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**Datasheet for the decision
of 18 December 2018**

Case Number: T 0123/14 - 3.5.02

Application Number: 05781717.3

Publication Number: 1799361

IPC: B07C5/00

Language of the proceedings: EN

Title of invention:

One-Pass Carrier Delivery Sequence Sorter

Applicant:

Lockheed Martin Corporation

Relevant legal provisions:

EPC 1973 Art. 113(1), 111(1)

EPC 1973 R. 68(2), 67

Keyword:

Substantial procedural violation - violation of the right to
be heard (yes) - appealed decision sufficiently reasoned (no)
Remittal to the department of first instance - (yes)
Reimbursement of appeal fee - (yes)



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Case Number: T 0123/14 - 3.5.02

D E C I S I O N
of Technical Board of Appeal 3.5.02
of 18 December 2018

Appellant: Lockheed Martin Corporation
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Bethesda, Maryland 20817 (US)

Representative: Hoffmann Eitle
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 8 July 2013
refusing European patent application No.
05781717.3 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman R. Lord
Members: F. Giesen
J. Hoppe

Summary of Facts and Submissions

- I. This appeal lies from the decision of the Examining Division refusing European patent application No. 05781717.3.
- II. With a communication dated 14 February 2012, the Examining Division raised objections under Article 123(2) EPC against then pending claim 1. The applicant, now appellant, replied to that communication by letter of 29 May 2012 presenting comments why, in their view, the amendments to then pending claim 1 met the requirements of Article 123(2) EPC, further requesting that if the Examining Division were not convinced by these comments, they did not wish to receive a further communication but a decision according to the state of the file.
- III. In response, the Examining Division issued the impugned decision according to the state of the file on the standard form stating that "The applicant filed no comments or amendments in reply to the latest communication" and making reference to the communication dated 14 February 2012 regarding the reasons for refusal.
- IV. With their statement setting out the grounds of appeal, the appellant filed claim sets according to a main and first to fifth auxiliary requests. The appellant requested that the impugned decision be set aside and that the case be remitted to the department of first instance for further prosecution on the basis of the claim request which the Board considers compliant with the requirements of Article 123(2) EPC. Furthermore they requested reimbursement of the appeal fee.

- V. The Board informed the appellant with a communication dated 23 October 2018 that they considered remittal of the case and reimbursement of the appeal fee due to a substantial procedural violation but that if the appellant insisted on their respective request, oral proceedings would have to be held for that matter alone.
- VI. In a response dated 17 December 2018 the appellant informed the Board that they agreed to the present case being remitted to the Examining Division for further prosecution with reimbursement of the appeal fee without the need to hold oral proceedings before the Board.
- VII. As far as relevant for this decision, the appellant's submissions can be essentially summarised as follows:
- The impugned decision was not sufficiently reasoned. At least it was not true that no comments were filed in response to the communication referred to in that decision. This constituted a substantial procedural violation which justified reimbursement of the appeal fee.

Reasons for the Decision

1. The appeal is admissible.

Procedural violation

2. According to Article 113(1) EPC 1973, the decisions of the European Patent Office may only be based on grounds

and evidence on which the parties concerned have had an opportunity to present their comments.

3. The right to be heard under Article 113(1) EPC 1973 requires that those involved be given an opportunity not only to present comments but also to have those comments considered, that is, reviewed with respect to their relevance for the decision on the matter. The deciding department must demonstrably consider the comments. For an Examining Division not to violate an applicant's right to be heard, its decision has to actually address the arguments put forward by the applicant in its reply to a previous communication. It may be assumed that the right to be heard has been contravened if the reasons given for the Examining Division's decision merely repeat the reasons given for the communication issued before the said reply (see Case Law of the Boards of Appeal of the European Patent Office, Eighth Edition, July 2016, III.B.2.4.2).
4. The impugned decision explicitly states that the applicant had filed no comments in reply to the latest communication, which is manifestly incorrect. The Examining Division therefore ignored the arguments submitted after the communication referred to in the impugned decision and thus infringed the appellant's right to be heard, which amounts to a first substantial procedural violation.
5. According to Rule 68(2) EPC 1973, decisions open to appeal must be reasoned. While the deciding organ is under no obligation to address each and every argument presented by the party concerned, the reasons must enable the parties, and in the case of an appeal the Board, to assess whether the decision was justified or not. Therefore the reasons have to deal with all

important issues in dispute and include considerations in respect of the core arguments presented by the appellant.

6. These requirements are not fulfilled in the present impugned decision. Without pre-empting any examination of the arguments in the letter of reply as to their substance, they can at least not be considered irrelevant at a first glance. Rather, they must be considered as at least potentially refutative. Since the decision does not demonstrably consider these arguments, neither the appellant nor the Board is in a position to assess whether the Examining Division was correct in not considering them convincing. Hence, the decision is not sufficiently reasoned, which amounts to a further substantial procedural violation.
7. The Board wishes to point out that the above procedural violations could have been avoided if the Examining Division had simply issued a regular reasoned decision in response to the letter of reply taking into account the freshly presented comments.

Remittal and reimbursement of the appeal fee

8. Pursuant to Article 111(1) EPC 1973 and 11 RPBA, the Board shall remit the case to the department of first instance in case of fundamental deficiencies, unless special reasons present themselves for doing otherwise. No such special reasons are apparent to the Board, and the appellant had requested and agreed to a remittal.
9. The appeal is allowable in so far as the procedural violation is concerned. Due to the missing reasoning, the appellant had to appeal in order to prosecute the

case further. The conditions of reimbursement of the appeal fee pursuant to Rule 67 EPC 1973 are therefore fulfilled.

Order

For these reasons it is decided that:

1. The case is remitted to the Examining Division for further prosecution.
2. The appeal fee is to be reimbursed.

The Registrar:

The Chairman:



U. Bultmann

R. Lord

Decision electronically authenticated