

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FREIGHTCAR AMERICA, INC.,
Petitioner,

v.

NATIONAL STEEL CAR, LIMITED,
Patent Owner.

Case IPR2016-00787
Patent 7,461,600 B2

Before JOSIAH C. COCKS, HYUN J. JUNG, and NEIL T. POWELL,
Administrative Patent Judges.

COCKS, *Administrative Patent Judge.*

FINAL WRITTEN DECISION
35 U.S.C. § 318(a) and 37 C.F.R. § 42.73

I. INTRODUCTION

A. Background

Petitioner, FreightCar America, Inc. (“FreightCar” or “Petitioner”), filed a Petition to institute an *inter partes* review of claims 1, 2, 7–10, and 13 of U.S. Patent No. 7,461,600 B2 (Ex. 1001, “the ’600 patent”). Paper 2 (“Pet.”). Patent Owner, National Steel Car, Ltd. (“NSC” or “Patent Owner”), filed a Preliminary Response (Paper 6, “Prelim. Resp.”). In view of those submissions, we instituted an *inter partes* review of claims 1, 2, 7–10, and 13 to resolve whether: (1) those claims are anticipated by, or would have been obvious over, Hitt;¹ and (2) claims 7–10 and 13 are anticipated by, or would have been obvious over, White.^{2,3} Paper 9 (“Inst. Dec.”). After Institution, NSC filed a Patent Owner Response (Paper 15, “PO Resp.”), to which FreightCar replied (Paper 19, “Pet. Reply”).

NSC also filed a Motion to Exclude certain exhibits offered by FreightCar. Paper 24. FreightCar filed an Opposition (Paper 28), to which NSC replied (Paper 30).

Oral argument was heard on June 8, 2017, and a copy of the transcript was entered into the record. Paper 34.

¹ Rodney Hitt (compiler), *The Car Builders Dictionary*, The Railway Gazette (1905) (Ex. 1005).

² John H. White, Jr., *The American Railroad Freight Car*, The Johns Hopkins University Press (1993) (Ex. 1009).

³ During trial, FreightCar withdrew its obviousness challenge to claim 7 based on Hitt. See Papers 21, 23.

We have jurisdiction under 35 U.S.C. § 6. This Decision is a Final Written Decision under 35 U.S.C. § 318(a) as to the patentability of the challenged claims. For the reasons that follow, we determine that FreightCar has not shown by a preponderance of the evidence that claims 1, 2, 7–10, and 13 of the '600 patent are unpatentable.⁴

B. Related Matters

The '600 patent is the subject of a lawsuit styled *National Steel Car Limited v. FreightCar American, Inc.*, Case No. 1:15-cv-03418 (N.D. Ill. 2015). See Pet. 5; see Paper 5, 2. Both parties also identify Case IPR2016-00788 involving U.S. Patent No. 7,757,611 B2 as being related to the instant *inter partes* review. Pet. 5; Paper 5, 2.

C. The '600 Patent

The '600 patent is titled “Rail Road Freight Car Structure.” Ex. 1001, Title. The Abstract of the '600 patent is reproduced below:

A rail road freight car may have a body for carrying lading. The body may be a gondola car body. The car body may include a decking or floor structure, and may include longitudinally extending side beams bordering the floor structure. The connection of the side beams to the floor structure may be may [sic] without the use of a dedicated side sill. The car body structure may include cross-bearers and side beam stiffeners that

⁴ In e-mail correspondence to the Board on September 14, 2017, NSC represented to the panel that it was seeking to “preserve the argument that the IPR process is unconstitutional” in light of the Supreme Court’s review of *Oil States Energy Services, LLC v. Greene’s Energy Group* (No. 16-712). See Ex. 3001. NSC expressly indicated, however, that it was not seeking briefing on the issue. Given the outcome of this current *inter partes* review proceeding, and NSC’s express indication that it is not seeking briefing on the issue, no briefing was, or is, authorized.

are joined together by structural knees. The car body may also include clean out ports to facilitate cleaning of the lading receptacle.

Id. at Abstract.

Figure 1 of the '600 patent is reproduced below:

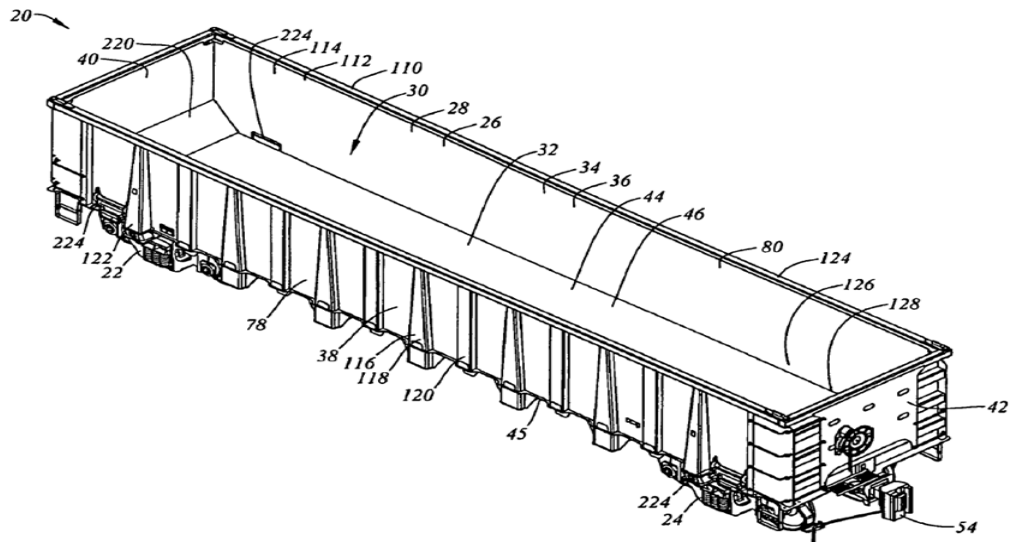


Figure 1

Figure 1 above depicts “an isometric, general arrangement view of a railroad freight car.” Ex. 1001, 6:33–34. As shown in Figure 1, railroad car 20 includes first and second trucks 22, 24 and rail body 26 that is carried on and supported by the trucks for rolling motion along railroad tracks. *Id.* at 8:64–67. Railroad car 20 also includes first and second side walls 36, 38, first and second end walls 40, 42, and flooring 32 including floor panel 44. *Id.* at 9:2–18.

