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Datasheet for the decision of 8 May 2012

Case Number: T 0311/10 - 3.2.08

Application Number: 04012846.4

Publication Number: 1452617

IPC: C22C 45/02

Language of the proceedings: EN

Title of invention:
Methods of forming steel

Patent Proprietor:
Battelle Energy Alliance, LLC

Opponent:
DURUM, Verschleiss-Schutz GmbH

Headword:
-

Relevant legal provisions:
EPC Art. 112(a)
PRBA Art. 15(4), 13(3)

Relevant legal provisions (EPC 1973):
EPC Art. 83
EPC R. 27(1)(e)

Keyword:
"Sufficiency of disclosure (no)"

Decisions cited:
-

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0311/10 - 3.2.08

D E C I S I O N
of the Technical Board of Appeal 3.2.08
of 8 May 2012

Appellant: (Patent Proprietor)
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Decision under appeal:
Decision of the Opposition Division of the European Patent Office posted 9 December 2009 revoking European patent No. 1452617 pursuant to Article 101(3)(b) EPC.

Composition of the Board:

Chairman: T. Kriner
Members: R. Ries
A. Pignatelli a

Summary of Facts and Submissions

I. By its decision posted on 9 December 2009 the opposition division revoked European patent No. 1 452 617 on the ground that the subject matter of claim 1 then on file did not comply with Article 83 EPC.

The appellant (patent proprietor) lodged an appeal against this decision on 13 February 2010, paying the appeal fee on the same day. The statement setting out the grounds of appeal was filed on 19 April 2010.

II. Oral proceedings took place before the Board on 8 May 2012. The following requests were made:

The appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request or, alternatively, of the first, second or third auxiliary requests (the third auxiliary corresponding to former auxiliary request VI), all filed on 19 April 2010. Auxiliary requests 3, 4, 5, 7 and 8 filed on 19 April 2010 were withdrawn.

After the discussion of the main, first and second auxiliary requests and after having heard the conclusions of the Board on these requests in the course of the oral proceeding, the appellant requested an interruption of the proceedings for one hour in order to be able to provide tests and data in support of its position given that in its view new issues had arisen during the oral proceedings. In the alternative, the appellant requested that the proceedings be adjourned to another date, or, in the further alternative, remittal of the case to the first instance

for further prosecution. These requests were also made in order to be able to provide data and tests.

The respondent requested that the appeal be dismissed and that all procedural requests be rejected.

The procedural requests were rejected by the Board during the oral proceedings.

The appellant raised the following objection under Article 112a(1)(c) EPC (verbatim):
"I formally object to a violation of the right to be heard because of the rejection of the procedural request to be able to file data in response to the new issues raised in the oral hearing, 8.5.12"

The objection was dismissed by the Board.

III. Claim 1 of the main request reads as follows:

"A method of forming a steel, comprising an iron-based alloy in which no other single element besides Fe is present in excess of 30 wt.-% and for which the Fe-content amounts to, at least, 55 wt.-% wherein the alloy incorporates C, the content of which is limited to a maximum of 2 wt.-% comprising the steps:
providing a first metallic glass steel substrate (100);
forming a molten alloy over the first metallic glass steel substrate (100) to heat and devitrify some of the underlying metallic glass of the steel substrate (100) wherein the forming the molten alloy over the first metallic glass steel substrate (100) comprises spraying the molten alloy to deposit material (102) on the substrate (100) to form a layer (106) wherein the

material (102) heats an exposed surface of the substrate to form a heat-treated portion (108) of the substrate (100) comprising a devitrified material, wherein the layer (106) is formed at a temperature which heats a surface of the substrate (100) to greater than 600°C and less than a melting temperature of the substrate (100), such heating devitrifies the portion of substrate (100) exposed to such temperatures."

