

1 UNITED STATES PATENT AND TRADEMARK OFFICE

2
3 BEFORE THE PATENT TRIAL AND APPEAL BOARD

4
5 HUM INDUSTRIAL TECHNOLOGY, INC.,

6 Petitioner,

7 v.

8 AMSTED RAIL COMPANY, INC.,

9 Patent Owner.

10
11 Case: IPR2023-00538, IPR2023-00539, IPR2023-00540

12 U.S. Patent Nos. 9,365,223; 9,981,673

13
14 Conference call before

15 KEVIN W. CHERRY, JAMES P. CALVE, MICHAEL L. WOODS,

16 Administrative Patent Judges

17 Conducted Virtually via Zoom

18 Thursday, June 8, 2023-1:01 p.m. CST

19 Job No.: 495424

20 Pages: 1 - 17

21 Reported by: THERESA A. VORKAPIC,

22 CSR, RMR, CRR, RPR

1

2 Conference call, conducted virtually via Zoom,
3 pursuant to agreement before Theresa A. Vorkapic,
4 a Certified Shorthand Reporter, Registered Merit
5 Reporter, Certified Realtime Reporter, Registered
6 Professional Reporter and a Notary Public in and
7 for the State of Illinois.

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1 A P P E A R A N C E S

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1 P R O C E E D I N G S

2 JUDGE CHERRY: I assume, Mr. Rakestraw,
3 you provided the court reporter.

4 MR. RAKESTRAW: That's correct,
5 your Honor.

6 JUDGE CHERRY: I move that after the call
7 that you file a copy of the transcript if you
8 wouldn't mind.

9 MR. RAKESTRAW: Absolutely.

10 JUDGE CHERRY: So this is as a conference
11 call in the matter of Hum Industrial versus Amsted
12 Rail Company, IPRs 2023-538, 539 and 540.

13 Mr. Rakestraw, you requested the call.
14 Could you please let us know what you're
15 requesting.

16 MR. RAKESTRAW: Yes, your Honor.

17 In IPR 538, we're asking for leave to file
18 a preliminary reply to address issues raised in
19 the POPR with respect to Section 325-D, and also
20 the priority date issue with respect to a subset
21 of the claims addressed in Grounds 4 through 6.

22 And the other two proceedings, IPRs 539

1 and 540, we're asking for leave to file a
2 preliminary reply to address the 325-D issue.

3 JUDGE CHERRY: How many pages are you
4 asking for for your replies?

5 MR. RAKESTRAW: For the 538 petition to
6 address both of those topics, we're asking for
7 seven pages and for the 539 and 540, we're asking
8 for five pages each.

9 JUDGE CHERRY: Okay. And if we allow the
10 reply, would you also consent to the Patent Owner
11 being able to file a surreply?

12 MR. RAKESTRAW: Yes, your Honor, we would.

13 JUDGE CHERRY: Why do you think that you
14 have good cause to file the reply?

15 MR. RAKESTRAW: Thank you, your Honor.
16 I'd be happy to address that here.

17 So the good cause is obviously going to be
18 different for each of the two topics. Just for
19 the sake of efficiency, I propose that I cover the
20 325-D topic for all three petitions first because
21 there are some issues that are in common for all
22 three, and then I can come back and pick up the

1 priority date issue of the 538 petition at the
2 end.

3 Does that work for the board if I address
4 it that way?

5 JUDGE CHERRY: Yes, that's perfect.

6 MR. RAKESTRAW: Before we jump into the
7 topics themselves, one thing that I did want to
8 briefly address is what is the standard for good
9 cause because that's something that came up during
10 parties' meet and confer call. And in our view,
11 there is no single test for standard for what
12 constitutes good cause.

13 Panels have found good cause when the POPR
14 raises arguments that could not reasonably have
15 been addressed in the petition or anticipated by
16 the petitioner, and there's a case citation that
17 I'd like to give you for that, IPR 2020-01317,
18 Paper 12 at Page 8 addresses a similar situation
19 and found there was good cause to file a reply on
20 that paper.

21 Additionally, panels have found good cause
22 simply because the Patent Owner raised a complex

1 and important issue in the POPR and the board
2 would benefit from further briefing. A case that
3 addressed good cause on that basis was IPR
4 2020-01042, Paper 7 at Page 3, and we believe both
5 of those grounds apply to the request we're making
6 today.

7 So under the Section 325-D ground, first
8 there's an issue that applies to all three
9 petitions, which is Patent Owner's legal argument
10 with respect to references that were disclosed on
11 an IDS during prosecution but were not applied in
12 a rejection, and we're looking for leave to
13 address the legal authority they cited which we
14 believe is distinguishable from the proceedings
15 here.