Figures 3b and 3c of the '600 patent are reproduced below:

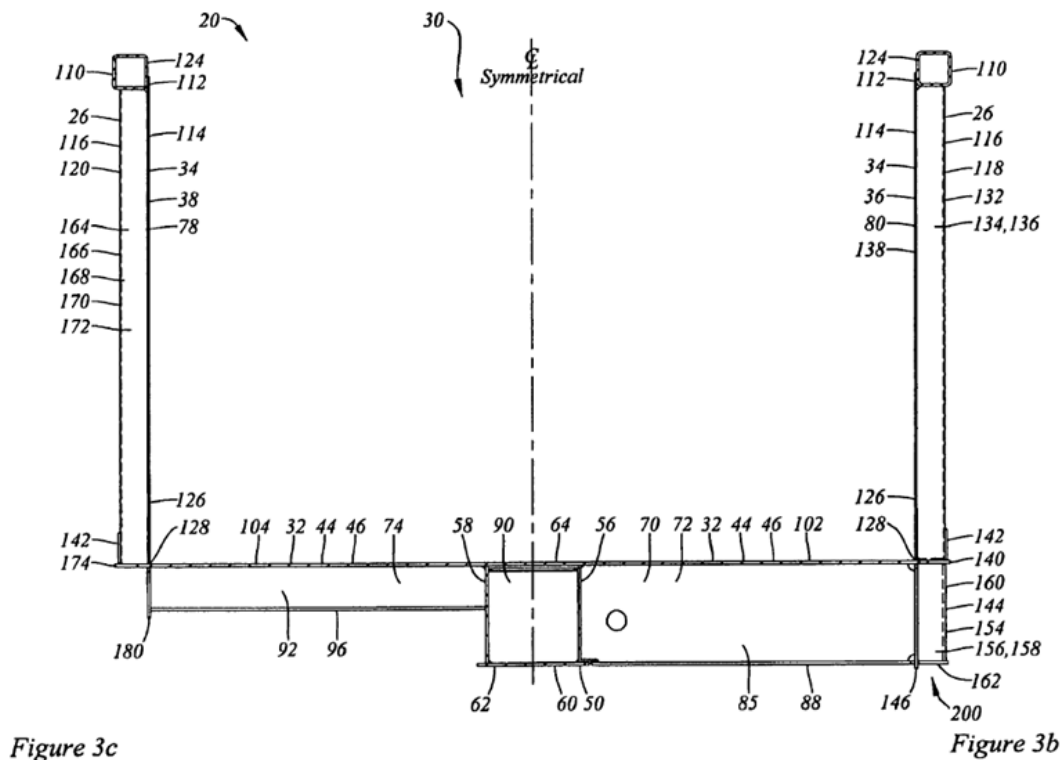


Figure 3b above shows a “right hand half cross-sectional view” of a gondola car looking towards array 70 of cross bearers 72. *Id.* at 6:41–43, 10:23–24. Figure 3c above illustrates a “left hand half cross-sectional view” of a gondola car looking toward array 74 cross-ties 76 (not numbered in Figure 3c). *Id.* at 6:44–46, 10:23–24. Cross-ties 76 alternate with cross-bearers 72. *Id.* at 10:34.

D. Illustrative Claims

Claims 1 and 7 are independent. Claim 2 depends from claim 1, and claims 8–10 and 13 depend from claim 7. Claims 1 and 7 are reproduced below:

1. A railroad gondola car comprising a gondola car body mounted on railroad car trucks for rolling motion along rail road

tracks, said gondola car body including flooring, said flooring including a floor panel carried on cross bearers, and a peripheral sidewall standing upwardly of said flooring, said sidewall having at least one opening defined therein defining a sidewall cleanout by which materials may be flushed from said gondola car body, said floor panel extending to said sidewall at said opening, and a member mounted to co-operate with said opening, said member being movable between a first position obstructing said opening and a second position in which said member obstructs said opening less than in said first position.

7. A railroad gondola car having a gondola car body mounted on railroad car trucks for rolling motion along railroad car tracks, said car body including a substantially flat floor structure and sidewalls standing upwardly of said substantially flat floor structure, said sidewalls having predominantly upstanding stiffeners spaced therealong, said substantially flat floor structure having cross members affixed to an underside thereof, said cross members extending predominantly cross-wise under said substantially flat floor structure, and at least one of said cross members having an outboard end terminating at a longitudinal location along said car body that is free of any corresponding one of said upstanding sidewall stiffeners.

II. ANALYSIS

A. Claim Construction

In an *inter partes* review, a claim in an unexpired patent shall be given its broadest reasonable construction in light of the specification of the patent in which it appears. 37 C.F.R. § 42.100(b); *Cuozzo Speed Techs. LLC v. Lee*, 136 S. Ct. 2131, 2144–46 (2016) (upholding the use of the broadest reasonable interpretation standard in *inter partes* review). Consistent with the broadest reasonable construction, claim terms are presumed to have their ordinary and customary meaning as understood by a person of ordinary skill

in the art in the context of the entire patent disclosure. *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007). Nevertheless, a “claim term will not receive its ordinary meaning if the patentee acted as his own lexicographer and clearly set forth a definition of the disputed claim term in either the specification or prosecution history.” *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002).