Claim 1 of the first auxiliary request differs from claim 1 of the main request by the additional feature (in bold added by the Board):

A method of forming a steel, comprising ... to such temperatures **wherein the devitrification of the portion of substrate (100) results in the formation of a steel matrix with an intimate mixture of ceramic precipitates therein, the steel matrix comprising an α-Fe phase, the intimate mixture of precipitates including at least one of $(TiZr)_1C_1$, $(CrMO)_{23}C_6$, $Fe_{23}B_6$, and $AlFe_3C_{0,5}$."**

Claim 1 of the second auxiliary request further differs from claim 1 of the main request by (also in bold added by the Board):

"A method of forming a steel, comprising... to such temperatures **wherein the molten alloy comprises a material selected from the group consisting of $Fe_{69}Zr_3Mo_7P_{16}C_3Si_2$, $Fe_{71}Ti_3Cr_7B_{14}C_3Si_2$, $Fe_{68}Cr_4Mo_7P_{12}B_6C_3$, DNA3, DNS2C and DNA6 and the first metallic glass substrate comprises a material selected from $Fe_{69}Zr_3Mo_7P_{16}C_3Si_2$, $Fe_{71}Ti_3Cr_7B_{14}C_3Si_2$, $Fe_{68}Cr_4Mo_7P_{12}B_6C_3$, DNA3, DNS2C and DNA6."**

Claim 1 of the third auxiliary request differs from claim 1 of the main request by the following features (also in bold added by the Board):

"A method of forming a steel, comprising an iron-based alloy... to heat and devitrify **at least** some of the underlying metallic glass of the steel substrate (100) ...to such temperatures **wherein the molten alloy comprises a material selected from the group consisting of $Fe_{69}Zr_3Mo_7P_{16}C_3Si_2$, $Fe_{71}Ti_3Cr_7B_{14}C_3Si_2$, $Fe_{68}Cr_4Mo_7P_{12}B_6C_3$, DNA3, DNS2C and DNA6 and the first metallic glass substrate comprises a material selected from $Fe_{69}Zr_3Mo_7P_{16}C_3Si_2$, $Fe_{71}Ti_3Cr_7B_{14}C_3Si_2$, $Fe_{68}Cr_4Mo_7P_{12}B_6C_3$, DNA3, DNS2C and DNA6 and wherein the molten alloy solidifies as a second metallic glass steel substrate, and further comprising forming a second molten alloy over the second metallic glass steel substrate to heat and devitrify the second metallic glass steel substrate, wherein an outermost layer (124) is not heat-treated and comprises a metallic glass.**"

IV. The appellant's arguments relevant to the present decision can be summarized as follows:

Main request:

The subject matter of claim 1 of the main request was restricted by the technical features that the iron-based alloy comprised (i) at least 55 wt% Fe, (ii) not more than 30 wt% of any other element other than iron and (iii) carbon amounts up to a maximum of 2%. The claimed process was further confined exclusively to spraying the molten alloy and by the feature that, by depositing the molten metal alloy on substrate, the

surface of the glassy steel substrate was heated to a temperature higher than 600°C and less than the melting temperature so that, by that heat treatment, a portion of the substrate surface was devitrified. The key feature of the claimed process resided in the lower temperature limit of more than 600°C which was strictly to adhere to. In the case of alloy DNA3, it was evident from Figure 7 that the exothermic glass-to-metastable crystalline and the metastable crystalline-to-crystalline transitions occurred at 525°C and 600°C, respectively. It was therefore indispensable to reach a temperature higher than 600°C on the surface of the glassy steel substrate so as to guarantee that devitrification in that area actually took place. The time needed for devitrification depended on the respective heat input and a temperature level above 600°C. The temperature level, that was achieved by spraying and depositing molten metal on the glassy steel substrate, could be effectively controlled for example by providing a thermocouple at or close to the surface region. Managing the heat input to the surface of the steel substrate thus could be done without any particular problems by the person skilled in the art.

Contrary to the respondent's allegations, there was no need for specifying in the patent other parameters which were to adhere to in the spraying process, such as the nature and temperature of the processing gas or the thickness of the substrate. The claimed method itself was fully described in paragraphs [0012] to [0014]. More specifically, paragraph [0018] of the patent specification gave details about the average grain size of the devitrified steel structure formed by the claimed method which was described with reference

to Figure 1 of the patent. Appropriate steel compositions which could be used for forming the metallic glass substrate and for the molten alloy to be sprayed on it were listed in Table 1 and paragraph [0021], [0022] of the patent specification as well as in granted claims 5 and 6. Thus, the skilled person was clearly taught by the patent which steel materials were appropriate when putting into practice the claimed process.

