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I N T E R L O C U T O R Y
D E C I S I O N
of 7 May 1999

Case Number: T 0027/98 - 3.4.1

Application Number: 91303416.1

Publication Number: 0453258

IPC: G07F 5/24

Language of the proceedings: EN

Title of invention:

Controller for an automatic vending machine

Patentee:

Kabushiki Kaisha Nippon Conlux

Opponent:

National Rejectors, Inc. GmbH

Headword:

Re-establishment/KKNCONLUX

Relevant legal provisions:

EPC Art. 122

EPC R. 65(1)

Keyword:

"Re-establishment of rights"

Decisions cited:

J 0005/80, J 0007/82, J 0002/86, J 0003/86, J 0027/88, T 0191/82,

T 0111/92

Catchword:

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Boards of Appeal

Chambres de recours

Case Number: T 0027/98 - 3.4.1

**I N T E R L O C U T O R Y
D E C I S I O N
of the Technical Board of Appeal 3.4.1
of 7 May 1999**

Appellant: Kabushiki Kaisha Nippon Conlux
(Proprietor of the patent)2-2, Uchisaiwai-cho 2-chome
Chiyoda-ku
Tokyo (JP)

Representative: Newstead, Micheal John
Page Hargrave
Southgate, Whitefriars
Lewins Mead
Bristol BS1 2NT (GB)

Respondent: National Rejectors, Inc. GmbH
(Opponent) Zum Fruchthof 6
21614 Buxtehude (DE)

Representative: Patentanwälte
Hauck, Graalfs, Wehnert
Döring, Siemons
Neuer Wall 41
20354 Hamburg (DE)

Decision under appeal: Decision of the Opposition Division of the European Patent Office posted 28 October 1997 revoking European patent No. 0 453 258 pursuant to Article 102(1) EPC.

Composition of the Board:

Chairman: G. Davies
Members: H. K. Wolfrum
G. Assi

Summary of Facts and Submissions

- I. By decision dated 28 October 1997, the Opposition Division revoked European patent No. 0 453 258. On 24 December 1997, the patent proprietor filed an appeal against this decision. The appeal fee was paid on 29 December 1997.
- II. In a Communication pursuant to Article 108 and Rule 65(1) EPC dated 24 June 1998 the patent proprietor was informed by the registry of the boards of appeal that no written statement of grounds of appeal had been filed in due time and that it was to be expected that the appeal would be rejected as inadmissible. Attention was drawn to the provisions of Article 122 EPC.
- III. By letter dated 25 June 1998, received by the EPO on the same day by facsimile, the appellant's representative applied for re-establishment of rights under Article 122 EPC and completed the omitted act, filing a statement of grounds of appeal. The required fee was paid on 26 June 1998. In this letter and in subsequent submissions filed in support of the request for re-establishment of rights, the representative put forward the following grounds for the request. It was submitted that the representative had sent the EPO a letter containing a statement of grounds of appeal and including new claims on 12 February 1998. He also noted that on the day in question he had sent a second letter to the EPO in connection with another case (European patent No. 0 625 947). Following receipt of the Communication of 24 June 1998, he had made enquiries at the EPO and been informed that this second letter had

not been received by the EPO either. A check had been made also with the British Post Office which stated that there was no reason why mail sent on 12 February 1998 would have been mishandled; it was not apparent, therefore, why the two letters in question should not have reached the EPO. The two letters sent on 12 February 1998 were, to the best of the representative's knowledge, the only letters sent by his firm to the EPO which ever had been lost in the post or at the EPO. In order to substantiate his case, the representative submitted, *inter alia*, the original of the letter he had sent to his Japanese client on 16 February 1998 reporting on the filing of the statement of grounds of appeal as well as a copy of the grounds of appeal sent therewith showing that these had indeed been received by his client on 20 February 1998.

IV. Subsequently, in response to an enquiry by the Board, by letter of 24 August 1998 the representative provided further details regarding the system for posting mail employed in his office to further support his case that his letter dated 12 February 1998 had actually been posted. His arguments can be summarised as follows:

On 12 February 1998, he had personally inserted the letter to the EPO containing the grounds of appeal in a window envelope (thus there was no possibility of the envelope being mis-addressed or of the letter being inadvertently included in an envelope intended for another recipient) and put the envelope in the "out" tray for outgoing post to be franked. A copy of the letter was placed in a second tray in the post room for copy letters, to be put in the so-called letter book containing copies of all letters sent out filed in

chronological date order. The same day, at a different time, he had followed the same procedure for the mailing of the second letter to the EPO (in patent case EP-A-0 625 947). After being weighed and franked, the outgoing mail was always placed in a bag to be collected by a Post Office employee in the late afternoon. This procedure was carried out by one of three staff members of the representative's office, all of whom were familiar with and experienced in the procedure for despatching mail and whose competence and reliability was beyond doubt.

After having received the Communication from the EPO dated 24 June 1998, he had checked that the firm's letter book contained copies of the two letters to the EPO in the correct chronological order, and that the respective case files also contained a copy of each letter.

He furthermore pointed out that the possibility that the letters could have been lost in his office was negligible, because theft could be excluded, security with respect to visitors to his office being very high. Moreover, he had no doubts about the reliability of the experienced employees whose job it was to dispatch the letters.

