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**Datasheet for the decision  
of 22 May 2014**

**Case Number:** T 0620/13 - 3.2.04  
**Application Number:** 08021319.2  
**Publication Number:** 2092969  
**IPC:** A63H19/16, A63H33/10, A63H33/12  
**Language of the proceedings:** EN  
**Title of invention:**  
Construction system for miniature locomotives with a motor  
**Patent Proprietor:**  
Largo Macias, Tomas  
**Opponent:**  
DOMINGUEZ LEIVA, Gil  
**Headword:**

**Relevant legal provisions:**

EPC Art. 108, 122  
EPC R. 99(1)(a), 99(1)(b), 99(1)(c), 101(1), 101(2)  
EPC 1973 R. 64(b)  
Article 5(2), 7(4) of the Decision of the President of the EPO  
dated 26 February 2009 concerning the electronic filing of  
documents

**Keyword:**

Admissibility of appeal - (no)  
Explicit statement or request (no)  
Decision impugned indicated (no)

**Decisions cited:**

T 0001/88, J 0019/90, T 0632/91, T 0925/91, J 0016/94,  
T 0281/95, T 0049/99, T 0358/08

**Catchword:**

reasons 3 to 13



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Case Number: T 0620/13 - 3.2.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 22 May 2014**

**Appellant:** DOMINGUEZ LEIVA, Gil  
(Opponent) Avda. Virgen de Montserrat, 44  
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**Representative:** Urizar Anasagasti, Jesus Maria  
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**Respondent:** Largo Macias, Tomas  
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**Representative:** Isern-Jara, Nuria  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 13 December  
2012 rejecting the opposition filed against  
European patent No. 2092969 pursuant to Article  
101(2) EPC.**

**Composition of the Board:**

**Chairman** A. de Vries  
**Members:** T. Bokor  
J. Wright

## **Summary of Facts and Submissions**

- I. The present appeal proceedings concern an appeal against the decision of the Opposition Division, announced at the oral proceedings on 21 November 2012 and posted 13 December 2012, rejecting the opposition against European patent No. 2 092 969.
  
- II. The representative of the opponent, now appellant, filed a document by means of the electronic filing facilities of the EPO on 13 February 2013. The transmission of the document resulted in the generation of another document by the EPO's online filing software, entitled "Letter accompanying subsequently filed items" in the electronic file (the "PHOENIX electronic file system") of the EPO and referred to hereafter as the Appeal Letter. Under the heading : "The document(s) listed below is (are) subsequently filed documents pertaining to the following application:" it indicated the application number and the applicant's reference identified in the appropriate boxes followed by a table listing attached files, fee payments and mode of payment as well as identifying any attachments. In the case at hand the attachment was identified as "Notice of Appeal" with the original file name recorded as "INGRESO TRANSFER E08021319.2 APPEAL.pdf", assigned the assigned file name "APPEAL.pdf". The attachment was a document in pdf format which, on the face of it, is a Spanish language printout of an online bank transfer order, for the amount of 1240 EUR, with the following handwritten addition: "011 - Fee for appeal E08021319.2" and further the name of the patent proprietor, also legibly handwritten. The generated Appeal Letter further referred to the appeal fee and its amount, as well as mode of payment by transfer to a Spanish bank account

of the EPO. The Appeal Letter further included the name of the representative and his address, and data of the electronic signature of the representative.

The appeal fee was paid with an effective date of 13 February 2013.

- III. The Registrar of the Board sent a standard communication (EPO Form 3204) to the appellant with a posting date of 15 March 2013, indicating the commencement of proceedings before the Board. This communication contained the following: "The letter dated 13.02.2013 filed by the opponent against the decision of the European Patent Office of 13.12.12 has been referred to Board of Appeal 3.2.04.".
- IV. A statement of grounds of appeal dated 15 April 2013 were filed online on the same day, followed by a confirmation copy including copies of cited prior art and received on 22 April 2013. The patent proprietor, now respondent filed a substantive response to the issues raised in the grounds by letter dated 12 August 2013, also filed online.
- V. A communication of the Board under Rule 100(2) EPC was issued on 27 September 2013. The Board pointed out that no document was apparent in the file which could be considered as a notice of appeal, and that the particulars of the appeal only became clear from the grounds of appeal. The document filed ostensibly as notice of appeal was in Spanish, without translation, so that it should be deemed not to have been filed. Prima facie it was also not a notice of appeal, but merely a copy of a transfer order. The fee payment could not substitute the notice of appeal, according to

settled case law. Therefore, the appeal was expected to be rejected as inadmissible under Rule 101(1) EPC.

