

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FREIGHTCAR AMERICA, INC.,
Petitioner,

v.

NATIONAL STEEL CAR, LTD.,
Patent Owner.

Case IPR2016-00788
Patent 7,757,611 B2

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

POWELL, *Administrative Patent Judge*.

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

I. INTRODUCTION

A. Background

Freightcar America, Inc. (“Petitioner”) filed a Petition requesting an *inter partes* review of claims 15, 18, and 20 of U.S. Patent No. 7,757,611 B2 (Ex. 1001, “the ’611 patent”). Paper 2 (“Pet.”). Patent Owner, National Steel Car, Ltd., filed a Preliminary Response. Paper 6 (“Prelim. Resp.”). In view of those submissions, we instituted an *inter partes* review of claims 15, 18, and 20. Paper 9 (“Institution Decision” or “Inst. Dec.”). Subsequently, Patent Owner filed a Patent Owner Response (Paper 15, “PO Resp.”), and Petitioner followed with a Reply (Paper 19, “Pet. Reply”).

An oral hearing was held on June 8, 2017 and a copy of the transcript was entered into the record (Paper 33, “Tr.”).

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 Petitioner has not shown by a preponderance of the evidence that claims 15, 18, and 20 of the ’611 patent are unpatentable.¹

¹ In e-mail correspondence to the Board on September 14, 2017, Patent Owner 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. Patent Owner expressly indicated, however, that it was not seeking briefing on the issue. Given the outcome of this current *inter partes* review proceeding, and Patent Owner’s express indication that it is not seeking briefing on the issue, no briefing was, or is, authorized.

B. Related Matters

The '611 patent has been asserted in *National Steel Car Limited v. FreightCar American, Inc.*, Case No. 1:15-cv-03418 (N.D. Ill. 2015) and *National Steel Car Limited v. FreightCar American, Inc.*, Case No. 1:15-cv-08643 (N.D. Ill. 2015), which have been consolidated. *See* Pet. 2; Paper 5, 2. Additionally, case IPR2016-00787 is identified by both parties as a related matter. Pet. 3, Paper 5, 2.

C. The Pending Grounds of Unpatentability

The pending grounds of unpatentability include (Pet. 4):

Reference	Basis ²	Challenged Claims
Johnson ³	“Anticipated by, or obvious over Johnson” (Pet. 4)	15, 18, and 20
Hitt ⁴	“Anticipated by, or obvious over Hitt” (Pet. 4)	15, 18, and 20

Petitioner also relies on a declaration from Keith A. Miller, P.E. (Ex. 1103) and a declaration from Scott Bennett, Ph.D. (Ex. 1104). Patent Owner relies on a declaration from Jack R. Long (Ex. 2118).

² For purposes of this Decision, we understand that Petitioner uses the phrase “anticipated by, or obvious over” to mean unpatentable under 35 U.S.C. § 102 or, alternatively, unpatentable under 35 U.S.C. § 103.

³ U.S. Patent No. 6,978,720 B2 (Ex. 1106, “Johnson”).

⁴ Rodney Hitt (compiler), *The Car Builders Dictionary*, The Railway Gazette (Ex. 1105, “Hitt”).

D. The '611 Patent

The '611 patent discloses a railroad freight car with a body, such as a gondola car body. Ex. 1001, [57]. Figure 1 of the '611 patent is reproduced below.

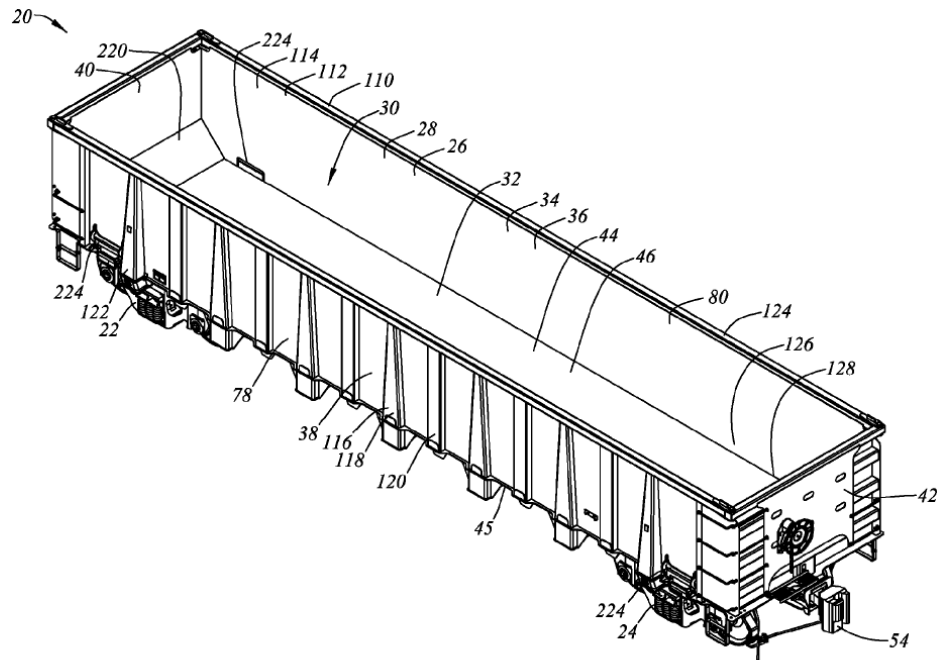


Figure 1

Figure 1 shows railroad car 20, which “may in one embodiment be a gondola car.” *Id.* at 8:54–60. Railroad car 20 includes trucks 22, 24 and rail car body 26. *Id.* at 9:1–4. Rail car body 26 includes floor 32, side walls 36, 38, first end wall 40, and second end wall 42. *Id.* at 9:4–10. Floor 32 may include floor panel 44. *Id.* at 9:18–19.

