



Case Number : T 702/89 - 3.2.1

Decision
of 4 February 1993
correcting errors in the decision
of the Technical Board of Appeal 3.2.1
of 26 March 1992

Appellant :
(Opponent)

Alfred Teves GmbH
Guerickestrasse 7
Postfach 90 01 20
W - 6000 Frankfurt 90 (DE)

Representative :

Dipl.-Phys.Dr. Manitz
Dipl.-Ing., Dipl.-W.-Ing. Finsterwald
Dipl.-Ing. Grämkow Dipl.-Chem.Dr. Heyn
Dipl.-Phys. Rotermond
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Robert-Koch-Strasse 1
W - 8000 München 22 (DE)

Respondent :
(Proprietor of the patent)

ALLIED-SIGNAL INC.
(a Delaware corporation)
Columbia Road and Park Avenue
PO BOX 2245R
Morristown
New Jersey 07960 (US)

Representative :

Lejean, Christian Michel
Bouju Derambure (Bugnion) S.A.
55, Rue Boissonade
F - 75014 Paris (FR)

Decision under appeal :

Decision of the Formalities Officer of the
Opposition Division of the European Patent Office
dated 4 October 1989 deeming the opposition
against European patent No. 0 175 089 as not to
have been filed.

Composition of the Board :

Chairman : F. Gumbel
Members : J.-C. Saisset
P. Alting van Geusau

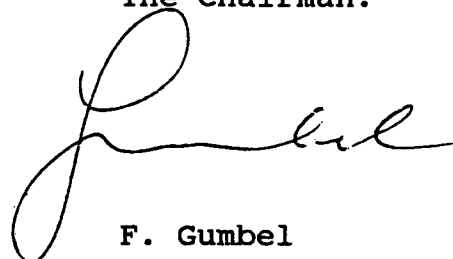
In application of Rule 89 EPC the decision given on 26 March 1992 is hereby corrected as follows:

On page 3 paragraph IX third line from the bottom, the word "Applicant" is substituted for the term "the person having posted the letter".

The Registrar:


J. Rückerl

The Chairman:


F. Gumbel



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File Number: T 702/89 - 3.2.1

Application No.: 85 109 138.9

Publication No.: 0 175 089

Title of invention: Deceleration and pressure sensitive proportioning valve

Classification: B60T 8/28

D E C I S I O N
of 26 March 1992

Proprietor of the patent: ALLIED-SIGNAL INC. (a Delaware corporation)

Opponent: Alfred Teves GmbH

Headword: Proportioning valve/ALLIED-SIGNAL INC.

EPC Articles 99(1), 120, 122; Rules 85(1), 85(2)

Keyword: "Extension of time limits (no)" -
"General interruption or subsequent dislocation in the delivery of
mail (no)" -
"Opposition time limit missed - restitutio (no)"

Headnote

A request for re-establishment of rights by an opponent who has failed to observe the time limit under Article 99(1) EPC for filing the notice of opposition and paying the appropriate fee must be rejected as inadmissible.

BESCHWERDEKAMMERN
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PATENTAMTS

BOARDS OF APPEAL
OF THE EUROPEAN
PATENT OFFICE

CHAMBRES DE RECOURS
DE L'OFFICE EUROPEEN
DES BREVETS

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D E C I S I O N
of 26 March 1992

Proprietor of the patent: ALLIED-SIGNAL INC. (a Delaware corporation)

Opponent: Alfred Teves GmbH

Headword: Proportioning valve/ALLIED-SIGNAL INC.

EPC Articles 99(1), 120, 122; Rules 85(1), 85(2)

Keyword: "Extension of time limits (no)"
"General interruption or subsequent dislocation in the delivery of
mail (no)"
"Admissibility of a request for restitutio in integrum (no)"

Headnote

Headnote follows



Europäisches
Patentamt

European
Patent Office

Office européen
des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

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Summary of Facts and Submissions

- I. European patent No. 0 175 089 was granted on 21 September 1988 (cf. Bulletin 88/38) in respect of European patent application No. 85 109 138.9 filed on 22 July 1985.
- II. Notice of opposition requesting revocation of the patent on the grounds that it did not satisfy the requirements of Articles 54 and 56 EPC was received by the European Patent Office on 22 June 1989. The opposition fee was paid the same day.
- III. On 25 July 1989, the Formalities Officer of the Opposition Division notified the Opponent in accordance with Rule 69(1) EPC that the notice of opposition was deemed not to have been filed as, in the case in question, the time limit for opposition had expired on 21 June 1989, i.e. one day before it was received.
- IV. In a letter received on 12 August 1989 the Opponent requested re-establishment of rights under Article 122 EPC. He explained that he had posted the notice of opposition and made arrangements to pay the appropriate fee on 16 June 1989, i.e. five days before expiry of the opposition period; in so doing, he had taken all due care since - as is borne out by the examples submitted - the normal postal delivery time was three days for items sent abroad and only one day between Frankfurt am Main and Munich. The one-day delay was not therefore due to failure on his part to take all due care, but to an irregularity in the postal services.
- V. In a decision dated 4 October 1989, the Formalities Officer of the Opposition Division refused the request for re-establishment, mainly on the basis of decision G 1/86, OJ EPO 1987, 447, in which a request by the Opponent for