- V. He concluded his submissions by stating that he had no reason to believe that the two envelopes containing the two letters to the EPO were not properly consigned, in the bag of franked mail, to the Post Office, in accordance with normal and routine office procedure. Furthermore, to the best of his knowledge, the two letters of 12 February 1998 were the only letters ever

sent by his firm to the EPO which had failed to reach the EPO. He submitted that the evidence submitted pointed to an isolated incident of letters having been lost in the post or at the EPO.

Reasons for the Decision

1. Under Article 108, third sentence, EPC, a written statement setting out the grounds of appeal must be filed within four months of the date of notification of the decision. In the present case, this period elapsed on 7 March 1998 (Rules 78(3), 83(1), (2) and (4) EPC).

2. In the present case, the application for re-establishment of rights by the appellant, proprietor of the patent, fulfils the conditions laid down in paragraphs (1), (2) and (3) of Article 122 EPC and is admissible. In particular, the Board finds that the date of the removal of the cause of non-compliance with the time limit was the date that the representative received the Communication from the EPO notifying him that the time limit had not been observed, that is 25 June 1998 (cf. J 07/82 (OJ EPO 1982, 391), J 27/88 of 5 July 1989 (unpublished), and T 191/82 (OJ EPO 1985, 189)). The application was filed by facsimile on the same day and the omitted act completed by the filing of the statement of grounds of appeal. The fee was paid on 26 June 1998; thus, the time limits set by Article 122(2) and (3) were met.

3. Article 122 EPC provides for an applicant who, in spite of all the due care required by the circumstances

having been taken, was unable to observe a time limit vis-à-vis the EPO, thereby losing a right or other redress, to have his rights re-established upon application subject to the conditions referred to in paragraph 2, above, being met. It is the established case law of the boards of appeal that a request for re-establishment of rights cannot be acceded to unless the representative himself can show that the due care required of the applicant or proprietor by Article 122(1) EPC has been taken. It is incumbent on the representative to show reasonable care in the choice of his employees, to properly instruct them and to exercise reasonable supervision over the work of any assistant to whom the performance of routine tasks has been entrusted (J 5/80, EPO OJ 1981, page 343). Moreover, Article 122 is intended to ensure that loss of rights does not result from an isolated mistake in an otherwise satisfactory system. Thus, in the present case, the representative is required to demonstrate that he exercised all due care in meeting the time limit for filing the grounds of appeal and that a normally effective system for posting mail was established at the relevant time in his office and operated by reliable personnel (J 2/86, J 3/86, OJ EPO 1987, 362).

- 4.1 The Board is satisfied on the evidence that the representative exercised all due care in this case, that the mailing system established in his office was normally satisfactory and that it was operated by reliable personnel. First, there can be no doubt that the representative prepared the written statement of grounds of appeal on 12 February 1998 well in advance of the deadline of 7 March 1998. This appears from the

evidence that a copy of the letter dated 12 February 1998 containing the grounds of appeal was received by the representative's Japanese client on 20 February 1998. The fact that such a letter was written is borne out by the evidence that copies thereof were filed in their correct date order in the mail room letter file in the representative's office as well as in the respective case files of the representative. The Board also has no reason to doubt the evidence of the representative that he placed the letter in an envelope in the outgoing post tray in his office's post room on 12 February 1998.

4.2 Secondly, the mailing system employed by the representative was operated by experienced and reliable members of staff and corresponds to reasonable requirements. According to the representative's submissions in his letter of 24 August 1998, in his office any one of three experienced and reliable staff members could have been responsible for franking and bagging the mail on 12 February 1998, each of whom had been employed by his firm for several years and he had no reason to believe that the letters had not been franked and bagged for collection by the Post Office in the usual way. Moreover, to his knowledge, never before had a piece of mail sent to the EPO failed to reach its destination.

5. Although the Board observes that the representative failed to make enquiries at the EPO when the confirmation Form 1037, enclosed with the letter of 12 February 1998, had not been returned by the EPO (this had explicitly been requested in the representative's letter of 12 February 1998), it takes

the view that the setting up of a system in his office to check up on receipt of every communication sent to the EPO would be unreasonably burdensome. Since the representative's firm apparently had never suffered any loss of mail to the EPO in the past, it must be concluded that their system was reasonable and normally satisfactory.

6. Furthermore, in Decision T 111/92 of 3 August 1992 (unpublished, see point 5 of the Reasons for the Decision), the Board referred to the principle of proportionality. In conformity with the Board's view in that case, in the particular circumstances of the present case, the loss of the possibility of appealing against the revocation of the patent because of the failure to file the grounds of appeal with the EPO in time would be a severe result.
7. The Board concludes, therefore, that the letter in question was posted but failed for unknown reasons to reach the EPO. It is also satisfied that the representative had taken all the due care required by the circumstances. Thus, the provisions of Article 122(1) are met in the present case. The application for re-establishment of rights is therefore allowed.

Order

For these reasons it is decided that:

1. The rights of the appellant are re-established in

relation to the filing of the written statement of grounds of appeal, which shall be considered, therefore, as having been filed within the four-month time limit provided by Article 108 EPC.

2. Consequently, the appeal is deemed to comply with Articles 106 to 108 and Rule 64 EPC and is admissible.

The Registrar:

The Chairman:

M. Beer

G. Davies