16 And then second, in each of the three
17 proceedings, the POPR raises certain factual
18 arguments under 325-D that we did not anticipate
19 and could not reasonably have anticipated.

20 So I'll start by addressing the legal
21 issue with respect to IDSs that were cited -- the
22 references that were cited on an IDS, excuse me.

1 In each petition, we acknowledged that the
2 Lefevere and Armitage references had been listed
3 on an IDS and argued that simply being listed on
4 the IDS but not being considered at any length
5 should not serve as the basis for denying
6 institutions under 325-D.

7 In each of the POPRs, Patent Owner string
8 cited a list of cases where institution was denied
9 and implied that it's common to deny institution
10 under 325-D solely because reference was
11 previously cited on an IDS. We don't believe that
12 accurately reflects the law, and we believe
13 there's good cause to respond to this legal
14 argument in a reply and specifically to address
15 the cases cited by Patent Owner, each of which
16 involve very different facts and circumstances
17 than those that are present here.

18 We know from our previous call that the
19 board finds citations to relevant precedent to be
20 particularly helpful and we in our reply briefly
21 we would certainly direct the board to relevant
22 cases and address legal authority that was cited

1 by the Patent Owner. Let me pause there.

2 Does the board have any questions about
3 that sort of sub issue that we just covered?

4 JUDGE CHERRY: No, I don't believe we do
5 have any questions. Why don't you go over what
6 the priority date issued to?

7 MR. RAKESTRAW: Yeah, yeah. Of course,
8 your Honor. I would like to briefly touch on
9 the -- okay, you're correct.

10 So on the priority date issue in the POPR
11 addressing the 223 patent, Patent Owner argued
12 that Armitage is not prior art under 102-E with
13 respect to some claims, and so this would affect a
14 subset of the claims appearing in Grounds 4
15 through 6 of the '223 petition, which I believe is
16 petition 538.

17 Patent Owner argues that, A, those claims
18 are entitled to an earlier priority date based on
19 a parent application that has a filing date before
20 that of Armitage. And they also argue that we
21 should have submitted Armitage's provisional
22 application as an exhibit to the petition and

1 explain in the petition how Armitage is entitled
2 to the benefit of that provisional filing date and
3 that having failed to do so, we've now waived that
4 argument going forward.

5 In this case, we believe there's good
6 cause to file a reply because Patent Owner in the
7 POPR has misstated the law on this issue which is
8 governed by the Federal Circuit's Dynamic
9 Drinkware case. Dynamic Drinkware establishes a
10 three-stage burden shifting framework where the
11 burden of production shifts back and forth between
12 the petitioner and the Patent Owner and I presume
13 the board is familiar with Dynamic Drinkware, but
14 given the importance of this issue, we believe
15 there's good cause to file a reply and address it
16 on the record.

17 JUDGE CHERRY: Does this relate to ground
18 five? I'm looking at the 538 petition, is that
19 what we're talking about, the Armitage and
20 Lefevere -- let me get this for the court
21 reporter. L-e-f-e-v-e-r-e. I'm not going to try
22 and pronounce that. Okay. Go ahead.

1 MR. RAKESTRAW: I believe that it relates
2 to each of Grounds 4 through 6 because Patent
3 Owner is alleging Claims 2 through 4, 23, and
4 272030 are entitled to the benefit of the 713
5 application which is the parent application of
6 which the '223 patent is a continuation in part.
7 And so it would not affect the grounds based on
8 Lefevere, but it would affect the grounds based on
9 Armitage potentially.

10 JUDGE CHERRY: I'm assuming that Armitage
11 it has a date that's before the continuation in
12 part but after the priority -- the earlier
13 priority date? Is that the situation?

14 MR. RAKESTRAW: Yes, your Honor. That's
15 correct. So Armitage has a -- on the face of it
16 has a filing date that is about two years before
17 the filing date on the face of the '223 patent,
18 but that parent application does predate Armitage
19 by I believe a little bit less than a year.

20 JUDGE CHERRY: Okay, great. I think we
21 understand the basic issues. Let's hear from
22 Mr. Miller.

1 Mr. Miller, what's your position?

2 MR. MILLER: Sure, your Honor. Just
3 before I do that, my colleague Jeff Schwartz with
4 my firm is also on the call for the benefit of the
5 court reporter.

6 Yes, Patent Owner does oppose the request.
7 On the issue of 325-D, Petitioner already
8 extensively addressed 325-D in the petition. It
9 stated that it believes the references were not
10 presented previously to the USPTO, and it's
11 unclear what additional facts or information are
12 really necessary there. There is a prior case
13 where the board has denied a reply on that exact
14 issue arguing cumulative nature of prior art
15 references, and that citation is PGR 2017-00040,
16 Paper 8 at Pages 2 to 3.