Having regard to the opposition division's and respondent's reference to the technical disclosure of document D14, which originated from the inventor of the present patent, a process different to that claimed in the patent was applied in this document. Specifically, the process described in D14 aimed at producing and developing thick amorphous layers, independent of the layer thickness during spraying. To this end, the known process prevented the subsequent layers from crystallising the underlying layer (D14, page 2621, IV. Conclusion, first paragraph, fourth sentence). The object of the process of D14 was, therefore, to produce a product different from that of the patent. Although alloy DNA3 ($Fe_{63}Cr_8Mo_2B_{17}C_5Si_1Al_4$) referred to in the patent was also treated in D14, it was evident from part II: "Experimental Procedure", paragraph 1, first sentence and page 2616, column 2 third sentence that during thermal spraying, the substrates and coatings were cooled by argon jets mounted on the gun with a pressure of 250 psi directed at the substrate. The gun rastered across the sample with a 5 mm spacing and a 7 second cooling time between subsequent layers. In so doing, the amorphous characteristics of the deposits independent of the number of layers were maintained.

By contrast, when carrying out the claimed process, the skilled person could manage the heat input in the surface area of the substrate by spraying and depositing the molten alloy on the substrate and by applying heating or cooling gases to adjust the thermal profile of the surface as to effect the devitrified portion in that area.

First to third auxiliary requests:

Compared to the main request, claim 1 of the first auxiliary request was even more restricted by defining the precipitates and metallic phases that had formed after devitrifying a portion of the substrate.

Claim 1 of the second auxiliary request further defined the list of specific materials that could be selected for forming the substrate and the molten alloy. The process set out in claim 1 of the third auxiliary request was intended to produce a multi-layered steel product comprising a second substrate and a second outermost metallic glass layer.

Since except for the lower temperature limit of 600°C, that was indispensably to be achieved on the surface of the substrate in order to obtain a heat-affected devitrified surface zone, no other process parameters needed to be adhered to, the claimed process was disclosed sufficiently clearly and completely for it to be carried out by the person skilled in the art. The requirement of Article 83 EPC (1973) was therefore met.

Procedural requests

As to the procedural requests, the appellant submitted that they became necessary because during oral proceedings new issues were dealt with. No explanations were given for the fact that no examples or data had been filed earlier in the proceedings. No submissions were made concerning the objection under Article 112a(1)(c) EPC.

V. The respondent's arguments relevant to the present decision can be summarized as follows:

The claimed process and the patent itself provided on page 5, lines 41 to 43 that, apart from a surface portion, "in particular applications" the entire thickness of material (100) could be heated up to more than 600°C and devitrified. It was however impossible to deposit a molten alloy on the surface of a substrate at a quenching rate greater than 10^4 °C/s as to bring about an amorphous structure and, at the same time, to provide by the deposited layer the whole substrate with an heat input high enough to effect complete devitrification of the metallic glass substrate. In such a case it was unavoidable that due to the heat input the layer sprayed on the substrate was devitrified as well. In that respect the patent specification failed to disclose any technical information as to how the "particular applications" could be put into practice by the person skilled in the art.

In support of the objection under Article 100(b) EPC (1973), document D14, although post published but originating from the inventor of the patent in suit,

disclosed on page 2616, second paragraph the composition of alloy DNS2C listed also in Table 1 of the patent at issue. The process described in D14 of spraying molten metal on a metal glass substrate resulted in a 30-layer product of 1.6 mm thickness, each single layer exhibiting a thickness of about 50 µm and, more importantly, an amorphous structure. Hence no devitrification occurred. Based on the disclosure of D14, it was highly unlikely to devitrify a portion of the substrate, as alleged in the patent in suit, without however providing any working example to prove the contrary. The same arguments were true for claim 1 of the first to third auxiliary requests.

Consequently, the subject matter claim 1 of all requests did not satisfy the requirements of Article 83 EPC.

