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OFFICE OF PETITIONS

In re Application of :
Kenneth Niles :
Application No. 29/285879 :
Filing or 371(c) Date: 04/14/2007 : DECISION
Attorney Docket Number: 1720.067 : ON PETITION

This is a decision on the request for reconsideration of Applicant's "Request for Reconsideration of Petition Under 37 C.F.R. Section 1.10(d)," filed February 11, 2008, requesting that the above-identified application be accorded a filing date of April 13, 2007, rather than the presently accorded filing date of April 14, 2007. The petition is properly treated under 37 CFR 1.10(d).

The petition is denied.

The June 14, 2007 petition

Applicant filed a petition on June 14, 2007 wherein Applicant asserted that the application was deposited in Express Mail service on April 13, 2007. In support of this assertion, Applicant filed copies of an affidavit of Michelle Freeman; a Print History from Stamps.Com; a listing of the business hours of the Silver Spring (Maryland) Post Office, and a copy of Express Mail Mailing Label No. EV838412263US. The petition and Affidavit of Michelle Freeman provided that a Postman was in front of the Post Office, and unsolicited, the Postman told Ms. Freeman to give him the mail. Ms. Freeman gave the Postman the mail and returned to her car and drove home, and did not obtain a copy of the Express Mail mailing label. The "Date-In" on the Express Mail Mailing Label was April 14, 2007. The Express Mail Mailing Label also included a date stamp of the USPS dated April 14, 2007.

Decision dismissing the petition

A Decision dismissing the petition was mailed on March 9, 2007. The Decision reviewed the evidence provided and stated that the affidavit of Michelle Freeman was "an affidavit or declaration prepared more than one business day after the correspondence was

deposited with the USPS as 'Express Mail' ". MPEP 513. The Decision stated that the "Print History" from Stamps.Com was not evidence from the United States Postal Service ("USPS"). The listing of the business hours of the Silver Spring (Maryland) Post Office failed to corroborate that the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day, and was only a listing of the hours of operation of the Post Office Branch. Express Mail Mailing Label No. EV838412263US was evidence of deposit on April 14, 2007, as evidenced by both the "Date-In" and the USPS date stamp appearing thereon. The Decision was dismissed.

The October 9, 2008 and October 18, 2007 request for reconsideration.

Applicant filed a request for reconsideration of the petition on October 9, 2007, supplemented on October 18, 2007, wherein Applicant asserted that the evidence submitted: the "print history" from Stamps.com, and the hours of operation for the USPS postal service facility, are evidence that is strongly convincing that the instant application was mailed on April 13, 2007. Applicant asserted that Stamps.com is one of three authorized PC Postage providers approved for operation by the United States Postal Service, as defined in the Domestic Mail Manual ("DMM"). As such, Applicant stated that Stamps.Com must meet qualifications to act as a Postage Evidencing System provider pursuant to 39 CFR 501.03(a)-(d), the failure to meet said qualifications could result in the suspension or revocation of the license to operate as a PC Postage provider. Applicant asserted that the DMM requires mailers to deposit mail on the date they indicate on the PC Postage System, to wit – Stamps.com. Applicant argued that the print history from Stamps.Com, along with the posted hours of the local USPS facility where the application was mailed, are strongly convincing that the application was mailed on April 13, 2007.

The December 11, 2007 Decision dismissing the request(s) for reconsideration

The petition was dismissed in a Decision mailed December 11, 2007. The Decision noted that Applicant must demonstrate compliance with 37 CFR 1.10, which requires the filing of correspondence by "Express Mail." As the rule states, the date of deposit with USPS is shown by the "date in" on the "Express Mail" label or other official USPS notation. (Emphasis supplied). If the USPS deposit date cannot be determined, the correspondence will be accorded the USPTO receipt date as the filing date.

The Decision reiterated language stated in the decision dismissing the June 14, 2007 petition, which stated that the "Print History" from Stamps.Com is not evidence from the USPS. Regarding the listing of the business hours of the Silver Spring (Maryland) Post Office, said listing fails to corroborate that the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. It is only a listing of the hours of operation of the Post Office Branch. Express Mail Mailing Label No. EV838412263US is evidence of deposit on April 14, 2007, as

evidenced by both the "Date-In" and the USPS date stamp (an other official USPS notation), appearing thereon.

The present request for reconsideration

Applicant initially notes that a similar petition was filed in Application No. 29/285,881, and was granted on the same evidence that the petition in the present application was dismissed. Office records reveal that the Decision granting the petition in Application No. 29/285,881 was vacated, and the petition was dismissed in a Decision mailed May 9, 2008.

Applicant also again asserts that because Stamps.Com is an official licensee of the U.S. Postal Service, the printout from Stamps.Com is evidence from the USPS.

