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Aktenzeichen / Case Number / N° du recours : T 264/88 - 3.3.1

Anmeldenummer / Filing No / N° de la demande : 83 113 130.5

Veröffentlichungs-Nr. / Publication No / N° de la publication : 0115071

Bezeichnung der Erfindung: Process for the production of bis-(N,N-dialkyl-
Title of invention: amino)alkyl ethers and the use of said ethers
Titre de l'invention :

Klassifikation / Classification / Classement : C07C 93/04

ENTSCHEIDUNG / DECISION

vom / of / du 23 March 1989

Anmelder / Applicant / Demandeur : Union Carbide Corporation

Patentinhaber / Proprietor of the patent /
Titulaire du brevet :

Einsprechender / Opponent / Opposant :

Stichwort / Headword / Référence : Restitutio/Union Carbide

EPU / EPC / CBE Articles 108, 122(1) (2) (3); Rules 65(1), 78(3)

Schlagwort / Keyword / Mot clé : Restitutio in integrum (refused); due care
of representative not established

Leitsatz / Headnote / Sommaire

Europäisches
Patentamt

European Patent
Office

Office européen
des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

Case Number : T 264/88 - 3.3.1



D E C I S I O N
of the Technical Board of Appeal 3.3.1
of 23 March 1989

Appellant : UNION CARBIDE CORPORATION
Old Ridgebury Road
Danbury Connecticut 06817
USA

Representative : Wuesthoff, Franz, Dr.-Ing.
Patentanwälte Wuesthoff
-v. Pechmann-Behrens-Goetz
Schweigerstrasse 2
D-8000 München 90

Decision under appeal : Decision of Examining Division 003 of the European Patent Office dated 12 February 1988 refusing European patent application No. 83 113 130.5 pursuant to Article 97(1) EPC

Composition of the Board :

Chairman : K. Jahn

Members : C. Payraudeau
R. Andrews

Summary of Facts and Submissions

- I. The Appellant's European patent application No. 83 113 130.5 was refused by a decision of the Examining Division 003 of the European Patent Office dated 12 February 1988.
- II. By letter received at the EPO on 12 April 1988, the Appellant gave notice of appeal against the decision; the appeal fee was duly paid on the same date.
- III. On 13 June 1988 the Appellant's representative addressed to the EPO a letter having the following content: "This is to request an extension of the term by two months".
- IV. On 12 July 1988 the Registrar of the Board of Appeal notified the Appellant that in view of the fact that no statement of grounds had been filed within the inextensible time limit of Article 108 and Rule 78(3) EPC, the Board would probably reject the appeal as inadmissible. The Registrar also drew the Appellant's attention on Article 112 EPC.
- V. On 3 August 1988 the Appellant filed a statement of grounds in support of his appeal and on 12 August 1988 a request for re-establishment of rights under Article 122 EPC. This request was supported by a detailed statement accompanied by affidavits and copies of documents tending to establish that the representative had taken all due care required by the circumstances. The submission was in substance that the filing of a request for an extension of time for filing the statement of grounds was due to an accidental mistake of an otherwise very reliable co-worker of the representative. The latter, due to the absence of any reference to an appeal in the letter requesting the extension of time had not distinguished it

from the "normal" request for extension as is regularly filed during examination of a European patent application in the absence of Applicant's instructions.

- VI. A communication of the Rapporteur of the technical Board of Appeal was issued on 27 October 1988 drawing the attention of the Appellant on the following points:

Although an accidental mistake made by an otherwise reliable co-worker of the representative could be considered as excusable, re-establishment of rights could only be granted when not only the representative, but also the Applicant for or Proprietor of the European patent had taken all due care (Art. 122(1) EPC).

It appeared from the Exhibits filed in support of the application for restitutio in integrum that although the representative had informed, then twice reminded, the Appellant of the necessity to file a statement of grounds within a statutory and inextensible term, the Appellant had not sent any instruction to the representative within the given time limit.

Therefore, unless a satisfactory answer was given to this question, the application for re-establishment of rights was unlikely to succeed.

- VII. In answer to this communication, the Appellant's representative explained that he had received on 16 June 1988 from the Appellant a telex so worded:

"have just received some arguments in support of the appeal from the inventor. I fully realise the term has expired. Is there any possibility of submitting the arguments at this later date".

The above mentioned co-worker had responded:

"please let us have your information as soon as possible. The term for filing grounds of appeal runs until 12th August 1988."

The Appellant's representative argued essentially that the Appellant could not be held responsible for the observation of terms. In the present case, the Appellant had been erroneously informed by the representative that the term ran until 12 August 1988. If this error had not been made, the Appellant could still have filed the statement of grounds before the expiry of the real term on 22 June 1988. The only reason for the later filing of the grounds of appeal was the unfortunate handling of the term in the representative's office.

Reasons for the Decision

1. Since no statement of grounds of appeal has been filed within the time limit set up by Art. 108 and Rule 78(3) EPC, the appeal should be rejected as inadmissible in application of Rule 65(1) EPC unless the application for re-establishment of rights filed by the Appellant on 3 August 1988 is granted.
2. The application for re-establishment of rights fulfills the conditions of Art. 122(2) and (3) EPC and is therefore admissible.
3. The Board, having duly considered the explanation, submission and affidavits filed in support of this application, finds that the temporary confusion of the provisions of the EPC with those of the German Patent Law relating to the filing of the statement of grounds of

appeal by the co-worker of the representative could be considered to be an excusable mistake under Art. 122(1) EPC.

4. Since it seems to be normal practice in the representative's office to automatically request extensions of time limits in the absence of any instructions from the client, the Board also considers that, due to the fact that the letter addressed to the EPO did not contain any reference indicating that the case was in the appeal stage, the failure of the representative to detect the mistake made by his co-worker could also be excusable.
5. It results clearly from the documents on file that the Appellant was well aware that the time limit given to him by the European representative (12 June 1988) had expired when he sent the telex dated 16 June 1988.

The Appellant's representative submitted that at this point in time, it would still have been possible to prepare and file a statement of grounds of appeal before the expiry of the real time limit of Art. 108 and Rule 78(3) EPC, i.e. before 22 June 1988.

6. Therefore, the determining error was made by the co-worker of the representative when she gave the Appellant as the (new) time limit for filing the statement of grounds of appeal the 12 August 1988.

The only explanation given by the representative is that this error was a continuation of the first (excusable) error.

The Board cannot accept this unsupported submission. The representative's attention should have been drawn to the fact that the case was an appeal before the EPO by the

telex of the Appellant dated 16 June 1988. The telex sent by the representative to the Appellant on 21 June 1988 also refers to the European patent application and to the appeal procedure.

Therefore this error which has been made in different circumstances from the first one and eight days later, can only be considered to be a new independent error.

No explanations nor justification has been given, or even offered in this respect. The complete facts of the case have in fact only been presented to the Board in answer to the communication of the Rapporteur.

7. Therefore, the Board considers that the representative of the Appellant has not established in the present case that he had taken all due care required by the circumstances and that consequently the Appellant cannot be re-established in his rights.
8. The appeal has also to be rejected as inadmissible in application of Art. 108 and Rule 65(1) EPC.

Order

For these reasons, it is decided that:

1. The application for re-establishment of rights in respect of the time limit for filing the statement of grounds is refused.
2. The appeal is rejected as inadmissible.

The Registrar:

J. Ruckerl

01225

The Chairman:

K. Jahn