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The opinion in support of the decision being entered today
(1) was not written for publication in a law journal and
(2) is not binding precedent of the Board.

Paper No. 35

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

DAVID F. BRASHEARS,
Junior Party,¹

v.

DON R. LINKLETTER and JOSEPH E. MUSIL,
Senior Party.²

Patent Interference No. 103,322

¹ Application 07/883,903, filed May 18, 1992. According to appellant, the application is a continuation of Application 07/598,957, filed October 17, 1990, abandoned. Assignor to Gencor Industries, Inc.

² Patent 5,067,254, granted November 26, 1991, based on Application 07/529,136, filed May 25, 1990. Assignors to Cedarapids. Inc.

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Before CALVERT, PATE and HANLON, Administrative Patent Judges.
PATE, Administrative Patent Judge.

FINAL DECISION UNDER 37 CFR § 1.658

This is a final decision in Interference No. 103,322. The subject matter at issue is a baffle plate for installation in the aggregate veil zone of an asphalt mixing drum. The baffle plate interrupts the aggregate veil or curtain permitting a tunnel of unimpeded gases to reach the gaseous effluent end of the drum. This enables the operator to raise the temperature of the exhaust gases to prevent condensation in the baghouse.

The count of the interference reads as follows:

Count 1

Apparatus for modifying a veil of falling materials generated in a drying and heating region of a substantially horizontally disposed elongate drum of a drying and mixing apparatus, within which drum the drying and heating is effected by a stream of hot gases flowing longitudinally of the drum and traversing the length of the veil of falling materials, the apparatus for modifying the veil comprising:

at least one baffle plate supported within the drying and heating region of said drum for extending at least partially through the veil of falling materials; and

a support for supporting said at least one baffle plate for pivotal movement about an axis disposed

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substantially parallel to the longitudinal axis of the drum, for changing the projected area of the baffle plate within and for creating a void below said baffle plate through the veil of falling materials.

The claims of the parties that correspond to the count

are:

Brashears: Claims 1 through 34

Linkletter et al.:³ Claims 1 through 3, 5, through 9, and
14 through 18

Background Facts

The interference was declared on September 22, 1994 with Brashears as junior party and Linkletter as senior party. The Brashears application is assigned to Gencor Industries, Inc. The Linkletter patent is assigned to Cedarapids, Inc.

No preliminary motions were filed during the motion period established by the Administrative Patent Judge. Both parties have filed records and main briefs. The junior party has filed a brief-in-reply. The parties have waived oral hearing. Accordingly, the sole issue for our consideration at

³ The senior party will henceforth be referred to in the singular.

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final hearing is priority of invention under 35 U.S.C. § 102(g).

Burden of Proof

The junior party application has been accorded a benefit date of October 17, 1990. The senior party's effective filing date is May 25, 1990, and the senior party was granted the

involved patent on November 26, 1990. Thus, the benefit date accorded the junior party was during the pendency of the senior party's application. Accordingly, for the junior party to prevail in a priority contest, the junior party must prove priority of invention by a preponderance of the evidence. **See Peeler v. Miller**, 535 F.2d 647, 651 n.5, 190 USPQ 117, 120 n.5 (CCPA 1976). **Accord Bosies v. Benedict**, 27 F.3d 539, 541-42, 30 USPQ2d 1862, 1864 (Fed. Cir. 1994). **Cf. Price v. Symsek**, 988 F.2d 1187, 1194, 26 USPQ 1031, 1036 (Fed. Cir. 1993).

The Parties' Respective Priority Cases

Conception has been defined as the formation, in the mind of the inventor, of a definite and permanent idea of the complete and operative invention. **Coleman v. Dines**, 754 F.2d 353, 359, 224 USPQ 857, 862 (Fed. Cir. 1985)(quoting **Gunter v. Stream**, 573 F.2d 77, 80, 197 USPQ 482, 484 (CCPA 1978)). It is settled that in establishing conception a party must show every feature recited in the count, and that every limitation in the count must have been known at the time of the alleged conception. **Coleman**, 754 F.2d at 359, 224 USPQ at 862.

Neither conception nor reduction to practice may be established by the uncorroborated testimony of the inventor. **See Tomecek v. Stimpson**, 513 F.2d 614, 619, 185 USPQ 235, 239 (CCPA 1975). The inventor's testimony, standing alone, is insufficient to prove conception--some form of corroboration must be shown. **See Price**, 988 F.2d at 1194, 26 USPQ2d at 1036. While the "rule of reason" originally developed with respect to reduction to practice has been extended to the corroboration required for proof of conception, the rule does

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not dispense with the requirement of some evidence of independent corroboration. **See Coleman**, 754 F.2d at 360, 224 USPQ at 862. As the CCPA stated in **Reese v. Hurst**, 661 F.2d 1222, 1225, 211 USPQ 936, 940 (CCPA 1981): "[the] adoption of the 'rule of reason' has not altered the requirement that evidence of corroboration must not depend solely on the inventor himself." There must be evidence independent from the inventor corroborating the conception.

