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Decision of Technical Board of Appeal 3.3.7 dated 30 March 2001

T 777/98 - 3.3.7

(Translation)

Composition of the board:

Chairman: R. E. Teschemacher

Members: G. Santavicca

R.J. Young

Patent proprietor/Respondent: Vianova Resins AG

Opponent/Appellant: BASF Coatings AG

Headword: Re-establishment/BASF

Article: 122 EPC

Keyword: "Standard delivery times" - "Due care - application of national standards (left open)" - "All due care (no)"

Headnote:

I. If a party to proceedings requests re-establishment of rights on the basis that a document missed an EPO time limit because it did not arrive within the standard delivery time, that party will have to prove that the form of postage used would normally have ensured that the document would reach the EPO on time.

II. Consideration of whether the party exercised due care with regard to the time limit, given that he assumed the document in question would be delivered by Deutsche Post AG within the standard delivery time (left open).

Summary of facts and submissions

I. In the decision mailed on 29 May 1998, the opposition division found that European patent No. 0 642 558 in amended form satisfied the Convention requirements.

II. In their submission received on 29 July 1998, the opponents filed an appeal and paid the appeal fee. The statement of grounds was received on 9 October 1998.

III. In a communication dated 15 October 1998, the board registry informed the appellants (opponents) that the statement of grounds had been received after the time limit. It was therefore likely that the appeal would be rejected as inadmissible.

IV. In the submission received on 30 November 1998, the appellants applied for re-establishment of rights in respect of the non-observed time limit for submitting the statement of grounds, and paid the fee for re-establishment.

V. The appellants' representative argued in the application for re-establishment that the statement of grounds had been put in the postbox of Ratingen's main post office on 7 October 1998 before the scheduled collection at 19.00 hrs. He supplied evidence to back up this claim. Given the usual delivery times and in the light of his previous experience, he assumed that the letter would be delivered to the EPO the next day, ie in time. He referred to the relevant German jurisprudence, which indicated that a party could make full use of the available time and assume that the postal service would deliver documents with a time limit within the standard delivery time.

VI. The respondents contested this on the grounds that the appellants had not exercised due care in the circumstances. They had been told over the phone by the post office that the standard delivery time for mail within Germany was one to two days. It therefore seemed foolhardy to post a statement of grounds on the eve of the time limit. In fact, it lay within the representative's duty of care to fax the statement of grounds or to send it by a courier who would guarantee next-day delivery. One way

or another, the appellants could have called the EPO on the day of the time limit's expiry to find out whether the submission had been received on time.

VII. In its communication in advance of the oral proceedings requested by both parties on an auxiliary basis, the board pointed out that there was no proof such as information from the postal service to back up the appellants' claim that the standard delivery time for mail from Ratingen to Munich was one day. Mail was delivered to the EPO at around 08.00 hrs each morning. Over the course of the day, the only other mail delivered was express post. Another issue was whether the national jurisprudence referred to by the appellants could be applied to the procedure before the EPO.

VIII. In response to this and at the oral proceedings on 30 March 2001, the appellants added the following:

(i) They were entitled to use to the full the time limit available to provide the statement of grounds. In fact there was good reason for this as the representative had had to confer with the client after starting work on the submission. As proof that the document would have reached the EPO if standard delivery times had applied, they submitted to the board, at the oral proceedings, information made available by Post AG in January 2001. This stated that letters posted in time for the last collection would be delivered the next working day. This applied to Germany as a whole. Recent surveys carried out by an independent research institute showed that about 96% of letters were delivered within the standard time; over 99% were delivered by the second working day after posting. Weather and traffic conditions, technical problems and human error meant that delivery times would never reach 100%. No indication of how long it would take a letter to get from Ratingen to the EPO under the conditions applying in the case in question was contained in the Post AG information.

(ii) The postal service's claims had been confirmed by the representative's prior experience, ie that submissions addressed to the patent authorities in Munich regularly arrived within a day. Non-observance of a time limit had never arisen

before as a result of delayed delivery. Likewise, post from the EPO also reached the attorney's office in one day. Examples were given to back up this claim.

