

The opinion in support of the decision being
entered today is not binding precedent of the Board.

Paper 51

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

BANGALORE A. NAGARAJ, WILLIAM B. CONNOR,
RICHARD W. JENDRIX, DAVID J. WORTMAN
and LARRY W. PLEMMONS

Junior Party,
(Patent 5,427,866),

v.

DAVID S. RICKERBY, DANIEL K. WHITE
and STANLEY R. BELL

Senior Party,
(Application 08/608,502).

Patent Interference No. 104,817

DECISION ON RICKERBY MISCELLANEOUS MOTION 3
(Motion In Limine Requesting That Nagaraj Exhibit 2054 Be Stricken)

During a conference call initiated by the parties on November 22, 2002, Rickerby requested and was authorized to file a miscellaneous motion in limine to have Nagaraj Exhibit 2054 stricken. As basis for filing the motion, Rickerby relies on § 51 of the standing order (Paper 2) and Federal Rule of Evidence 802. Paper 49, p. 1. No opposition or reply has been authorized. Upon review, permission to file a motion to strike "in limine" at this stage of the proceeding was inappropriate. The motion is therefore dismissed.

ANALYSIS

Section 51 of the Standing Order (Paper 2) authorizes the filing of a miscellaneous motion in limine for a ruling on the admissibility of evidence.¹ Generally, an in limine motion is a motion filed to resolve certain matters, including evidentiary matters, prior to trial. In the case of evidentiary matters, a party may seek an advance ruling on the admissibility of evidence to be proffered at trial. An in limine motion may seek to bar the presentation at trial of certain evidence on any ground based upon the Federal Rules of Evidence. In limine motions, however, are not ordinarily made during trial. Rather, the evidence submitted at trial may be objected to by the opponent and is ruled upon by the trial judge.

The conduct of an interference is similar to a trial. Under current interference procedures, there are actually two separate "trials." The first is the preliminary motions phase. The second is the priority phase. Only the preliminary motions phase is of concern here.

During the preliminary motions phase the parties may present motions with supporting witness testimony and other evidence. The Federal Rules of Evidence govern the admissibility of evidence. Witness testimony is presented in the form of affidavits or declarations. Objections to the admissibility of any evidence under the Federal Rules of Evidence may be made with the proponent of the evidence having an opportunity to correct the purported defect. Witnesses are subject to cross- and redirect-examination by deposition. This process may be repeated with oppositions and replies. Evidentiary matters which are timely raised by objection and not resolved to the satisfaction of the objecting party may be raised in a motion to suppress. An opposition and reply to the motion to suppress may also be filed. After presentation of the motions and evidence the parties may present a closing oral argument to the board. This entire process is a "trial" of the issues conducted primarily in paper and by deposition rather than live before a judge. The preliminary motions "trial" begins on the date preliminary motions are filed.

Section 51 of the standing order permits filing motions "in limine" seeking a ruling on evidence. What is contemplated by this section is a pretrial motion for a ruling on admissibility. In

¹ This section provides:

§ 51. Motion for ruling on the admissibility of evidence

At any appropriate time, a party may file a Rule 635 miscellaneous motion (in limine) for a ruling on the admissibility of evidence.

the conventional trial setting it is hoped that raising the prospective admissibility issue prior to trial will avoid having to consider the issue at trial. In the context of the "preliminary motions trial" motions in limine serve a similar purpose. A ruling before the preliminary motions trial begins will conserve resources. An in limine ruling may eliminate the need to submit evidence which may subsequently be ruled inadmissible and minimizes motions to suppress and the corresponding oppositions and replies.

Relying on § 51 of the standing order, Rickerby requested permission to file a motion in limine. However, the request came not during pretrial but well into the preliminary motions phase of the interference. Thus, § 51 of the standing order is not applicable and granting Rickerby's request based on that section was inappropriate. Rickerby's motion is actually a premature motion to strike. Rickerby Miscellaneous Motion 3 is dismissed. The dismissal is without prejudice to Rickerby filing a timely motion to suppress as scheduled by the order entered May 1, 2002, as subsequently modified by the parties.

ORDER

For the reasons stated above, it is

ORDERED that Rickerby Miscellaneous Motion 3 be DISMISSED.

Richard E. Schafer
Administrative Patent Judge

Date: 5 December 2002
Arlington, VA

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