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Aktenzeichen / Case Number / N^o du recours : T 298/89-3.3.1

Anmeldenummer / Filing No / N^o de la demande : 85 101 801.0

Veröffentlichungs-Nr. / Publication No / N^o de la publication : 0 152 943

Bezeichnung der Erfindung: A method for making bread, a composition for use
Title of invention: in the method and a process for preparing the
Titre de l'invention : composition

Klassifikation / Classification / Classement : A 21D 2/36

ENTSCHEIDUNG / DECISION
vom / of / du 17 January 1990

Anmelder / Applicant / Demandeur :

Patentinhaber / Proprietor of the patent /
Titulaire du brevet : Nexus ApS

Einsprechender / Opponent / Opposant : Unilever PLC

Stichwort / Headword / Référence : Unconfirmed telex

EPÜ / EPC / CBE Article 99(1), Rule 36(5), 69

Schlagwort / Keyword / Mot clé : "Notice of opposition filed by telex" - "no confirmation within 14 days" - "mandatory that notice is deemed not to have been received" - "facts set out in Decision under Rule 69(2) EPC accepted as accurate" - "no legal or factual reason in grounds of appeal for setting aside Decision" - "appeal inadmissible".
Leitsatz / Headnote / Sommaire

Europäisches
Patentamt

Beschwerdekammern

European Patent
Office

Boards of Appeal

Office européen
des brevets

Chambres de recours



Case Number : T 298 /89 - 3.3.1

DECISION
of the Technical Board of Appeal 3.3.1
of 17 January 1990

Appellant :
(Opponent 03)

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Decision under appeal : Decision of the European Patent Office
dated 28 February 1989 stating that the
notice of opposition is deemed not to have
been filed.

Composition of the Board :

Chairman : K. Jahn
Members : G. Paterson
F. Antony

Summary of Facts and Submissions

- I. The mention of the grant of European patent No. 152 943 was published in European Patent Bulletin 87/51 on 16 December 1987. Accordingly, the nine-month period for filing a notice of opposition under Article 99(1) EPC expired on 16 September 1988.
- II. On 14 September 1988, a notice of opposition in the name of the Appellants was received at the EPO in the form of a telecopy, which also contained an order to debit a deposit account with the amount due. The EPO did not receive written confirmation reproducing the contents of the telecopy within two weeks of the date of filing of the telecopy (i.e. by 28 September 1988), as required under Rule 36(5) EPC and the Decision of the President dated 29 July 1987 (OJ EPO 1987, 323).
- III. A document reproducing the notice of opposition set out in the telecopy accompanying a letter from the Appellant dated 4 November 1988, was filed at the EPO on 8 November 1988. The letter requested leave to withdraw a reference (Reference 3) from the notice of opposition.
- IV. By a communication pursuant to Rule 69(1) EPC dated 24 November 1988 the Appellant was notified that the notice of opposition received on 14 September 1988 was deemed not to have been filed, for the reason that "A document reproducing the contents of the telegram or telex whereby notice of opposition was received on 14 September 1988 was not filed within two weeks as from receipt, i.e. by 28 September 1988".

- V. In reply, by letter dated 1 December 1988 and filed on 5 December 1988, the Appellant stated that the delay in confirming the telecopy was caused by the discovery that a reference in the telecopy (reference 3) was incorrect, and that such delay was aggravated by a postal strike "operative according to the EPO authorities from 31 August to 17 October last". It was requested "that the circumstances be taken into account and the Opposition accepted".
- VI. A Decision pursuant to Rule 69(2) EPC was issued by the Formalities Officer of the Opposition Division on 28 February 1989, which stated that "On the basis of Article 99(1) EPC the notice of opposition is deemed not to have been filed". In the accompanying "reasons for the decision", it was stated that under Rule 85(2) EPC, because of the postal strike the time limit under Rule 36(5) EPC was extended to 18 October 1988. A document reproducing the contents of the telecopy was only received on 8 November 1988, which was therefore out of time. The finding that the notice of opposition was deemed not to have been filed was therefore maintained.
- VII. Notice of appeal against this Decision was filed by telecopy dated 21 April 1989, duly confirmed in writing by letter filed on 24 April 1989. The appeal fee was duly paid. A statement purporting to be grounds of appeal was filed by telecopy on 7 July 1989, duly confirmed in writing by letter filed on 10 July 1989.

The purported statement of grounds of appeal was as follows:

1. The reversal of the Decision would have no effect on the Patentees since the remaining Opponents are continuing their action, nor on these Opponents.