As far as the procedural requests of the appellant are concerned, the respondent requested their rejection because no new issues were raised and dealt with during oral proceedings. On the contrary, all the issues were well known to the appellant since the opposition proceedings. The appellant could and should have provided tests data and examples earlier in the proceedings. Therefore, its right to be heard would not be violated if the requests were refused. If new data and examples were to be submitted at that stage of the proceedings, the oral proceedings should be adjourned and this would be contrary to the principle of procedural economy.

Reasons for the Decision

1. This decision is issued after the entry into force of the EPC 2000 on 13 December 2007 whereas the application was filed and the patent granted before this date. Reference is made to the relevant transitional provisions for the amended and new provisions of the EPC, from which it may be derived which Articles and Rules of the EPC 1973 are still applicable to the present application and which Articles and Rules of the EPC 2000 are to apply. Where Articles or Rules of the former version of the EPC apply, their citations are followed by the indication "1973" (cf. Office's EPC, Citation practice, pages 4-6).

2. The appeal is admissible.

3. Insufficiency of disclosure; Articles 83 EPC (1973) and 100(b) EPC

3.1 Article 83 EPC (1973) stipulates that the application shall disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. Sufficiency of disclosure within the meaning of this Article must be assessed on the basis of the application as a whole, including the description, claims and figures.

According to the established jurisprudence of the Boards of Appeal (Case Law, 6th edition, 2010, II.A.3 b), c), 4.1 and 4.2), the requirements of Article 83 EPC (1973) are satisfied if it is possible to reproduce the claimed method using the original application documents without any inventive effort over and above

the ordinary skills of a practitioner. As long as the description of the claimed process is sufficiently clear and complete, i.e. the claimed process can be put into practice without undue burden by the skilled person taking into consideration his general technical knowledge to supplement the information contained in the application, there is no deficiency in this respect. Where, however, the skilled person can only establish by trial and error whether or not his particular choice of numerous parameters will provide a satisfactory result, this amounts to an undue burden.

3.2 According to Rule 27(1)(e) EPC (1973), the description must describe in detail at least one way of carrying out the invention claimed, using examples where appropriate and referring to the drawings, if any. The disclosure of one way of performing the invention is, however, only sufficient if it allows the invention to be performed over the whole range claimed. Sufficiency of disclosure thus presupposes that the skilled person is able to obtain substantially all embodiments falling within the ambit of the claims.

4. Main request

4.1 The method set out in claim 1 requires that, in a first step, a first metallic glass steel substrate of a very broad steel composition is provided. In a second step, a molten alloy is sprayed on the substrate to form a layer thereupon. In so doing, the heat input into the substrate should be high enough to increase the surface temperature of the amorphous substrate to greater than 600°C but lower than the melting point. As a result,

the portion of the substrate exposed to such temperature is devitrified.

In the preferred embodiment set out in claim 1, the alloy sprayed and deposited on the first metallic glass substrate solidifies in the amorphous state and forms a second metallic glass steel structure on which a second molten alloy is sprayed.

4.2 It is firstly noted that the patent specification does not comprise a single example which includes the process steps featuring in claim 1 of the main request. Rather, all examples given in the patent specification are concerned either with producing metallic glass tabular flake shaped ribbons, or atomized powder particles of an amorphous structure, which all could be transformed by heat treatment into a multiphase nanoscale nanocomposite microstructure. In paragraph [0023], the specification merely describes that the material deposited on the amorphous substrate (100) heats the exposed surface thereof to form a heat-treated portion which "can" comprise a devitrified material. The appellant referred in this context to paragraph [0014] stating that the metallic glass steel substrate "is" devitrified to support its position that such a solid state phase change takes place wherein the amorphous phase of the metallic glass of the substrate is converted to one or more crystalline solid phases. However, no evidence is given anywhere in the patent specification in support of the fact that a first metallic glass steel substrate could actually be devitrified at least in part by spraying a molten alloy and depositing a layer on the substrate surface. Although the appellant had long been aware of this

deficiency of the patent, it did not provide any working examples in order to convince the opposition division or the Board.

4.3 The patent specification further mentions in paragraph [0023] the embodiment of the claimed process according to which "in particular applications, temperatures greater than 600°C can permeate entirely through substrate 100 to heat treat an entire thickness of material 100." Apart from this bare statement, the patent does not provide any conclusive evidence to verify that this embodiment within the scope of claim 1 could be successfully put into practice.

