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DEC 17 2007

OFFICE OF PETITIONS

In re Application of :
Wilkey et al. :
Application Number: 10/984,297 : DECISION ON PETITION
Filing Date: 11/09/2004 :
Attorney Docket Number: :
210590US :

This is a decision on the "REQUEST FOR RECONSIDERATION OF PETITION DECISION" filed on November 13, 2007, which is treated as a renewed petition under 37 CFR 1.10(d), requesting that the above-identified application be accorded a filing date of November 8, 2007, rather than the presently accorded filing date of November 9, 2007. This is also a decision on the concurrently-filed petition for expedited treatment under 37 CFR 1.182.

The petition for expedited treatment is GRANTED.

The petition under 1.10(d) is DENIED.¹

BACKGROUND

On November 9, 2004, the application was filed.

On June 22, 2007, a petition under 37 CFR 1.10(d) was filed, requesting that the application be accorded a filing date of November 8, 2004, rather than the currently-accorded filing date of November 9, 2004.

On July 16, 2007, the petition was dismissed.

On September 19, 2007, a renewed petition was filed.

On October 5, 2007, the renewed petition was dismissed.

¹ This is a final agency action. See MPEP 1002.02.

On November 13, 2007, the present request for reconsideration was filed, along with a petition for expedited treatment.

Petitioners again assert that on November 8, 2004, the application was prepared at petitioner Chevron Phillips Chemical Company's (hereinafter CPChem) offices and placed in a drop box for pickup by petitioner's courier, Ridgeway's. Petitioners assert, via the declaration of Jill Owen, manager of the Ridgeway's office at CPChem, that the business routine was for the Ridgeway's courier to pick up mail from CPChem drop boxes around 4:00 pm each day and bring the mail back to Ridgeway's office, where the mail would be sorted and entered by type on a Closing Check Sheet.

Petitioners further aver that the mail was then taken by Ridgeway's courier, Fairway, to its respective destination (i.e., the United States Postal Service) for mailing. Petitioners have provided a declaration of Jennifer Metcalf, a delivery courier for Fairway responsible for collecting mail at the Ridgeway's office at CPChem and delivering it to the USPS. Ms. Metcalf's declaration states, in pertinent part, that

...

3. In November 2004, Ridgeway's [sic] used closing check sheets to monitor the mailings that were collected each day and given to me for appropriate delivery. Ridgeway's check sheets included the count of the total number of buckets of mail, as well as the number of "special" mailings including the number of Express Mail envelopes, Priority Mail envelopes...

4. Ridgeway's closing check sheet of November 8, 2004, and November 9, 2004, are attached as Exhibit A. My signature appears on each of these check sheets indicating that I was the delivery courier for these days.

...

The closing check sheets for November 8, 2004, and November 9, 2004, were included with the original petition, showing that 1 Express Mail envelope was received on November 8, 2004, and none on November 9, 2004.

The original petition was dismissed because, *inter alia*, petitioners did not provide corroborating evidence showing that the Express Mail envelope referenced on the closing check sheet

was the one containing the subject application. Specifically, the application was not identified by Express Mail number, or other identifying information, on the closing check sheet.

Petitioners assert, in the present second renewed petition, that Ridgeway's office collected mail exclusively from the CPChem facility, and that the subject application was the only Express Mail mailing sent from the CPChem facility via Ridgeway's and Fairway on November 8, 2004.

Petitioners' argument, essentially, is that as the records show that one (1) Express Mail mailing was received by Ridgeway's on November 8, 2004, and no (0) Express Mail mailings were received on November 9, 2004, the subject application must have been deposited in USPS Express Mail "Post Office to Addressee" service on November 8, 2004.

STATUTES AND REGULATIONS

35 U.S.C. 21(a) states:

The Director may by rule prescribe that any paper or fee required to be filed in the Patent and Trademark Office will be considered to be filed in the Office on the date on which it was deposited with the United States Postal Service but for postal interruptions or emergencies designated by the Commissioner.

37 C.F.R. § 1.10 *Filing of correspondence by "Express Mail."*

(a)...

(b)...

(c)...

(d) Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Director to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will

accord, a filing date based upon an incorrect entry by the USPS;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and

(3) The petition includes a showing which establishes, to the satisfaction of the Director, that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. **Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.**

(emphasis added)

OPINION

Petitioners state, in pertinent part, in the present renewed petition, that

As attested to in the declarations, the papers were placed in a properly addressed Express Mail envelope that processed as follows: it was deposited in a drop box at the [CPChem facility], picked up by Ridgeway's the company that handles all CPChem company mailings, recorded on the closing check sheet, and delivered to the USPS by the courier service Fairway prior to the last scheduled pickup of the day on November 8, 2004.

[A]ll of the mail from the CPChem facility was commingled in Ridgeway's office prior to being delivered to the USPS. However, all of the commingled mail was recorded on the closing check sheets.

(See Request for Reconsideration of Petition Decision filed on November 13, 2007, at page 3).