Additionally, we acknowledge that there is no single formula that must be followed in proving corroboration. An evaluation of all pertinent evidence must be made so that a sound determination of the credibility of the inventor's story may be reached. **Price**, 988 F.2d at 1195, 26 USPQ2d at 1037. Independent corroboration may consist of testimony of a witness, other than the inventor, to the actual reduction to practice, or

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it may consist of evidence of surrounding facts and circumstances independent of information received from the inventor. **Reese**, 661 F.2d at 1125, 211 USPQ at 940.

If a party places reliance on an embodiment of the invention in some physical form, such as a sketch or drawing, for proof of conception, the existence of the embodiment at the time must be established by testimony of a person other than the inventor. **Moran v. Paskert**, 205 USPQ 356, 359 (Bd. Pat. Int. 1979). **Accord Price**, 988 F.2d at 1196, 26 USPQ2d at 1037-38 (testimony of secretary that she recalled seeing drawing as of critical date provides necessary evidence corroborating testimony of inventor as to date of conception).

Proof of actual reduction to practice requires demonstration that the embodiment relied upon as evidence of priority actually worked for its intended purpose. **Newkirk v. Lulejian**, 825 F.2d 1581, 1582, 3 USPQ2d 1793, 1794 (Fed. Cir. 1987). As was stated in **Paine v. Inoue**, 195 USPQ 598, 604 (Bd. Pat. Int. 1976):

The nature of testing required to establish a reduction to practice depends on the particular facts of each case; a common-sense

approach is required to determine if the testing is sufficient. What is required is that it be reasonably certain the invention

will perform its intended function in actual use. The tests must be sufficient to establish utility beyond probability of failure, and must be sufficient to give assurance the device will operate under normal working conditions for a reasonable length of time [citations omitted].

Junior Party

The junior party inventor states that at least as early as September 25, 1989 he became aware that the exhaust gas temperature from the drum into the baghouse was sometimes too low, causing condensation in the baghouse. BR3.⁴ He further states that at least by October 3, 1989 he conceived the concept of locating a baffle plate on a shaft inside the drum within the veiling aggregate to control exhaust gas temperature. BR4. BX-1 is a letter addressed

⁴ The Brashears record will be abbreviated BR followed by the appropriate page number. The Brashears exhibits will be designated BX- followed by the appropriate exhibit number. Likewise, the Linkletter record and exhibits will be referred to as LR and LX- respectively.

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to Brashears' assignee's patent attorney. As part of BX-1, Brashears included a perspective drawing of his invention showing the baffle plate. The drawing attachment bears a date of October 3, 1989. The drawing also

bears the signature of Joseph Mollick. Mollick stated in a

declaration that as early as October 3, 1989, Brashears explained the invention to him and he fully understood the invention and signed the drawing attachment to BX-1. BR7-8. The drawing and the written description of the invention in the declaration include all the features of the count. We credit Brashears with a corroborated conception of the invention as of October 3, 1989, Mollick providing the necessary corroboration.

Brashears has also submitted declarations from two employees of Bituma, a subsidiary of the Brashears assignee. Both Messrs. Johanningmeier and Becker state that a diverter valve was installed in a drum mixer at the facilities of Orange Crush in Romeoville, Illinois. BX-6, 7, and 8 are service reports prepared by Larry Johanningmeier that detail

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the modification of the drum mixer to accept the baffle of the invention starting on January 3, 1990. BR14, 15. BX-9 and 10 are service reports of Dan Becker that attest to the same modifications. BR21. Johanningmeier and Becker state that on January 16, 1990 they witnessed a test of the diverter valve to test if it would pivot as designed. It did so. Since there was no use for asphalt paving hot mix in January, only pivoting of the baffle was tested, no aggregate was fed into the machine and the burner was not used. BR16, 23; BR28.

Brashears also provided a declaration by Mark Tubay. Mr. Tubay is an employee of Palumbo Brothers. Orange Crush is a subsidiary of Palumbo Brothers. BR25, 26. Tubay also observed the mechanical test of the invention on January 16, 1990. BR28. Tubay states that at least as early as April 20, 1990, the

modified mixing drum was run in commercial operation.