As to this embodiment, which is described also in paragraphs [0025], [0026] and depicted schematically in Figure 6 of the patent specification, showing multiple heat treated devitrified metal layers 120 and an outermost surface layer of metallic glass formed thereupon, the Board concurs with the respondent's position that it is highly unlikely or even impossible to produce such a structural part. Having regard to the thermal conduction properties of metallic materials, it seems unfeasible to provide at the same time the metal glass substrate with sufficient heat to devitrify its glassy structure entirely without devitrifying the amorphous structure of the exterior surface layer. In addition, no particular thickness for the metal glass steel substrate is mentioned in the patent. It is, however, to be noted that a complete transformation of bulk steel materials from the amorphous to the crystalline state is not possible for any thickness and any composition. Again, the appellant did not provide convincing evidence that the complete devitrification

of the entire thickness of the glass steel substrate could be obtained by the claimed process.

In that respect, the patent specification fails to satisfy the requirements of Rule 27(1)(e) EPC (1973).

4.4 The appellant argued that on the surface of the metal glass steel substrate a temperature of at least 600°C or higher must be reached by spraying molten alloy on it. Temperature control in the substrate was extremely simple to achieve by means of positioning a thermocouple in the metal glass steel substrate. No other parameters needed to be controlled in order to carry out the claimed process successfully.

However, nothing has been provided by the appellant in support of its allegation. Even if for the metallic substrate an alloy composition given in paragraph [0021] is selected, the thickness of the substrate remains undetermined. The composition of the substrate and its thickness are however interrelated as to obtain the desired devitrification. It would however be an undue burden for the skilled person to find out by trial and error which type of substrate material and which molten alloys he should use in order to devitrify at least some - or even the whole - of the substrate. This is all the more true since document D14 seems to show that by repeatedly spraying the molten steel composition DNS2C ($Fe_{63}Cr_8Mo_2B_{17}C_5Si_1Al_4$) on a substrate having the same composition, a multi-layered structure of about 30 layers all having an amorphous structure could be obtained (D14, II. Experimental Procedure). The fact that in the process of D14 during spraying the substrates and coating were cooled by argon jets

supports the Board's assessment that also in claimed process further parameters, other than controlling the temperature to be higher than 600°C, need to be observed in order to adjust the thermal input and profile of the substrate, if the desired devitrification proportion should be achieved. In particular such control is considered as being indispensable if the relatively thick materials should be devitrified completely.

4.5 The claims according the main request therefore do not comply with the requirements of Article 83 EPC (1973).

5. Auxiliary requests

The same reasoning advanced with respect to the main request applies in principle to the claims of the first to third auxiliary requests.

It is additionally noted that claim 1 of the first auxiliary request is at least in part defined by the result to be achieved since after devitrification the steel matrix should comprise an α-Fe phase, the intimate mixture of precipitates including at least one of $(TiZr)_1C_1$, $(CrMo)_{23}C_6$, $Fe_{23}B_6$, and $AlFe_3C_{0,5}$. However, the specification fails to give any technical assistance as to how these phases should be obtained.

Claim 1 of the second and third auxiliary requests defines the composition of the steel alloys which are to be used for spraying molten alloy and for forming the substrate. However, the process set out in claim 1 of both request suffers from the same deficiencies which led to the conclusion that the subject matter of

claim 1 of the main request did not comply with Article 83 EPC (1973).

For the above reasons the Board endorses the decision of the opposition division entirely. The patent lacks sufficiency of disclosure in the sense of Article 83 EPC and Rule 27(1)(e) EPC (1973).

6. Procedural matters

6.1 The appellant's request that the oral proceedings be interrupted for an hour is a request concerning the conduct of the oral proceedings which falls within the exclusive competence of the Chairman of the Board according to Article 15(4) RPBA. According to this provision, the Chairman has a duty to conduct the oral proceedings in a fair, orderly and efficient manner.

In order to establish whether the oral proceedings are conducted in a fair, orderly and efficient manner the following criteria play an important role: the right of the parties to be heard, the right of the parties to a speedy procedure, the public interest in a swift procedure leading to a clear legal conclusion and the general principle linked to this public interest that court proceedings may not be pursued ad infinitum even if this might lead to substantive justice.

