

Internal distribution code:

- (A) [] Publication in OJ
(B) [X] To Chairmen and Members
(C) [] To Chairmen
(D) [] No distribution

**Datasheet for the decision
of 21 December 2006**

Case Number: J 0018/05 - 3.1.01

Application Number: 00302394.2

Publication Number: 1039499

IPC: H01H 71/50

Language of the proceedings: EN

Title of invention:
Circuit breaker handle block

Applicant:
GENERAL ELECTRIC COMPANY

Opponent:
-

Headword:
Date of notification/GENERAL ELECTRIC

Relevant legal provisions:
EPC Art. 15, 96(2), 121(2)
EPC R. 9(3), 67, 69(1), 78(2)(4)

Keyword:
"Time limit for requesting further processing"
"No proof of receipt of Rule 69(1) communication"
"Refund of the appeal fee (no) - error of judgement - no
substantial procedural violation (no)"

Decisions cited:
J 0006/79

Catchword:
Requirements for proof of notification of communication under
Rule 69(1) EPC.



Case Number: J 0018/05 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 21 December 2006

Appellant: GENERAL ELECTRIC COMPANY
1 River Road
Schenectady, NY 12345 (US)

Representative: Pedder, James Cuthbert
London Patent Operation
General Electric International, Inc.,
15 John Adam Street
London WC2N 6LU (GB)

Decision under appeal: Decision of the Examining Division of the
European Patent Office of 28 April 2005
rejecting the request for further processing.

Composition of the Board:

Chairman: B. Günzel
Members: P. Schmitz
K. Garnett

Summary of Facts and Submissions

- I. European patent application 00 302 394.2 was filed on 23 March 2000. On 13 June 2003, the Examining Division issued a communication pursuant to Article 96(2) EPC in which a period of 4 months was set. On 27 November 2003 a communication under Rule 69(1) EPC was issued noting that the application was deemed to be withdrawn, the applicant not having replied within the set period.
- II. By letter received on 20 February 2004, the applicant requested further processing, paid the relevant fee and filed his observations to the Examining Division's communication. By brief communication dated 2 March 2004 the applicant was informed that his request for further processing had not been filed in due time and that re-establishment of rights could be requested.
- III. A request for re-establishment of rights was filed on 12 March 2004. The applicant submitted that he had not received the communication under Rule 69(1) EPC and that he had first become aware that there was a problem from the letter of 2 March 2004.
- IV. The European Patent Office started enquiries about the delivery of the Rule 69(1) EPC communication with the Deutsche Post. By letter dated 19 April 2004 the Deutsche Post replied that the enquiries with the foreign postal service had shown that the letter was delivered to an authorised recipient on 1 December 2003.
- V. On 14 February 2005, a communication under Rule 69(1) EPC was issued, noting that the request for further processing was not filed in due time. The letter from

the Deutsche Post was enclosed. By letter received on 14 April 2005, the applicant requested a decision under Rule 69(2) EPC. He explained that the evidence provided on the delivery of the Rule 69(1) EPC communication of 27 November 2003 was not persuasive since in the letter from the Deutsche Post it was not stated to what address the letter had been delivered, nor had any details been given as to who had signed for the letter.

- VI. In a decision dated 28 April 2005, the request for further processing was rejected because it had not been filed in due time. It was decided that the Rule 69(1) EPC communication of 27 November 2003 was deemed to have been duly delivered to the addressee on the tenth day following its posting. The request for re-establishment of rights was to be dealt with separately.
- VII. Notice of appeal was filed on 9 May 2005. The appeal fee was paid on the same day. The appellant requested that the decision under appeal be set aside and that the file be referred back to the Examining Division for further processing of the application. In the event that a procedural violation was found to have taken place, refund of the appeal fee and of the fee for re-establishment of rights was requested.
- VIII. In the statement setting out the grounds of appeal received on 5 September 2005, the appellant reiterated that the Rule 69(1) EPC communication of 27 November 2003 had not been received. There was no record of this communication having been received through the postal system at any time. The representative had only become aware that there had been a problem after having received the brief communication of the European Patent

Office of 2 March 2004. Only on 12 March 2004 was he able to retrieve a copy of it by means of online file inspection. The letter from the Deutsche Post did not state to what address the letter had been delivered nor did it give any details as to who had signed for the letter, as was, according to the representative's understanding, mandatory in the case of delivery of registered letters. There was a number of possibilities as to what could have happened to the letter. It could have been delivered to the wrong address. There was a 15 Adam Street within 500 meters of his current offices, his address being 15 John Adam Street. The letter could have been delivered to one of the other offices in the building and signed for by someone not related to his office. It could have been delivered without a signature being obtained. All these situations would be consistent with the Deutsche Post letter and none of them would have resulted in his office having received the letter.

