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(C)  To Chairmen

**D E C I S I O N**  
**of 26 March 1996**

**Case Number:** T 0840/94 - 3.3.1

**Application Number:** 87115024.9

**Publication Number:** 0270774

**IPC:** C09F 1/04

**Language of the proceedings:** EN

**Title of invention:**

Improved process of preparing polyol esters of rosin

**Patentee:**

Union Camp Corporation

**Opponent:**

Akzo N.V.

**Headword:**

Revocation/UNION CAMP

**Relevant legal provisions:**

EPC Art. 108, 122(2)

EPC R. 81(1)

**Keyword:**

"Re-establishment of rights"

"Removal of cause of non-compliance"

"Instruction not to pass on information on pending proceedings"

**Decisions cited:**

J 0027/90

**Headnote:**

If a party instructs the authorised representative not to pass on any further communication from the EPO it cannot then rely on the fact that information notified to the authorised representative and necessary for continuing the proceedings was lacking.

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Headnote:  
follows



Case Number: T 0840/94 - 3.3.1

**DECISION**  
of the Technical Board of Appeal 3.3.1  
of 26 March 1996

**Appellant:**  
(Proprietor of the patent) Union Camp Corporation  
1600 Valley Road  
Wayne  
New Jersey 07470 - 2066 (US)

**Representative:** Boeters, Hans Dietrich, Dr.  
Patentanwälte Boeters & Bauer  
Bereiteranger 15  
D-81541 München (DE)

**Respondent:**  
(Opponent) Akzo N.V.  
Velperweg 76  
NL-6824 BM Arnhem (NL)

**Representative:** -

**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 10 February 1994  
revoking European patent No. 0 270 774 pursuant to  
Article 102(3) EPC.

**Composition of the Board:**

**Chairman:** J. A. Nuss  
**Members:** R. E. Teschemacher  
R. K. Spangenberg

### Summary of Facts and Submissions

- I. The Opposition Division revoked European patent No. 0 270 774 by a decision dated 10 February 1994, as the Proprietors of the patent had declared that they no longer approved the text in which the patent had been granted.
  
- II. The Proprietors filed a request for re-establishment of rights and a notice of appeal on 14 October 1994. The appeal fee and the fee for re-establishment of rights were paid on the same date.
  
- III. The Appellants (Proprietors of the patent) submitted that they became aware of the loss of the patent on 22 August 1994 after they had instructed their US representative to pay the renewal fees for the designated States of the European patent remaining after abandonment of the German part. The instructions to abandon the European patent had been given by Mr W., the Appellants' in-house attorney responsible for the handling of this case. Mr W., however, had no authority to take this decision himself, but only in accordance with the decisions of the Appellants' Director of Chemical Products, who had decided to abandon the patent for Germany only. Confirmation of these facts was provided in particular in the form of affidavits by the Appellants' US representative and the Appellants' corporate intellectual property counsel, submitted on 7 November 1994.
  
- IV. Following an enquiry by the registry, the Appellants approved, by a fax dated 2 November 1994, the text communicated to them under Rule 58(4) EPC by the Opposition Division.

- V. In reply to a communication from the Rapporteur and in the oral proceedings which took place on 26 March 1996, the Appellants made additional submissions and filed a further affidavit by the Appellants' US representative.
- VI. In respect of the time limit for requesting re-establishment of rights, it was alleged that it was not possible for the Appellants to file the request earlier. The European authorised representative had not forwarded to the Appellants either the decision on revocation or further information from the EPO on the basis of the instructions, which later turned out to be wrong, to abandon the European patent and not to incur any further costs. After the authorised representative had received from the US representative the Applicants' declaration referring to the abandonment of the European patent for Germany, he enquired of the US representative whether all national parts of the patent were to be abandoned. The US representative telephoned Mr W. for instructions and the latter replied in the affirmative. The US representative sent these instructions in a letter to the authorised representative.
- VII. On receipt of these instructions, the US representative assumed that they had been given with the approval of the Appellants' Director of Chemical Products. To his knowledge, Mr W. had not previously acted in abandoning patent applications without the prior approval of the Appellants' proper manager. Since Mr W. had acted without authorisation and ultra vires his declaration could not legally bind the Appellants. In the US representative's dealings with the Appellants the common understanding had always been that he had to act on Mr W.'s oral instructions and that any later written confirmation was only for the purpose of record-keeping.