Figures 3b and 3c of the '611 patent are reproduced below.

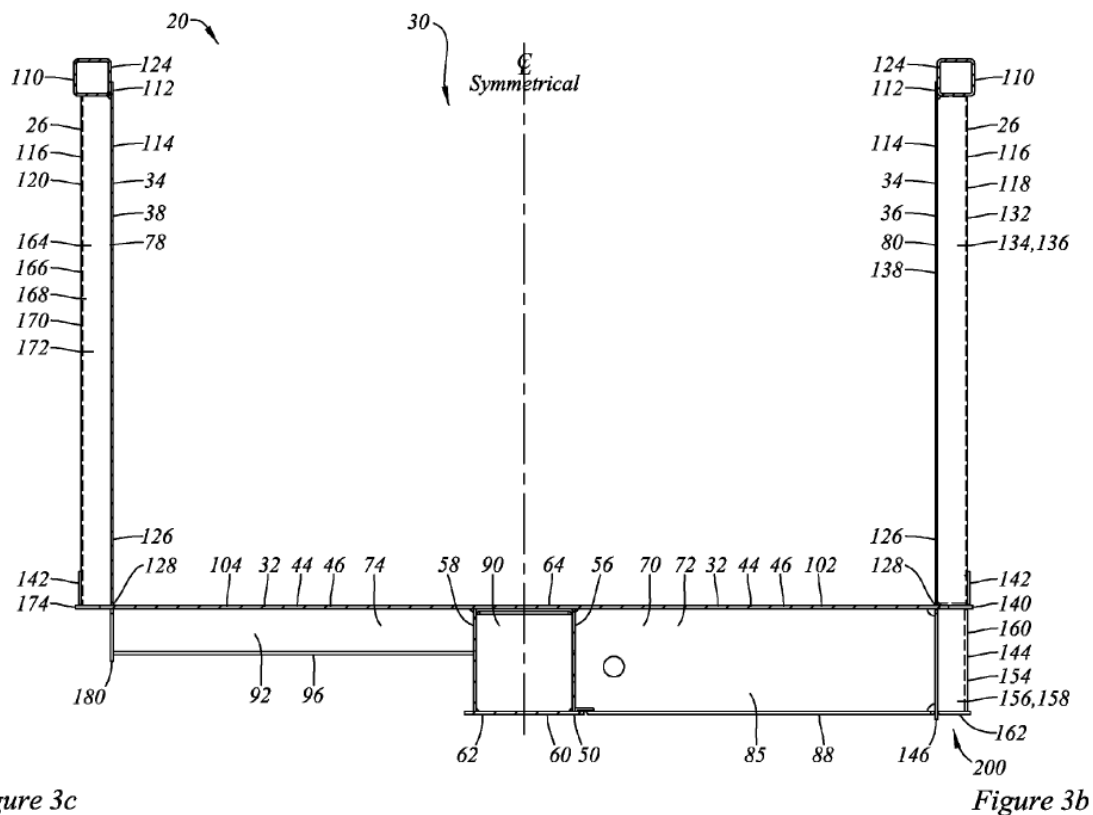


Figure 3b shows one cross-sectional view of the gondola car shown in Figures 1 and 2a, and Figure 3c shows another cross-sectional view of the gondola car shown in Figures 1 and 2a. *Id.* at 6:38–41, 6:46–51. Railroad car 20 includes array 70 of cross-bearers 72. *Id.* at 10:27–28. As shown in Figure 3c, floor panel 44 may form the upper flanges of cross-bearers 72. *Id.* at 11:26–27. Railroad car 20 also includes side beam 80. *Id.* at 11:42–43. Side beam 80 includes top chord member 110, generally upstanding web 114, and an array of vertical stiffeners 116 mounted to web 114 “at longitudinally spaced locations along side beam 80.” *Id.* at 11:49–51. Railroad car 20 may include side web extension 146 mounted beneath floor

panel 44, as well as stiffener extension assembly 144 mounted outward of side web extension 146. *Id.* at 14:66–15:2.

E. Illustrative Claim

Claim 15 is independent, and claims 18 and 20 depend from claim 15.
Claim 15 recites:

15. A rail road gondola car having:
 - a rail road car body supported by a pair of rail road car trucks for rolling motion along rail road tracks, those trucks being spaced apart in a longitudinal direction;
 - said rail road car body including a floor and containment walls standing upwardly from said floor;
 - said containment walls including first and second side walls running lengthwise along laterally spaced margins of said floor;
 - each of said first and second sidewalls including a sidewall sheet extending upwardly and lengthwise of said floor;
 - said first and second side walls each having a lower margin and an upper margin;
 - said first sidewall having a first sidewall reinforcement;
 - said first sidewall reinforcement having a base adjacent said lower margin of said first sidewall, and a tip distant from said lower margin of said first sidewall;
 - said first sidewall reinforcement having a back and a pair of first and second legs, said back and legs defining a channel section;
 - said first and second legs having toes mounted against said respective sidewall sheet, said back being spaced away;
 - a first transversely extending cross-bearer;
 - said first sidewall reinforcement being aligned with said first transversely extending cross-bearer when said rail road gondola car is viewed in side view;
 - said cross-bearer having a web and a flange, said web having a first margin mounted under said floor and a second margin below, and distant from, said floor, said flange of said cross-bearer running along said second margin of said web, said flange of said cross-bearer being distant from said floor;

said back of said first sidewall reinforcement including a portion extending below said floor;
said first and second legs of said first sidewall reinforcement including portions extending below said floor; and
said portions of said legs of said first sidewall reinforcement extending below said floor mating with said flange of said cross-bearer.