Aggregate was supplied to the drum, the burner was ignited, and the actuator motor was operated to move the baffle to form a channel in the veiling aggregate to allow some hot gases to bypass the veiling aggregate to control the temperature of the gas exhausting from the drum mixer. BR29. The operation of

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the drum mixer, as described by Tubay, satisfies all the terms of the count. Therefore, the junior party has provided corroborated evidence of a successful test of the invention as of the April 20, 1990 date. Accordingly, we credit the junior party Brashears with an actual reduction to practice of the subject matter of the interference as of April 20, 1990.

Senior Party

Senior party Linkletter's record consists of the declaration testimony of four witnesses--the two co-inventors, Linkletter and Musil, and Messrs. Schlarmann and Welling. Linkletter stated that he conceived of the invention on June 20, 1989 and recorded the invention in his notebook on June 21, 1989. LR3. LX-1 (referred to in the declaration as exhibit A) is two pages from Linkletter's notebook dated June 21, 1989. These pages are also signed by Schlarmann, who stated that he read and understood these pages of the notebook on June 21, 1989. LR10. We, therefore, credit Linkletter with a corroborated conception of the subject matter of the interference on June 21, 1989.

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We further note the statements of Musil with respect to his notebook pages. LX-3 (called exhibit C in the declaration). These entries were placed in the notebook on June 24, 1989. The next activity recorded in the senior party's record was production of drawings of the invention on October 10, 1989 and January 30, 1990 by Welling. LX-5 (called exhibit E). LR12.

According to Linkletter and Musil, sometime in February 1990 a working model of the veil modification device was installed and operated in a plant in Rotterdam, the Netherlands. LR7, LR4. LX-2 (exhibit B) is stated to be a memo from Linkletter to Welling about the plant. LR4. Linkletter argues that the operation of a plant in the Netherlands in February constitutes a reduction to practice of the subject matter of the interference.

Linkletter cannot be credited with a reduction to practice as of February based on operation of a plant in Holland. It is axiomatic that, at the time of the test, testing performed abroad to prove that an invention worked for

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its intended purpose clearly constituted a foreign activity relied on to establish a date of invention and thus was excluded by 35 U.S.C. § 104 from the evidence that can be relied on to establish a date of invention in this country. **See *Shurie v. Richmond***, 699 F.2d 1156, 1158, 216 USPQ 1042, 1044 (Fed. Cir. 1983) ("An actual reduction to practice in Canada is irrelevant in an interference proceeding concerning priority of invention") (quoting ***Wilson v. Sherts***, 81 F.2d 755, 760, 28 USPQ 381, 383-84 (CCPA 1936)); ***Colbert v. Lofdahl***, 21 USPQ2d 1068, 1071 (Bd. Pat. App. & Int. 1991):

If the invention is reduced to practice in a foreign country and knowledge of the invention was brought into this country and disclosed to others, the inventor can derive no benefit from the work done abroad and such knowledge is merely evidence of conception of the invention. ***DeKando v. Armstrong***, 169 O.G. 1185, 1911 CD 413 (App. D.C. 1911); see also 35 U.S.C. § 104.

Linkletter mentions the change in 35 U.S.C. § 104 respecting WTO countries. It is noted that the change Linkletter is referring to became effective in applications

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filed after January 1, 1996,⁵ well after both the alleged reduction to practice and the senior party's filing date. It is of no assistance to Linkletter in this case.

Secondly, Welling did not give evidence with respect to LX-2 in his declaration. Thus, the memo from Linkletter to Welling is uncorroborated. The only evidence with respect to the alleged reduction to practice are declarations from Linkletter and Musil, the coinventors, and, thus, the senior party has provided no corroboration for any reduction to practice in February 1990.

Finally, the evidence respecting a reduction to practice consists of a few merely conclusory statements from Linkletter and Musil. Therefore, this panel, as fact finder, has no facts on which to base a determination of a reduction to practice. Neither the structure of the exact modification installed, nor the conditions of any test or operation of the device are described. Such conclusory evidence cannot support a determination of a reduction to practice by a preponderance

⁵ Public Law 103-465 § 531(b).

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of the evidence. Affidavits fail in their purpose when they merely

contain unsupported conclusory statements. **See In re Wright**, 999 F.2d 1557, 1563, 27 USPQ2d 1510, 1514 (Fed. Cir. 1993); **In re Brandstadter**, 484 F.2d 1395, 1404, 179 USPQ 286, 294 (CCPA 1973)(affidavits fail in their purpose since they recite conclusions but few facts to buttress said conclusions). Nothing in the rules or in our jurisprudence requires the fact finder to credit the unsupported assertions of a witness.