A grantable petition under 37 CFR 1.10(d) must include "a showing which establishes, to the satisfaction of the Director, that the requested filing date was the date the correspondence was deposited in 'Express Mail Post Office to Addressee' service

prior to the last scheduled pickup for that day." In addition, the showing "must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the 'Express Mail Post Office to Addressee' service of the USPS." Evidence from the USPS may be, for example, the Express Mail Corporate Account Mailing Statement or a statement by an appropriate official of the USPS that, according to a USPS record, the "date-in" on petitioner's Express Mail receipt is erroneous and is accompanied by a copy of the relevant USPS record. Evidence that came into being within one day after the deposit of the correspondence as Express Mail may be, for example, a log book which contains information, such as the Express Mail label number; the application number, attorney docket number or other such file identification number; the place, date and time of deposit, the time of the last scheduled pick-up for that date and place of deposit; the depositor's initials or signature; and the date and time of the log book entry.

Petitioner's evidence has been considered, but is not persuasive. At the outset, as stated previously, the evidence that the Express Mail envelope purportedly processed by Ridgeway's for delivery to the USPS by Fairway on November 8, 2004, was, in fact, the envelope that contained the subject application is extremely weak: the closing check sheet does not contain any of the information indicated above, but rather merely shows that an Express Mail envelope was placed for mailing by CPChem and picked up and logged in by Ridgeway's on November 8, 2004.

Petitioners argue that since no other Express Mail envelopes were received by Ridgeway's on November 8, 2004, no other Express Mail envelopes were sent from **any** CPChem offices on November 8, 2004, and that, therefore, the Express Mail envelope logged in by Ridgeway's on their closing check sheet on November 8, 2004, **must** have contained the subject application. Petitioners, however, have not provided sufficient evidence that no other Express Mail envelopes were mailed from CPChem on that date. Specifically, as Ms. Owen's declaration states that Ridgeway's picked up mail from drop boxes at various locations at the CPChem facility, petitioners would need to provide affidavits or declarations of fact, as well as any mail logs, if available, from employees at all other CPChem departments that normally deposited mail in the drop boxes for pickup by Ridgeway's attesting to the fact that they did not deposit any Express Mail in the Ridgeway's drop boxes for collection on November 8, 2004.

Furthermore, assuming, *arugendo*, that no other Express Mail envelopes were deposited by any CPChem offices for mailing on November 8, 2004, by Ridgeway's, petitioners have still not provided evidence that came into being within one day after the alleged deposit of the correspondence as Express Mail. In this regard, the declaration of Jill Owen filed with the first petition states that, as indicated above, the contents of the drop boxes were entered on the closing check sheet when the packages were received at Ridgeway's office, and that the packages would be subsequently delivered to the USPS or other location.

More to the point, although the declaration of Jennifer Metcalf states that "My signature appears on each of these check sheets indicating that I was the delivery courier for these days," the handwritten name on the check sheets does not appear to be the signature of Ms. Metcalf's as it appears on her declaration. Rather than being her actual signature, it appears that Ms. Metcalf's name was handwritten on the closing check sheet by a Ridgeway's employee prior to the check sheet and the mail being given to her for delivery to the USPS. This conclusion is supported by Ms. Metcalf's statement inasmuch as it states that Ms. Metcalf's name on the closing check sheet indicates that she was the delivery courier for the dates in question. Simply put, the showing of record suggests that Ms. Metcalf did not make any record on the closing check sheet for November 8, 2004, of the alleged deposit of the Express Mail item to the USPS after deposit and within one business day of deposit of the Express Mail package with the USPS, as required by 37 CFR 1.10(d).

Further, the declaration of Jill Owen states that "Ridgeway's closing check sheets for November 8, 2004, and November 9, 2004, are attached ... and bear my signature. As can be seen, we received one Express Mail envelope on November 8, 2004, and no Express Mail on November 9, 2004." This statement supports a conclusion that Ms. Owen prepared the closing check sheet, including the indication that one Express Mail item was received, prior to the check sheet and Express Mail item being presented to Ms. Metcalf for delivery to the USPS.

As such, the showing of record is that the check sheet dated November 8, 2004, came into being **before** any Express Mail envelope was delivered to the USPS, rather than after delivery and within one business day as required by 37 CFR 1.10(d). Rather than showing what was delivered to the USPS on November 8, 2004, the showing of record is that the closing check sheet is

evidence only of what mailing items were received by Ridgeway's on November 8, 2004. As such, the check sheet cannot serve as evidence of the deposit of the Express Mail envelope with the USPS on November 8, 2004.

CONCLUSION

The evidence and arguments present have been carefully considered, but are not persuasive of petitioners' entitlement to a filing date of November 8, 2004. Petitioner must establish to the satisfaction of the Director that the original application papers were properly deposited in Express Mail "Post Office to Addressee" service on November 8, 2004. In this case, petitioners' has not provided sufficient evidence to support their entitlement to a filing date of November 8, 2004. Accordingly, petitioners have failed to meet their burden.

The petition is granted insofar as the request for reconsideration has been favorably considered. The petition to accord a filing date of November 8, 2004, is denied.

Accordingly, the application will be processed with the presently-accorded filing date of November 9, 2004.

The application is being referred to Technology Center Art Unit 1796 for further processing.

Telephone inquiries concerning this matter may be directed to Senior Petitions Attorney Douglas I. Wood at (571) 272-3231.



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