In the Institution Decision, under the broadest reasonable construction rubric, we gave all the terms their ordinary and customary meaning as would be understood by a person of ordinary skill in the art. Inst. Dec. 11. We discussed expressly the meaning for two claims terms/phrases: (1) “standing upwardly of”; and (2) “floor panel carried on cross bearers.” More particularly, we concluded that, on the record that was then before us, we were not persuaded that the recitation of a sidewall “standing upwardly of” flooring required that the sidewall stand “on” the flooring. Inst. Dec. 9. We also were not persuaded that the ordinary meaning of “floor panel carried on cross bearers,” taken in the context of the ’600 patent, required a “structural connection” between the floor panel and cross bearers, as had been urged by NSC. *Id.* at 9–11.

With respect to the phrase “floor panel carried on cross bearers,” neither party maintains any dispute in connection with the construction that we addressed as a part of the Institution Decision. Accordingly, we do not discern any reason to deviate from our prior determination that the phrase does not necessitate a “structural connection” between the floor panel and cross bearers.

With respect to “standing upwardly of,” however, dispute remains. In its Preliminary Patent Owner Response, NSC offered a construction for that

phrase, with which, at the time, we did not agree. In its Patent Owner Response, NSC offers a more robust explanation for its postulated claim construction. PO Resp. 12–20. FreightCar expresses disagreement with NSC. Pet. Reply 4–14. We revisit the interpretation of “standing upwardly of.” It also is now apparent that we must address expressly the meaning of an additional claim term—“substantially flat floor structure.”

1. “*standing upwardly of*”

As we observed in our Institution Decision, the parties had agreed to a meaning of “standing upwardly of” in the co-pending district court litigation. Inst. Dec. 8. The record before us reflects that the agreed to meaning in that forum was “standing on and rising in an upward direction.” Ex. 2001, 1; PO Resp. 15. As we also observed in the Institution Decision, the agreement of the parties in district court as to the meaning of a claim term/phrase is not dispositive when presented in the context of an *inter partes* review. Inst. Dec. 8–9. That is because in an *inter partes* review claim terms in an unexpired patent are afforded a claim construction generally regarded as its “broadest reasonable construction” that is consistent with the specification of the underlying patent. On the other hand, in district court a separate standard is applied, i.e., a standard generally regarded as the “*Phillips* standard.” See *PPC Broadband, Inc. v. Corning Optical Commc’ns RF, LLC*, 815 F.3d 747, 756 (Fed. Cir. 2016). Although the standards are different, however, in some cases applying them in connection with a given claim term may result in the same meaning. See *id.*

At the time we instituted trial, we were not persuaded that the record then demonstrated that the meaning of “standing upwardly of” agreed to by the parties in district court litigation was correct in this *inter partes* review.

NSC, however, has now taken the opportunity to articulate more thorough reasoning, and provide a more substantive basis, for its position that the proposed meaning of “standing upwardly of” as “standing on and rising in an upward direction” is also the broadest reasonable construction of the term in the context of the ’600 patent.

The ’600 patent depicts various embodiments of its disclosed invention. *See, e.g.*, Ex. 1001, Figures 1–10. In reviewing those depictions, and as noted by NSC (*see, e.g.*, PO Resp. 7–9), they consistently show sidewalls of a rail car that stand or rest on the underlying flooring of the car. NSC also relies on the testimony of its declarant, Mr. Jack Long, in discussing the meaning of “standing upwardly of.” *See, e.g.*, PO Resp. 12–16 (citing Ex. 2018 ¶¶ 160–165, 167–178). Specifically, Mr. Long testifies that a person of ordinary skill in the art would have recognized that in the ’600 patent the term “standing” is used in “its positional sense,” citing, for instance, to a dictionary definition of “standing” as “to rest or remain upright on a base or lower end.” Ex. 2018 ¶ 164 (citing Ex. 2013, 5). Mr. Long’s testimony and the underlying support for that testimony shed favorable light on the meaning of “standing upwardly of” that is urged by NSC.

NSC also directs our attention to distinctions that are drawn in the record between the term “standing” and the term “extending,” as those terms are used in the ’600 patent. As noted above, according to NSC, while “standing” is generally understood as a term of position, “extending,” in contrast, is a term of “direction.” PO Resp. 14–15. NSC contends that in using the term “standing” upwardly of, rather than “extending” upwardly of, the pertinent claims of the ’600 patent locate the position of the sidewalls

vis-à-vis the flooring rather than simply establish the direction that the sidewalls extend. *Id.*⁵

Having carefully considered the respective views of the parties as to the meaning of “standing upwardly of,” and for the reasons expressed above, we now conclude that its meaning of “standing on and rising in an upward direction of” is the broadest reasonable interpretation in light of the ’600 patent.

2. “*substantially flat floor structure*”

The parties disagree as to the appropriate interpretation of “substantially flat floor structure,” which appears in claim 7. Specifically, the core basis of disagreement seemingly rests on whether the “substantially flat” characteristic of the floor structure requires only that the top surface be substantially flat, or whether it requires that both the top surface and the bottom surface be so configured. For the reasons set forth below, we conclude that, in the context of the ’600 patent, a “substantially flat floor structure” requires both the upper and lower surfaces of the floor structure be substantially flat.