- VIII. The authorised representative declared that he had not been expressly directed not to pass on further communications from the EPO. On the basis of his previous experience, however, the Appellants' instructions had made it clear to him that the Appellants had no further interest in the case and did not wish to receive further correspondence in the matter.
- IX. The Appellants requested that their rights be re-established and that the decision to revoke the patent be set aside. Alternatively, they requested that their statement of disapproval, received on 3 February 1994, be corrected to the effect that they approve the proposed text.
- X. The Respondents (Opponents) argued, without formally making a request, that the appeal should not be admitted since the decision under appeal had been taken in accordance with the Appellants' request.

#### Reasons for the Decision

1. The appeal was filed after expiry of the time limit of two months after the notification of the decision under appeal. Therefore the Board can only decide in substance on the appeal if the Appellants can be re-established in their rights in respect of the time limit pursuant to Article 108, first sentence, EPC.
2. A request for re-establishment of rights has to be filed within two months from the removal of the cause of non-compliance with the time limit (Article 122(2), first sentence, EPC). If there is an error of fact in respect of the time limit to be complied with, then according to

the established case law of the Boards of Appeal, the removal of the cause of non-compliance occurs on the date on which the applicant or his representative should have discovered the error (J 27/90, OJ EPO, 1993, 422, pt. 2.4 of the reasons).

3. According to the submissions in the present case, the European authorised representative did not know that the European patent was not to be abandoned whereas the Appellants did not know that the patent had been revoked. The Appellants conclude from these facts that the cause of non-compliance was not removed until they actually became aware of the loss of the patent on 22 August 1994.

The Board cannot share this view. The lack of information on the part of the Appellants was the consequence of the arrangement between the Appellants and their representatives. The EPO gave the necessary information to the Appellants by notifying their authorised representative as prescribed in Rule 81(1) EPC. If information on the course of the proceedings is duly notified, the party may or may not take notice of it. If it decides deliberately not to take notice of it, it cannot rely thereafter on the fact that it had no knowledge of matters necessary for continuing the proceedings.

4. The Board has no reason to doubt that the authorised representative's understanding of the Appellants' instructions not to incur any further costs corresponded to the intentions on which these instructions were based (see points VI to VIII above). It is, however, not necessary to pursue the question whether the authorised representative interpreted his client's instructions correctly. Even if the authorised representative had misinterpreted the instructions, this would not help the

Appellants' case. If there was any doubt at all whether the authorised representative should or should not withhold any further communication from the EPO, it was his responsibility to clarify the matter.

5. The Appellants' allegation that Mr W. did not have the authority to abandon the patent cannot have the legal consequence that his instructions to the authorised representative via the US representative were irrelevant and thus not binding. The US representative was entitled to act on Mr W.'s instructions and to pass them on to the authorised representative. There was no need for the US representative to make sure that Mr W. acted with the approval of the responsible managers in his company. Rather, Mr W. was expected not to abandon the patent without the instruction or the approval of his corporate manager. This requirement did not, however, affect the Appellants' and Mr W.'s relationship with the representatives. Since the Appellants generally allowed their representatives to act on Mr W.'s instructions without restriction, his instructions in the present case are also to be attributed to them.
  
6. In summary, it was as a direct consequence of the Appellants' own instructions that they did not receive the information on the revocation of the patent. On the basis of the information addressed to them, they were in a position to detect the loss of the patent after the decision to revoke. Therefore the request for re-establishment was not filed within the time limit pursuant to Article 122(2), first sentence, EPC. It follows from this that the notice of appeal was not filed within the time limit pursuant to Article 108, first sentence, EPC. Since the appeal is inadmissible for this reason, the question may be left unanswered



whether the Appellants were adversely affected under Article 107, first sentence, EPC by the decision under appeal, which was in accordance with the request made by their representative.

7. In the absence of an admissible appeal, there are no proceedings pending in which the Board can deal in substance with the request for correction.

**Order**

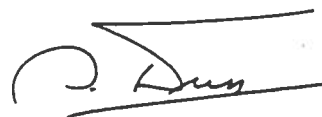
**For these reasons it is decided that:**

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

The Registrar:

  
E. Gorgmayer

The Chairman:

  
A. Nuss

Tc  
18.14.96