 1992 the Receiving Section, on 31 March 1992, issued a communication pursuant to Article 113(1) EPC setting out the grounds on which it envisaged rejecting these requests.

On 7 April 1992, the Receiving Section informed the applicant that there was no right of priority for the patent application referred to above since no correction of the deficiency as to the priority date had been received within the prescribed time limit. Moreover, the applicant's attention was drawn to the possibility of applying for a decision on the matter pursuant to Rule 69(2) EPC.

IV. The applicant, on 14 May 1992, filed observations on the communication of 31 March 1992 and requested that any refusal of any of its three requests be issued in the form of an appealable decision.

V. In its decision of 1 September 1992 the Receiving Section refused all three requests referred to above. In particular, the first request was rejected substantially on the following grounds:

(a) A temporary loss of a particular group of items is not considered as "a **general** interruption in the delivery of mail" within the meaning of Rule 85(2) EPC since it does not affect all mail destined for a particular area.

- (b) A private courier service is not considered to fall within the meaning of "postal services" as used in Article 120 EPC.
- (c) Since the interruption was in the sending of mail between Japan and the United Kingdom, it was not an interruption "in a Contracting State or between a Contracting State and the European Patent Office" within the meaning of Rule 85(2) EPC.

VI. On 28 October 1992, the applicant filed a notice of appeal against this decision. A written statement of Grounds of Appeal was filed on 30 December 1992. Oral proceedings were requested in the event that any decision adverse to the applicant (Appellant) was contemplated.

VII. Oral proceedings were held on 17 May 1994. During these proceedings the Appellant withdrew requests 2 and 3 referred to above. **Request 1** was revised to read as follows:

The Board is requested to decide on the question of fact whether, in the present case, there was a period of interruption or dislocation in the delivery of mail which qualifies as a general interruption or dislocation within the meaning of Rule 85(2) EPC.

In support of this request the Appellant submitted the following arguments challenging the grounds of the decision of the Receiving Section referred to above (cf. point V, supra):

- (a) It has been accepted by the Boards of Appeal that interruptions of mail deliveries which are geographically localised may, nonetheless, be of a "general" character. Interruptions of mail

deliveries which are localised in the sense that they are confined to a particular delivery service can equally be of general character. Since applicants are not restricted by the EPC to the use of a particular mail delivery service, the generality of an interruption in the delivery of mail should be considered separately for each delivery service available to the public, independently of whether other services remain unaffected. Therefore, if there is a substantial disruption of mail deliveries by the service concerned, the interruption is of a "general" character.

- (b) There was no justification for the assumption that the term "postal services" in Article 120 EPC inherently excludes services which are not provided by national authorities, and that Rule 85 (2) EPC must be interpreted in the light of this inherent exclusion. On the contrary, the generality of Rule 85(2) EPC made it clear that "postal service" as mentioned in Article 120 EPC are (any) services which deliver mail.
- (c) In the circumstances of the present case, the interruption in the delivery of mail occurred in the United Kingdom since the mail was lost at London Heathrow Airport. Therefore, there was an interruption in the delivery of mail in a Contracting State within the meaning of Rule 85(2) EPC.

The Appellant further requested (**request 1A**) that the Board, should it conclude that the provisions of Article 120 and Rule 85(2) EPC were strictly applicable only to mail deliveries by national postal authorities,

exercise its powers under Article 125 to ensure equal treatment of the delivery of mail by private courier services.

In support of this request it was submitted that, since the the European Patent Convention was adopted, the use of private mail delivery services had increased greatly in frequency and significance. In view of this development, the PCT, in 1991, adopted an amendment to Rule 82.1 PCT recognizing the equal status of delivery services other than the postal authorities (cf. Rule 82.1 (d) and (e) PCT). This showed that equal treatment of private delivery services and postal authorities is a principle of procedural law generally recognized in the Contracting States and should therefore be taken into account by the European Patent Office under Article 125 EPC.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 64 EPC, and, therefore, is admissible.

2. The main issue to be considered is whether there was, in the circumstances of the present case, an interruption in the delivery of mail which qualifies as a general interruption within the meaning of Rule 85(2) EPC. This is a question of fact which has to be decided upon the basis of any credible information available (cf. J 11/88, OJ EPO 1989, 433, point 3 of the Reasons).