17 As to the priority date issue, this is
18 slightly different in that Petitioner was already
19 on notice of Patent Owner's claim to entitlement
20 to the late filing date at least as to Claim 2,
21 and they were aware of that as early as
22 November 14, 2022. So they were already on notice

1 of our claim to the earliest effective filing
2 date. This is not a case like Drinkware where --
3 Dynamic Drinkware where there was an argument by
4 the Patent Owner to antedate the earliest
5 effective filing date and the Petitioner then had
6 the ability to respond to the antedating of the
7 earliest effective filing date. This is not the
8 case here. We are simply claiming the earliest
9 effective filing date, and Petitioner was on
10 notice of that two and-a-half months prior to the
11 filing of the petitions. And they -- a case on
12 point for that at least as to the issue of no good
13 cause found to file a reply on an issue that
14 petitioner had prior notice is IPR 2016-00825,
15 Paper 11 at 3.

16 JUDGE CHERRY: If we did grant a reply as
17 Mr. Rakestraw has requested, would you also want a
18 surreply?

19 MR. MILLER: Yes, your Honor. We would
20 request surreply in that circumstance, and we
21 would also request an order that Petitioner cannot
22 submit any new evidence.

1 JUDGE CHERRY: Mr. Rakestraw, are you
2 submitting additional evidence?

3 MR. RAKESTRAW: Your Honor, we don't
4 propose that we would submit additional evidence
5 as part of this preliminary reply.

6 It is our position that under the law we
7 would be able to submit additional evidence if
8 trial is instituted for the purposes of responding
9 to Patent Owner's argument that they are entitled
10 to an earlier priority date.

11 JUDGE CHERRY: Thank you.

12 Is that pledge sufficient for you,
13 Mr. Miller, that he's not going to submit
14 additional evidence --

15 MR. MILLER: As to that issue, yes, yes,
16 your Honor, yes. That's fine.

17 JUDGE CHERRY: All right. I think we
18 understand the parties' positions. Let me confer
19 with my colleagues and we'll put you on hold for
20 a few minutes and then we'll come back and
21 discuss.

22 (A recess was had.)

1 JUDGE CHERRY: Parties, this is Judge
2 Cherry. I conferred with Judge Woods and Judge
3 Calve and we are going to grant Petitioner's
4 request for a preinstitution reply and then we're
5 also going to grant Patent Owner the opportunity
6 to file a surreply of the length that for
7 Petitioner for seven pages in the 538-case and
8 five pages in the 539 and 540 cases, and the
9 538-case the reply can address the 325-D issue and
10 the priority date issue and then in the 539 and
11 540 cases, it will be limited to the 325-E issue.

12 When would you like to file your brief,
13 Mr. Rakestraw?

14 MR. RAKESTRAW: Thank you, your Honor. We
15 could do Monday, June 12.

16 JUDGE CHERRY: Great. Mr. Miller, when
17 would you like to file your surreply?

18 MR. MILLER: If we could have to Monday,
19 June 19.

20 JUDGE CHERRY: Great. Do the parties have
21 any other requests or questions?

22 MR. RAKESTRAW: Not from Petitioner,

1 your Honor.

2 MR. MILLER: No, not from Patent Owner,
3 your Honor.

4 JUDGE CHERRY: Great. Thank you both for
5 your helpful argumentation, and we look forward to
6 receiving your papers. If you have any additional
7 questions, please feel free to contact us, and
8 with that the call is adjourned.

9 MR. RAKESTRAW: Thank you. Your Honor.

10 MR. MILLER: Thank you. Your Honor.

11 (Call concluded at 1:21 p.m. CST.)

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1 CERTIFICATE OF COURT REPORTER - NOTARY PUBLIC

2
3 I, Theresa A. Vorkapic, Certified
4 Shorthand Reporter No. 084-2589, CSR, RMR, CRR,
5 RPR, and a Notary Public in and for the County of
6 Kane, State of Illinois, the officer before whom
7 the foregoing conference call was taken, do hereby
8 certify that the foregoing transcript is a true
9 and correct record of the proceedings had; and
10 that I am neither counsel for, related to, nor
11 employed by any of the parties to this case and
12 have no interest, financial or otherwise, in its
13 outcome.

14 IN WITNESS WHEREOF, I have hereunto set my
15 hand and affixed my notarial seal this 8th day of
16 June, 2023.

17 My commission expires November 6, 2023.

18 
19 _____

20 THERESA A. VORKAPIC

21 NOTARY PUBLIC IN AND FOR ILLINOIS

22

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