At the outset, as noted by NSC, claim 7, by its own terms, provides insight as to the meaning of “substantially flat floor structure.” See PO Resp. 17–18. In that respect, claim 7 sets forth that sidewalls are “standing upwardly of said substantially flat floor structure,” and also that the

⁵ We further observe that NSC’s contention as to the juxtaposition in the meaning of “standing” and “extending” is also consistent with the position that the parties took in district court, in which both parties expressed that the meaning of “extending above” includes “rising in an upward direction of,” which does not convey the same positional aspect that arises in connection with the meaning of “standing.” See Ex. 2001, 1.

“substantially flat floor ha[s] cross member affixed to an underside thereof.” That the “substantially flat floor” structure serves as a reference point for other components both above and below that structure suggests that the “substantially flat” nature of the floor structure exists at both its upper and lower surfaces.

Furthermore, as noted above, the '600 patent describes various embodiments of its disclosed invention. Figure 4c, for instance, depicts one such embodiment and is reproduced below.

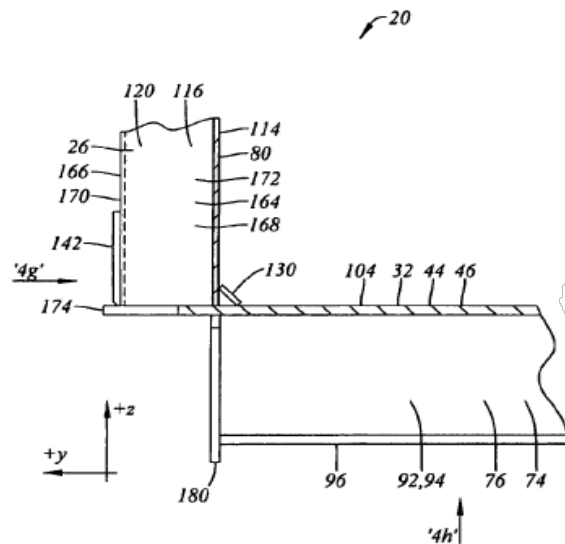


Figure 4c above shows a portion of rail road car 20 in which a section of flooring 32 is also illustrated. See Ex. 1001, 6:35–36, 6:44–46, 6:51–52. Flooring 32 includes upper and lower surfaces that are both generally recognizable as being substantially flat. Such is also the case for every other depiction of flooring in the figures of the '600 patent. In other words, in every instance in the '600 patent in which flooring is illustrated, the flooring includes upper and lower surfaces that are flat.

Further still, the content of the prosecution history of the application that matured into the '600 patent is informative in resolving the possible

ambiguity of the pertinent term's meaning. *See World Class Tech. Corp. v. Ormco Corp.*, 769 F.3d 1120, 1123 (Fed. Cir. 2014) (noting that the prosecution history of a patent document “informs the determination of claim meaning in context, including by resolving ambiguities.”). To that end, NSC explains the following:

The term “substantially flat” was added during prosecution to distinguish the floor of the invention from prior art “bathtub” railcars. *See* Ex. 1002, 146, 152. In distinguishing between the substantially flat floor of the invention and the prior art, the applicant explained that “[t]he structure shown and described in the Applicants’ disclosure was not intended to be understood in the context of a bathtub car, but rather of a **flat-bottomed** gondola having **a substantially flat floor**.” *Id.* at 152 (emphasis added); *see also id.* at 153; Ex. 2018 ¶¶ 150-157. This demonstrates that the term “substantially flat” refers to both the top and bottom surfaces of the floor.

PO Resp. 19–20.

Thus, the record conveys that the “substantially flat” nature of the claimed floor structure was a limitation added to distinguish a floor structure from other prior art forms of floor structure that do not have a lower surface regarded as “flat.” That is consistent with NSC’s position that a “substantially flat floor structure” also encompasses a lower surface that is substantially flat.

The discussion above conveys a rational and credible basis for concluding that the claimed “substantially flat floor structure” dictates a floor structure with both an upper and lower surface that are substantially flat. We are mindful of FreightCar’s opposing view. On the record now before us, however, we conclude that view is not well founded. For instance, Petitioner’s attempt to downplay the pertinent language of claim 7 as to the affixation of a cross member to the underside of the substantially

flat floor structure is puzzling. In particular, FreightCar discounts NSC's reliance on that language urging that "[t]ellingly, Patent Owner does nothing to show that a cross member cannot be affixed to a surface that is not perfectly flat." Pet. Reply 10. Yet, left unexplained is the pertinence of that statement. Whether the underside surface is "perfectly flat" for receiving the cross member is not the relevant inquiry. Rather, the significance of the language of claim 7 lies in its association of the "substantially flat floor structure" with components beneath that structure. The logical conclusion to draw from the language of claim 7 is that the "substantially flat" aspect of the floor structure exists with respect to the surface associated with the affixation of the cross member, i.e., the lower surface of the flooring.

Accordingly, in light of the record at hand, we conclude that "a substantially flat floor structure" requires more than simply a substantially flat upper surface. More particularly, such a structure must as a whole be regarded as being substantially flat, and, thus, includes a substantially flat lower surface as well.

B. Unpatentability Based on Hitt

1. Overview of Hitt

Hitt characterizes its content as follows: "An Illustrated Vocabulary Of Terms Which Designate American Railroad Cars Their Parts Attachments And Details Of Construction With Definitions And Illustrations Of Typical British Practice In Car Construction." Ex. 1005, 1.⁶ Hitt's Figure 30 is reproduced below:

⁶ Hitt contains 17 pages, and the identified page numbers in this Decision are those appearing at the bottom of each page.