Ex. 1001, 43:12–44:3.

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). Only those terms in controversy need to be construed, and only to the extent necessary to resolve the controversy. *Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed.Cir.1999).

In order to determine whether Petitioner has shown unpatentability of claims 15, 18, and 20, we need only address one claim limitation,

specifically claim 15's recitation of "containment walls standing upwardly from said floor." The issue regarding this claim language is whether it requires that the containment walls stand "on" the floor, as Patent Owner contends. *See, e.g.*, PO Resp. 17–21; Pet. Reply 4–6. In the Institution Decision, in view of the arguments presented by Patent Owner in its Preliminary Response, we determined that there was a reasonable likelihood of Petitioner demonstrating that the broadest reasonable interpretation of this claim language did not require the containment walls to stand "on" the floor. Inst. Dec. 8–10.

On the record before us now, Patent Owner persuades us that the broadest reasonable interpretation of the disputed claim language requires that the containment walls stand "on" the floor. In the recitation "containment walls standing upwardly from said floor," the word "from" indicates that the containment walls are disposed "on" the floor. Consistent with this, all of the various embodiments of the invention disclosed by the '611 patent consistently show sidewalls of a rail car that stand or rest on underlying floor of the car, as Patent Owner notes. *See, e.g.*, PO Resp. 7–12; Ex. 1001, Figs. 1–10. Patent Owner also relies on the testimony of Mr. Long, in discussing the meaning of "standing upwardly from." *See, e.g.*, PO Resp. 17–21 (citing Ex. 2118 ¶¶ 101–102, 144–161). Specifically, Mr. Long testifies that a person of ordinary skill in the art would have recognized that in the '611 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. 2118 ¶ 145 (citing Ex. 2112, 7). Mr. Long's testimony and the underlying support

for that testimony shed favorable light on the meaning of “standing upwardly from” that is urged by Patent Owner.

Patent Owner 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 ’611 patent. As noted above, according to Patent Owner, while “standing” is generally understood as a term of position, “extending,” in contrast, is a term of “direction.” PO Resp. 18–20. Patent Owner contends that in using the term “standing” upwardly of, rather than “extending” upwardly of, the pertinent claims of the ’611 patent locate the position of the sidewalls vis-à-vis the flooring rather than simply establish the direction that the sidewalls extend. *Id.*⁵

Patent Owner also observes that Petitioner agreed in the related district court proceeding that the phrase “standing upwardly of” means “standing on and rising in an upward direction of.” PO Resp. 17, n.2 (citing Ex. 2001, 1). Patent Owner contends that Petitioner has not provided persuasive evidence or reasoning to demonstrate that the broadest reasonable interpretation of the language “standing upwardly from” is broader than the meaning of “standing upwardly of” stipulated to by Petitioner in the district court proceeding. *Id.* We agree. As we 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*

⁵ We further observe that Patent Owner’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.

partes review. Inst. Dec. 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.* Here, on the current record, we determine that the meaning is the same under either claim-construction standard.

Having carefully considered the respective views of the parties as to the meaning of “standing upwardly from,” 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 ’611 patent.

B. Unpatentability Based on Johnson

1. Overview of Johnson

Johnson discloses a gondola railcar with plural side posts connected to an underframe of the car. Ex. 1106, [57]. Figure 1 of Johnson is reproduced below.

