

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HUM INDUSTRIAL TECHNOLOGY, INC.
Petitioner

v.

AMSTED RAIL COMPANY, INC.
Patent Owner

Case IPR2023-00539
Patent No. 9,981,673

**PATENT OWNER'S CORRECTED OBJECTIONS TO EVIDENCE
SUBMITTED WITH PETITIONER'S REPLY AND OPPOSITION TO
MOTION TO AMEND**

Pursuant to 37 C.F.R. § 42.64 and the Federal Rules of Evidence, as applied by the Patent Trial and Appeal Board, Patent Owner Amsted Rail Company, Inc. (“Amsted” or “Patent Owner”) provides the following objections to evidence submitted by Petitioner Hum Industrial Technology Inc. (“Hum” or “Petitioner”). These objections are timely served within five (5) business days of institution of trial pursuant to 37 C.F.R. § 42.64(b)(1).

Exhibit 1021 – Expert Declaration of Steven Ricca in Support of Petitioner’s Opposition to Patent Owner’s Motion to Amend

Amsted objects to Exhibit 1021 to the extent the testimony of Mr. Ricca is not cited to or relied upon by the Petitioner in its Opposition to the Motion to Amend. *See* 37 C.F.R. § 42.104 (In the Petition, “[t]he Board may exclude or give no weight to the evidence where a party has failed to state its relevance or to identify specific portions of the evidence that support the challenge.”); *Actifo, Inc. v. Delphix Corp.*, IPR2015-00108, Paper 56 at 57 (PTAB Apr. 29, 2016) (excluding evidence not relied upon by the Petition); *SK Innovation Co., Ltd. v. Celgard, LLC*, IPR2014-00679, Paper 58 at 49 (PTAB Sept. 25, 2015) (same). For example, paragraphs 1-16, 27, 29, 30, 32-35, 38, 39, 41, 43, 44, 47-49, 54, 69, 76-78, 81, 82, 87-89, 92, 97-99 are not cited to or relied upon in the Opposition. Accordingly, this testimony is also irrelevant, misleading, and confusing under Fed. R. Evid. 401-403.

Amsted further objects to other portions of Exhibit 1021 to the extent they do not adequately disclose the underlying facts or data on which statements and/or opinions are based, either by (1) providing no citations, (2) failing to cite where in a reference the disclosure supporting the statement and/or opinion can be found, *i.e.*, by providing pin cites, or (3) citing to disclosures or prior analysis that does not support the statement and/or opinion being proffered. *See, e.g.*, Ex. 1021 at ¶¶12, 16-19, 21, 26, 35, 37, 40, 43, 49, 50-53, 55-58, 60-76, 78-86, 88-98, 100, 101.

Amsted further objects to Exhibit 1021 to the extent it references unspecified other arguments to support a position. *See, e.g.*, Ex. 1003 at ¶¶2, 21, 35, 36, 42, 50, 51, 54, 77, 87, 96. Accordingly, this testimony is misleading and confusing under Fed. R. Evid. 401-403.

Amsted further objects to Exhibit 1021 because it includes improper incorporations of other documents by reference in violation of 37 C.F.R. §42.6(a)(3). *See, e.g.*, Ex. 1021 at ¶¶11, 12, 49, 52, 53, 57, 72, 73, 75, 76, 83-86, 93-96, 100, 101.

Because many statements and opinions in Exhibit 1021 are unsupported and conclusory, Amsted further objects to this testimony as irrelevant, misleading, unduly prejudicial, and confusing under Fed. R. Evid. 401-403.

Exhibit 1025 U.S. Patent No. 2,818,508 to Johanson et al.

Amsted objects to Exhibit 1025 because it is not cited to or relied upon in the Reply. *See* 37 C.F.R. § 42.104 (“The Board may exclude or give no weight to the

evidence where a party has failed to state its relevance or to identify specific portions of the evidence that support the challenge.”); *Actifo, Inc. v. Delphix Corp.*, IPR2015-00108, Paper 56 at 57 (PTAB Apr. 29, 2016) (excluding evidence not relied upon by the Petitioner); *SK Innovation Co., Ltd. v. Celgard, LLC*, IPR2014-00679, Paper 58 at 49 (PTAB Sept. 25, 2015) (same).

Exhibit 1026 U.S. Patent No. 5,149,025 to Utterback et al.

Amsted objects to Exhibit 1026 because it is not cited to or relied upon in the Reply. *See* 37 C.F.R. § 42.104 (“The Board may exclude or give no weight to the evidence where a party has failed to state its relevance or to identify specific portions of the evidence that support the challenge.”); *Actifo, Inc. v. Delphix Corp.*, IPR2015-00108, Paper 56 at 57 (PTAB Apr. 29, 2016) (excluding evidence not relied upon by the Petitioner); *SK Innovation Co., Ltd. v. Celgard, LLC*, IPR2014-00679, Paper 58 at 49 (PTAB Sept. 25, 2015) (same).

Exhibit 1027 U.S. Patent No. 5,331,311 to Doctor et al.