(iii) Internal administrative procedures at the EPO must not be allowed to impinge on the parties' time limits. The EPO had to see to it that it actually received all mail arriving in Munich that day. The appellants referred to the practice at the German Patent and Trade Mark Office, which, they claimed, collected its post twice - at 09.00 and 12.00 hrs - to ensure that all mail was received on the day of delivery.

(iv) The case in question involved a delivery within Germany. This meant that the conditions prevailing in Germany needed to be taken into consideration, and equally that the same degree of care needed to be exercised as applied in Germany for the observance of time limits before administrative bodies and courts. Nor would another means of delivery have provided the parties with an absolute guarantee that the documents would get there in time.

(v) The principle of due care did not therefore oblige the appellants to choose an alternative means of delivery or to check that the documents had arrived at the EPO on time. Obligations of this kind would adversely affect the parties' legal certainty.

IX. The respondents replied as follows:

(i) Under the circumstances, the documents only had 13 hours to reach the EPO. It was therefore unlikely that the submission would be delivered on time, irrespective of the information provided by the post office. The respondents had enquired with the post office by phone and had been informed that the standard delivery time for letters within Germany was one to two days. Even if 95% of letters were delivered within one day of posting, this statistic could not be extrapolated to the expected delivery time of a letter to the EPO posted at 19.00 hrs in Ratingen. By sending the document by standard post, the appellants had failed to observe due care; nor had they made arrangements for a faster method of delivery or checked with the EPO that the document had arrived. Lack of due care was also apparent on the part of the attorney in taking the 95% chance of delivery as a guarantee that the document

would get there in time. Nor was there any special reason why the statement of grounds should have been sent off on the eve of the time limit. The submission had been completed back on 30 September 1998 and could have been mailed on that day.

(ii) The previous experience of the appellants' representative had not been substantiated and did not constitute a verifiable basis for making assumptions about standard delivery times.

(iii) The comparison made by the appellants with the German Patent and Trade Mark Office was irrelevant. If this office collected its own mail, it was also responsible for transporting it from the local delivery office. The EPO, on the other hand, had its mail delivered, so the post office was responsible for getting mail to it from the local delivery office.

(iv) The benchmark for due care generally adopted in Germany could not simply be applied direct to the EPO. It was not appropriate to take Article 125 EPC as a basis, because then the principle would have to be **generally** recognised throughout the EPC contracting states. The appellants had not referred to the legal situation in other states.

(v) If the appellants had really had good reason to use the time limit to the full, it would have been reasonable to expect them to adopt simple expedients - standard ones, moreover, in EPO procedures - to ensure on-time delivery, such as express mail or fax, and checking with the Post Room.

X. The appellants requested that their rights in respect of the time limit for filing the statement of grounds be re-established, that the decision under appeal be set aside, and that the patent be revoked.

The respondents requested that the application for re-establishment be refused and the appeal rejected as inadmissible.

Reasons for the decision

1. The decision mailed on 29 May 1998 was deemed to have been received on 8 June 1998 (Rules 78(2), 83(2) EPC). Accordingly the time limit for submitting the statement of grounds was 8 October 1998 (Article 108, third sentence, in conjunction with Rule 83(4) EPC). The statement of grounds, which arrived the following day, was therefore late, with the result that the appeal is inadmissible (Rule 65(1) EPC). Re-establishment of rights in respect of the time limit is permissible (G 1/86, OJ EPO 1987, 447; Guidance for parties to appeal proceedings and their representatives, OJ EPO 1996, 342, point 1.5). There do not appear to be formal deficiencies in the application for re-establishment of rights.

2. However, the appellants have not shown that the time limit was missed in spite of all due care required by the circumstances having been taken (Article 122(1) EPC).

2.1 The application for re-establishment is based primarily on the appellants' assumption that the statement of grounds would have reached the EPO before the time limit's expiry if the standard delivery period had been adhered to.

2.2 However, the appellants did not conclusively show how long the standard delivery time was under the prevailing circumstances. In particular, they did not demonstrate exactly what route the documents would have taken when sent by the usual means.

