

Publication in the Official Journal Yes / No

File Number: T 315/90 - 3.4.2
Application No.: 80 902 026.6
Publication No.: 0 038 339
Title of invention: Process for transferring and sterilizing a solution

Classification: B01D 13/00

D E C I S I O N
of 18 March 1991

Proprietor of the patent: Baxter Travenol Laboratories, Inc.

Opponent: Fresenius AG

Headword:

EPC Articles 108, 122(2)(3), Rule 65(1)

Keyword: Inadmissible re-establishment of rights
Lack of due care

Headnote



Case Number : T 315/90 - 3.4.2

D E C I S I O N
of the Technical Board of Appeal 3.4.2
of 18 March 1991

Appellant :
(Opponent)

Fresenius AG
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Representative :

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Respondent :
(Proprietor of the patent)

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One Baxter Parkway
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Representative :

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Decision under appeal :

Decision of the Opposition Division of the
European Patent Office dated 7 December 1989
posted 15 February 1990 rejecting the opposition
filed against European patent No. 0 038 339
pursuant to Article 102(2) EPC.

Composition of the Board :

Chairman : E. Turrini
Members : C. Payraudeau
M. Chomentowski

Summary of Facts and Submissions

- I. By a decision given orally on 7 December 1989 and notified to the parties on 15 February 1990, the Opposition Division rejected the opposition filed against European patent No. 038 339 (application No. 80 902 026.6) by the Appellants.
- II. The Appellants filed an appeal against this decision on 14 April 1990 and paid simultaneously the appeal fee.
- III. On 14 June 1990, the Appellants filed a request for a two month extension of time stating that they would consider the request as granted if no refusal was communicated by the EPO.
- IV. The Appellants subsequently filed a statement of grounds on 3 August 1990.
- V. On 10 August 1990, the Registrar of the Board of Appeal sent to the Appellants a communication pursuant to Article 108 and Rule 65(1) EPC informing them that as the statement of grounds had been filed after the expiry of the four month period provided for in Article 108 EPC it was to be expected that their appeal would be rejected as inadmissible and drawing their attention to the remaining possibility of filing a request for re-establishment of rights.
- VI. On 10 October 1990, the Appellants filed a request for re-establishment of rights and paid simultaneously the corresponding fee.

- VII. In the grounds filed in support of the request, the Appellants' attorney explained that when his clerk presented him the letter asking for an extension of time, he did not realise that the time limit concerned was not extensible and thought it was a usual time limit of an examination proceeding. As the circumstances of the present case were practically identical to those of the case T 281/87 of 14 July 1988 in which a Board of Appeal had granted the request for re-establishment of rights, considering that such an oversight was an excusable mistake which could occur although the attorney had taken all due care, the Appellants requested that their request be granted on the same grounds as those given in this former decision.
- VIII. In a communication sent on behalf of the Board, the Rapporteur expressed the opinion that if it could be eventually considered that the error made by the Appellants' attorney had occurred in spite of the fact that he had taken all due care it remained necessary to determine first whether the application for re-establishment of rights was itself admissible.

The Appellants seemed to have considered that the date of removal of the cause of non-compliance was automatically the date of receipt of the letter of the Registrar of the present Board of Appeal dated 10 August 1990 drawing his attention to the loss of rights, so that the application filed on 10 October 1990 fulfilled all the conditions of Article 122(2) EPC. However, in the Board's opinion, "due care" was a permanent obligation which must be exercised not only at the moment when the time limit has not been observed but also subsequently.

This means that the date of the removal of the cause of non-compliance is not necessarily the date when an

applicant for re-establishment of rights has effectively discovered that he had failed to observe a time limit but the date when he should have discovered it if he had taken all due care.

In the present case, the Appellants' attorney had posted the statement of grounds on 30 July 1990 and should have, at the latest on this date, reopened the file of the case.

The Appellants' attorney was, therefore, invited to fully disclose to the Board all the circumstances relating to the preparation of this statement of grounds and to explain why he had not been able, while taking all due care, to notice the error which had been made.