re-establishment of rights, made after failing to observe the time limit for appeal, had expressly been deemed inadmissible by the Enlarged Board of Appeal. Consequently, and pursuant to Article 99(1) EPC, he decided that the notice of opposition was deemed not to have been filed and that the fee for re-establishment of rights and the opposition fee had to be refunded.

VI. On 28 October 1989 an appeal was lodged against this decision and the appeal fee was paid at the same time. The appeal was assigned to Technical Board of Appeal 3.2.1.

In his Statement of Grounds of Appeal received on 14 February 1990, the Appellant (Opponent) requested in the main that his notice of opposition be deemed admissible and, in the alternative, that he be allowed to avail himself of the provisions of Article 122 EPC to enable him to proceed with the said opposition.

VII. In a communication dated 12 June 1991, the Board informed the parties that it was suspending proceedings pending a decision by the Enlarged Board of Appeal in separate proceedings (T 272/90, OJ EPO 1991, 205) on the question of whether the Legal Board of Appeal was responsible for the examination of appeals against decisions taken, as in the present case, by Formalities Officers pursuant to Rule 9(3) EPC. In Decision G 2/90, OJ EPO 1992, 10, the Enlarged Board of Appeal ruled that the provisions relating to competence in Article 21(3)(a) and (b) and (4) EPC were not effected by Rule 9(3) EPC.

The proceedings were resumed in the present case once it was confirmed that Technical Boards of Appeal were alone competent to examine appeals of this kind.

VIII. On 12 December 1991 the parties were summoned to oral proceedings, in preparation for which the Board informed them of its preliminary opinion in a communication of the same date.

IX. At the oral proceedings held on 26 March 1992, the Appellant developed the line of argument set out in his submissions and put forward a fresh argument.

Starting with his auxiliary request for re-establishment of rights, he did not contest the content of the Enlarged Board of Appeal's decision cited by the Opposition Division (cf. point V above), but maintained that the decision represented a step forward as far as an Opponent's rights were concerned in that it acknowledged the previously contested principle of an Opponent's entitlement to avail himself, in part at least, of the provisions of Article 122 EPC. Stating that this article should not be interpreted as being applicable only to the Applicant and Patent proprietor, the Enlarged Board introduced a change in practice the tendency of which was to give an Opponent the same rights as those available to the Applicant and Patent proprietor. This development should be taken further and the Opponent's request for re-establishment of rights should be allowed where, through no fault of his own, he has been unable to observe the time limit for opposition. More specifically, the Appellant maintained that even if this development were not to result in the Opponent's being able to avail himself in general of Article 122 EPC, he should at least be so entitled where, as in the present case, failure to observe the time limit is due simply to an irregularity in an administrative service - in this case, the post - and the ~~Applicant~~ has made all the necessary arrangements.

person having posted the letter

As regards his main request, he repeated the arguments contained in his Statement of Grounds and based on the

combined provisions of Article 120 and Rule 85(2) EPC. He did not contest the fact set out by the Board in its communication of 12 December 1991 and that at the time of expiry of the time limit for opposition there had been no general interruption in the delivery of mail. He nevertheless maintained the point of view set out below. It emerged from his enquiries of the postal authorities that there was no known cause for the delay in question. He inferred from this that such irregularities occurred in isolation but nevertheless sufficiently frequently to be described as a general dislocation in the delivery of mail, enabling the time limit to be extended by one day in accordance with Rule 85(2) EPC.

In a further attempt to have his notice of opposition declared admissible, he submitted a new argument drawn this time from Rule 85(1) EPC interpreted with the aid of point 14.02 of the "Manual of patent practice in the U.K. Patent Office", the relevant page of which he submitted as evidence. In this connection, he pointed out that Rule 85(1) EPC provided that "if a time limit expires on a day on which ... ordinary mail is not delivered ... the time limit shall extend until the first day thereafter ...". The UKPO manual stipulates that if the patent application is filed by post, it is deemed to have been filed "when the letter containing it would be delivered in the ordinary course of post". The Appellant considers that the concept of "ordinary mail" which appears in both texts should enable the Office to extend the time limit for receipt of mail which, although despatched, has not been received within the normal delivery period, as in the present case.