2.2.1 The appellants submitted information supplied by Post AG as proof of the standard delivery time. This information was first presented at the oral proceedings, even though it had been in the appellants' possession for more than two months previously and even though the parties had been asked to submit any further observations at the latest one month before the oral proceedings. However, the board did not reject this evidence on the grounds that it had not been submitted in due time under Article 114(2) EPC, as the respondents were in a position to express an opinion on its contents, so taking it into consideration did not hold up the proceedings. Furthermore, this information corresponds in part with what the

respondents themselves established when they called the post office.

2.2.2 The post office's information cannot, for several reasons, suffice to show that when the statement of grounds was posted there was still enough time for the document to reach its destination within the standard delivery time.

2.2.2.1 First, this information is based on current calculations and therefore provides no insight into the situation in October 1998 when the statement of grounds was submitted. There are no grounds for supposing that the situation has not changed over more than a two-year period.

2.2.2.2 Second, the information relates very generally to letters sent in Germany and has no bearing whatsoever on the particular circumstances surrounding delivery in this case. Clearly, mail delivery times vary depending on the geographical distance involved, how fast and reliable the means of transport are, and how often the mail is handled. The time of posting can also play an important role in determining whether mail gets to its destination the following day. If mail is transported part of the way on the day of posting, the chances are higher that it will be delivered the next day. In the absence of hard facts, the board could only speculate on whether, or with what degree of probability, the statement of grounds would have reached the EPO in time in this case. The broad claim made by the post office that 96% of mail is delivered on the next working day does not reflect what happens in individual cases. As stated, different factors come to bear on different consignments, which suggests that delivery times vary accordingly. Consequently the board has no real basis for assuming that 96% of the mail put in the postbox at the main post office in Ratingen at around 19.00 hrs reaches the EPO the following day. Similarly there is no indication of how high the probability of first-day delivery is in relation to the various factors that come to bear. Although Post AG makes the general claim that letters posted in time for the last collection are delivered the next working day, one should not forget that this does not always happen. A similar conclusion is suggested by the information which the respondents passed on after receiving it from the post office over the phone, which indicates that the standard delivery time within Germany is one to two days (see also *Schulte*, fifth edition, 1994, Article 123 German Patent

Law (PatG), point 40, referring to the Federal Court of Justice publication BGH NJW 1990,188).

2.2.3 The parties have conflicting opinions about whether the appellants, taking into account the logistics of the postal system, could reasonably have assumed that a letter posted before 19.00 hrs in Ratingen would be delivered the next day in Munich. The board has no concrete evidence to support the appellants' submission and show that under normal circumstances the documents would have reached the EPO in time by the postal means chosen. However, the onus was on the appellants to present and to prove the facts of the case, and thereby demonstrate that due care was exercised (Article 122(3), first sentence, EPC, *Singer/Stauder*, second edition, 2000, Article 122 EPC, point 120).

2.2.4 For the above reasons, the present case cannot be compared to the cases from German jurisprudence cited by the appellants. The facts of a case he cited, German Federal Constitutional Court decision (BVerfGE) 62, 216, showed that information was available from the post office tracking the route actually taken by the mail from the place of posting to the destination and its handling at the destination, enabling the standard delivery time to be determined (*loc. cit.*, page 218 ff). Nor can the appellants cite Federal Patents Court jurisprudence to support their case. In one instance, it was held that the letter should have been received within the standard delivery time of **two** days (Federal Patents Court (BPatG) in Bl.f.PMZ 1979,180; and Federal Patents Court decision (BPatGE) 21, 80); in another, posting on the day before was deemed to be sufficient, but the distance involved was incomparably shorter than in the present case and the letter had been posted two hours earlier at a post office at a railway station from which several direct trains were still due to depart to Munich. The appellants did not present comparable circumstances. Nowhere in German jurisprudence, at any rate, does a general ruling emerge on next-day delivery where there is no hard evidence of the route taken by the mail (see the numerous examples cited in *Baumbach/Lauterbach/Albers/Hartmann*, 59th edition, 2001, Article 233 of the Code of Civil Procedure (ZPO), points 37, 39, 154 ff, which note recent longer delivery times, particularly on long north-south routes, *loc. cit.*, point 39).