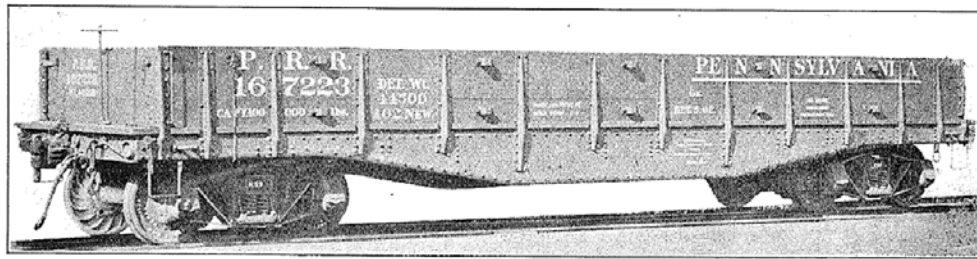
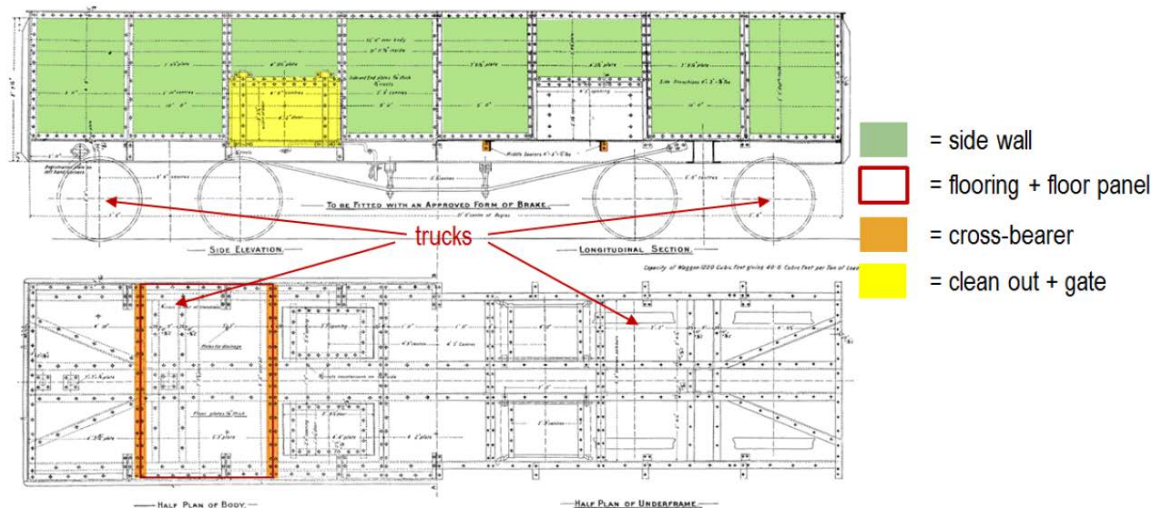


Fig. 30. Gondola Car, Drop Ends, Wooden Body, Pressed Steel Underframe. Capacity, 100,000 lbs. Weight, 44,500 lbs. Pressed Steel Car Co., Builders. (Drawings of this car are shown in Figs. 333-336.)

(8)

Ex. 1005, 7.

Figure 30 above depicts an image of a “Gondola car” understood as a “38-ft Gondola Car” that includes a wooden body and steel underframe. *Id.* at 7–8. Hitt’s Figures 6188 and 6189 are labeled as being directed to a “30-Ton Open Wagon with Steel Underframe and Metal Body.” Ex. 1005, 15. The Petition includes annotated versions of those Figures highlighting aspects of the wagon that is depicted. For illustration purposes, we reproduce below the figures as presented and annotated in the Petition:



Pet. 3. The figures above show various plan, elevation, and sectional views of Hitt’s 30-ton open wagon.

2. Discussion—Ground Based on Hitt

FreightCar contends that all the features of claims 1, 2, 7–10, and 13 are found in Hitt. Pet. 18–36. NSC does not agree. In considering the record now before us, and for the reasons set forth below, we are not persuaded that FreightCar has established by a preponderance of the evidence its challenge to claims 1, 2, 7–10, and 13 as unpatentable over Hitt. In coming to that conclusion, we focus on the limitation in each of claims 1 and 7 requiring a sidewall or sidewalls that are “standing upwardly of” underlying flooring.

i. Claims 1 and 2

In urging the unpatentability of claims 1 and 2, FreightCar relies exclusively on Hitt’s description of its “30-Ton Metal Wagon.” Pet. 22–23. More particularly, FreightCar takes the position that the above-noted claim requirement concerning sidewalls “standing upwardly of” is shown in the two Figures of Hitt designated Figures 6188 and 6189. *Id.* Those figures, however, are not a model of clarity when it comes to ascertaining the relationship of the sidewalls and the flooring of a rail car. We observe also that FreightCar seemingly bases its challenge to claims 1 and 2 on the premise that sidewalls that extend on the sides of the flooring are within the scope of those claims. Indeed, FreightCar’s own declarant, Mr. Keith Miller, provides testimony to that effect, i.e., that the sidewalls of the rail car depicted in Hitt’s Figures 6188 and 6189 do not rest or stand on the flooring or the car, but rather, lie to the sides of the flooring. See Ex. 1003 ¶ 124.

