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**Datasheet for the decision  
of 27 June 2013**

**Case Number:** T 0050/12 - 3.3.05

**Application Number:** 09013460.2

**Publication Number:** 2143485

**IPC:** B01F 13/10, B01F 15/00,  
G01G 13/00, G01F 13/00

**Language of the proceedings:** EN

**Title of invention:**  
Modular dye meter

**Applicant:**  
Hero Europe S.r.l.

**Opponent:**  
-

**Headword:**  
Restitutio/HERO

**Relevant legal provisions:**  
EPC Art. 108, 122(1)  
EPC R. 126(2)(4)

**Keyword:**  
"Admissibility of the appeal (no) - late filed"  
"Request for re-establishment of rights (rejected) - no  
exercise of all due care"

**Decisions cited:**  
-

**Catchword:**  
-



Case Number: T 0050/12 - 3.3.05

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.05  
of 27 June 2013

**Appellant:** Hero Europe S.r.l.  
(Applicant) Frazione Burette 12/A  
I-12041 Bene Vagienna (CN) (IT)

**Representative:** Garavelli, Paolo  
A.Bre.Mar. s.r.l.  
Consulenza in Proprietà Industriale  
Via Servais 27  
I-10146 Torino (IT)

**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 7 July 2011  
refusing European patent application  
No. 09013460.2 pursuant to Article 97(2) EPC.

**Composition of the Board:**

**Chairman:** G. Raths  
**Members:** J.-M. Schwaller  
C. Vallet

## Summary of Facts and Submissions

I. The appeal lies against the decision of the examining division dated 07 July 2011 to refuse the European patent application No. 09 013 460.2.

This appeal was lodged on **20** September 2011. The corresponding fee was paid on the same day.

II. By a communication dated 31 October 2011, the examining division drew the attention of the applicant ("the appellant") to the fact that the contested decision was notified by a letter whose advice of delivery, as received at the EPO, was dated 19 July 2011. This meant that the notice of appeal should have been filed on **19** September 2011 at the latest. The examining division further suggested that a request for re-establishment of rights would be necessary.

III. The appellant filed the statement of grounds of appeal together with an auxiliary request for re-establishment of rights with a letter dated 16 November 2011, received on the same day at the EPO. The fee for re-establishment was also paid on that day.

In addition to supplying a comprehensive reasoning as to the patentability of the subject-matter of the application, the appellant also raised an objection as to the date of the decision's notification. In essence, it argued that the date of 19 July 2011 mentioned on the advice of delivery was erroneous, the letter having actually been delivered on the following day - i.e. 20 July 2011 - as ascertained by the attached written statement of the gatehouse of his premises. It

suggested that the mailman made a clerical mistake by putting the wrong date on the advice of delivery and concluded that the appeal was thus admissible.

As regards the auxiliary request for re-establishment of rights, the appellant asserted that it had exercised all due care and that there had been no mistake on its part.

IV. The board issued a preliminary opinion on 16 April 2012 conveying the view that:

- the appeal was late-filed, and thus, inadmissible, and
- the request for re-establishment of rights was not allowable due to the lack of evidence relating to the cause of non-compliance with the time limit and to the exercise of all due care required by the particular circumstances.

V. In its reply dated 12 June 2012, the appellant challenged the view that the EPO had fulfilled its duty under Rule 126(2) EPC to establish the real date of delivery of the notification of the contested decision. Further, it argued that the signature on the advice of delivery was obviously not that of its representative, Paolo Garavelli, and that no relevant proof existed either as to the identity of the signatory, possibly the mailman, or as to when the representative actually received this notification. Hence, according to Rule 126(4) EPC, the Italian law (Art. 1335 Civil Code) was applicable in the present case. This provided that an addressee was only deemed to have knowledge of a notification when it actually reached the addressee, if

the latter could prove that he could not, through no fault of its own, have received it. Thus, the relevant date to be taken into consideration as forming the starting point of the two-month time limit to lodge an appeal was 20 July 2011. The appeal was therefore admissible and the same applied to the request for re-establishment of rights.

