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**Datasheet for the decision
of 21 April 2021**

Case Number: R 0005/18

Appeal Number: T 0421/16 - 3.3.05

Application Number: 99900207.4

Publication Number: 1044044

IPC: B01D1/00, F26B3/10,
F26B17/10, F26B21/02

Language of the proceedings: EN

Title of invention:
METHOD AND APPARATUS FOR THE REMOVAL OF LIQUID FROM
PARTICULATE MATERIAL

Patent Proprietor:
ASJ Holding ApS

Opponent:
BMA Braunschweigische Maschinenbauanstalt AG

Headword:
Fundamental violation of the right to be heard

Relevant legal provisions:
EPC Art.112a(2)(c)
EPC R.106

Keyword:
Petition for review - obligation to raise objection - clearly
inadmissible

Decisions cited:
R 0017/10, R 0017/14, R 0008/17

Catchword:
-



**Große Beschwerdekammer
Enlarged Board of Appeal
Grande Chambre de recours**

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Case Number: R 0005/18

D E C I S I O N
of the Enlarged Board of Appeal
of 21 April 2021

Petitioner:
(Patent Proprietor)

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Decision under review:

**Decision T 0421/16 of the Technical Board of
Appeal 3.3.05 of the European Patent Office of
16 November 2017.**

Composition of the Board:

Chairman: C. Josefsson
Members: W. Sekretaruk
M.O. Müller

Summary of Facts and Submissions

- I. The patent proprietor's petition for review of 12 April 2018 is directed against the decision of Board of Appeal 3.3.05 in case T 0421/16 revoking European patent EP 1044044. The board's written decision was posted to the proprietor's representative on 7 February 2018. The petition for review is based on Article 112a(2)(c) EPC. The petitioner asserts that, in the appeal proceedings, a fundamental violation of its right to be heard had occurred. The Board of Appeal refused to hear submissions of Mr. A. S. Jensen acting as legal representative of the patent proprietor. The Board wrongly based its arguments in support of this decision on reasons dealing with the procedural situation of submissions of an accompanying person.

- II. In a communication the Enlarged Board of Appeal expressed its preliminary view that the petition was inadmissible due to the fact that no objection in respect of the alleged procedural defect had been raised during the oral proceedings before the board of appeal. The petition thus did not comply with Rule 106 EPC.

- III. In its reply to the Enlarged Board's communication the Petitioner put forward that in the light of the fundamental importance of the parties' right to be heard, a proper interpretation of Rule 106 EPC would only require an implicit objection. An implicit objection simply lay in the fact that the request of the patent proprietor was refused by the Board of Appeal.

IV. At oral proceedings held on 21 April 2021 before the Enlarged Board of Appeal, the petitioner added that he had worked in the field of steam dryers for 50 years now and had become a well-known expert. His inventions guided the way to an environmental-friendly operation of such plants. The minutes of the oral proceedings before the board were not accurate in each aspect. Mr Jensen was not only an inventor, but also managing director of the patent proprietor. The opponent's submission created a false impression concerning the subject-matter claimed by the patent proprietor. It would have been necessary to let Mr Jensen explain what was really behind his invention. Instead, the chairman of the board asked the opponent for permission. The patent proprietor's request to let Mr Jensen speak was denied, the hearing was finished and the European patent revoked. Proceeding this way eroded the confidence in the European patent system. From a legal point of view it had to be taken into account that Article 6 ECHR included the right of a party to a fair trial. Rule 106 EPC had to be interpreted in the light of the European Convention on Human Rights. That is why Rule 106 EPC had to be interpreted narrowly. Lawmakers' intention simply was to rule out misuse of the review procedure and an implicit objection fulfilled the conditions as set out in Rule 106 EPC. The implicit objection lay in the request for hearing the managing director of the patent proprietor itself and in the following discussion. Furthermore, an explicit objection was not possible, because the way of conducting the oral proceedings by the chairman was not foreseeable. The statement in the minutes of the oral proceedings before the board of appeal that the chairman asked the parties whether they had any further

comments or requests related only to costs or related issues.