As discussed above, we now conclude that claims 1 and 2 require a sidewall that stands on the flooring of a rail car. NSC maintains that such a configuration is not shown in the portions of Hitt on which FreightCar relies

in its Petition. PO Resp. 22–31. NSC also relies on the testimony of its declarant, Mr. Long, in advocating that Hitt’s 30-Ton Metal Wagon embodiment does not meet the sidewall and flooring configuration required by claims 1 and 2. *Id.* (citing Ex. 2018 ¶¶ 195–208). We find Mr. Long’s testimony explaining the disclosure of Hitt’s Figures 6188 and 6189 credible. Although FreightCar does contend, as a part of its Reply to NSC’s Patent Owner Response, that Hitt’s 30-Ton Wagon includes “stanchions” as a part of a peripheral sidewall, we are not persuaded on that basis of the unpatentability of claims 1 and 2. It is not apparent readily that such position was taken by FreightCar as a part of its Petition, nor does FreightCar explain adequately why, even if true, such a circumstance constitutes a peripheral sidewall standing upwardly of flooring, as is required by claims 1 and 2 of the ’600 patent.

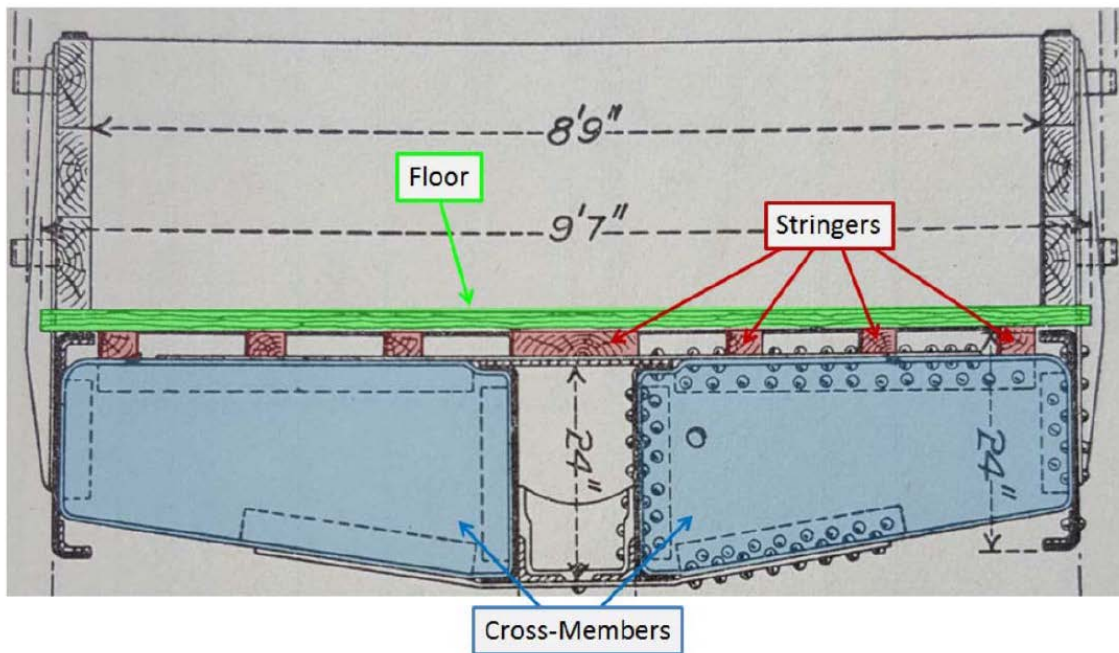
Having thoroughly considered the record that has been developed at trial, we conclude that FreightCar’s Petition does not establish, by a preponderance of the evidence, that claims 1 and 2 are unpatentable over Hitt. More specifically, we are not persuaded that Hitt’s “30-Ton Metal Wagon” embodiment sets forth a “peripheral sidewall standing upwardly of said flooring” as required by claim 1. Accordingly, we are not persuaded that Hitt anticipates that claim, or dependent claim 2, nor does FreightCar offer any adequate explanation as to why the claims would have been obvious in view of Hitt.

ii. Claims 7–10 and 13

Independent claim 7 requires a railroad gondola car with a car body that include “a substantially flat floor structure.” We noted that such

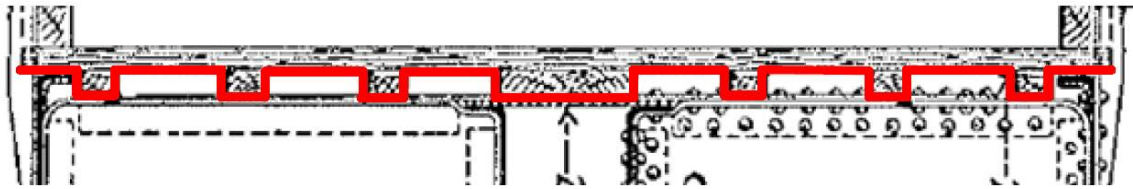
requirement was a central point of dispute between FreightCar and NSC at the time we instituted trial (see Inst. Dec. 15), and remains so now.

NSC takes two approaches in challenging the propriety of FreightCar's reliance on Hitt vis-à-vis claims 7–10 and 13. Those approaches focus on the requirement of claim 7 directed to a “substantially flat floor structure having cross members affixed to an underside thereof.” In considering NSC's position, we reproduce below an annotated version of Hitt's Figure 335 showing a portion of a “38-ft. Gondola Car.”



PO Resp. 32. The figure above depicts an underframe of Hitt's “38-ft. Gondola Car.” *Id.* As marked by NSC, the underframe includes a floor portion, rows of “stringers,” and underlying cross-members. NSC first contends that a person of ordinary skill in the art would not regard the “stringers” as part of the floor structure, and, thus, Hitt does not disclose “cross members affixed to an underside” of the floor structure. PO Resp. 32–40. Alternatively, NSC is of the view that if the stringers are considered

part of the floor structure, those stringers create a lower profile of the floor structure that cannot be viewed reasonably as “substantially flat.” *Id.* at 40–44. In advancing that alternative view, NSC offers the following illustration.



