

**THIS OPINION WAS NOT WRITTEN FOR PUBLICATION
AND IS NOT BINDING PRECEDENT OF THE BOARD**

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

ROBERT G. SPALDING

Junior Party
(Patent No. 5,195,564)¹

v.

HAL C. HARTSELL, JR. and
KENNETH L. POPE,

Senior Party
(Application 08/033,311)²

Patent Interference No. 104,699

Before LEE, TORCZON, and NAGUMO, Administrative Patent Judges.

LEE, Administrative Patent Judge.

Memorandum Opinion and Judgment

¹ Based on application 07/693,549, filed April 30, 1991. The real party in interest is Dresser Industries, Inc.

² Filed March 15, 1993. Accorded the benefit of application 07/946,741, filed September 16, 1992; application 07/824,702, filed January 21, 1992; and application 07/625,892, filed December 11, 1990. The real party in interest is Gilbarco Inc.

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On December 23, 2002, junior party Spalding filed a paper (Paper No. 150) stating:

In compliance with Judge Lee's Order dated September 19, 2002, Junior Party Spalding hereby requests entry of an adverse judgment in the above-identified interference, **without prejudice to filing a complaint challenging the adverse decisions and judgment pursuant to 35 U.S.C. § 146.** (Emphasis added)

Junior party Spalding's request for entry of adverse judgment, via the bolded text shown above, appears to also seek from the board an indication that the junior party, despite all its actions and inactions, including the request for entry of adverse judgment, may challenge any and all adverse decisions and the judgment in this case in a civil action before a U.S. District Court under 35 U.S.C. § 146. The district court's jurisdiction under 35 U.S.C. § 146 is what it is and can neither be augmented or diminished by the board. We decline to express any indication on what the junior party may or may not do under 35 U.S.C. § 146 under these circumstances.

Accordingly, junior party's request is granted without any regard to the proviso in the request that the junior party is "without prejudice to filing a complaint challenging the adverse decisions and judgment pursuant to 35 U.S.C. § 146." If such treatment of the request is not acceptable to the junior party, a notice to that effect shall, upon reading of this judgment by junior party's counsel, be filed immediately by the junior party by facsimile to the board and also served by facsimile to senior party's counsel. Upon filing of that notice, (1) the request for entry of judgment shall be regarded as automatically withdrawn; (2) this judgment shall be regarded as automatically vacated; and (3) all time periods outstanding on December 23, 2002, be regarded

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as automatically reinstated, as is, without extension.

Based on the foregoing, it is

ORDERED that judgment as to the subject matter of Count 1 is herein entered against junior party ROBERT G. SPALDING;

FURTHER ORDERED that judgment as to the subject matter of Count 2 is herein entered against junior party ROBERT G. SPALDING;

FURTHER ORDERED that junior party ROBERT G. SPALDING is not entitled to its patent claims 1-6 which correspond to Count 1;

FURTHER ORDERED that junior party ROBERT G. SPALDING is not entitled to its patent claims 7-8 which correspond to Count 2;

FURTHER ORDERED that if there is a settlement agreement, the parties should note the requirements of 35 U.S.C. § 135(c) and 37 CFR § 1.666; and

FURTHER ORDERED that a copy of this judgment be filed in the respective involved application or patent of the parties.

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By Facsimile:

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