- VI. The board sent a second communication dated 10 October 2012. It emphasised the contradiction that emerged in the argumentation of the appellant. The board noted that it appeared clearly from the testimony of the caretaker and the comparison between the signatures that the caretaker was the signatory of the advice of delivery dated 19 July 2011. The advice of delivery constituted the evidence the EPO had to provide under Rule 126(2) EPC as to the true state of affairs and the actual date of the delivery, so that the burden of proof lay on the appellant.
- VII. On 14 January 2013 the appellant was summoned to oral proceedings to be held on 4 June 2013.
- VIII. By a letter dated 21 May 2013, the representative of the appellant informed the board that due to a severe illness, it was not able to attend the scheduled oral proceedings.
- IX. By a letter of 28 May 2013, the appellant was informed that the oral proceedings were cancelled.

## **Reasons for the Decision**

### 1. *The legal frame*

Article 108 EPC provides that the notice of appeal shall be filed at the European Patent Office within a time limit of two months of notification of the contested decision.

Under Rule 101(1) EPC, if the appeal does not comply with, in particular Articles 106 to 108 EPC, the board of appeal must reject the appeal as inadmissible.

In the present case, considering the date mentioned on the advice of delivery, the appeal was lodged one day after the expiry of said time limit and it should therefore be held inadmissible.

### 2. *Establishing the date of delivery*

By producing the advice of delivery, the EPO fulfilled its duty under Rule 126(2) EPC to assess the actual date of delivery to the addressee.

Hence, the burden of proof now lies with the appellant. If the appellant intends to establish that the date mentioned on the advice of delivery is erroneous, it has to bring convincing evidence, which is not the case at present.

The appellant's submission that the starting point of the time limit should be fixed on 20 July 2011 due to a mistake made by the mailman in Italy, who erroneously

affixed the stamp of the previous day, does not convince the board.

To this end the appellant submitted two documents.

The appellant's representative produced a written statement (first document), signed by the gatehouse responsible for its building, asserting that said letter with advice of delivery arrived on 20 July 2011 and that no such letter was delivered at all on 19 July 2011.

It also produced a copy of the EPO Form 2936 (second document) indicating "*Received on 20.7.2011*" with the signature of the authorised recipient, M. Paolo Garavelli, also the representative of the appellant.

As to the first document - the written statement of the caretaker - this cannot be placed on the same level, as regards its reliability, as the act of a postman who is a civil servant and exercises his duty under oath. This statement therefore does not convince the board.

As to the second document, i.e. EPO Form 2936, this acknowledgement of receipt was introduced by the EPO a long time ago in order to avoid difficulties linked with the fact that advices of delivery were not returned to the EPO or not completed. The parties were thus given the possibility to date and sign this form and to return it **immediately** (*emphasis added by the board*) to the EPO through Epoline, by fax or by post, as explained in the Notice from the EPO dated 10 June 2010 and published in OJ EPO 7/10, 377, in particular point 4.

In the present case, the acknowledgement of receipt constituted by Form 2936 was not returned to the EPO immediately after the date of notification, but later on, namely on 16 November 2011, together with the statement of grounds of appeal and the request for re-establishment of rights, namely on 16 November 2011. This delay deprives the second document of any probative value. It is obvious that in such circumstances the date mentioned on this document may be the one chosen by the addressee to suit his convenience and therefore amounts to self-made evidence.

In passing, reference is made to an "Enclosure of prepared acknowledgement of receipt" presented by the European Patent Office in its Official Journal EPO 7/94, 325, according to which, in its point 4. the recipient was "*asked to acknowledge receipt and return the acknowledgement by return of post*".

In summary, there is no convincing evidence that the date of delivery is erroneous.

3. *The contestation of the delivery itself*

In its statement of grounds of appeal (last but one paragraph), the appellant wrote: "*... the mistake about the effective date of receiving of the communication of refusal (written on the receipt as 19/07/2011, but actually received by us on 20/07/2011) has probably to be ascribed to the Italian Mail Service, which writes on the receipt the date on which the mail has been given to the Mailman for delivery. However, the Mailmen*



*delivered the mail to our gatehouse service in our building on the following day, namely 20/07/2011, as our gatehouse responsible is confirming in writing...."*

By the attached testimony, the gatehouse asserted that the person in the gatehouse received no registered letter coming from the European Patent Office on 19 July 2011 but that said letter arrived on 20 July 2011 for which **he signed** the advice of delivery.

From the above it appears clearly that the advice of delivery dated 19 July 2011 reached the appropriate destination and was signed by the caretaker.

In his letter dated 12 June 2012, the representative put forward the new argument that the one who signed the advice of delivery was unknown, suggesting that it could have been the mailman himself, and concluded that said letter did not reach its addressee. Since the EPO had failed to establish the real date of notification, the EPO should admit that the notification was effective on 20 July 2011 as alleged.