- X. The essence of the Respondent's (Patent proprietor's) rejoinder was that the fact that the notice of opposition was not admissible did not mean that the Opponent's rights

were irrevocably lost; furthermore, it was up to whoever despatched the mail to include in the delivery period a safety margin in addition to the normal time required: since the Opponent had failed to do so, he had not taken all due care. He also maintained that the Opponent had not provided evidence of the date of posting the mail in question or proof that the requirements of Article 85(2) EPC had been satisfied. He accordingly requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal complies with Article 106 to 108 and Rules 1(1) and 64 EPC and is therefore admissible.
2. In order to have his notice of opposition declared admissible, the Appellant relied in turn on Article 120 in conjunction with Rule 85(2) EPC, and then Rule 85(1) EPC.
 - 2.1 Concerning the argument derived from Article 120 and Rule 85(2) EPC.
 - 2.1.1 As the Board had explained to the parties in its communication dated 12 December 1991, it regards as admissible a request for extension of the time limit on the basis of Article 120 in conjunction with Rule 85(2) EPC if the time limit expired, as the Appellant claims, during a dislocation in the delivery of mail. Decision J 11/88, OJ EPO 1989, 433, cited by the Appellant, constitutes a precedent in this respect.
 - 2.1.2 As regards an assessment of the merits of such a request, the same decision stressed that, even outside periods of general interruption or subsequent dislocation in the delivery of mail duly indicated by the President of the

Office, it was a question of fact which the Board of Appeal had to decide on the basis of any credible information available. In practice, this decision has the effect of obliging the European Patent Office to seek evidence and credible information in order to judge whether a delay resulting from an interruption or subsequent dislocation in the delivery of mail qualifies as a "general interruption" within the meaning of Rule 85(2) EPC (cf. point 2 of the Reasons for the Decision), in the absence of a notice issued by the President of the Office (cf. point 5 of the Reasons). As for the actual delay, the decision implies that it must have been caused by an interruption or subsequent dislocation in the delivery of mail (cf. points 2 and 3 of the Reasons). Only the "general" nature of the interruption was the subject of debate.

In the present case, the Appellant claims that the notice of opposition and the instructions regarding payment of the opposition fee, both dated 15 June 1989, were posted on 16 June 1989. They were received at the European Patent Office on 22 June 1989.

The Respondent contested the very existence of a delay, alleging that the Opponent had not furnished proof that the mail in question was posted on 16 June. However, the Board takes this fact for granted. It considers that the Respondent has not given any serious grounds for doubting the Appellant's good faith, that he only put forward this argument late in the proceedings whereas he could have arranged for the litigious envelope to be submitted as evidence during the one-year period in which the office retains envelopes and, finally, that the general practice as regards despatching business mail is to post it on the date which it bears or on the following day.

The Appellant, for his part, stated that enquiries made by him of the postal authorities had revealed that there was no known reason why six days had elapsed between the date of despatch and the date of receipt of the documents in question.

The Board acknowledges that six days for delivery between Frankfurt am Main and Munich is unusual and that, as the Appellant concludes, this was probably due to a postal delay attributable to an unknown factor. However, although the cause of the delay is not known, it has been established that there was no general interruption and consequently no subsequent dislocation in the delivery of mail within the meaning of Rule 85(2) EPC at the time.

However, in decision J 4/87, OJ EPO 1988, 172, the Board ruled that the time limit provided for in Rule 85(2) EPC could not be extended just because there was a postal delay. This decision, like J 11/88 mentioned above, states that, given the wording of Rule 85(2) EPC, the delay must originate in a general interruption or subsequent dislocation in the delivery of mail.

As none of the requirements have been met in the present case, the Board, following the jurisprudence in the above precedent decisions, rules that there are no grounds for extending the time limit as requested under Article 120 and Rule 85(2) EPC.

2.2 Concerning the argument derived from Rule 85(1) EPC

The Board notes first of all that the provisions of said rule limit its scope to cases where the time limit for which an extension is sought expires on a day on which one of the filing offices of the European Patent Office is not open or on which ordinary mail is not delivered there. Once again, none of the requirements have been met.

Wednesday, 21 June 1987 was in point of fact a working day when all the Office departments were open to the public and mail was received as normal. It is true that Rule 85(1) EPC refers to the delivery of ordinary mail, and the "Manual of patent practice in the U.K. Patent Office" provides that "when the filing is done by post the documents are deemed to have been filed when the letter containing it would be delivered in the ordinary course of post".