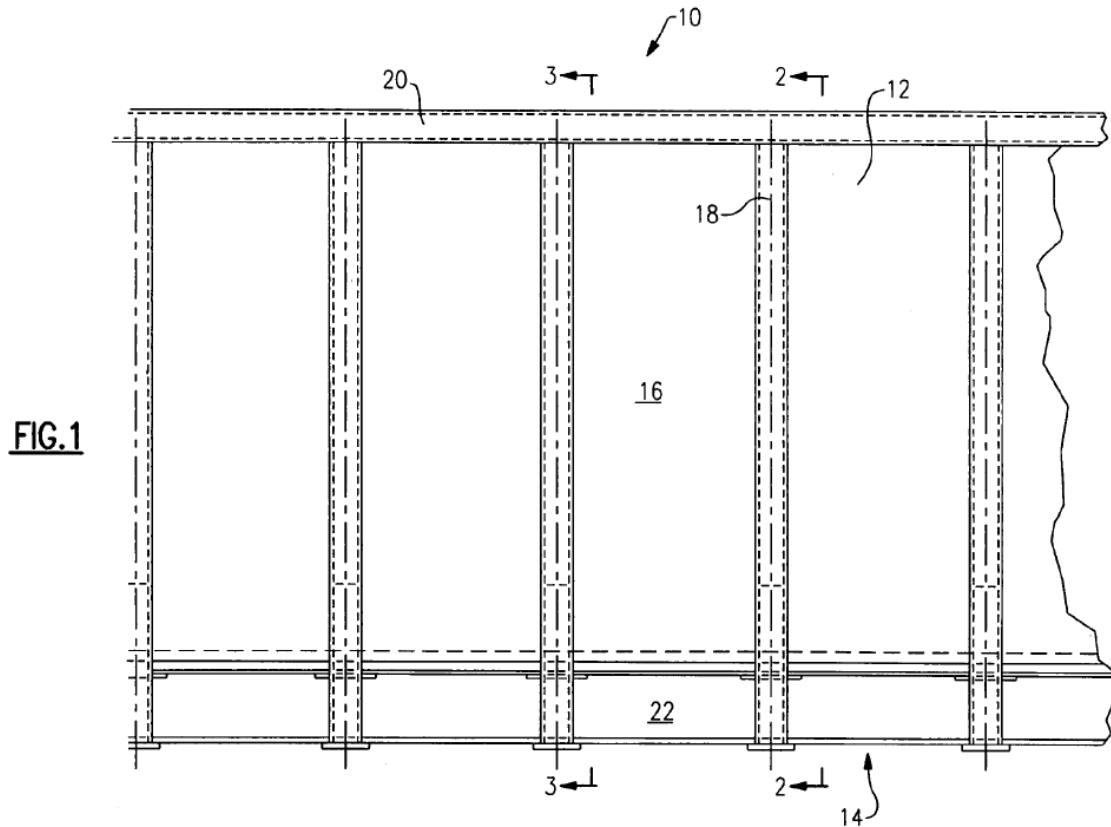


Figure 1 of Johnson shows gondola car 10 with side frame assembly 12 and subframe assembly 14. Ex. 1106, 3:44–46. Side frame assembly 12 includes side sheet 16 and side posts 18. *Id.* at 3:51–52. Figure 6 of Johnson is reproduced below.

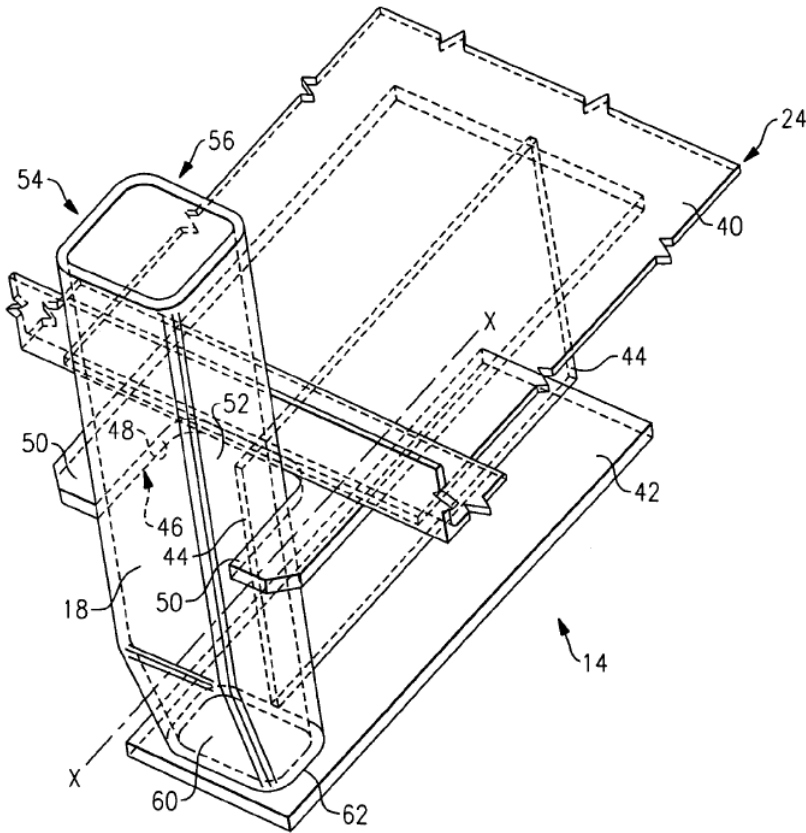


FIG.6

Figure 6 of Johnson shows details of a connection between one side post 18 and subframe assembly 14. *Id.* at 4:36–37. Figure 6 also shows cross-bearing member 24 in the form of an I-beam with upper flange 40, lower flange 42, and vertical web 44. *Id.* at 4:37–39. Upper flange 40 includes opening 46, in which side post 18 fits. *Id.* at 4:43–50. Bottom 60 of side post 18 is welded to lower flange 42. *Id.* at 4:59–60.

A Certificate of Correction, dated December 27, 2005, corrected certain errors in Johnson. *Id.* at 16–27; *see* Ex. 2002. The certificate of correction included corrected drawings. Ex. 1106, 16–27; *see* Ex. 2002.

2. Discussion—Ground Based on Johnson

Petitioner explains how it believes Johnson discloses each of the limitations recited in claims 15, 18, and 20, citing to record evidence. Pet. 20–40; Pet. Reply 16–22. Patent Owner argues that Petitioner fails to show that Johnson discloses certain claim limitations, including the limitation of “containment walls standing upwardly from said floor” in claim 15. PO Resp. 38–47. As noted above in Section II.A, we interpret this claim language as requiring containment walls “standing on and rising in an upward direction of” the floor. Under this construction, as discussed below, we are not persuaded that Petitioner has demonstrated, by a preponderance of the evidence, that Johnson renders claims 15, 18, and 20 unpatentable.

The Petition asserts that Johnson discloses the claim limitations “containment walls standing upwardly from said floor.” Pet. 24–28. The Petition notes that Johnson discloses floor 26 and side sheet 16. *Id.* at 24–25. The Petition contends that “[b]ased on the vertical direction of the ‘side frame assembly,’ . . . , a [person of ordinary skill in the art] would have understood Johnson to teach that the containment walls stand ‘upwardly from said floor.’” *Id.* at 25. Showing the uncorrected versions of Figures 1 and 2 of Johnson, the Petition elaborates that “[t]his is further shown, e.g., in Fig. 2, where wall 16 is generally perpendicular with respect to the floor 26.” *Id.* at 25–26 (citing Ex. 1106, Fig. 2; Ex. 1103 ¶ 132).