In the board's view, firstly it must be born in mind that a party cannot deviate completely from an earlier statement in a later one contradicting the first. This derives from the obligation of fairness in the course of the proceedings, an obligation which is not restricted to the EPO or to the boards, but also applies to the parties, among them and vis-à-vis the deciding body.

Apart from that point, a simple comparison between the signature of the advice of delivery and the assessment

of the caretaker dated 14 November 2011 confirms beyond all reasonable doubt that the latter was the signatory.

The appellant did not formally deny that said caretaker was entitled to receive and sign registered letters on its behalf. The testimony of the caretaker is evidence at least that such was the common practice.

Therefore, the board concludes that the notification reached the representative of the appellant on the date mentioned on the advice of delivery, i.e. on 19 July 2011.

The provisions of Rule 126(2) EPC have thus been complied with.

The advice of delivery is the evidence of the receipt of the notification, which amounts to tautology. This is in fact the only evidence that the EPO can bring. According to Rule 126(4) EPC, to the extent that notification by post is not covered by Rule 126(1) to (3) EPC, the law of the State in which the notification is made shall apply. However, in the present case, the provisions of Rule 126(1) to (3) EPC apply. Thus, the provisions of Rule 126(4) EPC under which the law of the State in which the notification is made are not applicable in the present case.

Turning back to the contestation of the date of delivery itself, the burden of proof lies on the appellant. The appellant denies the date put on the advice of delivery and it is therefore up to him to provide evidence that this date was wrong, or at least to make the occurrence of a mistake highly plausible,

which is not the case at present. As already explained above (point 2.1) the board cannot accept the statement of the caretaker as conclusive enough.

The expression "in the event of any dispute" used in Rule 126(2) EPC, second sentence, does not mean that where the ten-day fiction does not apply, which is the case at present, the parties should be allowed to raise any kind of objection. The dispute, if any, has to be founded on facts which are likely to cast doubt on the reliability of the date of delivery given. Otherwise, it would mean that the addressee, even in the presence of an advice of delivery, could choose the date of receipt at its own convenience, which would deprive the time limit set out in Article 108 EPC, of its very substance.

It can be derived from the above that the appeal was late-filed and is thus inadmissible.

#### 4. *Request for re-establishment of rights*

##### 4.1 Admissibility

The request for re-establishment of rights, which complies with the time limit laid down by Rule 136(1) EPC, is admissible.

##### 4.2 Allowability

Under Article 122(1) EPC, the applicant for a European patent must have his rights re-established upon request when he was unable to observe a time limit vis-à-vis

the EPO in spite of all due care required by the circumstances having been taken.

In the present case, the appellant's representative explains that he was not able to comply with the two-month time limit laid down by Article 108 EPC to file an appeal due to the fact that the contested decision dated 7 July 2011 was notified to him on 20 July 2011, and not on 19 July 2011 as indicated on the advice of delivery.

Assuming, for the sake of argument, that the contested decision might actually have been notified on 20 July 2011 instead of 19 July 2011, or that the representative believed that such was the case, the board considers that this did not prevent the representative from filing an appeal within the applicable time limit.

A representative who is facing the possibility of filing an appeal, is concerned firstly with the time limit within which this act has to be done. Hence, he has to consider the documents assessing the starting point, which is the date of the decision plus 10 days or, if later, the date on which the letter was delivered to him (Rule 126(2) EPC).

In this second case, which is the present situation, he necessarily considers the advice of delivery and thus can assess that the indicated starting point, even if erroneous, is the 19 July 2011. The representative is then aware of the mistake and knows that in order to avoid any concern relating to the admissibility of the

appeal, he has to file the appeal on 19 September 2011 at the latest.

Under the present circumstances, the board tends to consider that waiting until after the end of the time limit as it stands from the file does not indicate the exercise of all due care. On the contrary, the appeal has unnecessarily and in full knowledge been put at risk. This is all the more true given that no real cause of non-compliance with the time limit resulting from the date put on the acknowledgement of receipt has been put forward.

Thus, the request for re-establishment of rights is not allowable and, consequently, the appeal remains inadmissible.

## **Order**

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

1. The appeal is inadmissible.
2. The request for re-establishment of rights is rejected.

The Registrar

The Chairman

C. Vodz

G. Raths