Amsted objects to Exhibit 1027 because it is not cited to or relied upon in the Reply. *See* 37 C.F.R. § 42.104 (“The Board may exclude or give no weight to the evidence where a party has failed to state its relevance or to identify specific portions of the evidence that support the challenge.”); *Actifo, Inc. v. Delphix Corp.*, IPR2015-00108, Paper 56 at 57 (PTAB Apr. 29, 2016) (excluding evidence not relied upon

by the Petitioner); *SK Innovation Co., Ltd. v. Celgard, LLC*, IPR2014-00679, Paper 58 at 49 (PTAB Sept. 25, 2015) (same).

Exhibit 1028 Hum's First Supplemental Counter-Infringement

Contentions

Patent Owner objects to Exhibit 1028 under FRE 401-403 on the grounds of relevance and as more prejudicial than probative, insofar as it is an unserved document prepared with regard to the related District Court litigation, and it is not relevant to the current matter. Petitioner was required to seek leave to file its First Supplemental Counter-Infringement Contentions in the District Court. *See Amsted Rail Co., Inc. v. Hum Industrial Tech., Inc.*, No. 4:22-cv-00445-AGF, Dkt. 30 at 2, §I.5.D (E.D. Mo. filed Oct. 21, 2022). This exhibit was never ordered served by the District Court; in fact, Petitioner never moved for leave to serve it on Patent Owner. In any case, upon reviewing it, Patent Owner objected to the contentions as untimely and lacking good cause for the supplement. Moreover, Patent Owner objects to this exhibit on the grounds of hearsay because it reflects Petitioner's own out-of-court statements and is excluded under FRE 802. Patent Owner also objects to this exhibit on the grounds that Petitioner relies on it for the truth of the matter asserted and it does not fall within any of the exceptions provided by FRE 803.

Exhibit 1029 Declaration of Eric J. Rakestraw in Support of Petitioner's

Reply

Amsted objects to Exhibit 1029 because it is not cited to or relied upon in the Reply. *See* 37 C.F.R. § 42.104 (“The Board may exclude or give no weight to the evidence where a party has failed to state its relevance or to identify specific portions of the evidence that support the challenge.”); *Actifo, Inc. v. Delphix Corp.*, IPR2015-00108, Paper 56 at 57 (PTAB Apr. 29, 2016) (excluding evidence not relied upon by the Petitioner); *SK Innovation Co., Ltd. v. Celgard, LLC*, IPR2014-00679, Paper 58 at 49 (PTAB Sept. 25, 2015) (same).

Exhibit 1030 – Expert Declaration of Steven Ricca in Support of Petitioner's Reply

Amsted objects to Exhibit 1030 to the extent the testimony of Mr. Ricca is not cited to or relied upon by the Petitioner in its Opposition to the Motion to Amend. *See* 37 C.F.R. § 42.104 (In the Petition, “[t]he Board may exclude or give no weight to the evidence where a party has failed to state its relevance or to identify specific portions of the evidence that support the challenge.”); *Actifo, Inc. v. Delphix Corp.*, IPR2015-00108, Paper 56 at 57 (PTAB Apr. 29, 2016) (excluding evidence not relied upon by the Petitioner); *SK Innovation Co., Ltd. v. Celgard, LLC*, IPR2014-00679, Paper 58 at 49 (PTAB Sept. 25, 2015) (same). For example, paragraphs 1-3

are not cited to or relied upon in the Opposition. Accordingly, this testimony is also irrelevant, misleading, and confusing under Fed. R. Evid. 401-403.

Amsted further objects to other portions of Exhibit 1030 to the extent they do not adequately disclose the underlying facts or data on which statements and/or opinions are based, either by (1) providing no citations, (2) failing to cite where in a reference the disclosure supporting the statement and/or opinion can be found, *i.e.*, by providing pin cites, or (3) citing to disclosures or prior analysis that does not support the statement and/or opinion being proffered. *See, e.g.*, Ex. 1021 at ¶¶4, 6-19.

Because many statements and opinions in Exhibit 1030 are unsupported and conclusory, Amsted further objects to this testimony as irrelevant, misleading, unduly prejudicial, and confusing under Fed. R. Evid. 401-403.

Exhibit 1031 – U.S. Provisional Application No. 61/333,428 to Armitage et al.

Amsted objects to Exhibit 1031 as untimely. The document was available to Petitioner prior to filing the petition and could have been filed with the petition at the time of filing. Petitioner was aware, at the time it filed the Petition, of Patent Owner's claim to an earlier priority date than the date of the continuation-in-part application, yet declined to present proper evidence in support of its claim that Armitage was entitled to the effective filing date of its provisional.

Respectfully submitted,

Dated: January 19, 2024

By: /Ryan N. Miller/
Ryan N. Miller
Reg. No. 68,262
Counsel for Patent Owner
Amsted Rail Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2024, a copy of the foregoing was served by electronic mail on Petitioner's counsel, lead and back-up, as follows:

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