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**STEVEN B. NORDSTROM
222 GLENDALE AVENUE
HINSDALE IL 60521**

MAILED

APR 29 2009

OFFICE OF PETITIONS

In re Application of :
Steven B. Nordstrom : DECISION ON PETITION
Application No. 12/077,321 :
Filed: March 18, 2008 :

This is a decision on the renewed petition under 37 CFR 1.10(d), filed January 27, 2009, requesting that the above-identified application be accorded a filing date of March 17, 2008, rather than the presently accorded date of March 18, 2008.

The renewed petition is **DENIED**¹.

BACKGROUND

Late in the evening on March 17, 2008, Mr. Micheal D. Lake (Lake), representative of applicant, allegedly filed the above-identified application at a 24 hour United States Post Office. After seeing that all of the clerks at the clerk stations were busy, Lake chose to deal indirectly with the United States Postal Service (USPS) by using an Automated Postal Center (APC) at the Post Office. An unidentified postal employee behind the clerk's counter, but not at a clerk station, indicated that the envelope would receive the date of March 17, 2008 if the APC was used and agreed that Mr. Lake could hand her the envelope when he was finished with his transaction at the APC.

The APC produced an adhesive label allegedly with the date of March 17, 2008, which was applied on Express Mail Envelope EM 133502609 US, and a sales receipt for the transaction. Express Mail Envelope EM 133502609 US was then handed to the postal employee who previously agreed to accept this envelope. This employee was still behind the clerk's counter, but not at a clerk station, when Lake handed her the envelope.

A sales receipt provided as evidence is dated March 17, 2008 and shows that an Express Mail envelope was deposited for delivery to the USPTO. The sales receipt does not show the Express Mail Number of the envelope so as to establish that the APC sale of March 17, 2008 relates to EM 133502609 US, which is the Express Mail Number associated with above-identified application 12/077,321. No other receipt for the transaction was obtained from the APC or USPS on March 17, 2008. However, a customer copy of the Express Mail label was later mailed

to Lake by the USPS. This copy included Express Mail Number EM 133502609 US with a date accepted of March 18, 2008 at 3:16 PM. Express Mail Envelope EM 133502609 US was delivered to the USPTO on March 19, 2008 and received a filing date of March 18, 2008.

In addition to the sales receipt and customer copy of the Express Mail label, petitioner attempts to make a showing that Express Mail Envelope EM 133502609 US was deposited in the USPS Express Mail service on March 17, 2008 through several declarations by Lake and his assistants explaining the circumstances of the deposit; an electronic time record accounting for work performed in an application on a particular day; email communications between Lake and Yolanda Solis (Solis), a legal assistant with the law firm of Factor & Lake, Ltd.; a listing of some USPTO records for applications under the responsibility of Customer Number 22876, which is the law firm of Factor & Lake, Ltd.; an American Express transaction summary showing activity by Lake on March 17, 2008; a Google Desktop listing of activities on a computer on March 17, 2008 and March 18, 2008; a letter from Jody L. Factor of Factor and Lake, Ltd. to applicant Steven Nordstrom dated March 20, 2008; a certificate of mailing asserting that the present application was deposited by express mail on March 17, 2008; a transmittal letter asserting that the present application was filed on March 17, 2008

The items submitted for the showing have been considered together in their entirety.

STATUTE AND REGULATION

35 U.S.C. § (2)(B)(2) provides, in part, that:

The Office-- may, establish regulations, not inconsistent with law, which

(A) shall govern for the conduct of proceedings in Office.

35 U.S.C. § 21(a) provides:

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

37 C.F.R. § 1.10(d) provides:

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.

MPEP § 513 II provides, in pertinent part:

... [C]orrespondence should be deposited directly with an employee of the USPS to ensure that the person depositing the correspondence receives a legible copy of the "Express Mail" mailing label with the "date-in" clearly marked, and that persons dealing indirectly with the employees of the USPS (such as by depositing correspondence in an "Express Mail" drop box) do so at the risk of not receiving a copy of the "Express Mail" mailing label with the desired "date-in" clearly marked. On petition, the failure to obtain an "Express Mail" receipt with the "date-in" clearly marked may be considered an omission that could have been avoided by the exercise of due care, as discussed below. While the Office strongly urges direct deposit of "Express Mail" correspondence in order to obtain a legible copy of the "Express Mail" mailing label, parties are not precluded from using "Express Mail" drop boxes, but do so at their own risk...

... Parties who do use drop boxes can protect themselves from uncertainty due to illegible mailing labels by routinely maintaining a log of "Express Mail" deposits in which notations are entered by the person who deposited the correspondence as "Express Mail" within one business day after deposit with the USPS. Such evidence could be useful to later support a petition filed under 37 CFR 1.10(d). Evidence that came into being after deposit and within one day after the deposit of the correspondence as "Express Mail" may be in the form of a log book which contains information such as the "Express Mail" 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 entry in the log.

MPEP § 513 IV provides, in pertinent part:

The reason the Office considers correspondence to have been filed as of the date of deposit as "Express Mail" is that this date has been verified by a disinterested USPS

employee, through the insertion of a "date-in," or other official USPS notation, on the "Express Mail" mailing label. Due to the questionable reliability of evidence from a party other than the USPS that did not come into being contemporaneously with the deposit of the correspondence with the USPS, 37 CFR 1.10(d) specifically requires that any petition under 37 CFR 1.10(d) be corroborated either by evidence from the USPS, or by evidence that came into being after deposit and within one business day after the deposit of the correspondence as "Express Mail."