See Rohm and Haas Co. v. Brotech Corp., 127 F.3d 1089, 1092, 44 USPQ2d 1459, 1462 (Fed. Cir. 1997).

Next, Linkletter and Musil are relying on testing argued to have established a reduction to practice in March 1990 in Aberdeen, Maryland. The evidence offered for this alleged reduction to practice also fails to make out a reduction to practice by a preponderance of the evidence.

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Here again, Linkletter and Musil have failed to provide any corroboration of the testing in March that was alleged to have established the reduction to practice. Secondly, Linkletter and Musil are again relying on conclusory statements instead of underlying facts. As noted above, such conclusory statements cannot provide a sufficient evidentiary basis for us to determine a reduction to practice has occurred. Accordingly, we cannot credit the

senior party with a reduction to practice based on inventive acts said to have occurred in March 1990. Consequently, it is our determination that the senior party reduced the invention to practice constructively by filing their application on May 25, 1990.

Senior Party Diligence

Based on our findings and conclusions above, we note that the junior party was the first party to reduce to practice,

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but since the senior party was first to conceive, the senior party can prevail, if the senior party can show diligence from just prior to the junior party's entry into the field to the senior party's reduction to practice.

A party that seeks to establish reasonable diligence must account for the entire period during which diligence is required; that period commences from a time just prior to the opponent's conception date to the party's reduction to practice, either actual or constructive. **Gould v. Schawlow**, 363 F.2d 908, 919, 150 USPQ 634, 643 (CCPA 1966). During this period there must be "reasonably continuous activity." **Burns v. Curtis**, 172 F.2d 588, 591, 80 USPQ 587, 588-89 (CCPA 1949). Evidence which is of a general nature to the effect that work was

continuous and which has few specifics as to dates and facts does not constitute the kind of evidence required to establish diligence in the critical period. **Kendall v. Searles**, 173 F.2d 986, 993, 81 USPQ 363, 369 (CCPA 1949). Of course, a requirement of the law of reasonable diligence is the

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necessity of providing adequate corroboration of that diligence. *See Gould*, 363 F.2d at 919, 150 USPQ at 643. Finally, something more than mere conversation or keeping an idea under consideration is required to constitute diligence. *Id.* at 918 n.9, 150 USPQ at 643 n.9. The presence or absence of reasonable diligence must necessarily be determined by the evidence adduced in each case. *Id.* at 921, 150 USPQ at 645.

Reviewing the senior party's record, we note that the senior party has not shown reasonably continuous diligence from just before the junior party's entry into the field, i.e., October 3, 1989. The senior party's evidence has an unexcused hiatus or gap from the time Musil recorded his contributions in his notebook, June 24, 1989, until after the junior party's entry into the field when Welling prepared some drawings on October 10, 1989. We also note a relatively long unexcused gap in the evidentiary record of the senior party from October 10, 1989 to January 30, 1990. We need not inquire further into the senior party record, since we find these two gaps, alone, are

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fatal to the senior party's case for diligence. **See Reiser v. Williams**, 255 F.2d 419, 118 USPQ 96 (CCPA 1958)(party held not diligent for failing to show activity during first 13 days of critical period) or **Morway v. Bondi**, 203 F.2d 742, 97 USPQ 318 (CCPA 1953)(party held not diligent where, following June 7 activity which was just prior to opponent's June 14 entry into field, party did not perform other acts until August 1; not diligent where there were two hiatuses of one and a one-half months each during critical period, one of which was at the outset of critical period).

In summary, we note that the junior party has overcome the senior party's filing date with an earlier reduction to practice, and the senior party was unable to show diligence from just prior to the junior party's conception to its constructive reduction to practice. We will issue judgment in favor of the junior party, hereinbelow.

Judgment

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Judgment in Interference No. 103,322 is hereby entered in favor of the junior party, David F. Brashears. David F. Brashears is entitled to a patent containing claims 1 through 34, which claims correspond to the count in interference. Judgment is entered against Don R. Linkletter and Joseph E. Musil, the senior party. Don R. Linkletter and Joseph E. Musil are not entitled to their patent containing claims 1 through 3, 5 through 9, and 14 through 18, which claims correspond to the count in interference.

	IAN A. CALVERT)	
	Administrative Patent Judge)	
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PATENT)	
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	Administrative Patent Judge)	
INTERFERENCES)	
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	ADRIENE LEPIANE HANLON)	
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