These statements do not indicate, much less prove, that Johnson discloses a containment wall that stands on a floor. Observing the vertical direction of side frame 12 and the perpendicular orientation of side sheet 16 to floor 26 does not establish that side frame 12 or side sheet 16 is disposed on floor 26. The cited testimony of Mr. Miller notes that Figure 2 shows

“side sheet 16 is shown as standing normal to the floor.” Ex. 1103 ¶ 132. This too facially does not indicate, much less prove, that side sheet 16 is disposed on floor 26.

The Petition’s annotated reproduction of Figure 1 also fails to demonstrate that Johnson discloses containment walls disposed on a floor. *See* Pet. 25–26. Neither the uncorrected or corrected version of Figure 1 shows side sheet 16 standing on floor 26. *See* Ex. 1006, 2, 18; Ex. 1120, 129.

Furthermore, we find that the Petition’s citation of Figure 2 also does not demonstrate that Johnson discloses a containment wall disposed on a floor. We look first to the corrected version of Figure 2, reproduced below.

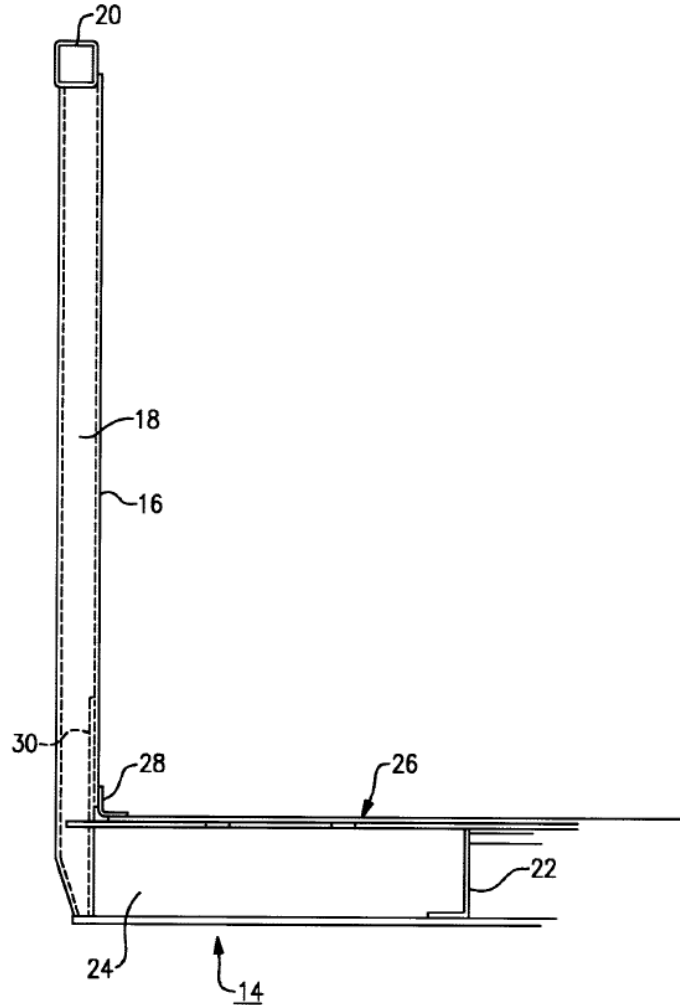


FIG. 2

Ex. 1106, 19. The corrected version of Figure 2 is a “sectional side view taken along line 2—2” of Figure 1, showing side sheet 16, side post 18, lateral member 20, cross-bearing member 24, floor 26, angled member 28, and reinforcing member 30 connected to one another. *Id.* at 3:3–4, 4:18. Mr. Long testifies that the corrected version of Figure 2 clearly shows that side sheet 16 is not on floor 26, as floor 26 stops short of side sheet 16, placing side sheet 16 outward of floor 26. Ex. 2118 ¶¶ 201–202. Petitioner

does not dispute this characterization of the corrected version of Figure 2. In view of this, the corrected version of Figure 2 does not support a determination that Petitioner has shown, by a preponderance of the evidence, that Johnson discloses “containment walls standing upwardly from said floor.”

We consider next whether the uncorrected version of Johnson’s Figure 2 can support Petitioner’s position that Johnson discloses the disputed claim language. We note, however, that the Petition states that Petitioner relies on the uncorrected figures of Johnson, elaborating that the differences between the corrected and uncorrected figures “appear to be immaterial to the analysis presented herein.” Pet. 21, n.6.

Patent Owner contends that the uncorrected figures of Johnson do not support Petitioner’s case. PO Resp. 38–45. Patent Owner argues that the uncorrected figures are not prior art and do not reflect what Johnson actually discloses to a person of ordinary skill in the art. *Id.* at 39. Citing testimony of Mr. Long, Patent Owner explains that the uncorrected version of Figure 2 shows an impossible structure not described in Johnson’s specification. *Id.* at 40.

In particular, Mr. Long testifies that the uncorrected version of Figure 2 shows “an impossible design in which solid pieces, such as the floor, pass uninterrupted through other solid pieces, such as the vertical beam.” Ex. 2118 ¶ 32. Consequently, Mr. Long opines that a person of ordinary skill in the art would have understood that the uncorrected version of Figure 2 would not have conveyed a structure that could actually be implemented (*id.* at ¶ 197), and instead, that a person of ordinary skill in the art would have understood Johnson’s specification as disclosing the structure shown in

the corrected version of Figure 2 (*id.* at ¶¶ 28–31). Consistent with this, during oral argument, Petitioner agreed that a person of ordinary skill in the art would have interpreted the uncorrected version of Figure 2 as teaching substantively the same structure that the corrected version of Figure 2 shows. Tr. 34:19–35:6.

