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File Number: T 714/92 - 3.2.4

Application No.: 89 850 061.6

Publication No.: 0 330 638

Title of invention: Valve gear for internal combustion engine

Classification: F02D 15/04

DECISION
of 18 September 1992

Applicant: Pohjola, Jorma

Headword:

EPC Articles 18 and 97, Rule 67 EPC

Keyword: "Examining Division no longer existed in its stated composition
when decision was taken - substantial procedural violation"



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Boards of Appeal

Chambres de recours

Case Number : T 714/92 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 18 September 1992

Appellant : Pohjola, Jorma
Merituuli Hailuodontie
SF-90460 Oulunsalo (FI)

Representative : Rostovanyi, Peter et al
Awapatent AB
Box 5117
S-20071 Malmö (SE)

Decision under appeal : Decision of Examining Division 2.3.01.101 of the
European Patent Office dispatched on 17 March
1992 refusing European patent application
No. 89 850 061.6 pursuant to Article 97(1) EPC.

Composition of the Board :

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

Summary of Facts and Submissions

- I. European patent application No. 89 850 061.6, filed on 22 February 1989 and published with the publication No. 330 638 was refused by a decision of the Examining Division 2.3.01.101.
- II. The decision was dispatched to the Appellant on 17 March 1992. In the part of the file which is open to public inspection there is a form (EPO Form 2048.1) dated 4 March 1992 stating that the Examining Division has decided to refuse the application on the basis of Article 97(1) EPC, the form being signed by the three members of the Examining Division. However it is known to the Board that the first examiner was no longer a member of the Examining Division after 29 February 1992.
- III. A Notice of Appeal was filed by facsimile on 12 May 1992, the appeal fee being paid on the same day. The Statement of Grounds was filed by facsimile on 16 July 1992.
- IV. The Appellant requests that the decision be set aside, that the case be remitted to the Examining Division for examination of Claims 1 to 13 filed with the Statement of Grounds (facsimile of 16 July 1992) and that oral proceedings be held if these claims are not found to form a basis for the grant of a patent.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 64 EPC and is therefore admissible.

2. EPO Form 2048.1 in the part of the file open to public inspection states that the Examining Division has decided to refuse the application, the form carries the date 4 March 1992 and the names and signatures of three persons, defined respectively as the first examiner, second examiner and chairman.

The cover page of the decision (EPO Form 2007), also in the part of the file open to public inspection, is dated 17 March 1992 and carries the same names and their functions in Examining Division 2.3.01.101 as Form 2048.1. The pages setting out the grounds of the decision are also dated 17 March 1992.

3. However the person defined as the first member of the Examining Division could not have been a member of the Examining Division on the above mentioned dates of 4 March 1992 and 17 March 1992 since it is known to the Board that he was no longer a member of the Examining Division after 29 February 1992.

4. The Board has been unable to find any indication in the part of the file open to public inspection that the first examiner had already signed the impugned decision before the date on which he left the Examining Division. Accordingly the Board comes to the conclusion that the steps taken on 4 March 1992 and 17 March 1992 were taken when the Examining Division no longer existed in its stated composition.

5. Even though the Board considers it plausible that the first examiner gave his approval and his signature to the text of the impugned decision before he left the Examining Division, the fact remains that the file gives no evidence to support this view; accordingly the case must be decided on the basis of the facts on file.

6. The Board therefore concludes that the taking of a decision on a date on which the Examining Division no longer existed in its stated composition, without the Examining Division ensuring that it be apparent from the part of the file open to public inspection that the member who left the Examining Division had agreed the text of the decision before leaving, has to be considered as a substantial procedural violation. Thus the impugned decision must be set aside as void ab initio and of no legal effect. Further this substantial procedural violation makes reimbursement of the appeal fee equitable (Rule 67 EPC).

7. In order to avoid a prolongation of the proceedings and to grant the Appellant's request, the Board is remitting the case to the Examining Division for further prosecution on the basis of Claims 1 to 13 filed with the Statement of Grounds (facsimile of 16 July 1992).

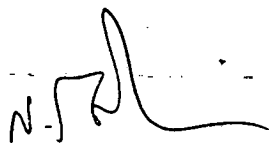
8. There is no need in this appeal proceedings to appoint oral proceedings because the decision under appeal is being set aside and the application is not being refused (cf. decision T 222/87, section 5, not published). The Board emphasises that the Appellant's request for oral proceedings is a request in the present appeal proceedings and has no effect in the further proceedings before the Examining Division.

Order

For these reasons, it is decided that:

1. The decision under appeal is set aside.
2. The application is remitted to the Examining Division for further prosecution on the basis of Claims 1 to 13 filed with the Statement of Grounds (facsimile dated 16 July 1992).
3. The appeal fee shall be reimbursed to the Appellant.

The Registrar:



N. Maslin

The Chairman:



C. Andries

JPS

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