

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

Before JAMES P. CALVE, KEVIN W. CHERRY, and MICHAEL L. WOODS,
Administrative Patent Judges.

**PETITIONER'S MOTION TO EXCLUDE
PURSUANT TO 37 C.F.R. §§ 41.155 AND 42.64**

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TABLE OF EXHIBITS CITED

Exhibit No.	Description
2011	Internet Archive Capture of https://www.merriam-webster.com/dictionary/level
2012	Internet Archive Capture of https://www.merriam-webster.com/dictionary/fault
2157	Exhibit 15 to Declaration of Ryan Miller

Pursuant to 37 C.F.R. §§ 41.155(c) and 42.64(c), Petitioner Hum Industrial Technology, Inc. (“Petitioner”) moves to exclude exhibits and testimony cited below that do not comply with the Federal Rules of Evidence (“FRE”).

I. ARGUMENT

Set forth below is the identification of where in the record the above-listed exhibits were relied upon by Patent Owner, where in the record Petitioner objected to each exhibit, and Petitioner’s explanation of each objection.

A. Exhibits 2011 and 2012 Lack Authentication and Should Be Excluded as Irrelevant Because Patent Owner Has Not Established the Exhibits are from the Correct Time Frame.

Patent Owner filed Exhibit 2011 and Exhibit 2012 with its Patent Owner Response. *See* Paper 16 at p. 5 (citing Exhibits 2011 and 2012). At the time, Patent Owner did not file any declaration or other evidence sufficient to establish a proper foundation for Exhibits 2011 or 2012 or to authenticate them under FRE 901.

Following Petitioner’s timely objections, Paper 20 at pp. 2-3, Patent Owner served supplemental evidence in the form of a declaration by counsel, asserting each exhibit to be “a true and correct copy of a website...visited on September 29, 2023.”

Exhibit 2165¹ at ¶ 4. While the offered declaration may be sufficient to establish that counsel created the exhibits in question on September 29, 2023, it is *not* sufficient to establish that the *content* of the exhibits are what Patent Owner claims—accurate reproductions of web pages that existed on the effective filing date of the ’673 Patent.

In cases involving similar or identical facts, the Board has consistently required the party proffering the evidence “to produce some statement or affidavit from someone with knowledge of the website, such as a web master or someone else with personal knowledge.” *Comcast Cable Comms., LLC v. Rovi Guides, Inc.*, IPR2017-00941, Paper 70 at p. 56 (PTAB Sept. 7, 2018) (collecting cases); *see also Neste Oil Oyj v. REG Synthetic Fuels, LLC*, IPR2013-00578, Paper 53 at p. 4 (PTAB March 12, 2015) (“When offering a printout of a webpage into evidence to prove the website’s contents, the proponent of the evidence must authenticate the information from the website itself, not merely the printout.”).

Patent Owner’s counsel, however, does not have (nor claim to have) personal knowledge of the systems used by the Internet Archive to capture and archive web pages. Patent Owner therefore has not provided any evidence sufficient to establish

¹ Patent Owner served, but did not file, the Declaration of Ryan N. Miller. Petitioner notes there is a second Exhibit 2165 filed by Patent Owner, which Petitioner is not citing to here.

that Exhibit 2011 or Exhibit 2012 accurately represent the *content* of web pages that were in existence on the effective filing date of the '673 Patent.

In the absence of evidence authenticating the content of Exhibits 2011 and 2012—specifically, evidence that the offered dictionary definitions are from the correct time period—the exhibits are irrelevant to any issue in this proceeding. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (“[T]he ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question ***at the time of the invention***, i.e., as of the effective filing date of the patent application.”). Exhibits 2011 or 2012 therefore lack authentication under FRE 901 and are irrelevant under FRE 402.

B. Exhibit 2157 Should Be Excluded Under FRE 402 Because it is Irrelevant.

The Board has excluded, as irrelevant, briefs and other documents stemming from corresponding District Court litigation when the District Court document is associated with an issue unrelated to inter partes review (“IPR”). *Samsung Electronics Co., Ltd. v. Huawei Technologies Co., Ltd.*, IPR2017-01487, Paper 45 at p. 25 (PTAB Dec. 10, 2018). Here, Petitioner’s Preliminary Counter-Infringement Contentions filed in the corresponding District Court litigation (Exhibit 2157) are only relevant to the issue of *infringement*, which is not an issue properly before the Board. Notwithstanding that the exhibit contains no admission of infringement (*see*,

e.g., Exhibit 2157 at p. 15 (denying infringement of claim 1)), Patent Owner's allegations of infringement and Petitioner's responses to the same are not relevant to the questions of validity at issue in this proceeding. Exhibit 2157 should therefore be excluded under FRE 402.

II. CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that Exhibits 2011, 2012, and 2157 be excluded.

Respectfully submitted,

Dated: May 2, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2024, the foregoing was served via electronic mail to the attorneys of record for the '673 Patent at the following address:

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