

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
US Patent No. 9,981,673

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

**PETITIONER'S REPLY IN SUPPORT OF ITS
MOTION TO EXCLUDE EVIDENCE**

Amsted Rail Company's opposition to Petitioner's motion is without merit, as explained below:

I. ARGUMENT

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.

As stated before, Exhibit 2011 and Exhibit 2012 lack authentication 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 the absence of authenticating evidence to satisfy FRE 901, the exhibits are irrelevant to any issue in this proceeding under FRE 402.

Patent Owner relies on inapposite case law to support its argument that Exhibits 2011 and 2012 are sufficiently authenticated. The two Board decisions cited by Patent Owner included declarations from a person with either (a) personal knowledge of the substantive content of the webpages at issue during the relevant time period, or (b) personal knowledge regarding the operations of the Internet Archive. Here, Patent Owner did not provide a similar declaration to authenticate the content of Exhibit 2011 or Exhibit 2012.

In *Analog Devices v. Xilinx*, the patent owner moved to exclude a declaration and corresponding exhibits for lack of authentication. *See Analog Devices, Inc. v. Xilinx, Inc.*, IPR2020-01596, Paper 52, at p. 12 (PTAB Apr. 13, 2022). Some of the

exhibits at issue were archived copies of Lucent Technologies webpages from the Wayback Machine. *See id.* A manager at Lucent who was “aware of the types of technical documents Lucent made available on its customer-facing website” submitted a declaration authenticating the websites based upon his personal knowledge of their content during the relevant time period. *See id.* The Board also took notice of a declaration from a custodian of the Internet Archive, filed in a related proceeding, that identified the same exhibits as “true and accurate copies” of webpages that had been captured and stored by the Internet Archive. *Id.* at 12 n.8.

In *Keysight Techs. v. Centripetal Networks*, the issue was whether an exhibit qualified as a printed publication, not whether the exhibit was authenticated under FRE 901. *See Keysight Techs., Inc. v. Centripetal Networks, LLC*, IPR2022-01525, Paper 27, at pgs. 19-20 (PTAB Apr. 15, 2024). And in any event, in *Keysight*, the petitioner actually submitted a declaration from an administrator of the Internet Archive to authenticate the exhibit. *Id.* at 19. (“In support of its contention, Petitioner submits the declaration of Nathaniel E. Frank-White, an administrator of the Internet Archive, which provides a service called the Wayback Machine.”).

The facts in both of these cases are unlike the instant case because Patent Owner’s counsel who provided the declaration does not have (nor claim to have) personal knowledge of either the historic web pages themselves or the operations of the Internet Archive. Accordingly, Patent Owner has not provided the declaration of

a person who could be cross-examined regarding the content of Exhibits 2011 and 2012 as required by FRE 901(b)(1).

Patent Owner's reliance on the *Valve Corporation* case to argue Petitioner's cited case law should be disregarded is similarly misplaced. In *Valve Corporation*, there was "overwhelming evidence" that an article was prior art, including a declaration and deposition testimony from a co-inventor. *Valve Corp. v. Ironburg Inventions Ltd.*, 8 F.4th 1364, 1372 (Fed. Cir. 2021). The examiner had also found the article was published before the critical date using the Internet Archive. *Id.* at 1374. The court said, "Patent examiners are trained and required to determine publication dates," and "The confirmation of the ... article's publication date...by the ...patent examiner is highly persuasive evidence of public accessibility." *Id.* at 1374-75. *Valve Corporation* does *not* overrule Board precedent requiring a declaration by a person with personal knowledge to establish the authenticity of exhibits such as those from the Wayback Machine. *See, e.g., Comcast Cable Comms., LLC v. Rovi Guides, Inc.*, IPR2017-00941, Paper 70 at p. 56 (PTAB Sept. 7, 2018) (collecting cases).

In the alternative, Patent Owner now offers to obtain a declaration from the Internet Archive if the Board will take judicial notice of the exhibits. However, the time for serving supplemental evidence has passed. Patent Owner could have obtained a proper declaration following Petitioner's timely objections to Exhibit

2011 and Exhibit 2012 instead of serving a declaration from Patent Owner's counsel, but it did not.

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

Patent Owner argues the counter-infringement contentions are relevant to non-obviousness because they are admissions of infringement. As stated before, Petitioner denied infringement of claim 1 in Exhibit 2157, and claims 2, 6, and 7 that Patent Owner cites as admissions all depend on claim 1. *See* Exhibit 2157 at p. 15-16. Thus, infringement remains disputed in co-pending litigation and is not an issue properly before the Board.

II. CONCLUSION

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

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Respectfully submitted,

Dated: May 16, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th 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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