VI. The appellant responded to the communication of the Board by a telefax dated and received 4 December 2013, and requested a reconsideration of the finding that the appeal did not comply with Rule 101 EPC. According to the appellant, the Appeal Letter contained all necessary data, such as the representative and his address, patent number, the fact of the fee payment. This document was in English, and clearly expressed the dissatisfaction of the opponent with the appealed decision. The other document was a mere proof of the corresponding fee. The fee payment had to be understood as the intention to appeal the relevant decision under Article 108 and Rule 99(1) EPC. Secondly, the Registry had not complied with Rule 101(2) EPC, in that it did not call the attention of the appellant to the deficiencies in the appeal and did not set a time limit to correct the identified deficiencies. The appellant's attention was first drawn to the problem by the Communication of the Board, and as a reaction to this Communication the appellant submitted with the response a correct Notice of Appeal, pursuant to Rule 101(2) EPC. The appeal could not be rejected as inadmissible before the appellant was given a chance to correct the deficiencies under Rule 101(2) EPC. It was requested to continue the appeal proceedings. The response of the appellant contained in an Annex a Notice of Appeal, dated 4 December 2013 and written in English.

VII. A second communication of the Board under Rule 100(2) EPC was issued on 20 December 2013. The Board commented on the position of the Appellant that the Appeal Letter should be considered as the valid notice of appeal and it indicated that the appeal still appeared to be

inadmissible essentially for the reasons set out in this decision, namely that the Appeal Letter does not meet the requirements of Rule 99(1)(b) and (c) EPC.

VIII. The appellant responded to the second communication of the Board by a telefax of 28 February 2014, and argued that the decision impugned must have been implicitly identified in the Appeal Letter as the Registrar was able to deduce from the Appeal Letter the necessary data, as attested by its communication of 15 March 2013 (see point III above). Case Law of the Boards of Appeal support that the subject of the appeal can also be implied from the overall intention of the appellant. Specific reference was made to several decisions of the Boards of Appeal.

### **Reasons for the Decision**

#### Admissibility of the appeal

1. Pursuant to Article 108, first sentence, EPC, a notice of appeal shall be filed in accordance with the Implementing Regulations. Rule 99 EPC defines the required content of the notice of appeal. Pursuant to Rule 99(1)(b) and (c) EPC the notice of appeal shall contain an indication of the decision impugned and a request defining the subject of the appeal. Rule 101 EPC is specifically directed at inadmissible appeals, in that it instructs the Board of Appeal how to proceed with appeals not complying with the minimum formal requirements foreseen by Article 108 or Rule 99(1)(b) and (c) EPC. Pursuant to Rule 101(1) EPC if the appeal does not comply with Rule 99(1)(b) and (c) EPC the Board of Appeal shall reject it as inadmissible unless the deficiency is remedied before the relevant period under Article 108 EPC has expired, in this case within

two months of notification of the decision for the notice of appeal.

2. The purported notice of appeal - the Appeal Letter - was received in the EPO within the time limit for filing the notice of appeal, and the appeal fee was also paid in time. The fact that the Appeal Letter is a computer generated form is immaterial, as electronic filing is an admissible form of filing documents and the Board is satisfied that it has been signed with an enhanced electronic signature (Article 5(2) and 7(4) of the Decision of the President of the EPO dated 26 February 2009 concerning the electronic filing of documents, OJ EPO 2009, 182, for a more recent publication see: Supplementary publication to OJ EPO 1/2014, 98). As such, it must be taken to have been sent with the knowledge and approval of the party sending it. The crucial issue is whether the Appeal Letter complies with the requirements of Rule 99(1)(b) and (c) EPC for a notice of appeal. As indicated in the communication of the Board (see point VII above) the Appeal Letter does not include anything that the Board may recognize as *an indication of the decision impugned* or a *request defining the subject of the appeal*, and thus it does not meet the requirements of Rule 99(1)(b) and (c) EPC.
  