V. The petitioner's requests are:

1. That the decision of the Technical Board of Appeal in T 0421/16-3.3.05 be reviewed and set aside and that the proceedings before the Technical Board of Appeal be reopened.
2. That the members of the Board of Appeal who participated in taking the decision be replaced.
3. That the petition fee be reimbursed.

Reasons for the Decision

1. The petition meets the requirements with respect to the time limit and payment of the petition fee.
2. The petition does not to comply with Rule 106 EPC. The Enlarged Board of Appeal takes the view that an objection in respect of the alleged procedural defect would have been possible during the oral proceedings before the Board of Appeal.

2.1 Rule 106 EPC reads:

A petition under Article 112a, paragraph 2(a) to (d), is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board of Appeal,

except where such objection could not be raised during the appeal proceedings.

2.2 The minutes of the oral proceedings on 16 November 2017

If a petitioner considers the minutes to be incomplete it is expected to submit a corresponding request for correction (see e.g. R 17/10 of 15 June 2011, reasons 2.2). However, no such request is on file. Consequently, the Enlarged Board of Appeal has to rely on the minutes as they stand.

The minutes (page 2, third paragraph to page 3, first paragraph) read as follows:

Further the subject-matter of the main request regarding Article 83 EPC was discussed with the parties. The chairman before deliberation of the Board asked whether any further arguments were to be put forward by the parties. There were none. After a break for deliberation, as the chairman was about to give the conclusion of the Board, the respondent requested that the accompanying person Mr Jensen be permitted to make oral submissions on Article 83 EPC. The appellant objected and the parties were heard on this issue. After a further break for deliberation, the Board informed the parties that Mr Jensen was not allowed to make oral submissions. Further the Board came to the conclusion that the subject-matter of the main request was not sufficiently disclosed. Regarding the auxiliary request the respondent stated that the situation was the same as with the main request and requested therefore a break to consider its requests. After the break oral proceedings were resumed and the respondent stated that he had no further requests to submit. The parties maintained their opening requests as stated above. The chairman asked the parties if they had further comments or requests to submit. There were none.

2.3 Opportunity to raise an objection to the alleged procedural defect

Based on what is stated in the minutes, the petitioner could have raised the objection that the legal representative was not allowed to make submissions at the point in time when it stated that it had no further requests to submit and maintained its opening requests. In case the petitioner was of the opinion that the minutes are incorrect, a request for correction would have been appropriate to clarify what exactly happened during oral proceedings. In any case, an explicit reference to Rule 106 EPC, or alternatively to Article 113 EPC is required (see R 17/14 of 15 December 2015, reasons 7.,11.,12.,18.) An implicit objection is not sufficient. It must be expressed in such a form that the board of appeal is able to recognise immediately and without doubt that such an objection - i.e. one which is additional to and distinct from other statements, in particular arguing or even protesting against the conduct of the proceedings or against an individual procedural finding - is intended. Furthermore, the objection must be specific, which means it has to indicate unambiguously which particular defect is relied on (see R 8/17 of 18 June 2018, reasons 7.,11.,12.). The Enlarged Board of Appeal cannot see any reason why such a finding is contrary to the right of a party to fair proceedings. The purpose of Rule 106 EPC is to give the board a chance to react immediately and appropriately by either removing the cause of the objection or by dismissing it, thereby ensuring legal certainty for the parties and the public as to whether the ensuing substantive decision of the board is open to review under Article 112a EPC. By

safeguarding that errors can be corrected by a board before a final decision is taken, Rule 106 EPC also ensures that unnecessary petitions for review are avoided (see Case Law of the Boards of Appeal of the European Patent Office, 9th edition, V.B.3.6.1). The mere fact that the Board refused the request for hearing the inventor after a discussion of this issue does not fulfil the requirements for an objection under Rule 106 EPC as defined in the case law of the Enlarged Board of Appeal.

Order

For these reasons it is decided that:

The petition for review is unanimously rejected as being clearly inadmissible.

The Registrar:

The Chairman:



N. Michaleczek

C. Josefsson

Decision electronically authenticated