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File No.: T 0235/93 - 3.3.2
Application No.: 89 200 243.7
Publication No.: 0 327 184
Classification: C02F 3/30
Title of invention: Anoxic ammonia oxidation

DECISION
of
8 September 1993

Applicant: GIST-BROCADES N.V.

Proprietor of the patent:

Opponent:

Headword: Oral proceedings/GIST-BROCADES

EPC: Art. 116; R. 67

Keyword: "Decision issued without granting request for oral proceedings;
request not withdrawn; substantial procedural violation"

Headnote
Catchwords



Case Number: T 0235/93 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of
8 September 1993

Appellant: GIST-BROCADES N.V.
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NL - 2611 XT Delft (NL)

Representative: Matulewicz, Emil Rudolf Antonius, Dr.
Gist-Brocades N.V.
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Decision under appeal: Decision of the Examining Division of the European
Patent Office dated 28 October 1992 refusing
European patent application No. 89 200 243.7
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: P.A.M. Lançon
Members: I.A. Holliday
E.M.C. Holtz

Summary of Facts and Submissions

- I. European patent application No. 89 200 243.7 (publication No. 327 184) was refused by a decision of the Examining Division.
- II. The Examining Division issued a communication pursuant to Rule 51(4) EPC on 31 January 1992 proposing the grant of a patent based on the Applicant's second auxiliary request.

In a response received in the EPO on 8 April 1992 the Applicant indicated disapproval of the text proposed for grant and argued that the Examining Division had given no reasons why the first auxiliary request received in the EPO on 8 October 1991, which had now become the main request, was deemed to be unacceptable.

The Examining Division issued a further communication dated 11 June 1992 explaining why the new main request failed to satisfy the requirements of Article 84 EPC. Refusal of the application was foreshadowed in the event that the Applicant was unable to accept this argumentation.

In a reply received in the EPO on 8 October 1992, the Applicant indicated, without further argumentation that the main request was maintained.

The decision to refuse the application under Article 97(1) EPC was issued on 28 October 1992.

- III. The Appellant lodged an appeal against the said decision in a letter received on 9 November 1992, the appeal fee being paid at the same time. Grounds for the appeal were received on 1 March 1993.

In a further communication received in the EPO on 31 July 1993, the Appellant indicated that he had recently become aware of decision T 663/90 dated 13 August 1991. According to the said decision, a request for oral proceedings can only be deemed to be withdrawn if a clear written statement to that effect is on file.

The Appellant referred to a letter dated 19 July 1990 which requested oral proceedings before any decision pursuant to Article 97(1) EPC was taken.

The said request for oral proceedings had not been withdrawn. The Appellant argued that a substantial procedural violation had taken place on the part of the Examining Division and requested reimbursement of the appeal fee.

Reasons for the Decision

1. The appeal is admissible.
2. In the judgment of the Board a substantial procedural violation took place during the examination procedure.
 - 2.1 The right of a party to oral proceedings in examination, opposition and appeal procedure is embodied in Article 116 EPC. Accordingly, an adverse decision issued without granting the aggrieved party's request for oral proceedings must be declared void *ab initio* and without legal effect (see for example Decisions T 19/87, OJ EPO 1988, 268 ; T 663/90 dated 13 August 1991 ; and T 766/90 dated 15 July 1992).

- 2.2 Although the examination procedure in the present case was not straightforward insofar as the examination was reopened after the issue of the Rule 51(4) communication, the Examining Division ought not to have lost sight of the fact that the Applicant, in a letter dated 19 July 1990, had requested oral proceedings before an adverse decision was issued. The request had not been withdrawn. Accordingly, the decision to refuse the application under Article 97(1) EPC should not have been issued without holding oral proceedings.
- 2.3 Thus, irrespective of any opinion the Board might hold concerning patentability, it is obliged, under Article 116 EPC and having regard to the jurisprudence, to set aside the contested decision and to remit the case to the Examining Division with an order to grant the Appellant's request for oral proceedings.
3. The Appellant was entitled to oral proceedings before the Examining Division. Accordingly, the failure by the Examining Division to hold such oral proceedings constituted a substantial procedural violation which justifies the reimbursement of the appeal fee under Rule 67 EPC.

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 with the order that oral proceedings under Article 116 EPC shall take place before the Examining Division takes a decision.
3. The appeal fee shall be reimbursed to the Appellant.

The Registrar:

The Chairman:

P. Martorana

P.A.M. Lançon