- IX. In answer to this communication the Appellants' attorney explained that he had entrusted the preparation of the statement of grounds to an external collaborator to whom he had only given the technical part of the file, this being confirmed by a statement signed by this collaborator and annexed to the answer.

This collaborator had prepared the statement of grounds within the time limit allotted to him and this statement was presented for signature to the Appellants' attorney before the expiry of the time limit noted in the attorney's calendar. Since he had every confidence in the technical abilities of his collaborator, he did not have any reason to re-open the file at this stage and due to this conjunction of circumstances he had not been able to notice the unobservance of the time limit which had occurred.

- X. The Respondent did not comment on the request for re-establishment of rights.

Reasons for the Decision

1. In the present case, the statement of grounds of the Appellants having been filed more than four months after the date of notification of the appealed decision, the appeal should be rejected as inadmissible under Article 108 and Rule 65(1) EPC unless the Appellants are re-established in their rights.
2. The Enlarged Board of Appeal has decided in the case G 1/86 (OJ EPO 1987, 447) that an Appellant who is an Opponent may validly file an application for re-establishment of rights when he has omitted to observe the time limit provided in Article 108 EPC for filing the statement setting out the grounds of appeal.
3. The present Board of Appeal considers, therefore, that the Appellants were entitled to file an application for re-establishment of rights.
4. Before examining the substance of the case, the Board should first determine whether the application itself satisfy the conditions of Article 122(2) and (3) EPC.
5. In the present case, the written application for re-establishment of rights states the grounds on which it is based and was filed on 10 October 1990, the fee for re-establishment of rights being paid on the same date. The two conditions of Article 123(3) are thus satisfied.

However, this application can only be admissible if the condition of Article 122(2), first sentence, is also met, i.e. it must have been filed within two months of the removal of the cause of non-compliance.

6. As stated in the communication of the Board, the date of the removal is not necessarily the date of receipt of the communication of the Registrar notifying the loss of rights; it is more precisely the date at which the Appellants should have discovered the committed error if they had taken all due care, due care being a permanent obligation.
7. In the present case, the Appellants' attorney admitted that he had entrusted the case to an external collaborator and that because he had every confidence in him he had no reason to re-open the case when the statement of grounds were presented to him for signature.
8. The Board remarks that if according to the jurisprudence of the Board of Appeal it is admitted that a professional representative may entrust an assistant with routine tasks, he cannot relieve himself of responsibility for carrying out tasks which by reason of his qualification falls upon him personally. If he delegates such tasks to an employee, and if due to this fact an error is committed which would not otherwise have occurred, the representative cannot establish that he took all due care required by the circumstances (see decision J 05/80, OJ EPO 1981, 343).
9. The Board of Appeal is of the opinion that the Appellants' attorney in signing the statement of grounds prepared by his external collaborator without consulting the file, which would have enabled him to notice that the time limit for filing this statement had not been observed, did not take the due care required in such circumstances.

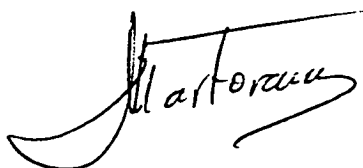
10. The Board, therefore, considers that the date at which the Appellant's attorney would have discovered that the time limit had not been observed if he had taken the necessary due care, that is the date of removal of the cause of non-compliance, was 30 July 1990, when the Appellants' attorney signed the statement of grounds.
11. The application for re-establishment of rights having been filed on 10 October 1990, i.e. more than two months from the removal of the cause of non-compliance, this application does not satisfy the condition of Article 122(2), first sentence and is, therefore, inadmissible.
12. Since the application for re-establishment of rights cannot be granted the appeal should also be rejected as inadmissible for non-compliance with Article 108, last sentence, EPC, in application of Rule 65(1) EPC.

Order

For these reasons, it is decided that:

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

The Registrar:



P. Martorana

The Chairman:



E. Turrini

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