3. The Board holds that the clear wording of Rule 101(1) EPC leaves no choice but the rejection of the appeal as inadmissible if the requirements of Rule 99(1)(b) and (c) EPC are not met in due time, and the Board has no power to ignore these clear and unambiguous provisions of the EPC. It is also not possible to allow a correction of these formal errors in the notice of appeal by setting a time limit to the appellant once the two month time limit under Article 108 EPC for



filing a notice of appeal has expired, as explained below.

4. As to the requirements of Rule 99(1)(b) EPC, the appellant argues that these were fulfilled by the Appeal Letter, as the impugned decision had obviously been properly identified as could be inferred from the Board's communication of 15 March 2013 (see point III above). As to the requirements of Rule 99(1)(c) EPC, the appellant argues that the subject of the appeal could be inferred from the overall circumstances and the apparent intention to appeal.
  
5. The Board does not accept these arguments. The question is not whether a department of the EPO, such as a Board of Appeal is able to deduce with a relatively high probability that a party intends to appeal a decision and which decision that might be. Rather, as a question of principle, the notice of appeal is a legal declaration or legal statement made by a party to a proceeding before the EPO, and as such it must contain an unambiguous, clear and most of all, *explicit* statement, which is recognisable as a legal statement, concerning both the identification of the impugned decision and the subject of the appeal (see also J 19/90 of 30 April 1992, point 2.1.3 of the Reasons).
  
6. As to the required indication of the impugned decision (Rule 99(1)(b) EPC), the Board does not find anything in the Appeal Letter itself which could be considered to be such an indication. It is immaterial that the Registrar was able to establish that a decision was being appealed and on the face of it was able to identify which decision that might be, so that she was also able to issue a communication on EPO Form 3204, informing the parties of the commencement of an appeal

and the allocated appeal number. That is the sole, stated purpose of such a communication. In no way does such a communication reflect on whether or not an appeal has been validly filed, i.e. meets all formal requirements for admissibility, or whether or not the appeal is well founded, issues that are only considered and decided once the appeal procedure has commenced. In particular therefore the issuing of the communication on Form 3204 marking commencement of appeal proceedings neither establishes nor confirms that the Appeal Letter actually complied with Rule 99(1)(b) EPC, even if it refers to a (presumably impugned) decision. The Board adds that the date of the last decision is in fact filled in - on the basis of the application or publication number - automatically by the internal software used by the Registrars, among others for the preparation of Form 3204. The date can be overwritten if necessary. Presumably the decision was also "identified" in this manner, after the Registrar noted the appearance of the word "appeal" in the Appeal letter) and proceeded to prepare and send Form 3204.

7. Concerning the required request defining the subject of the appeal, the Board recognises that such a request may indeed be implicit as stated by the Appellant on page 3 of the letter of 28 February 2014 in reference to the "guidelines" in the Case Law of the Boards of Appeal of the EPO (CLBA), 6th Edition 2010. The Board takes this reference to be to Chapter VII.E.7.5.2 (b) of the 6th edition of the CLBA, in particular decision T 358/08, mentioned on page 852 last paragraph, see Catchword and point 5 of the Reasons. In light of the totality of this decision it is clear that T 358/08 was concerned with the question how the required "subject of the appeal" introduced in Rule 99(1)(c) EPC related to the "extent of the appeal" required by corresponding

previous Rule 64(b) EPC 1973. Thus, according to the correct reading of that decision by the present Board, what may be "implicit" is that part of the request which indicates whether the decision is to be set aside in whole or only in part. Otherwise decision T 358/08 lends no authority to the argument that there need not be any request at all, a situation which did not occur in that case, see point III of the Summary of Facts and Submissions. Indeed, such an argument would imply that a document clearly identifiable as a Notice of Appeal could actually be dispensed with, which would rather erode the regulatory intent and purpose of Rule 99(1) EPC. Finally, all case law cited by the Appellant regarding implicit requests assumes that the impugned decision is identifiable in a notice of appeal.