We are persuaded that a person of ordinary skill in the art would have understood that the uncorrected version of Figure 2 shows an impossible structure, consistent with the fact that the drawing was later corrected. We find that a person of ordinary skill in the art, reviewing Johnson and the uncorrected version of Figure 2, would have understood them as teaching the structure ultimately shown in the corrected version of Figure 2. Because this structure does not have side sheet 16 disposed on floor 26, we are not persuaded that Johnson’s Figure 2 disclosure includes the claimed “containment walls standing upwardly from said floor.”

In its Reply, Petitioner also cites Johnson’s statement that “[a]n angled member 28 is disposed along the edge where the side sheet 16 and the floor 26 converge” (Ex. 1106, 4:13–15) as teaching the disputed claim limitations.⁶ Pet. Reply 19. This disclosure occurs within the context of Johnson’s discussion of Figure 2. Ex. 1106, 4:1–15. Johnson’s corrected Figure 2 and the balance of Johnson’s disclosure regarding Figure 2 appear to show that side sheet 16 does not stand on floor 26. Petitioner cites no evidence that a person of ordinary skill in the art would have understood Johnson’s single recitation of the word “converge” to mean that, contrary to

⁶ The Petition also cites this passage, but only for the assertion that Johnson discloses floor 26, not for the contention that Johnson discloses the claimed relationship between containment walls and the floor. Pet. 24–25.

what appears in Figure 2, side sheet 16 stands on floor 26. See Pet. Reply 19. In view of Johnson's characterization of Figure 2, the uncorrected version of Figure 2, which shows an "impossible design" (Ex. 2118 ¶ 32), and the corrected version of Figure 2, which shows side sheet 16 outward of floor 26, we do not find the portion of Johnson quoted by Petitioner discloses that side sheet 16 stands on floor 26.

In its Reply, Petitioner also asserts that Johnson's Figure 5 shows the claimed relationship between containment walls and a floor. Pet. Reply 19–20. Patent Owner objected to this assertion as an improper new argument presented in Petitioner's Reply. See Paper 22, 1; Tr. 65:5–11. Patent Owner also contends that Figure 5 does not show clearly the relationship between containment walls and a floor, such that a person of ordinary skill in the art would not have interpreted Figure 5 as showing containment walls standing on a floor. Tr. 65:12–67:18.

Petitioner's citation of Johnson's Figure 5 in the Reply is unavailing. When addressing the claim limitations "containment walls standing upwardly from said floor," the Petition does not cite Figure 5 of Johnson. See Pet. 24–28. This section of the Petition cites paragraphs 54–56, 130–132, 134, and 135 of Mr. Miller's testimony (*id.*), and none of this testimony cites to or addresses Figure 5 of Johnson, either (*see* Ex. 1103 ¶¶ 54–56, 130–132, 134–135). Furthermore, it is not apparent that Figure 5 of Johnson shows the same embodiment as Figure 2; Johnson identifies Figure 5 as a cross-section of Figure 4, which Johnson introduces as "a partial side elevation view of a gondola railcar having a bolster." Ex. 1106, 3:7–8. We determine that Petitioner's citation of Johnson's Figure 5 in the Reply is unavailing because it constitutes an improper new argument. In that respect,

we do not regard Petitioner's new reliance on Johnson's Figure 5 in an attempt to address a deficiency raised by Patent Owner in its Patent Owner Response as constituting a proper response envisioned by our rules. *See* 37 C.F.R. § 42.23(b).

Furthermore, even if Petitioner's citation of Figure 5 were a proper response, it would not demonstrate, by a preponderance of the evidence, that Johnson discloses the claimed relationship. We are persuaded that, without any other supporting evidence, Figure 5 of Johnson does not show the relationship between containment walls and a floor clearly enough to support, by a preponderance of the evidence, Petitioner's contention that Johnson discloses containment walls that stand on a floor.

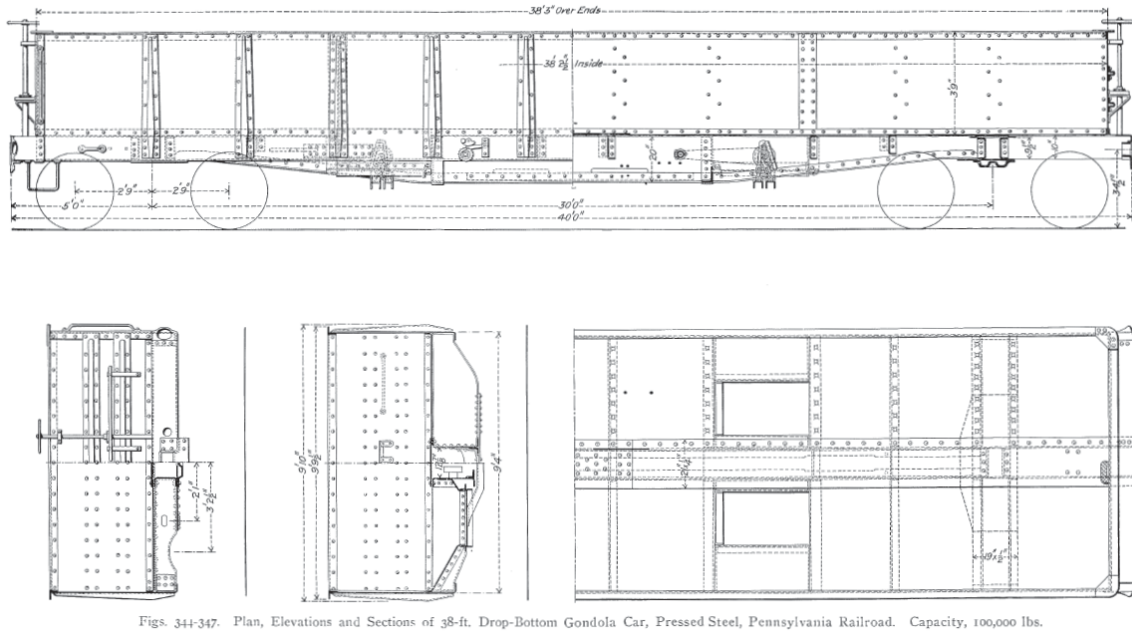
For the foregoing reasons, Petitioner has not persuaded us that Johnson discloses containment walls that stand on the floor, as required by independent claim 15. Additionally, Petitioner has not asserted that it would have been obvious to modify Johnson's railcar to have such a configuration, much less provided evidence and reasoning persuading us that it would have been obvious to do so. *See, e.g.*, Pet. 24–28. Accordingly, Petitioner has not demonstrated by a preponderance of the evidence that claims 15, 18, and 20 are unpatentable over Johnson.