- IX. In addition, the normal procedure when a letter was received in the office was explained. Normally, the postman delivered the letter to his office on the third floor. The member of staff receiving the letter would sign and pass it straight to the office manager. The office manager would then enter it, together with any due dates involved, in their record system. The office manager would then have the letter married up with the file to which it belonged and the file would be passed over to the attorney dealing with the matter. The file would then be filed by the attorney in his own filing system in due date order. The attorney was provided, at least once a month, with an "actions due" list formulated automatically by the record system. In view

of this system it would be difficult to see how a letter received could have disappeared entirely.

- X. With respect to the still-pending request for re-establishment of rights, affidavits were filed from the responsible European professional representative, the office manager and a secretary. The affidavits from the office manager and the secretary confirm the office procedure as set out in the statement setting out the grounds of appeal. As exhibit B to their affidavits, a print-out of the file record was attached.
- XI. In reply to a communication of the Board the appellant submitted further arguments with respect to the refund of the appeal fee.

Reasons for the Decision

1. According to Article 121(2) EPC, a request for further processing shall be filed within two months of notification of the communication that the application is deemed to have been withdrawn. In the present case, the Rule 69(1) EPC communication bears the date of 27 November 2003. According to Rule 78(2) EPC this communication is deemed to have been delivered to the addressee on the tenth day following its posting, unless the letter failed to reach the addressee or reached him at a later date. In the event of any dispute, it is incumbent on the European Patent Office to establish that the letter reached its destination.
2. Thus in a situation where an applicant submits that he has not received a communication, the European Patent

Office bears the burden of proof. The only evidence on which the Examining Division based its assumption that the letter was delivered is the letter from the Deutsche Post referring to the information received from the foreign postal service, according to which the letter was delivered to an authorised recipient on 1 December 2003. The letter does not indicate to whom it was delivered so that it can not be judged whether this person was authorised to accept delivery or not. Nor was the signature of the person allegedly having received the letter provided, something which would have been of assistance in tracing the letter back.

3. Against this evidence the submissions and evidence of the appellant have to be balanced. In this respect it has to be observed that a party submitting that something has not happened is in difficulties in trying to prove the negative. He can mainly argue what could have happened or what normally would have been done if a letter had been received, in order to cast doubt upon the Examining Division's evidence. The filing of cogent evidence showing that the letter was not received is hardly ever possible.
4. The appellant has submitted three affidavits. In the affidavits from the office manager and the secretary, the operation of the office system for monitoring time limits is explained. The printout of the file record shows that an official communication was received requiring action by 13 October 2003 and that the action on this communication had been completed on 20 February 2004. No entries can be found with respect to the communication under Rule 69(1) EPC of 27 November 2003. Of course, this does not prove that the letter was not

received. It could have got lost in the representative's office. However, the burden of proof is on the European Patent Office and all a reasonable applicant can do in such a situation is explain his normal procedure and produce his file records. If doubts remain, the applicant has to be given the benefit of the doubt.

