

United States District Court,
D. Delaware.

**GE-HARRIS RAILWAY ELECTRONICS, L.L.C. and GE-Harris Railway Electronics Services,
L.L.C,**
Plaintiffs.

v.

WESTINGHOUSE AIR BRAKE COMPANY,
Defendant.

No. Civ.A. 99-70 GMS

Nov. 24, 1999.

Richard D. Allen and Donald Parsons, Jr. of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, Charles D. Ossola and Timothy R. DeWitt of Arnold & Porter, Washington, D.C., for Plaintiffs.

Mary B. Matterer and Steven L. Caponi of Blank Rome Comiskey & McCauley LLP, Wilmington, Delaware, George Patrick Baier, Daniel M. Darragh and Michael L. Dever of Buchanan Ingersoll P.C., Pittsburgh, Pennsylvania, for Defendant.

MEMORANDUM OPINION AND ORDER

SLEET, J.

I. INTRODUCTION

Plaintiffs GE-Harris Railway Electronics, L.L.C. and GE-Harris Railway Electronics Services, L.L.C. (collectively, GE-Harris) bring this patent infringement action against Defendant Westinghouse Air Brake Company (WABCO). The complaint alleges infringement by WABCO of various claims contained in two patents owned by GE-Harris FN1- U.S. Patent No. 4,582,280 (the '280 patent) and U.S. Patent No. 4,553,723 (the '723 patent).FN2 Presently before the court is GE-Harris's motion for summary judgment of literal infringement of claim 53 of the '280 patent. For the reasons that follow, GE-Harris's motion will be granted in part and denied in part.

FN1. Plaintiff GE-Harris Railway Electronics Services, L.L.C. is the owner of the patents in suit and plaintiff GE-Harris Railway Electronics, L.L.C. is the exclusive licensee of the patents.

FN2. In addition to its patent infringement claims, GE-Harris has alleged Lanham Act violations, willful misappropriation of trade secrets, tortious interference with prospective contractual relations, civil conspiracy, and willful breach of contract. All of these claims relate to the patents in suit or to the products in which those patents are used.

II. BACKGROUND

The '280 patent describes a communication system for use in trains with "distributed power systems." Such systems permit the use of multiple locomotives dispersed throughout a train, rather than having the locomotives only at the front or rear of the train. In distributed power systems, a "lead" locomotive at the front of the train controls the operations of the "remote" locomotives by sending commands (e.g., accelerate, decelerate) and receiving information to and from the remote locomotives.

The '280 patent improved upon prior distributed power systems by reducing the risk that a command sent by a lead locomotive in one train might inadvertently be received and performed by a remote locomotive in an entirely different train operating nearby. This risk is present in distributed power systems in which commands are sent by radio signals, rather than by physical connection (e.g., a hard wire connecting all the locomotives in a train). The communication system disclosed in the '280 patent reduces this risk by breaking down the communication process into two steps. The first step is to establish a "communication link" between the lead and remote locomotives. This is accomplished through the exchange and comparison of codes that identify the lead locomotive on the train and the remote locomotives to which a command is intended to be sent. The second step in the process—the sending of a "functional" command (e.g., accelerate, decelerate)—occurs only after the communication link has been established. (Locomotives are referred to in the '280 patent as "units"; that term will be used hereafter .)

GE-Harris designs and sells distributed power systems under the name Locotrol; WABCO designs and sells distributed power systems under the name PowerLink. Both GE-Harris and WABCO sell various versions of their respective distributive power systems. It is undisputed that the PowerLink systems send functional commands only after first establishing a communication link between the lead and remote locomotives. The dispute centers on whether PowerLink sufficiently alters the method by which a communication link is established to avoid infringing the '280 patent.

III. DISCUSSION

In the present motion for summary judgment, GE-Harris asks the court to find that WABCO has literally infringed claim 53 of the '280 patent by making, using, selling, and/or offering to sell several versions of its PowerLink distributed power systems. *See* 35 U.S.C. s. 271. Summary judgment is proper if there is no genuine issue of material of fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Bai v. L & L Wings, Inc.*, 160 F.3d 1350, 1353 (Fed.Cir.1998). "In determining whether there is a genuine issue of material fact, the evidence must be viewed in the light most favorable to the party opposing summary judgment, with doubts resolved in favor of the opponent." *See Karlin Tech. Inc. v. Surgical Dynamics, Inc.*, 177 F.3d 968, 970 (Fed.Cir.1999).

A patent infringement analysis entails two steps: "(1) claim construction to determine the scope of the claims, followed by (2) determination whether the properly construed claim encompasses the accused device." *Bai*, 160 F.3d at 1353 (citations omitted). The first step, claim construction, is a matter of law for the court to decide. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996). The second step, the determination of infringement, is a question of fact. *Bai*, 160 F.3d at 1353. "Literal infringement of a claim exists when every limitation recited in the claim is found in the accused device." *Cole v. Kimberly-Clark Corp.*, 102 F.3d 524, 532 (Fed.Cir.1996). Thus, summary judgment of literal infringement is properly granted when no reasonable jury could fail to conclude that every limitation recited in the properly

construed claim is present in the accused device. *See* Karlin, 177 F.3d at 974.

A. Step One: Construction of Claim 53 FN3

FN3. WABCO argued in its opposition brief that GE-Harris's motion for partial summary judgment was an inappropriate attempt to force an early *Markman* determination without the benefit of full discovery. *See* Def. Opp'n Br. at 1-2. WABCO appeared to abandon that position in a scheduling conference held on October 13, 1999. In that teleconference, counsel for both parties suggested that a substantive claim construction ruling on claim 53 would be helpful at this time. To the extent WABCO has not abandoned its original position, the court finds that position to be without merit for the reasons stated on pages 6-7 of GE-Harris's reply brief.

The primary claim construction dispute concerns the extent to which the term "communication link" as used in claim 53 incorporates *the methodology for establishing* a communication link that is described in the '280 patent's specification.FN4 WABCO argues that claim 53 encompasses the entire "linking protocol" described in the patent specification—such protocol to include (1) the sending of a "link message" from the lead unit to the remote unit, which message contains identifying codes for the lead and remote unit intended to be linked; (2) the remote unit's receipt of the link message and comparison of the lead and remote unit identifiers in that message with codes in the remote unit's stored memory; (3) the sending of a "link reply message" from the remote unit to the lead unit with the same lead and remote unit identifying codes; (4) the lead unit's receipt of the reply message and comparison of the lead and remote unit identifiers in that message with codes stored in the lead unit's stored memory; and (5) the lead unit's sending of a confirming message to the remote unit thus establishing a "communication link." *See* Def. Opp'n Br. at 7, 16.

FN4. Claim 53 reads as follows (emphasis on the disputed term added):

53. In a communication system for use with the control of a train having at least a lead unit and one or more remote units in which the lead unit controls the operation of the one or more remote units with commands which are transmitted after *a communication link* is established between the lead unit and the one or more remote units, and the one or more remote units transmit return messages to the lead unit confirming execution of the commands, commands and messages conveying information of the operation of the one or more remote units after *the communication link* is established and a plurality of transceivers each adapted for location at the lead and the one or more remote units for transmitting and receiving messages, a lead station adapted for location at the lead unit comprising:

(a) means for storing a first lead identifier which identifies the lead unit and a plurality of first remote identifiers equal in number to the number of remote units, each remote identifier being assigned to a separate remote unit for identifying that remote unit and

(b) means for generating a link message to be transmitted by the lead unit transceiver prior to the transmission of commands for use in establishing *the communication link* between the lead unit and any specified one of the one or more remote units over which commands are to be transmitted, the link message containing said first identifier of said lead unit and said first identifier of the specified one of said remote units to which the lead unit is to be linked.

By contrast, GE-Harris argues that the term "communication link" in claim 53 carries only its ordinary meaning-"a medium over which communications are transmitted." That is, the term describes only the communication link itself; it does not incorporate the process by which that link is established.

For the reasons that follow, the court agrees with GE-Harris and concludes that the term "communication link" in claim 53 means "a medium over which communications are transmitted."

1. Limitations Should Not be Read Into the Claims from the Specification FN5

FN5. Technically, the claims are a part of a patent's specification. *See* 35 U.S.C. s. 112. It is common practice, however, to use the term "specification" to refer to the portions of a patent other than the claims. *See, e.g.*, *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed.Cir.1995) (in banc) (noting that the meaning of a claim should be determined from three sources-"the claims, the specification, and the prosecution history") (citation omitted), *aff'd*, 517 U.S. 370 (1996). That practice will be followed herein.

The five step linking protocol described above is undoubtedly included in the written "summary of the invention" included in the patent specification. *See* '280 patent, col. 4 1., 37-col. 5, 1. 34. Claim 53, however, makes no mention of steps two through five. As a general rule, limitations in the written description and preferred embodiment set forth in the patent specification should not be read into the patent claims. *See, e.g.*, *Burke, Inc. v. Bruno Independent Living Aids, Inc.*, 183 F.3d 1334, 1340 (Fed.Cir.1999); *Karlin Tech. Inc. v. Surgical Dynamics, Inc.*, 177 F.3d 968, 972-73 (Fed.Cir.1999); *see also* 35 U.S.C. s. 112. There is no reason to depart from this rule in the present case.

It is not surprising that claim 53 does not encompass four of the five steps in the linking protocol described in the patent specification, once the overall structure of the '280 patent is considered. The various components and features of the linking methodology described in the patent specification are spread over more than thirty claims in the '280 patent. *See* '280 patent, claims 1-16, 41-56. Claim 53 describes only the system's "lead station." The lead station is the physical component of the communication system that is located in the lead unit.

Claim 53 has a "preamble" and two subparagraphs. The preamble describes the nature of the communication system of which the lead station must be a part. FN6 Subparagraph (a) describes the lead station's means for storing identifying codes of the lead and remote units in the train. Subparagraph (b) describes the lead station's means for generating a "link message" for use in establishing a communication link between the lead and remote units, and also describes the contents of the "link message."

FN6. The significance of a claim "preamble" must be determined on a case by case basis. *See Pitney Bowes, Inc. v. Hewlett-Packard Co .*, 182 F.3d 1298, 1305-06 (Fed.Cir.1999). Where, as here, the preamble recites limitations and "is necessary to give life, meaning, and vitality" to the claim, the preamble should be construed as if in the "body" of the claim. *Id.*

Thus, step (1) of the five step linking protocol is expressly included in subparagraph (b) of claim 53. Other steps are included in other claims within the '280 patent. For example, claim 42 includes both the lead

station and the "remote stations" (the physical components of the communication system that are located in the remote units), and encompasses steps (1) through (4) of the linking protocol. Claims 50 through 52 focus on the remote stations. Those claims incorporate steps (2) and (3) of the linking protocol.FN7

FN7. Though GE-Harris has alleged infringement of various claims in the '280 patent, it has only moved for summary judgment as to claim 53. Accordingly, the court does not purport to construe any other claim in the '280 patent at this time. The other claims mentioned above were considered only to the extent that they helped shed light on the proper construction of claim 53.

Indeed, claim 53 is not the only claim that focuses on the lead station. Claim 54, for example builds on claim 53 by, *inter alia*, encompassing step (4) of the linking protocol. WABCO's proposed construction of claim 53 would thus violate the doctrine of "claim differentiation." That doctrine "normally means that limitations stated in dependent claims [e.g., claim 54] are not to be read into the independent claim from which they depend [e.g., claim 53]." Karlin, 177 F.3d at 971-72.

2. The Term "Communication Link" Should Take Its Ordinary Meaning

Although limitations should not be read into the claims from the specification, this does not mean that the specification is not relevant to the claim construction inquiry. The patent specification must be considered when a claim term is specially defined in the specification. *See Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1249 (Fed.Cir.1998). The specification can also help shed light on the proper meaning of a claim term that is susceptible to more than one common meaning. *Id.* at 1250. In either case, however, the party wishing to incorporate guidance from the patent specification must first identify a claim term in need of definition. *See id.* at 1248. This is so because it is the function of the claims-not the specification-to particularly point out the scope of the protected invention. *See* 35 U.S.C. s. 112; *Renishaw*, 158 F.3d at 1248.

As previously noted, WABCO points to the term "communication link" in claim 53 as its basis for arguing that claim 53 incorporates the five step linking protocol identified in the specification. *See* Def. Opp'n Br. at 14-17. Neither of the two principles noted above warrant such incorporation.

First, the claim term "communication link" is not given a special definition in the patent specification. *See Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979-80 (Fed.Cir.1995) (in banc) ("[A] patentee is free to be his own lexicographer. The caveat is that any special definition given to a word must be clearly defined in the specification.") (citations omitted), *aff'd*, 517 U.S. 370 (1996); *see also* *Renishaw*, 158 F.3d at 1249 ("The patentee's lexicography must, of course, appear with reasonable clarity, deliberateness, and precision before it can affect the claim.") (citations and internal quotation marks omitted). The '280 patent specification does not clearly provide a special definition for the claim term "communication link." At most, the linking protocol in the patent specification merely describes a process by which a "communication link" *can* be established. In essence, WABCO does not seek to "define" the term "communication link"; it seeks to *limit* the term to "a communication link established via a five step protocol." This is not an appropriate use of the patent specification. *See Renishaw*, 158 F.3d at 1249 (noting that it is inappropriate to "add a narrowing modifier before an otherwise general term that stands unmodified in a claim").

Second, the patent specification is not properly used in this case to help choose among several possible "ordinary meanings" of the term "communication link." "Absent a special and particular definition created

by the patent applicant, terms in a claim are to be given their ordinary and accustomed meaning." Renishaw, 158 F.3d at 1249. In this case, only one "ordinary meaning" has been suggested-"a medium over which communications are transmitted." Pl. Reply Br. at 7-9.

From the context in which the term is used in claim 53, it is readily apparent that a "communication link" simply refers to a medium over which two units can send commands and messages. *See* footnote 4, *supra* ("... commands which are transmitted after a communication link is established between the lead unit and the one or more remote units ..."; "... for use in establishing the communication link between the lead unit and any specified one of the one or more remote units over which commands are to be transmitted ..."). Indeed, Richard Klemanski, the WABCO engineer who designed the PowerLink system, testified at his deposition that the ordinary meaning of the term "communication link" in the field of electrical engineers and electronics is "a method for two systems to communicate to one another." 8/18/99 Klemanski Dep. at 206.FN8 He further testified that a "communication link" could be a wire connecting two systems together or radios connecting two systems together. *Id.* Klemanski's testimony is thus entirely consistent with the ordinary meaning proffered by GE-Harris for the term "communication link."

FN8. Transcripts from two separate Klemanski depositions have been introduced into the summary judgment record and are cited herein. Klemanski's 5/20/99 deposition transcript was introduced as Exhibit D to WABCO's opposition brief. Excerpts from Klemanski's 8/18/99 deposition transcript were introduced as Exhibit D to GE-Harris's reply brief. These transcripts are cited herein as "5/20/99 Klemanski Dep." and "8/18/99 Klemanski Dep.," respectively.

3. WABCO Offers No Valid Reason to Deviate from the Ordinary Meaning

WABCO argues at length that claim 53 would be invalid as an unobvious advance over the prior art if it did not require a communication link to be established before functional commands are sent. *See* Def. Opp'n Br. at 17-22. While this appears to be a true statement, it does not help WABCO's position. The requirement that functional commands be sent only after a communication link has been established is not incorporated into claim 53 by importing the five step linking protocol into the term "communication link." Rather, that requirement is expressly stated-indeed, several times-in claim 53. *See* footnote 4, *supra* ("In a communication system ... in which the lead unit controls the operations of the one or more remote units with commands which are transmitted *after a communication link is established* between the lead unit and the one or more remote units ..."; "... commands and messages conveying information of the operation of the one or more remote units *after the communications link is established* ..."; "... link message to be transmitted by the lead unit transceiver *prior to the transmission of commands* ...") (emphasis added). WABCO fails to explain why these explicit requirements are insufficient to save claim 53 from invalidity, such that incorporation of the five step linking protocol might be necessary to do so.FN9

FN9. For the same reasons, WABCO's reliance on the prosecution history of the '280 patent to attempt to incorporate the five step linking protocol into claim 53 is unavailing. *See* Def. Opp'n Br. at 5-7, 20-21. GE-Harris overcame the patent examiner's initial objections to a precursor to claim 53 by clarifying that functional commands are sent only after a communication link is first established. *See* Pl. Reply Br. at 11-12 and Ex. F. at 53-55. Nothing in the prosecution history suggests that the patent examiner required any particular linking protocol be used to establish the communication link.

4. Summary of Claim Construction

The meaning of the term "communication link" was the only term addressed by the parties in their briefing on claim construction. There does not appear to be any other disputed term in the claim 53 preamble, which, as noted above, describes the nature of the communication system of which the lead station must be a part. Nor is there a dispute over the construction of subparagraph (a), which essentially requires the lead station to store the lead and remote units' identifying codes in RAM memory. Subparagraph (b) requires the lead station to have a microprocessor for generating a "link message." FN10 It also requires the link message to be sent prior to the transmission of commands, and requires the link message to be sent "for use in establishing the communication link." Finally, subparagraph (b) describes the required contents of the link message. A dispute does appear to have arisen with respect certain aspects of the "link message." This dispute appeared in the parties' briefing on literal infringement (rather than claim construction), and the court will discuss the dispute in that context. *See* section III.B.3.b., *infra*. As discussed below, resolution of the dispute may require further claim construction by the court.

FN10. Both of these subparagraphs are written in "means plus function" form. *See* 35 U.S.C. s. 112; *DSC Communication Corp. v. Pulse Communication, Inc.*, 170 F.3d 1354, 1368 (Fed.Cir.1999). The parties appear to agree that the unspecified "means" in subparagraphs (a) and (b) are RAM memory and a microprocessor, respectively. *See* Pl. Opening Br. at 15-20; Def. Opp'n Br. at 20 & fn. 31.

B. Step Two: Literal Infringement of Claim 53

The second step in an infringement analysis is to compare the accused product with the properly construed claims. *Bai v. L & L Wings, Inc.*, 160 F.3d 1350, 1353 (Fed.Cir.1998). As previously noted, WABCO has sold various versions of its PowerLink distributed power system. GE-Harris claims that the following PowerLink systems literally infringe claim 53 of the '280 patent: (1) two systems sold to Queensland Rail; (2) a system tested at Conrail; (3) four systems sold to MRS; (4) the systems "offered" to CVRD and Freightcorp; and (5) the systems "offered" to CP Rail and Spoornet.

GE-Harris relies heavily on the deposition testimony of Richard Klemanski, the WABCO engineer who designed PowerLink, to attempt to establish the features of the various PowerLink systems. As will be discussed below, that testimony is insufficient to establish GE-Harris's right to summary judgment except as to the two systems sold to Queensland Rail.

1. The PowerLink Systems Sold to Queensland Rail

The court is satisfied that there are no disputed facts as to the relevant features of the PowerLink systems sold to Queensland Rail ("QR"). GE-Harris has provided sufficient evidence-both in the form of deposition testimony and documentation of the QR systems-to establish that each limitation in claim 53 of the '280 patent is found in the QR systems. The court will not discuss each limitation in detail, but will instead refer the reader to the infringement claim chart attached as Exhibit A to GE-Harris's reply brief in support of its motion.FN11 The court will discuss only those features of the QR systems that WABCO argues preclude summary judgment.

FN11. Thus, for example, the evidence establishes that the QR remote units are controlled by the lead unit; that functional commands are sent only after a communication link is first established; that the lead stations store codes identifying the lead and remote units in RAM memory; and that a microprocessor is used to

generate a link message for use in establishing the communication link. *See* Pl. Reply Br. at Ex. A and documents and deposition testimony referred to therein.

WABCO argues that the linking procedure used in the QR systems is different from that required by claim 53. First, WABCO notes that the "link message" used in the QR systems contains not only a code identifying the lead and remote unit intended to be linked, but also a second identifying code for the lead unit. *See* Def. Opp'n Br. at 23-25. (The '280 patent refers to the codes identifying the lead and remote units as "lead identifiers" and "remote identifiers," respectively; that terminology will be used hereafter.) GE-Harris correctly points out that this is irrelevant because claim 53 neither requires nor precludes the inclusion of a second lead identifier. *See* Northern Telecom, Inc. v. Datapoint Corp., 908 F.2d 931, 945 (Fed.Cir.1990) ("The addition of features does not avoid infringement if all the elements of the patent claims have been adopted." (citation omitted)); *Discovision Assoc. v. Disc Manufacturing, Inc.*, 25 F.Supp.2d 301, 335 (D.Del.1998) ("Infringement may not be avoided simply by adding features or components not required by the claims." (citation omitted)). It is undisputed that the link message used in the QR systems includes a first identifier for the lead and remote units intended to be linked. *See, e.g.*, Def. Opp'n Br. at 23; *id.* at Ex. E (Klemanski Affidavit) p. 3. The link message described in claim 53 requires no more.

Second, WABCO points to differences in the content of the "link reply message" used in the QR systems as compared to that described by the '280 patent. *See* Def. Opp'n Br. at 23-25. The court has already concluded that the link reply message-step (3) in the five step linking protocol discussed above-is not an element of claim 53. The link reply message of the QR system therefore cannot result in noninfringement of that claim.

Since the undisputed facts establish that every limitation recited in claim 53 is present in the two PowerLink systems sold to Queensland Rail, GE-Harris is entitled to summary judgment as to those systems. *See* Karlin Tech. Inc. v. Surgical Dynamics, Inc., 177 F.3d 968, 974 (Fed.Cir.1999).

2. The PowerLink System Tested at Conrail

GE-Harris next asserts that WABCO tested a PowerLink system at Conrail that utilized the same linking procedures as the QR systems. Although Conrail apparently did not purchase a system, GE-Harris contends that WABCO's test was an infringing "use" within the meaning of 35 U.S.C. s. 271(a). Summary judgment on this claim is inappropriate, or at least premature, for at least two independent reasons. First, the deposition testimony that GE-Harris relies on establishes, at most, that the system tested at Conrail used the same linking protocol as the QR systems. *See* 8/18/99 Klemanski Dep. at 126-28. But claim 53 encompasses more than just a linking protocol, and GE-Harris has introduced no evidence that the "first prototypes" of PowerLink that were tested at Conrail include all of the limitations recited in claim 53. *See id.* Second, there is insufficient evidence regarding the circumstances surrounding this "test" for the court to determine that, as a matter of law, it was an infringing "use" within the meaning of 35 U.S.C. s. 271(a).

3. The PowerLink Systems Sold to MRS

Summary judgment is also inappropriate, or at least premature, with respect to four PowerLink systems sold to MRS. WABCO asserts that the "link message" used in the MRS systems includes only remote identifiers, whereas claim 53 requires the link message to contain both lead and remote identifiers. Def. Opp'n Br. at 24-25.FN12 GE-Harris counters that there were two versions of the MRS system. GE-Harris claims the original MRS system was identical to the QR system. If the QR system infringes claim 53, then so too must the original MRS system, according to GE-Harris. The revised MRS system allegedly infringes claim 53 by

virtue of its "link complete" message.

FN12. WABCO also points out that the MRS systems use different modems than the QR systems, but fails to explain why this is relevant. Claim 53 does not specify what type of modem must be used, nor does it even mention the word "modem." WABCO fails to identify what claim term, if any, necessarily incorporates a particular type of modem.

a. The Original MRS system

GE-Harris has not established that the original MRS system is identical to QR. GE-Harris attempted prove this through testimony given by Klemanski at two separate depositions. At one point, Klemanski does appear to state there was only one version of PowerLink at that time. *See* 5/20/99 Klemanski Dep. at p. 81, II. 1-9. He further appears to state that this single version was sold to both QR and MRS. *Id.* Immediately following that testimony, however, Klemanski appears to state, with equal clarity, that the MRS and QR versions are different from each other. *See id.* at 82. GE-Harris attempts to remedy this with testimony from Klemanski's second deposition. *See* Pl. Reply Br. at 18; 8/18/99 Klemanski Dep. at 214-215. That testimony, however, at most establishes that the original MRS system used the same "message structure" as did the QR system.FN13 As noted above, claim 53 encompasses more than merely "message structure." While it appears likely that the original MRS system literally infringed claim 53, GE-Harris's showing is simply insufficient to establish this as a matter of law.

FN13. GE-Harris has provided an "infringement claim chart" for the revised MRS system, but not for the original version. *See* Pl. Reply Br. Ex. B (including "link complete messages" that apparently were not present in the original MRS version). Instead, GE-Harris relies wholly on its unsupported assertion that the original MRS system is identical to the QR system.

b. The Revised MRS System

The revised MRS system apparently uses four messages to establish a communication link between the lead and remote units. First, a "link message" is sent from the lead unit to the remote unit containing only a remote identifier. Next, the remote unit sends a "link reply message" to the lead unit, also containing only the remote identifier. The lead unit then sends a "link complete message" containing a remote identifier, a "unique address" for the lead unit, and a "link sequence number." Finally, the remote units send "link complete reply messages" back to the lead unit containing the same information contained in the "link complete message." *See* Pl. Reply Br. at 18-19; *id.* at Ex. I, p. 36; 8/18/99 Klemanski Dep. at 81-82.

Because the MRS "link message" does not contain a lead identifier, that message does not cause the system to infringe claim 53. GE-Harris does not assert otherwise. It claims, however, that the "link complete message" causes the MRS system to infringe claim 53. That message contains both a lead identifier (what MRS calls the "unique address for the lead unit") and a remote identifier.FN14 Further, the MRS link complete message is used for the purpose of establishing the communication link between the lead and remote units. Finally, MRS functional commands are not sent until after the communication link is established. Thus, GE-Harris argues that the "link complete message" has the same content and serves the same purpose as the "link message" described in claim 53.

FN14. The term "first lead identifier" and "first remote identifier" as used in claim 53 simply refer to codes

identifying the lead and remote units. Thus the court agrees that the MRS "unique address for the lead unit" qualifies as a lead identifier as that term is used in claim 53. Further, the modifier "first" in claim 53 is used only to distinguish the first lead and remote identifiers from additional identifiers used in '280 patent claims other than claim 53. As described above, the identifiers in the MRS "link complete message" are indeed the "first" identifiers of the lead and remote units in the MRS linking process.

Therefore, the crucial inquiry is therefore whether or not the MRS "link complete message" should be considered a "link message" as that term is used in claim 53.FN15 This inquiry turns on whether claim 53 requires the "link message" to be the first message sent in the linking process. If so, then GE-Harris is not entitled to summary judgment with respect to the revised MRS system because the first message sent in the MRS linking process does not contain a lead identifier.FN16

FN15. The mere fact GE-Harris and WABCO use different terminology to describe their respective messages-"link message" vs. "link complete message"-is of course irrelevant to the infringement inquiry.

FN16. Though this construction of claim 53 would preclude summary judgment on literal infringement, this does not mean that the revised MRS system would necessarily not infringe claim 53. First, if GE-Harris could establish that the first two messages in the MRS linking process serve no real purpose, then a fact finder could perhaps reasonably conclude that the "link complete message" is indeed the first message in the linking process. Second, even if the first two messages are not to be disregarded, the MRS system could nevertheless infringe claim 53 under the "doctrine of equivalents." *See, e.g., Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17 (1997). As GE-Harris has limited its motion to literal infringement, the court expresses no opinion on the merits of a doctrine of equivalents argument in this case.

The parties have not briefed this claim construction issue.FN17 On its face, claim 53 appears to require no more than that the "link message" be "transmitted by the lead unit transceiver *prior to the transmission of commands for use in establishing* the communication link." *See* footnote 4, *supra* (emphasis added). Unlike the term "communication link," however, the term "link message" does not appear to have an "ordinary meaning" (or, more accurately, neither party has proffered any evidence of an ordinary meaning). As such, if the term "link message" is not fully defined by the claim language itself, it may be proper to look to the patent specification for guidance on this issue. *See Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1248-50 (Fed.Cir.1998). And, at least in the preferred embodiment disclosed in the specification, the link message is described as *initiating* the establishment of a communication link. *See* '280 patent, col. 10, II. 45-48; *id.*, cols. 19-20 (table). There is a fine line between improperly reading limitations into a claim from a specification and properly looking to a specification to help define a term used in a claim. *See Renishaw*, 158 F.3d at 1248. The court is simply not prepared to locate this boundary without the benefit of briefing by the parties. As such, summary judgment must be denied with respect to the revised MRS systems.

FN17. Nevertheless, the parties appear to take opposite positions. GE-Harris's position is implicit in its claim that the revised MRS system literally infringes claim 53 by virtue of the link complete message. WABCO alludes to its position in a footnote in its brief. *See* Def. Opp'n Br. at 11 & fn. 18 ("The '280 patent describes the 'link message' as the *initial* message sent by the lead unit.") (emphasis added by the court).

4. The PowerLink Systems "Offered" to CVRD and Freightcorp

WABCO has not yet sold PowerLink systems to CVRD or Freightcorp, but has submitted "proposals" to both. *See* Klemanski Aff. at 2. GE-Harris contends that these proposals are infringing "offers to sell" PowerLink in violation of 35 U.S.C. s. 271(a). Summary judgment is inappropriate with respect to these proposals for at least two reasons. First, it appears that these proposals were for the revised MRS version of PowerLink discussed above. *See* Klemanski Aff. at 2; Pl. Reply Br. at 19. Since the court was unable to conclude that the MRS system infringes claim 53 as a matter of law, it necessarily follows that summary judgment cannot be granted on the basis of an offer to sell that system. Second, GE-Harris has produced insufficient evidence to establish that, as a matter of law, these "proposals" constitute "offers" within the meaning of 35 U.S.C. s. 271(a).FN18

FN18. Section 271(a) was only recently amended to include "offers to sell" as an infringing activity. *See* 35 U.S.C. s. 271(a) (Supp.II.1996). GE-Harris cites no authority interpreting this term. The fact that Klemanski at times called these proposals "offers" is not dispositive. *See* 8/18/99 Klemanski Dep. at 121-23.

5. The PowerLink Systems "Offered" to CP Rail and Spoornet.

Similarly, GE-Harris asserts that WABCO "offered" to sell infringing PowerLink systems to CP Rail and Spoornet. These systems would have used hardwire communications, but would have included radio-based communication systems as a back-up. If the hardwire were to break, communications would occur via the back-up radio systems.

Once again, the deposition testimony on which GE-Harris relies is insufficiently clear to establish infringement as a matter of law. First, although GE-Harris asserts that the back-up radio system offered to CP Rail and Spoornet would have been the QR system, no support is cited for this proposition. *See* Def. Reply Br. at 19-20. Further, GE-Harris's evidence that these systems were "offered" within the meaning of 35 U.S.C. s. 271(a) is even weaker than the evidence discussed above with respect to the CVRD and Freightcorp "offers." FN19 Summary judgment with respect to these "offers" must therefore be denied.

FN19. *See, e.g.*, 8/18/99 Klemanski Dep. at p. 22, II. 17-22 (Q: "And whose decision was it on whether or not to accept the backup, was that Spoornet's decision or WABCO's decision?" A: "I'm not sure. I know meetings were held to talk about these things, but I was not part of it."); *id.* at p. 24, II. 12-17 (Q: "Are you aware of whether the backup radio system for a wired PowerLink system has been offered to anyone other than Spoornet?" A: "I believe it's been discussed with CP Rail, but I don't believe anything has really-I don't believe anything has progressed.").

IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. GE-Harris's motion for summary judgment of literal infringement of claim 53 of the '280 patent (D.I.29) is GRANTED IN PART and DENIED IN PART;
2. The two PowerLink systems sold to Queensland Rail literally infringe claim 53 of the '280 patent; and

3. The term "communication link" as used in claim 53 of the '280 patent means "a medium over which communications are transmitted"

D.Del.,1999.

GE-Harris Railway Electronics, L.L.C. v. Westinghouse Air Brake Co.

Produced by Sans Paper, LLC.