C. 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. 1105, 1.⁷ Hitt shows a 38-foot drop-bottom gondola car in Figures 344–347, which are reproduced below. *Id.* at 8.



Figures 344–347 of Hitt show plan, elevations, and sections of a 38-foot drop bottom gondola car. *Id.*

2. Discussion—Ground Based on Hitt

Petitioner, citing to evidence in the record, explains how it believes Hitt discloses each of the limitations recited in claims 15, 18, and 20. Pet. 40–57; Pet. Reply 22–28. Patent Owner argues that Petitioner fails to show that Hitt discloses certain claim limitations, including the claim 15 limitation of “containment walls standing upwardly from said floor.” PO Resp. 58–60. As noted above in Section II.A, we interpret this claim

⁷ Hitt contains 15 pages, and the identified page numbers in this Decision are those appearing at the bottom of each page.

language as requiring containment walls “standing on and rising in an upward direction of” the floor. Under this construction, and as discussed below, we are not persuaded that Petitioner has demonstrated, by a preponderance of the evidence, that Hitt renders claims 15, 18, and 20 unpatentable.

The Petition asserts that Hitt discloses the claim limitations “containment walls standing upwardly from said floor.” Pet. 43–45. In addressing these limitations, Petitioner provides a drawing that it styles “Fig. I,” as well as a drawing that it styles “Fig. J.” “Fig. I” is reproduced below.

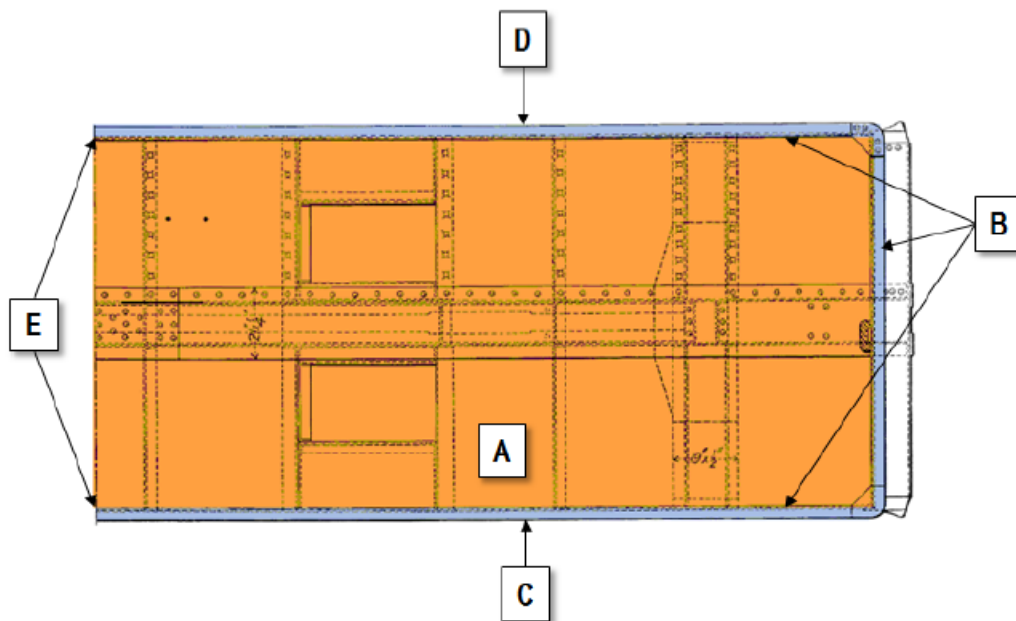


Fig. I: *Hitt (Ex. 1105) at Fig. 347 (annotated)*

“Fig. I” shows Figure 347 of Hitt with annotations added. See Pet. 44.

“Fig. J” is reproduced below.