It should however be noted that the conditions governing expiry of time limits in the European Patent Convention and the above-mentioned manual are based on two contrasting points of view. In the case of the first, the EPC, the relevant criterion is the date of receipt: in other words, the addressee - in this case the European Patent Office - must have taken note of the sender's wish prior to expiry of the applicable time limit. In the case of the second the relevant criterion is the date of despatch: here it is sufficient for the sender to have despatched his mail prior to expiry of the applicable time limit, allowing for the normal postal delivery time. The system adopted in the EPC, based on the date of receipt, has been adjusted to take account of the sender's legitimate interests (cf. for example, Article 122 EPC or, more specifically, Rule 85 EPC). However, such adjustments could not lead, as suggested by the Appellant, to abandonment of this system in favour of that based on the date of despatch which, although proposed during the preparatory work on the European Patent Convention (cf. for example, Minutes of the 9th meeting of Working Party I BR 135/71, point 158 of the Inter-Governmental Conference on the setting up of a European system for the grant of patents), was deliberately ruled out by the authors of the EPC as can be seen from the wording of Article 120 EPC and consequently from the wording of Rule 85(1) EPC.

The Board accordingly decides that Rule 85(1) EPC cannot apply in the present case.

2.3 By analogy with Decision J 4/87 mentioned above and leaving aside Article 122 EPC which will be examined in point 3 below and Rule 85(1) and (2) EPC which is not applicable in the present case, the Board considers all in all that there is nothing in the European Patent Convention to allow a time limit to be extended because of a delay in the delivery of mail.

2.4 For all the foregoing reasons, the Board refuses the request that the opposition be declared admissible.

3. Concerning the request for re-establishment of rights

3.1 The requirements relating to admissibility of a request under Article 122 EPC filed by the Opponent were set out in part in above-mentioned Decision G 1/86 of the Enlarged Board of Appeal. The Board shares the Appellant's opinion that this decision represented a step forward as far as the Opponent's rights were concerned in that it enabled him to benefit from the provisions of Article 122 EPC in the event of late filing of the Statement of Grounds of Appeal, whereas previously this would appear to have been limited to the Applicant and Patent proprietor.

However, the Enlarged Board's reasons for this decision were based on an analysis of the differences between the rights which can legitimately be invoked by the Opponent and the Applicant or Patent proprietor, depending on whether the legal process has begun or not (cf. point 9 of the decision). This process begins in appeal proceedings when the appeal has been filed and the appropriate fee paid (cf. point 8, second sub-paragraph).

For the same reasons as those given by the Enlarged Board of Appeal, the present Board maintains that, in accordance with Article 99(1) EPC, the legal process begins in opposition proceedings when the notice of opposition is filed and the appropriate fee is paid.

Continuing with its analysis, the Enlarged Board decided that, since the legal process had given rise to the appeal, the Opponent should be granted the same rights under Article 122 EPC as the Applicant or Patent proprietor in respect of the filing of the Statement of Grounds of Appeal and the other time limits provided for in the appeal procedure, because failure to observe the procedural time limits may involve the Opponent too in a loss of rights (cf. point 10 of the Reasons).

On the other hand, on the question of time limits connected with the initiation of the legal process, the Enlarged Board pointed out that, in the course of the preparatory work on the European Patent Convention, a majority of the Working Party which had looked into the scope of re-establishment of rights had considered that re-establishment should not apply to the Opponent because he had other means of availing himself of his rights, in particular by bringing an action for revocation before the national courts. Clearly, under similar circumstances where it was not possible to observe the time limits connected with the initiation of the legal process, an Applicant or Patent proprietor wishing to appeal against a decision to refuse him a patent or to revoke it would irrevocably have lost his rights were re-establishment not possible.

It is true that in the above-mentioned decision the matter was only referred to the Enlarged Board once the Statement

of Grounds of Appeal had been filed. This naturally prompted it to base its reply on an analysis of the circumstances specific to the appeal proceedings (cf. inter alia points 5 to 11 of the Reasons). However, when the ad hoc Working Party held that the Opponent should not be entitled to have his rights re-established because he had other means of availing himself of those rights, it did not intend such exclusion to apply only to the specific case of non-observance of the time limits for appeal but to all cases of failure to observe time limits before the European Patent Office. The same generalisation is accordingly found in Article 122 EPC, which does not apply only to appeal proceedings.

- 3.2 Consequently, the request for re-establishment of rights by the Opponent, who has failed to observe the nine-month time limit under Article 99(1) EPC for filing the notice of opposition and paying the appropriate fee, must be rejected as inadmissible, notwithstanding any arguments put forward to explain the reasons for not complying with the time limit, which are a matter for consideration in connection with an assessment of the merits and not the admissibility of the request.

Order

For these reasons, it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

S. Fabiani

F. Gumbel