2. The error in the Notice of Opposition which the Appellants sought to correct would, if left uncorrected, have misled all parties concerned, namely the EPO, the Patentees and the main Opponents.
3. No provision exists in the Rules or practice for waiving the time limit for filing confirmation copies for the purpose of rectifying errors.
4. The provision of confirmatory copies of facsimilied communications is freely dispensed with in their own communications by the EPO at their discretion.
5. The Appellants refer to the Decision of the Enlarged Board of Appeal date 24 June 1987 Gr 01/86 (Official Journal October 1987 pp. 447 to 454). According to the Order of that Board, Article 122 EPC is not to be interpreted as being applicable only to the Applicant and Patent Proprietor. Further, an Appellant as Opponent may have his rights re-established under Article 122 EPC if he has failed to observe the time limit for filing the Statement of Grounds for Appeal.

The circumstances of the delay in filing a confirmatory copy of the telecopy dated 14 September 1988 were also set out in the telecopy dated 7 July 1989. In essence such delay was said to have been caused by several attempts to obtain copies of reference 3, but it was found to be unobtainable. It was ultimately concluded that reference 3 was an error.

VIII. In a communication on behalf of the Board dated 26 September 1989, it was pointed out that the Appellant had accepted that the confirmatory copy of the notice of opposition had been filed out of time, even taking into account the extension of the time limit under Rule 85(2)

EPC because of interruption and dislocation of mail. In this circumstance, it appeared to be mandatory under Rule 36(5) EPC that the notice of opposition should be deemed not to have been filed, by operation of law. The statement of purported grounds of appeal were therefore not relevant as a matter of law.

No observations in reply to this communication were filed by any party within the stated time limit.

Reasons for the Decision

1. The notice of appeal was filed, and the appeal fee paid, in due time. Furthermore, a statement purporting to contain grounds of appeal was filed in due time.
2. Under Rule 36(5) EPC, written confirmation of a document transmitted to the EPO by telecopy must be filed within the then prescribed period of 14 days (Decision of the President dated 29 July 1987) (or any extension thereof by virtue of Rule 85(2) EPC) of receipt of the telecopy by the EPO; "if such confirmation is not supplied in due time, the documents shall be deemed not to have been received".

Thus if a notice of opposition is transmitted to the EPO by telecopy, and if written confirmation is not thereafter filed in due time, it is mandatory under Rule 36(5) EPC that the telecopy notice of opposition shall be deemed not to have been received.

3. In the present case, it is accepted by the Appellant that a written confirmation of the telecopy notice of opposition filed on 14 September 1988 was not filed in due time. Thus, such telecopy must be deemed not to have been

received by the EPO at all. Since the written confirmation of the telecopy was filed outside the nine-month period for opposition prescribed by Article 99(1) EPC, no notice of opposition was therefore filed by the Appellant within the nine-month period, and the Appellant is not an Opponent for the purpose of Article 99 EPC. Prima facie, no other result is possible as a matter of law.

4. In Decision T 522/88 dated 19 December 1989, the distinction is emphasised between grounds for appeal and grounds for re-establishment. In particular, it is stated in Reasons paragraph 4 that

"As pointed out in Decision T 26/88 (dated 7 July 1989, to be published), the essential feature of an appeal is to consider whether a decision at first instance is correct on its merits. Grounds of appeal are, as a matter of principle, the antithesis of grounds for re-establishment, since the former should be setting out a case why the appellant should not have lost rights or otherwise been "adversely affected", and the latter should be setting out a case why in the particular circumstances rights which have been lost should be re-established".

The above comments are directly applicable to the present case, in which no application for re-establishment under Article 122 EPC has in fact been filed (and in which there appears to be no basis for such an application).

The Decision pursuant to Rule 69(2) EPC dated 28 February 1989 was necessarily a decision as to the facts in connection with the filing of the notice of opposition (in this connection see paragraph 3.8 of Decision T 26/88). As previously stated, in his grounds of appeal the Appellant has not contested the relevant facts as set out in the Decision dated 28 February 1989, but has accepted them as

accurate. In this circumstance, the so-called grounds of appeal do not, and cannot as a matter of law, constitute any reason for setting aside the legal conclusion that necessarily follows from such facts, namely the mandatory "deeming of the notice of opposition as not having been received".

As was stated in Decision T 145/88 dated 27 October 1989 (to be published), "it is the established case law of the Boards of Appeal that grounds of appeal should state the legal and factual reasons why the decision under appeal should be set aside and the appeal allowed". It follows that if the grounds of appeal as a matter of substance do not contain any legal or factual reason which can lead to the decision under appeal being set aside, the appeal will normally be rejected as inadmissible.

In the Board's judgment, therefore, in the present case the grounds of appeal do not contain anything which can be relevant to the appeal or which as a matter of law can lead to the appeal being allowable, and thus do not constitute a "written statement setting out the grounds of appeal" within the meaning of Article 108 EPC. The appeal is therefore held to be inadmissible.

Order

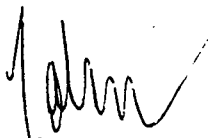
For these reasons, it is decided that:

The appeal is rejected as inadmissible.

The Registrar:


M. Beer

The Chairman:


K. Jahn


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