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File Number: T 382/92 - 3.2.4
Application No.: 85 112 425.5
Publication No.: 0 184 626
Title of invention: Control method for a fuel injection engine

Classification: F02D 41/34

D E C I S I O N
of 26 November 1992

Applicant: HITACHI, LTD.

Opponent: Robert Bosch GmbH

Headword: Nullity of the impugned decision

EPC Article 19(2), Rule 67

Keyword: "Lack of jurisdiction of the first instance"
"Nullity of the impugned decision"
"Reimbursement of the appeal fee"

Catchwords

- It follows from the lack of jurisdiction of the first instance that the impugned decision is void ab initio.
- The faulty constitution of the Opposition Division gives rise to a substantial procedural violation and the appeal fee must be reimbursed.
- Remittal to the first instance.



Case Number : T 382/92 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 26 November 1992

Appellant :
(Proprietor of the patent)

HITACHI, LTD.
6, Kanda Surugadai 4-chome
Chiyoda-ku,
Tokyo 100 (JP)

Representative :

Strehl, Schübel-Hopf, Groening
Maximilianstrasse 54
Postfach 22 14 55
W - 8000 München 22 (DE)

Respondent :
(Opponent)

Robert Bosch GmbH
Postfach 10 60 50
W - 7000 Stuttgart 10 (DE)

Decision under appeal :

Decision of the Opposition Division of the
European Patent Office dispatched on 14 February
1992 revoking European patent No. 0 184 626
pursuant to Article 102(1) EPC.

Composition of the Board :

Chairman : C. Andries
Members : J.-P. Seitz
M. Hatherly

Summary of Facts and Submissions

- I. European patent No. 0 184 626 was granted on 10 January 1990 on the basis of European patent application No. 85 112 425.5.

The decision to grant was taken by an Examining Division on 10 April 1989 using EPO Form 2035 bearing the names of three technical examiners.

- II. Notice of opposition to this European patent was filed on 10 October 1990.

By its decision given at the end of oral proceedings on 28 January 1992 the Opposition Division revoked the patent. The decision was subsequently issued in written form using EPO Form 2331 dated 14 February 1992 and bearing the names of the Chairman and of two other technical examiners.

- III. Notice of appeal against this decision was filed by the Appellant (Proprietor of the patent) on 24 April 1992. The appeal fee was paid on the same day. The Statement of Grounds of Appeal was received on 24 June 1992.

Reasons for the Decision

1. The appeal complies with the requirements of Articles 106 to 108 and Rule 64 EPC and is, therefore, admissible.
2. According to Article 19(2) EPC, an Opposition Division shall consist of three technical examiners, at least two of whom shall not have taken part in the proceedings for grant of the patent to which the opposition relates, and an examiner who has taken part in the proceedings for the

grant of the opposed patent shall not be the Chairman of the Opposition Division.

3. In the present case from the examination of the file, and in particular from a comparison of the above-mentioned EPO Form 2035 of 10 April 1989 and the EPO Form 2331 of 14 February 1992, it is apparent that:

- the decision to grant the European patent No. 0 184 626 was taken by three technical examiners,
- the decision to revoke this European patent was taken by a Chairman and a technical examiner who had already acted in the Examining Division which granted the same European patent.

3.1 It is evident that such a composition of the Opposition Division does not satisfy the requirements of Article 19(2) EPC, since two of its members acted in both the proceedings for grant and the opposition proceedings, and since furthermore one of these two acted as Chairman of the Opposition Division.

3.2 It follows from the lack of jurisdiction of the first instance that the impugned decision must be considered as void ab initio and of no legal effect. The Board accordingly sees no need to hold oral proceedings in the present state of the case.

3.3 The faulty constitution of the Opposition Division gives rise to a substantial procedural violation and the reimbursement of the appeal fee must be ordered (Rule 67 EPC).

3.4 Since the parties are entitled to have their case considered by two instances, the case must be remitted to

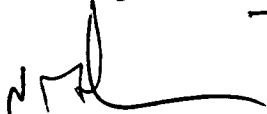
the correctly composed Opposition Division with the order to examine whether the grounds for opposition prejudice the maintenance of the European patent.

Order

For these reasons, it is decided that:

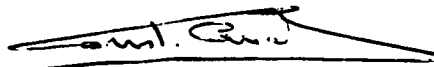
1. The impugned decision is null and void ab initio.
2. The case is remitted to the first instance for further prosecution.
3. The reimbursement of the appeal fee is ordered.

The Registrar:



N. Maslin

The Chairman:



C. Andries

Task
JOS