In the present case, contrary to the appellant's argument, no new issues or questions other than those addressed in the impugned decision and already known to the appellant arose at the oral proceedings on that point. New evidence filed at that stage of the proceedings would therefore have been late filed.

In fact at the oral proceedings, the only issue discussed was insufficiency of disclosure of the invention (Article 83 EPC (1973) and 100(b) EPC), i.e. the ground on which the opposition division decided to revoke the patent. Specifically on page 4, third paragraph of the impugned decision, the opposition division objected to the fact that the patent specification did not clearly indicate at least one way of enabling the skilled person to carry out the invention (criterion (i)) since none of the examples featuring in the patent specification related to the process set out in claim 1 on file. In the absence of concrete compositions of metallic glass and molten alloy and as a result of the lack of additional details regarding the "particular applications" referred to in paragraph [0023] of the patent specification, according to which temperatures greater than 600°C can permeate entirely through substrate (100) to heat-treat (and devitrify) the entire thickness of the material (100), the opposition division further reasoned that it was difficult if not impossible for the skilled person to find out in which conditions the method was to be applied and which alloys could be used.

At the oral proceedings, reference was also made by the respondent to document D14 which had already been dealt with in detail in the impugned decision.

6.2 Given this situation, the appellant had been fully aware from the very beginning of the opposition/appeal proceedings of the deficiencies of the patent specification. It was given sufficient opportunity during the procedure to provide counterarguments and

further evidence in support of its position (in particular with the statement of grounds of appeal or in answer to the Board's communication), albeit in the form of specific examples showing explicitly which materials and process conditions had actually been selected to provide a glass steel substrate comprising a devitrified portion which resulted from spraying molten alloy on its surface.

The appellant did not explain why it did not do so until the oral proceedings before the Board. The only explanation given was that new issues were dealt with, but as shown before, this was not the case.

Thus, there were no reasons for submitting evidence at such a late stage in the proceedings.

6.3 Admitting evidence filed without a proper reason during the oral proceedings before the Board would have been contrary to Article 13(3) RPBA since in order to give the other party the opportunity to react appropriately, adjournment of the oral proceedings would have been necessary. This is particularly true for experimental data because handling with such data is more cumbersome and time-consuming than handling with scientific publications and most of the time call for counter-experiments (Cf. Case law 6th edition, VII.C.1.3.4).

As a consequence, the interruption of the oral proceedings for an hour would have been useless because it was clear from the outset that the evidence that would have been submitted could not have been admitted.

Thus, the interruption of the oral proceedings would either have violated the right of the respondent to a speedy procedure and would thus have been contrary to Article 13(3) RPBA if adjournment was ordered after the filing of the new submissions or it would have violated the right of the respondent to be heard on the newly admitted submissions if no adjournment was allowed. Furthermore, the public interest in a quick procedure would have also been violated, if an adjournment was ordered without proper reasons.

6.4 After evaluation of all these aspects, the Board came to the conclusion that not interrupting the oral proceedings would not be a breach of the appellant's right to be heard. Whereas an interruption would have breached the respondent's right to a speedy procedure, the admission of new evidence without adjournment of the oral proceedings would have breached its right to be heard, the admission of new evidence with adjournment of the oral proceedings would have been contrary to Article 13(3) RPBA and to the principle of procedural economy.

An interruption of the oral proceedings would therefore have been neither fair, nor orderly, nor efficient.

6.5 The appellant requested in the alternative that the oral proceedings be adjourned to another date or in the further alternative that the case be remitted to the first instance. These requests were also filed in order to submit data and tests. These requests were rejected for the same reasons of procedural economy since the appellant had had ample time to provide such evidence

either during the opposition proceedings or enclosed with the statement of grounds of appeal.

The objection under Article 112a(1)(c) was dismissed by the Board because the appellant had had ample opportunity to present its arguments and evidence on the issue and failed to do so without any good reasons, so that the refusal of additional time to do so at the very last moment in the proceedings was not considered a breach of its right to be heard.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

V. Commare T. Kriner