Id. at 40. The figure above depicts NSC’s annotated take on the lower profile of any floor structure that includes the stringers. NSC characterizes that resulting profile as including “substantial vertical variance” across the lower surface thereof creating a surface that is not substantially flat. *Id.* at 40–44 (citing Ex. 2018 ¶¶ 228–242).

FreightCar seemingly does not dispute NSC’s contention that if Hitt’s stringers are not part of the floor structure, the claim requirement that cross members be affixed to the underside of the floor structure is not satisfied. Rather, FreightCar evidently maintains that the stringers form part of the floor structure and constitute flat elements that are “all level and generally planar.” Pet. Reply 9–14 (citing Ex. 1003 ¶ 251; Pet. 28).

As discussed above in considering the meaning of the term “substantially flat floor structure,” we conclude that, in the context of the ’600 patent, the floor structure as a whole must be substantially flat, which requires that each of the upper and lower surfaces of the floor be substantially flat. We are cognizant of the contrasting testimony of FreightCar’s declarant, Mr. Miller, and NSC’s declarant, Mr. Long, offering differing views as to the relative flatness of the collective lower surfaces of the stringers. In considering the contrasting testimony, and upon further

reflection, we cannot now reach the conclusion offered by Mr. Miller that the above-noted flooring including the stringer surfaces (illustrated above in red) form a profile that is regarded reasonably as substantially flat. In our view, the vertical variance of such profile renders it something other than substantially flat. We credit the above noted testimony of Mr. Long (Ex. 2018) in that respect over the less persuasive testimony of Mr. Miller.

Accordingly, for the reasons set forth above, regardless of whether Hitt's stringers are considered part of the floor structure of its Gondola Car, we conclude that FreightCar has not accounted adequately for the requirement of claim 7 of a "substantially flat floor structure having cross members affixed to an underside thereof" either with respect to anticipation or obviousness. As a result, we conclude that FreightCar has not established by a preponderance of the evidence that Hitt renders claim 7 or the claims 8–10 and 13, which depend therefrom, unpatentable.

C. Unpatentability Based on White

1. Overview of White

White is titled "The American Railroad Freight Car." Ex. 1009, 2.⁷ White's Figure 8.48 is reproduced below.

⁷ As filed in this proceeding, White includes 59 pages. Those pages are referenced in this Decision based on the pagination scheme appearing at the bottom center of each page.

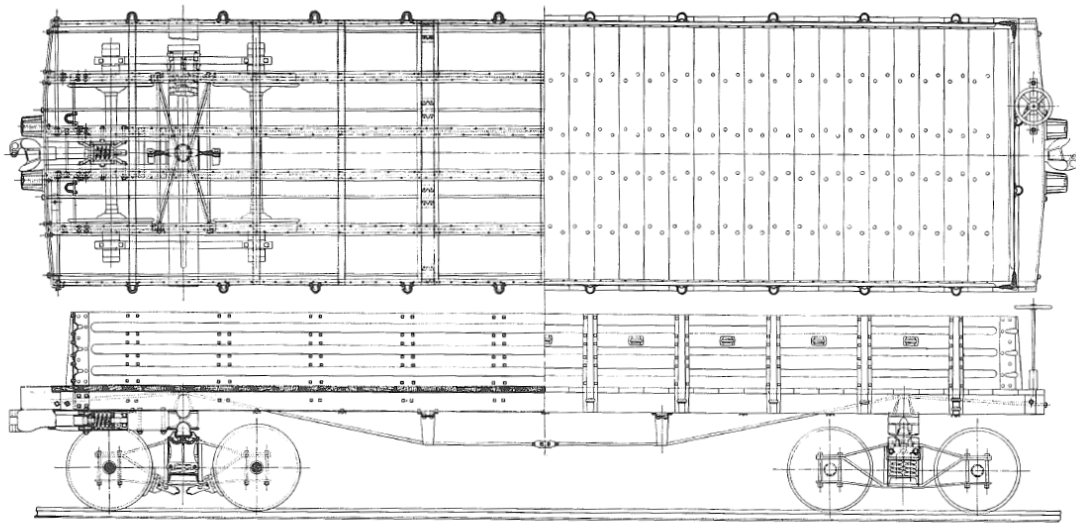
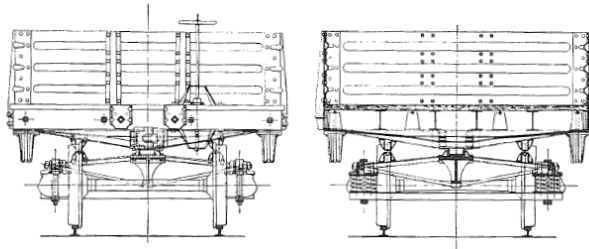


FIGURE 8.48
Schoen's early ideas for steel
construction are shown in this
drawing published in 1890.
(*Railroad Gazette*, May 23, 1890)