- 2.1 The Appellant credibly established that one of four mail bags consigned to a private delivery service in Japan for delivery in the UK was lost at London airport between 14 and 24 January 1992. The missing bag

contained 36 items of mail including the application documents for the present patent application, whilst the three other bags contained only ten items. The priority year expired on 21 January 1992, i.e. on a day on which the mail bag was still lost.

- 2.2 According to the established case law of the Legal Board of Appeal, Rule 85(2) EPC not only applies to disruptions of full national extension but also to interruptions of mail service in a limited area of some magnitude provided, however, that those residing in that area are affected in such a way as to render the interruption of general character (cf. J 3/90, OJ EPO 1991, 550, point 9).

When applying these principles to the circumstances of the present case, it is immediately apparent that the incident referred to above does not qualify as a general interruption in the delivery of mail within the meaning of Rule 85(2) EPC. Even though the loss of a single mail bag may have affected a number of individual addressees in the UK, it was far from affecting the public in general residing in the UK or a particular area thereof.

The Appellant never referred to (nor is the Board itself aware of) any other interruption in the delivery of mail having occurred in the UK during the critical period and qualifying as a general interruption within the meaning of Rule 85(2) EPC. Therefore, there is no basis for the application of Rule 85(2) EPC in the present circumstances.

- 2.3 There is nothing else in the EPC which provides the EPO with the power to extend the time limit for claiming priority in the event of an unforeseeable delay in the delivery of mail (cf. J 4/87, OJ EPO 1988, 172, point 5 of the Reasons).

3. The Appellant, however, maintains that the Board's interpretation of Rule 85(2) EPC should be extended to also cover interruptions of mail deliveries which are "localized" in the sense that they are confined to a particular delivery service. Each delivery service should in this context be considered separately from other possible delivery services (cf. point VII. a, supra).
- 3.1 Rule 85(2) EPC deals with the legal consequences of a general interruption or subsequent dislocation in the delivery of mail in a Contracting State (or between a Contracting State and the EPO). It provides that, as a consequence of such general interruption, the time limits "for parties resident in the State concerned" shall be extended. This Rule therefore refers to a group of people defined as residents in a particular area generally affected by an interruption in the delivery of mail. Nothing other than a geographical delimitation can be derived from Rule 85(2) EPC for determining the circle of those to whom Rule 85(2) EPC may apply in the event of a general interruption in the delivery of mail in a particular area.
- 3.2 It should further be noted that Rule 85(2) EPC was adopted to deal with postal strikes. The term "general interruption" was chosen in order to cover also all forms of action **similar to strikes** (cf. preparatory documents BR/209/72, No. 39 to 43; van Empel, The Granting of European Patents, Leyden 1975, N. 584 on p. 264). This term must not, therefore, be broadened by interpretation to cover situations very **dissimilar** to strikes.
- 3.3 It should also be taken into account that the Convention imposes certain limitations on the procedural remedies available in the case of non-observance of time limits.

Re-establishment of rights pursuant to Article 122 EPC is e.g. excluded for a number of time limits (cf. Article 122(5) EPC). In this context, Rule 85(2) EPC appears to be an exception in the sense that it leads, by operation of law, to the extension of **any** time limit under the EPC (cf. J 11/88, loc. cit., point 5 of the Reasons). Therefore, it does not appear appropriate to unduly extend, by broad interpretation as suggested by the Appellant, the range of application of Rule 85(2) EPC so as to allow the limitations imposed by the Convention on other procedural remedies to be circumvented.

3.4 The Legal Board of Appeal cannot therefore follow the Appellant's interpretation of Rule 85(2) EPC referred to above (cf. point VII. a, supra). Instead, the Board upholds its case law according to which it is significant for the general character of an interruption in the delivery of mail under Rule 85(2) EPC that the public in general residing in an area of some magnitude, even if of limited geographical extent, is affected (cf. point 2.2, supra).

4. For these reasons alone the appeal has to be dismissed. The Board, therefore, need not consider the Appellant's further arguments regarding, inter alia, the interpretation of the terms "postal services" and "mail" as used in Article 120 and Rule 85(2) EPC (cf. point VII.b, supra). Even if, according to the Appellant's submission, the above terms were construed to also include delivery services other than the national postal authorities, this would not influence the outcome of the present case, since, in any case, the interruption was not general within the meaning of Article 120 and Rule 85(2) EPC.

For the same reason, it is not necessary for the Board to consider Appellant's request 1A which substantially refers to the same question.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:



M. Beer

The Chairman:



R. Schulte