Applicable Law, Rules and MPEP

Public Law 97-247, 96 Stat. 317 (1982), amended 35 U.S.C. § 21 permitting, but not requiring, the Office to prescribe that any paper or fee required to be filed in the Office be considered filed in the Office on the date on which it was deposited with the U.S. Postal Service. The Office promulgated 37 CFR § 1.10 pursuant to the authority provided in 35 U.S.C. § 21. (Emphasis supplied).

37 CFR § 1.10, Filing of correspondence by "Express Mail," states

- (a) (1) Any correspondence received by the U.S. Patent and Trademark Office (USPTO) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed with the USPTO on the date of deposit with the USPS.
- (2) The date of deposit with USPS is shown by the "date in" on the "Express Mail" label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be accorded the USPTO receipt date as the filing date. See § 1.6(a).
- (b) Correspondence 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. Persons dealing indirectly with the employees of the USPS (such as by deposit 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. The paper(s) or fee(s) that constitute the correspondence should also include the "Express Mail" mailing label number thereon. See paragraphs (c), (d) and (e) of this section¹. (Emphasis supplied).

¹ In promulgating 37 CFR § 1.10, the Office also considered other types of mail service (e.g., registered mail and certified mail), but chose the "Express Mail" service since this service provides, *inter alia*, a legible mailing date on the "Express Mail" label for the records of both the applicant and the Office. See "Revision of Patent Procedure," 48 *Fed. Reg.* at 2697, 1027 *Off. Gaz. Pat. Office* 12-13.

37 CFR 1.10(d) provides that

[a]ny 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 supplied).

The MPEP 513 further explains that

The showing under 37 CFR 1.10(d) must be corroborated by (1) evidence from the USPS, or (2) evidence that came into being after deposit and within one business day of the deposit of the correspondence as "Express Mail." Evidence from the USPS may be the "Express Mail" Corporate Account Mailing Statement. Evidence that came into being 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. (Emphasis supplied).

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").

On the other hand, a notation in a log book, entered after deposit by the person who deposited the correspondence as "Express Mail" within one business day of such deposit, setting forth the items indicated above, would be deemed on petition to be an adequate showing of the date of deposit under 37 CFR 1.10(d)(3).

37 CFR 1.10(d)(3) further provides that a party must show that correspondence was deposited as "Express Mail" before the last scheduled pickup on the requested filing date in order to obtain a filing date as of that date.

Analysis

In order to be accorded a filing date other than the date of receipt (37 CFR 1.6), Applicant must demonstrate compliance with 37 CFR 1.10, which requires the filing of correspondence by "Express Mail." As the rule states, the date of deposit with USPS is shown by the "date in" on the "Express Mail" label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be accorded the USPTO receipt date as the filing date. As stated in the decision dismissing the June 14, 2007 petition, and reiterated in the December 11, 2007 Decision, the "Print History" from Stamps.Com is not evidence from the USPS. Simply put, a licensee is not a licensor.

See, Black's Law Dictionary (Abridged 6th Ed. 1992). In this instance, Applicant failed to receive a legible copy of the "Express Mail" mailing label with the "date-in" clearly marked. The rule requires that correspondence be deposited "Express Mail Post Office to Addressee" service of the USPS. Applicant has provided that when walking into the Post Office, a USPS Postman was in front of the Post Office, and unsolicited, the Postman told Ms. Freeman to give him the mail. Ms. Freeman gave the Postman the mail and returned to her car and drove home, and did not obtain a copy of the Express Mail mailing label. In doing so, Applicant bore the risk of, and in fact did not, receive a copy of the "Express Mail" mailing label with the desired "date-in" clearly marked.

The fact that the "Print History" printout shows that the postage was printed on April 13, 2007, does not mean that the package in question was in fact mailed on that date. Under 37 CFR 1.10(d), the evidence required to "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... 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. 37 CFR 1.10(d). As noted supra, in promulgating 37 CFR § 1.10, the Office considered other types of mail service (e.g., registered mail and certified mail), but chose the "Express Mail" service since this service provides, inter alia, a legible mailing date on the "Express Mail" label for the records of both the applicant and the Office. See "Revision of Patent Procedure," 48 Fed. Reg. at 2697, 1027 Off. Gaz. Pat. Office 12-13. Here, Applicant failed to receive a copy of the Express Mail mailing label, and has not provided 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, to corroborate Applicant's assertion that the application was deposited Express Mail on April 13, 2007. The filing date accorded the application is therefore, in accordance with 37 CFR 1.10(a), the date of deposit with USPS as shown by the "date in" on the "Express Mail" label or other official USPS notation, or April 14, 2007.

Decision

The renewed petition requesting that the above-identified application be accorded a filing date of April 13, 2007, rather than the presently accorded filing date of April 14, 2007, is **DENIED**.

Telephone inquiries concerning this matter should be directed to Attorney Derek L. Woods at (571) 272-3232.



Charles Pearson
Director
Office of Petitions