5. In addition, the appellant submitted that it has happened that registered letters have been left at the entrance hall of the building without a signature being obtained. The Board accepts that this is something which can happen in practice. Therefore, since no details are given by the postal service about the person to whom they handed over the letter, there is no way of being sure that such a thing did not happen in this case.
6. The appellant further submitted that in another file a loss of rights communication under Rule 69(1) EPC, also dated 27 November 2003, had allegedly been issued but was not received by him. The European Patent Office finally admitted that this communication had in fact not been sent. All this shows that mistakes occur and it creates doubts about what really happened.
7. The European Patent Office is also in a difficult situation if an applicant submits that it has not received a communication. The Office then has to start enquiries with the postal services and has to rely on the information obtained. This information is often not satisfactory since often no details are given. After a certain period the relevant information may not even be obtainable at all. However, this ought not be to the

- detriment of the applicant, specifically not where a loss of rights communication is concerned. These problems could be avoided if such communications were delivered by registered letter with advice of delivery.
8. Balancing the evidence of the Examining Division, which consists of the rather vague letter from the Deutsche Post, against the evidence submitted by the appellant, and taking into account the serious consequences for the appellant, the Board comes to the conclusion that it has not been sufficiently proven that the applicant received the Rule 69(1) EPC communication dated 27 November 2003. In such a situation where the European Patent Office bears the burden of proof, the applicant has to be given the benefit of the doubt. Thus, the Rule 69(1) EPC communication of 27 November 2003 was not validly notified and therefore the two month time limit for filing the request for further processing did not start on the tenth day following its posting.
 9. The appellant only retrieved this communication by means of online file inspection on 12 March 2004. The request for further processing had been filed before this date and therefore was filed in due time. Since the other requirements for further processing were also met, further processing is allowable.
 10. According to Rule 67 EPC reimbursement of the appeal fee shall be ordered where the Board of Appeal deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation. A substantial procedural violation is to be understood, in principle, as meaning that the rules of

procedure have not been applied in the manner prescribed by the EPC (J 6/79, OJ EPO 1980, 225, Reasons point 8). The appellant submitted that the European Patent Office failed to establish the relevant facts. There was a well established procedure for determining if registered letters had been delivered and this involved the receipt of a signature from the addressee. If such proof had been available, such proof should have been produced.

11. The Board is of the opinion that the Examining Division's approach can not be qualified as a substantial procedural violation. Once it is claimed that a letter has not been received, the European Patent Office starts investigations. This was done in the present case via the Deutsche Post, which is best suited for getting the relevant information from the other postal authorities. These investigations resulted in the letter from the Deutsche Post which the Examining Division took as sufficient evidence for reaching the conclusion that the Rule 69(1) EPC communication of 27 November 2003 had been validly notified. In reaching this conclusion, it was first stated in the decision that the law of the State on the territory of which the notification was made should apply as to whether delivery to a person other than the addressee constitutes an effective notification of the letter (see Rule 78(4) EPC and Guidelines for Examination, E-I, 2.3). The decision then went on to state: "In other words, if the British postal service states, like in this case, that 'The (registered) letter has been duly notified to an authorised recipient on 1.12.2003', this constitutes for the EPO evidence of the occurred notification." The link

between these two parts of the reasoning of the decision is not at all clear, but it is not necessary to analyse it further since in any case there was no sufficient evidence on which to reach the conclusion that the communication of 27 November 2003 had been duly notified to the representative.

12. Although, therefore, the Examining Division evaluated the evidence incorrectly, this amounted to an error of judgement only and cannot be characterised as a procedural non-compliance, which is a prerequisite for the application of Rule 67 EPC.

13. The Board has noted that the decision under appeal was signed by "Central Unit Formalities Munich". In Article 15 EPC the departments charged with the procedures are listed and included are the Receiving Section, the Examining Divisions and Opposition Divisions. In addition, according to Rule 9(3) EPC in conjunction with the Notices of the Vice President DG2 dated 28 April 1999 (OJ EPO 1999, 504, 506), formalities officers are entrusted with certain tasks which are normally the responsibility of the Examining or Opposition Divisions. The formalities officers are then acting on behalf of the Examining or Opposition Division. The Central Unit is not a department having competence under Article 15 EPC. A formalities officer can act in different capacities. He can act for the Receiving Section, as well as for the Examining or Opposition Division. It must, however, be made clear throughout the procedure for which department of the European Patent Office responsible to take decisions under Article 106(1) EPC the formalities officer actually acts in order to allow for the conclusion that

the decision was taken by the department responsible for it under the EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The request for reimbursement of the appeal fee is refused.
3. The case is remitted to the Examining Division for further processing.

The Registrar:

The Chairman:

P. Martorana

B. Günzel