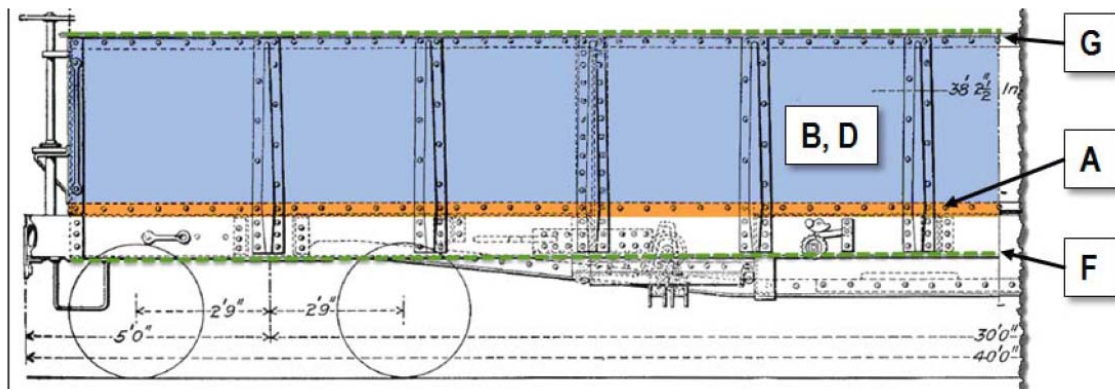
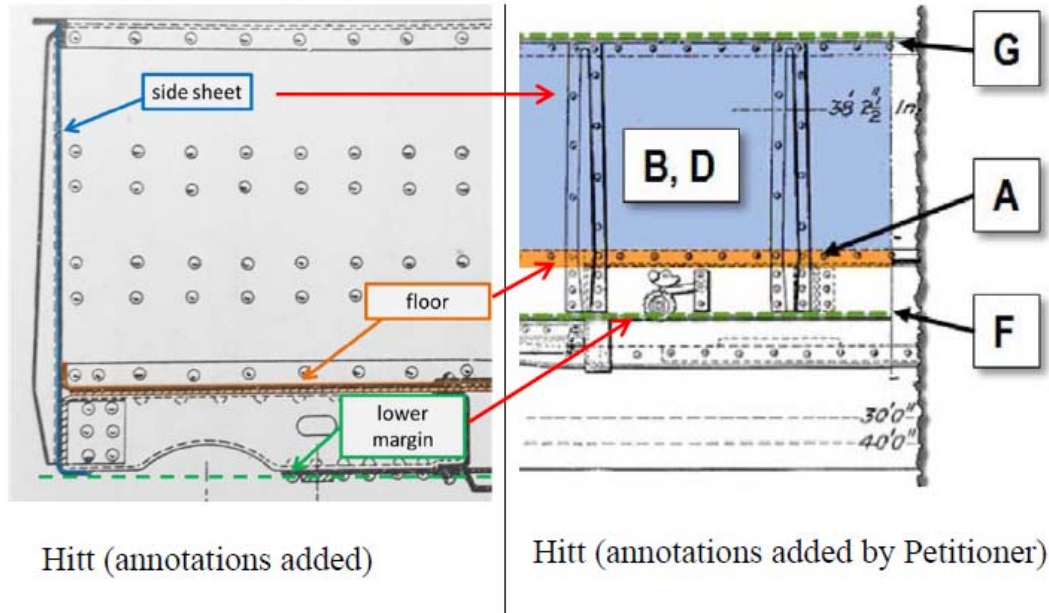


Fig. J: Hitt (Ex. 1105) at Figs. 344, 347 (annotated)

Petitioner's "Fig. J" shows a portion of Figure 344 of Hitt with annotations added. See Pet. 45. The Petition asserts that Hitt discloses a floor, labeled "A," as well as containment walls, labeled "B." *Id.* at 44. The Petition also asserts that "[t]he containment walls include first and second sidewalls, labeled 'C' and 'D'" (*id.*), which include sidewall sheets that stand "up from floor and run its length" (*id.* at 45).

Patent Owner argues that the sidewalls of Hitt do not stand on the floor, but lie outboard of the floor. PO Resp. 58–59. In support of this position, Patent Owner provides an annotated version of one of Hitt's Figures showing an end view of the railcar beside a portion of Petitioner's annotated version of a side Hitt's rail car.



These drawings show the portions of the railcar that Patent Owner and Petitioner contend are the side sheet, the floor, and the lower margin of the side sheet. *See id.* at 59. It appears that Patent Owner is correct that the side sheet, which forms a containment wall of Hitt’s rail car, does not sit on the floor, but lies outward of the floor. Indeed, we agree with Patent Owner that Petitioner’s own drawing, which shows the lower margin (“F”) of the side sheet below the floor, indicates that the side sheet does not sit on the floor. *See id.*; Pet. 44–45.

Petitioner notes that the Petition also identifies Hitt’s end walls as containment walls. Pet. Reply 23. Asserting that Patent Owner did not address whether Hitt’s end walls stand on the floor, Petitioner argues that “[t]hus, Patent Owner failed to meet its burden as to whether Hitt’s 38-ft. Gondola includes ‘containment walls standing upwardly from’ the floor.” *Id.* at 23–24. This argument has no merit because it is Petitioner, not Patent Owner, that bears the burden of persuasion. *See* 35 U.S.C. § 316(e). And

Petitioner has not provided evidence or explanation persuading us that Hitt's end walls stand on the floor.

For the foregoing reasons, Petitioner has not persuaded us that Hitt discloses containment walls that stand on the floor, as required by independent claim 15. Additionally, Petitioner has not asserted that it would have been obvious to modify Hitt's railcar to have such a configuration, much less provided evidence and reasoning persuading us that it would have been obvious to do so. *See, e.g.*, Pet. 43–45. Accordingly, Petitioner has not demonstrated by a preponderance of the evidence that claims 15, 18, and 20 are unpatentable over Hitt.

III. CONCLUSION

Having evaluated the Petition, its underlying supporting evidence, Patent Owner's Response, and Petitioner's Reply we determine that Petitioner has not shown, by a preponderance of the evidence, that claims 15, 18, and 20 are unpatentable based on Johnson, or that claims 15, 18, and 20 are unpatentable based on Hitt.

IV. ORDERS

After due consideration of the record before us, it is

ORDERED that Petitioner has not shown by a preponderance of the evidence that claims 15, 18, and 20 of the '611 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.

Case IPR2016-00788

Patent 7,757,611 B2

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