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**Datasheet for the decision
of 17 January 2007**

Case Number: T 1382/06 - 3.4.01

Application Number: 00203373.6

Publication Number: 1072897

IPC: G01R 31/28

Language of the proceedings: EN

Title of invention:

Method and apparatus for searching electromagnetic disturbing source and noncontact voltage probe therefor

Applicant:

NIPPON TELEGRAPH AND TELEPHONE CORPORATION

Opponent:

-

Headword:

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Relevant legal provisions:

EPC Art. 113(1), 116(1), 111(1)

Keyword:

-

Decisions cited:

-

Catchword:

-



Case Number: T 1382/06 - 3.4.01

D E C I S I O N
of the Technical Board of Appeal 3.4.01
of 17 January 2007

Appellant: NIPPON TELEGRAPH AND TELEPHONE CORPORATION
19-2 Nishi-Shinjuku 3-chome
Shinjuku-ku
Tokyo 163-19 (JP)

Representative: Hutchinson, Glenn Stanley
Harrison Goddard Foote
Fountain Precinct
Balm Green
Sheffield S1 2JA (GB)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 12 April 2006
refusing European application No. 00203373.6
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: B. Schachenmann
Members: G. Assi
H. Wolfrum

Summary of Facts and Submissions

- I. The appellant (applicant) lodged an appeal, received on 22 June 2006, against the decision of the examining division, dispatched on 12 April 2006, refusing European patent application No. 00 203 373.6 (publication number 1 072 897). The fee for the appeal was paid on 22 June 2006. The statement setting out the grounds of appeal was received on 11 August 2006.
- II. During the first instance procedure, the examining division had issued two communications and the applicant filed observations and amendments in reply. The applicant was then summoned with a letter of 20 December 2005 to attend oral proceedings due to take place on Monday, 20 March 2006. With a letter of 20 February 2006 the applicant's representative submitted remarks as to the objections of the examining division and filed further amended application documents. In the morning of the day of the oral proceedings the representative's office informed the formalities officer of the examining division by telephone that due to an accident on Saturday, 18 March 2006, the representative was not able to attend the oral proceedings. The formalities officer thus invited the representative to communicate in writing whether a further date for oral proceedings should be appointed and to send a medical or police report of the accident within the next two weeks.
- III. By a fax on the day of the oral proceedings, i.e. on 20 March 2006, the formalities manager of the representative requested in writing reappointment of oral proceedings and announced that a medical

certificate would follow in due course. With a letter of 28 March 2006 the representative confirmed the request for a new date for attending oral proceedings and filed a copy of a letter dated 24 March 2006 signed by his doctor. In this letter the doctor confirmed that the representative had been to see him saying that at the end of the previous week he had lifted his son from the cot which resulted in him having a bad back, which with analgesia and rest had been resolved.

IV. On 12 April 2004 the decision to refuse the application was dispatched without any prior warning to the applicant. In the decision the examining division, *inter alia*, refused the request for appointing a new date for the oral proceedings on the ground that the letter signed by the representative's doctor did not provide proof of the existence of a serious illness diagnosed by a physician and hindering the representative from participating at the appointed oral proceedings.

V. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of a main, a first or a second auxiliary request. The appellant also requested reimbursement of the appeal fee. Oral proceedings were requested if the board of appeal contemplated refusing either the application or any of the requests made.

Reasons for the Decision

1. The appeal is admissible.
2. The appellant submitted that the examining division issued the decision refusing the application without giving him an opportunity to be heard (Article 113(1) EPC). This was contrary to the principle of good faith governing the relations between the EPO and the applicants (Article 125 EPC).
3. Pursuant to Article 116(1) EPC oral proceedings shall take place either at the instance of the EPO or at the request of any party to the proceedings.

In present case, the appellant's representative requested oral proceedings with a letter of 1 September 2003 and confirmed his request with a letter of 14 March 2005. Oral proceedings which were thus appointed with the letter of 20 December 2005 could however not be attended by the representative as outlined above (cf. point II, supra). The issue has to be considered whether in the circumstances referred to above the examining division should have given the representative the opportunity to comment on its intention to refuse the request for postponement of the oral proceedings on the ground of insufficient substantiation and to refuse the patent application without oral proceedings.

4. The procedure for changing the date of oral proceedings is defined in a Notice of the Vice-Presidents Directorates-General 2 and 3 dated 1 September 2000 concerning oral proceedings before the EPO (OJ EPO 2000,

456-458). According to point 2.2, "*Oral proceedings appointed by the EPO will be cancelled and another date fixed at the request of a party only if the party concerned can advance serious reasons which justify the fixing of a new date. The request to fix another date shall be filed as soon as possible after the grounds preventing the party concerned from attending the oral proceedings have arisen. The request shall be accompanied by a sufficiently substantiated written statement indicating these reasons.*" According to point 2.3, "*serious illness*" represents an admissible reason to request the change of the date for oral proceedings.

5. In the Board's view, the procedural steps taken by the representative cannot be objected to. Since he had the problem during a weekend, it was impossible for him to inform the examining division earlier of the need, from his point of view, of postponing the oral proceedings. Moreover, after the telephone conversation on Monday, 20 March 2006, the representative followed the instructions given by the formalities officer of the examining division. In particular, he went to see his doctor and filed a declaration of said doctor in time as requested by the formalities officer.
6. As is evident from the contested decision (cf. point 1 of the Reasons), the examining division did not consider the declaration of the representative's doctor to constitute a significant medical report and thus a convincing proof for the existence of a serious illness diagnosed by a physician and hindering, on the days in question, the representative from travelling to the EPO and participating at the appointed oral proceedings.

7. Article 113(1) EPC prescribes that the decisions of the EPO may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments. However, the examining division immediately issued a decision denying postponement of the oral proceedings and refusing the application without previously giving the representative an opportunity to present his comments on the sufficiency of substantiation and/or to file additional proof if considered necessary. The examining division thus violated the appellant's right to be heard because its decision was based on grounds on which the appellant had no opportunity to present his comments.

8. According to Rule 67 EPC "*The reimbursement of appeal fees shall be ordered ... where the Board of Appeal deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation*". According to the constant jurisprudence of the boards of appeal, a violation of the principle of the right to be heard pursuant to Article 113(1) EPC is considered as a substantial procedural violation within the meaning of Rule 67 EPC (see Case Law of the Boards of Appeal of the EPO, 4th ed., 2001, p. 556). It also appears that in the circumstances of the present case such reimbursement is equitable since, as mentioned above, the representative had followed the instructions given by the formalities officer of the examining division. Moreover, the Board has no reason to doubt the representative's good faith. In particular, it is plausible that, on the day the representative went to see his doctor, the back injury had been resolved due to rest and the use of pain killers and that, in such a case, the doctor could not make any other declaration

than that on file. Had the examining division seen the necessity for additional proof, it should have informed the representative accordingly before refusing the application.

9. In conclusion, the appeal being allowable, the reimbursement of the appeal fee is equitable by reason of the substantial procedural violation (Rule 67 EPC). Moreover, pursuant to Article 111(1) EPC, second sentence, second alternative, and Rule 10 of the Rules of procedure of the Boards of Appeal the case is remitted to the department of first instance for further prosecution.

Order

For these reasons, it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the examining division for further prosecution.
3. Reimbursement of the appeal fee is ordered.

The Registrar

The Chairman:

R. Schumacher

B. Schachenmann