A petition alleging that the USPS erred in entering the "date-in" will be denied if it is supported only by evidence (other than from the USPS) which was:

- (A) created prior to the deposit of the correspondence as "Express Mail" with the USPS (e.g., an application transmittal cover letter, or a client letter prepared prior to the deposit of the correspondence); or
- (B) created more than one business day after the deposit of the correspondence as "Express Mail" (e.g., an affidavit or declaration prepared more than one business day after the correspondence was deposited with the USPS as "Express Mail").

OPINION

The evidence offered by petitioner fails to show that the requested filing date of March 17, 2008 was the date the above-identified application was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Contrary to petitioner's assertion, all of this evidence was considered and reconsidered together in its entirety. While certain items of evidence were addressed individually, the evidence was considered collectively and not separately. Since each item of evidence was presented by petitioner individually, they were addressed individually to logically follow the presented format.

In particular, the showing by petitioner **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. See 37 C.F.R. 1.10(d). However, none of the evidence submitted by petitioner provides such corroboration.

The sales receipt from the APC dated March 17, 2008 is evidence from the USPS, but is inconclusive since it does not show a correlation between the Express Mail envelope deposited on March 17, 2008 and the Express Mail envelope for EM 133502609 US.

The electronic time record is evidence that came into being after the alleged March 17, 2008 deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS, but is not an acceptable log of when the present application was deposited with the USPS as "Express Mail." The time record shows that time related to work performed on the present application was accounted for on March 17, 2008, but is inconclusive as to what work was performed. The time record does not present information such as the "Express Mail" 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 entry in the log, which would establish that the work performed on March 17, 2008 involved depositing the above-identified application with the USPS as "Express Mail." The information that would support a record as being an "Express Mail" log is discussed in MPEP § 513 II and clarifies how a petitioner may meet the "satisfaction of the Director" standard set forth in the regulation even after indirectly dealing with employees of the USPS by using an APC. This was presented in the previous dismissal to help explain the decision and was not an admonishment, as suggested by petitioner. Although a record may qualify as a log that would support or corroborate the showing without having all of the information discussed in MPEP § 513 II, the record must have enough information to link an item addressed in the record with a particular item deposited with the USPS as "Express Mail." Such a requirement is not capricious as petitioner contends, but is necessary to effectively manage the numerous papers filed with the Office. Here, the electronic time record provided by petitioner does not have sufficient information to link the work addressed in the record with the deposit of the above-identified application with the "Express Mail" service of the USPS.

Furthermore, the email from Solis to Lake dated March 18, 2008 is evidence that came into being after the alleged March 17, 2008 deposit and within one business day of the alleged deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS. However, this email is inconclusive since it does not provide any information that would connect it to the present application, such as the attorney docket number or Express Mail number.

Therefore, the sales receipt, electronic time record, and email from Solis to Lake alone do not corroborate the required showing that the above-identified application was deposited with the Express Mail service of the USPS on March 17, 2008. Rather, petitioner desires to fill the deficiencies in this evidence with other evidence that is either inconclusive or of questionable reliability. The showing places substantial reliance on a hindsight reconstruction of events presented through declarations in conjunction with other evidence that came into being more than one business day after the alleged deposit on March 17, 2008 of the above-identified application with the "Express Mail Post Office to Addressee" service of the USPS. Although this explanation of events describes how the deposit was made with the "Express Mail" service of the USPS on March 17, 2008, it is not reliable since it is not from a disinterested USPS employee or did not come into being contemporaneously with the deposit of the correspondence with the USPS. See MPEP § 513 IV. Also, the March 17, 2008 filing date cited in the documents created prior to the deposit of the correspondence as "Express Mail" with the USPS may have been based on a mistaken belief that March 17th was the correct date. The evidence used to fill the deficiencies in the sales receipt, electronic time record and email from Solis to Lake are not discounted, as petitioner asserts, but are not persuasive. That is, the sales receipt, electronic time record and email from Solis to Lake do not corroborate the required showing, as they must, and the other evidence submitted does not overcome their deficiencies.

In regard to questions of the credibility and probability of the showing, petitioner states:

"So it appears to boil down to this: what are the odds that Mr. Lake is not being honest versus that the USPS employee to whom Mr. Lake handed Express Mail Envelope EM133502609US made a mistake and put the envelope aside for processing which occurred on the following afternoon?"

However, Lake's veracity is immaterial since 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. The failure to provide such evidence cannot be overcome simply through an attorney's explanation in a declaration. Also, the USPTO maintains a high degree of confidence in the performance of the USPS regardless of petitioner's personal views.

Furthermore, the fees shown on the customer copy of Express Mail label EM133502609US do not link the label to the USPS receipt, as petitioner asserts. The label indicates that \$18.35 was paid while the receipt indicates that \$18.40 was paid. Petitioner explains the five cent difference by suggesting that a USPS employee incorrectly added the flat rate postage amount of \$16.25 and the "Return Receipt" amount of \$2.15, which were listed on the receipt, to arrive at the \$18.35 indicated on the label. However, this is unsubstantiated conjecture by petitioner. The amount on the label and the amount on the receipt are different. There are numerous possible explanations for the difference and there is no evidence of record that would conclusively explain the difference. Therefore, nothing of record establishes that the fee payment shown on the label links the label to the receipt.

DECISION

Petitioner has failed to meet the burden of proving 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. Accordingly, the filing date will not be changed and remains March 18, 2008. The petition is **denied**.

The USPTO will not further consider or reconsider this matter.

Any inquiries concerning this communication may be directed to Christopher Bottorff at (571) 272-6692.

A handwritten signature in dark ink, appearing to read "Charles Pearson", with a long horizontal flourish extending to the right.

Charles Pearson
Director, Office of Petitions
cb/db

¹ This decision may be considered a final agency action within the meaning of 5 U.S.C. § 704 for purposes of obtaining judicial review. See MPEP 1002.02.