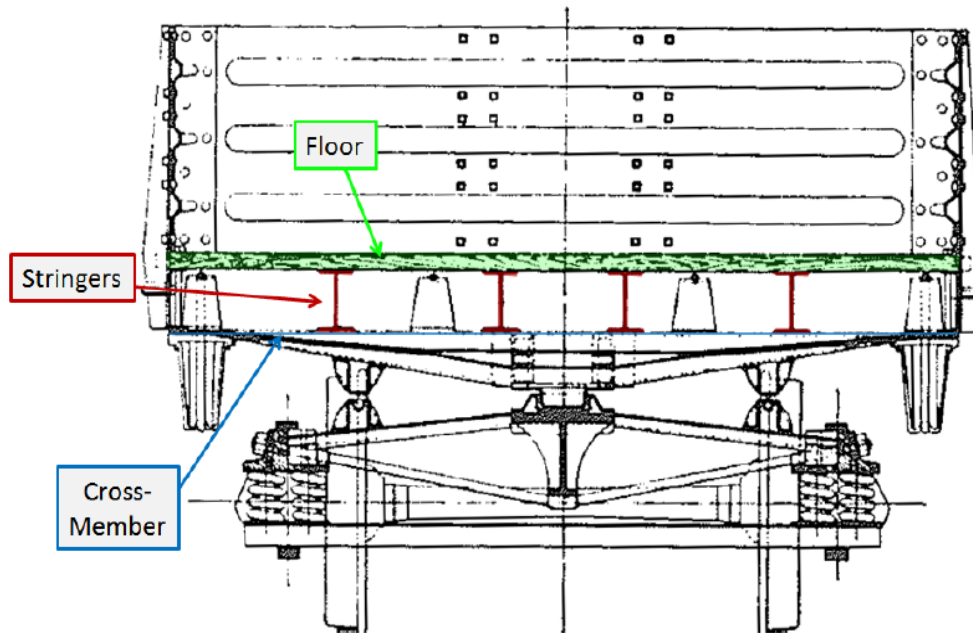


Ex. 1008, 59. The figure above depicts views of a freight car made of “steel construction.” *See id.*

2. Discussion—Ground Based on White

FreightCar also contends that claims 7–10 and 13 are unpatentable over White. NSC disagrees. The core basis of that disagreement rests on essentially the issue discussed above with respect to Hitt. Namely, whether FreightCar’s reliance on White accounts appropriately for the limitation of a “substantially flat floor structure having cross members affixed to an underside thereof.” The resolution of that disagreement is the same for the ground based on White as it was for the ground based on Hitt.

NSC provides an annotated version of White's "Schoen Car" that was the basis for FreightCar's challenge to claims 7–10 and 13 as a part of its Petition. PO Resp. 44–47. That annotated version is reproduced below.



Id. at 47. The figure above depicts an underframe of White's Schoen Car. As it did with Hitt's Gondola Car, NSC identifies a floor portion, rows of "stringers" or floor sills, and underlying cross-members.⁸ In a similar refrain as that discussed above, NSC urges that a skilled artisan would not regard the "stringers" as part of the floor structure, and, thus, White does not disclose "cross members affixed to an underside" of the floor structure. PO Resp. 45–47. Alternatively, NSC submits that, if the stringers are considered part of the floor structure, those stringers create a lower profile of the floor structure that cannot be viewed reasonably as "substantially flat."

⁸ White characterizes the "stringers" structures identified by NSC as "floor sills." See Ex. 1009, 58.

Id. at 47–51. In advancing that alternative view, NSC offers the following illustration.



PO Resp. 50. The figure above depicts NSC’s annotated version of the lower profile of any floor structure that includes the stringers. Like it did with the Hitt ground, NSC describes that profile as including significant vertical variation across the lower surface thereof creating a surface that is not substantially flat. *Id.* at 47–51 (citing Ex. 2018 ¶¶ 247–256).

FreightCar’s basis of disagreement with NSC with respect to the White ground is essentially the same as it was for the Hitt ground. Specifically, FreightCar does not challenge NSC’s view that White does not disclose cross members affixed to the underside of a floor structure if White’s stringers are not viewed as part of the floor structure. Once again, however, FreightCar take the position that floor stringers, such as those as a part of White’s Schoen Car, are part of the floor structure, and that they result in a floor structure that is substantially flat. Pet. Reply 18–24 (citing Ex. 1003 ¶¶ 151, 152, 156–159, and 250).

For all the same reasons discussed above in connection with the ground based on Hitt, we are of the same view when it comes to the ground based on White. Regardless of whether White’s stringers or floor sills are part of the claimed floor structure, on the present record, we conclude that FreightCar has not accounted sufficiently for the requirement of a

“substantially flat floor structure having cross members affixed to an underside thereof.”⁹ Accordingly, FreightCar has not established by a preponderance of the evidence that White renders claim 7–10 and 13 unpatentable.

D. Motion to Exclude

NSC filed a Motion to Exclude various exhibits offered by FreightCar in support of its Petition. Specifically, NSC seeks to exclude, in part or in total, exhibits 1003, 1007, 1011, 1012, 1014, and 1022. In reaching our determination in this Decision that FreightCar’s Petition does not establish the unpatentability of any of claims 1, 2, 7–10 and 13, we either: (1) did not rely on any of the content that NSC seeks to exclude, or; (2) evaluated that content in NSC’s favor. We conclude that the circumstances here do not require us to consider the substantive merits of NSC’s Motion to Exclude, and, instead, we dismiss that Motion as moot.

III. CONCLUSION

Having evaluated the Petition, its underlying supporting evidence, NSC’s Response, and its supporting evidence, we determine that FreightCar has not shown, by a preponderance of the evidence that claims 1, 2, 7–10, and 13 are unpatentable based on Hitt, or that claims 7–10 and 13 are unpatentable based on White.

⁹ As with the Hitt ground, in reaching this conclusion we credit the above-noted testimony of Mr. Long (Ex. 2018) over that of Mr. Miller when it comes to the question of whether the profile of White’s flooring that includes the stringers or floor sills is viewed reasonably as substantially flat.

IV. ORDER

After due consideration of the record before us, it is

ORDERED that FreightCar has not shown by a preponderance of the evidence that claims 1, 2, 7–10, and 13 of the '600 patent are unpatentable; and

FURTHER ORDERED that this is a Final Written Decision under 35 U.S.C. § 318(a), and that parties to the proceeding seeking judicial review of the decision under 35 U.S.C. § 319 must comply with the notice and service requirements of 37 C.F.R. § 90.2.

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