2.3 The appellants' representative's own experience also fails to provide any support for the claim that, under the circumstances, one was entitled to assume the letter would be delivered punctually if the standard delivery time had been adhered to. As emerged at the oral proceedings, this experience was primarily based on the fact that the attorney's office had not missed any time limits in the past on account of postal delays. The representative did not however claim that submissions were always posted the evening before the time limit; for example, the appeal was received ten days before the time limit and the application for re-establishment of rights more than two weeks before. The files of the department of first instance show that the reply to the summons - to which a time limit also applied - was faxed. As any risk was obviously avoided in other cases, the fact that no loss of rights had previously been incurred is irrelevant. The EPO communications received at the representative's office the day after posting and presented at the oral proceedings do not back up the appellants' conclusions either: first, the EPO despatches its post over the course of the afternoon; second, asserting that delivery occurs in some cases on the day after posting is of no significance. If the appellants had submitted their examples in time, the respondents might have been able to come up with other examples of mail not received by the EPO until the second day after posting, or later.

2.4 Given the facts, it is debatable whether German jurisprudence, which holds that a party to proceedings may rely on standard delivery times, can be transposed to non-compliance with time limits in proceedings before the EPO. Without pursuing the matter here, there is good reason why the degree of due care mentioned in Article 122(1) EPC refers to the exercise of **all** due care required by the circumstances and deliberately deviates from national law (*Singer/Stauder*, loc. cit., Article 122 EPC, point 66, with other references). In this context, the question arises of whether the available and usual means of ensuring punctual delivery, in conjunction with the additional provision under Rule 84a EPC for ruling out loss of rights because of delayed delivery, affect the interpretation of what due care involves in practice (see interlocutory decision T 667/92 of 10 March 1994, not published in OJ EPO, Reasons point 5, on the use of fax).

2.5 The appellants are also not in a position to claim that the EPO prevented the statement of grounds from reaching it in time.

2.5.1 The appellants' assumption that the EPO is generally obliged to treat mail arriving at the local delivery office over the course of the day as having been received on that day is unsound, even as far as the basic legal premise is concerned. Mail delivered through the postal service is only deemed delivered once it has reached the addressee, as only then does the addressee have access to it. The situation is different if the addressee has a post-office box, as he can access the mail as soon as it has been placed in the box. However, the EPO has no such post-office box, and since its mail is delivered through the postal service it is only deemed delivered once it reaches the EPO; no legal significance is attached to the time when it reaches the local delivery office. The only difference between mail deliveries to the EPO and deliveries of ordinary letters in other cases is that the volume makes it necessary to use a truck rather than a bicycle or car. To ensure that mail arriving at the local delivery office over the course of a day is delivered that day, it must be sent express.

2.5.2 The parallel drawn by the appellants with German Federal Constitutional Court decision (BVerfGE) 62, 216 is likewise not ad rem.

2.5.2.1 In the cited case, it was established that the document had reached the local delivery office within the standard delivery time while the night and morning post was being sorted. The judicial authorities only collected their mail once a day, shortly after 08.00 hrs, before sorting was over at about 09.00 hrs. The Federal Constitutional Court deemed the document to have arrived on time.

The late arrival was explained by the addressee's non-standard practice of collecting its post before sorting had been completed. It was held that citizens should not be put at a disadvantage if an authority held up the otherwise punctual delivery of a document by having its own post collection service, and put citizens in a worse position on account of its organisational arrangements than if the mail had been delivered through the postal service.

2.5.2.2 Nothing comparable has been presented, or become apparent in any other way, in the present case. The EPO receives its mail through the post and does not interfere with the internal workings of the postal service. As a rule, post is delivered once a day, a fact anyone submitting documents with a time limit should bear in mind. Furthermore, there does not seem to be anything out of the ordinary about delivery at 08.00 hrs. One can also assume that the postal service is organised in such a way that the various workflows dovetail with one another; no reasons for thinking otherwise have been presented. One way or another, the responsibility for choosing the most appropriate logistical means of getting mail from the postbox to the addressee - the basis on which standard delivery times are calculated - lies with the postal service (see German Federal Constitutional Court decision (BVerfGE) 62, 216, 221), not the EPO.

Order

For these reasons it is decided that:

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