8. In this respect the decisions cited by the appellant also do not help, as they did not concern situations comparable with the case before the Board. Decision J 16/94 (OJ EPO 1997, 331) was concerned with a case where an appeal was filed as a subsidiary request conditional on the outcome of an application for re-establishment of rights; the statement of appeal as required by Rule 64(b) EPC 1973 was itself formulated explicitly (see point V of the Summary of Facts and Submissions, concerning the second subsidiary request). The present Board notes that the findings of J 16/94, namely that the appeal "must express the definite intention" to appeal (see point 4 of the Reasons) must be seen against this background. The present Board further notes that in J 16/94 the appeal was found in the end to be inadmissible, because an appeal filed as a subsidiary, conditional request did not constitute a definite intention to appeal (see point 6.2 of the Reasons). In the present case the Board is unable to identify any request in the Appeal letter, let alone

- verify from the purported notice of appeal, i. e. the Appeal Letter, if the intention to appeal was definite (in the sense of unconditional). On this basis, decision J 16/94 does not support appellant's case.
9. Decision T 1/88 had to decide whether the erroneous indication of an impugned decision of an Opposition Division to reject the opposition as "a decision against the refusal of our European Patent application" but otherwise correctly referring to the bibliographic data, title and date of the impugned decision (see point IV of the Summary of Facts and Submissions) would make an appeal inadmissible. There was no question of a missing explicit or definite statement to appeal; rather, an erroneous request had been made. Therefore, no guidance can be derived from this decision for the present case.
  10. Decisions T 632/91 of 1 February 1994, T 925/91 of 26 April 1994 (OJ EPO 1995, 469), T 281/95 of 24 September 1996 and T 49/99 of 5 March 2002 all had to decide whether an otherwise explicit statement to appeal a clearly identified decision was sufficient to identify the extent of the appeal, see Rule 64(b) EPC 1973, essentially corresponding to Rule 99 (c) EPC. The present case is significantly different as there is simply no explicit request (corresponding to the required "statement" of Rule 64(b) EPC 1973) at all which could be taken as a minimal basis to fulfil the requirements of Rule 99(1)(c) EPC.
  11. To put it simply, if the Board were to accept that the totality of the circumstances on their own, i. e. in the absence of any explicit request or statement to appeal were sufficient, then it would also have to accept that a mere fee payment is also sufficient to

find an appeal admissible, contrary to established case law (see CLBA 7th Edition 2013, Chapter IV.E.2.5.4). Obviously, in most cases the mere payment of the appeal fee and its stated purpose as an appeal fee would be perfectly suitable to derive therefrom an intention to appeal. Furthermore, as long as at least an application or publication number is indicated with the payment (as is customary), the presumed decision impugned could also be safely identified in the overwhelming majority of the cases. In this regard, the present Board follows decision J 19/90 (supra), which found that even if the overall content of some documents accompanying the payment include all necessary data and clearly indicate that the purpose of the payment is an appeal (in case J 19/90 the EPO Form 1010 recommended and provided by the EPO was examined in this regard), this cannot substitute a clear and explicit statement or request expressing the will to appeal, see point 2.2.2 of the Reasons.

12. The Board also has no authority to accept the Notice of Appeal subsequently filed 4 December 2013 (see point VI above), as if it had been filed in time. This latter would only have been possible following a request for re-establishment of rights as foreseen by Article 122 EPC.
  
13. According to the accompanying letter (see point VI above), the Notice of Appeal dated 4 December 2013 was sent in response to the Board's communication of 27 September 2013 first noting the absence of a notice of appeal and which the Appellant therefore interpreted as an invitation from the EPO to correct deficiencies under Rule 101(2) EPC. However, as the Board already indicated in its communication dated 20 December 2013, Rule 101(2) EPC invoked by the Appellant pertains only

to the possible later correction of the missing name and address that are required by Rule 99(1)(a) EPC, to which Rule 101(2) EPC explicitly refers. Contrary to the opinion of the appellant, Rule 101(2) EPC is not open to correct deficiencies in respect of Rule 99(1)(b) and (c) EPC. Consequently, given that no request for re-establishment of rights was filed, the Notice of Appeal filed on 4 December 2013 could neither substitute the Appeal Letter nor could it be used to correct its deficiencies.

14. In the light of the above the Board concludes that the requirements of Rule 99(1)(b) and (c) EPC are not met.

**Order**

**For these reasons it is decided that:**

The appeal is rejected as inadmissible.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated