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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Mailed: December 26, 2002

Opposition No. 91122837

NEW BALANCE ATHLETIC
SHOE, INC.

v.

H. JOHN CAMPAIGN

**Before Bucher, Holtzman, and Rogers, Administrative
Trademark Judges.**

By the Board:

Pursuant to the Board's order of February 8, 2002, opposer's testimony period for its case in chief closed on July 8, 2002. On June 24, 2002, opposer timely submitted a notice of reliance, indicating that it would rely on two of its registrations and upon applicant's answers to interrogatories. Title and status copies of the registrations were attached, as was a copy of the referenced interrogatory responses.

Now before the Board is applicant's motion to dismiss, pursuant to Trademark Rule 2.132(a), filed December 2, 2002. Opposer filed a brief resisting the motion.

In short, we agree with opposer that applicant's motion is untimely. Trademark Rule 2.132(c) provides that

a motion filed under paragraph (a) or (b) of this section must be filed before the opening of the

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testimony period of the moving party, except that the Trademark Trial and Appeal Board may in its discretion grant a motion under paragraph (a) even if the motion was filed after the opening of the testimony period of the moving party.

Here, applicant's testimony period opened on August 7, 2002, yet it did not file its motion under Trademark Rule 2.132(a) until nearly four months later. No explanation has been proffered for the tardy filing. Accordingly, we decline to exercise our discretion to consider applicant's untimely motion.¹

All dates remain as previously set.

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¹ Even if considered, we agree with opposer that applicant's motion is inappropriate. As noted, opposer did file a notice of reliance. Applicant's Rule 2.132(a) motion does not dispute the timeliness of opposer's notice of reliance or the admissibility of the documents attached thereto, but rather takes issue with what applicant assumes to be opposer's interpretation of the evidence attached thereto.

Trademark Rule 2.132(a) is directed to a situation in which the plaintiff in a Board proceeding has failed to submit any evidence. Under such circumstances, there is no point to proceeding with the remainder of the trial and briefing of the case. Because the plaintiff bears the burden of proof, if it does not submit evidence during its case in chief, it cannot prevail. But the rule does not provide a defendant with an opportunity to argue the legal significance of evidence which has been properly submitted. During trial, each party may submit whatever admissible evidence it believes will support its case. The parties may argue the interpretation and significance of that evidence in their briefs (and, if requested, at oral argument). A panel of the Board will weigh the evidence after considering any such arguments only upon final hearing of the case, and not during trial.