

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DELL INC., HEWLETT-PACKARD COMPANY, and NETAPP, INC.,
Petitioners,

v.

ELECTRONICS AND TELECOMMUNICATIONS RESEARCH
INSTITUTE,
Patent Owner.

Case 2013-00635
Patent 6,978,346 B2

Before BRIAN J. McNAMARA, MIRIAM L. QUINN, and
GREGG I. ANDERSON, *Administrative Patent Judges*.

ANDERSON, *Administrative Patent Judge*.

DECISION
Petitioners' Request for Rehearing
37 C.F.R. § 42.71

I. INTRODUCTION

Dell, Inc., Hewlett-Packard Company, and NetApp, Inc. (“Petitioners”) request rehearing (Paper 21, “Rehearing Req.”) of the Board’s Decision instituting (Paper 19, “Dec.”) *inter partes* review of claims 1-3 and 5-8. In the Decision, the Board concluded that Petitioners did not present sufficient evidence to support the contention that Weygant discloses the “exchanges information” limitation recited in claim 1 as follows:

[T]he first network controlling unit *exchanges information* with the fourth network controlling unit, and the second network controlling unit *exchanges information* with the third network controlling unit.

See Dec. 21-22(emphasis added).

Claim 9 recites virtually the same limitation regarding “exchanges information” as follows:

wherein the first network controlling unit in the first RAID controlling unit *exchanges information* with the second network controlling unit in the second RAID controlling unit, and the second network controlling unit in the first RAID controlling unit *exchanges information* with the first network controlling unit in the second RAID controlling unit.

(emphasis added). Because the evidence presented regarding the “exchanges information” limitation was insufficient, the Board determined that Petitioner was not likely to prevail in showing a reasonable likelihood that dependent claim 4 and independent claim 9 would have been obvious over Weygant, Mylex (Ex. 1007) and ServiceGuard (Ex. 1004). Dec. 22-23. As a result, the Board did not institute *inter partes* review on claims 4 and 9. *Id.* at 24. Petitioners request reconsideration of that part of the Decision. Rehearing Req. 1.

Petitioners contend that the Board misapprehended or overlooked the portions of Weygant cited in the Petition that teach the aforementioned claim limitation. Rehearing Req. 2. Specifically, Petitioners contend that, because Weygant discloses “heartbeats,” the “exchange information” limitation is met. *Id.* Further, Petitioners contend that the Board does not specifically address statements made in the declaration of Dr. Mercer (Ex. 1006) regarding the “heartbeats” discussed in Weygant. Rehearing Req. 2-3. For the reasons set forth below, Petitioners’ request for rehearing is denied.

II. ANALYSIS

When rehearing a decision on institution, the Board reviews the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion may be indicated if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors. *Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *Arnold P’ship v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004); *In re Gartside*, 203 F.3d 1305, 1315-16 (Fed. Cir. 2000). The request for rehearing must identify, specifically, all matters the party believes the Board misapprehended or overlooked. 37 C.F.R. § 42.71(d).

Petitioners’ request is based on two arguments: (1) that that the Board made a “technical observation of Weygant”; and (2) that the Board failed to address the opinion of Dr. Mercer. Rehearing Req. 3.

Regarding the first argument, Petitioners allege an abuse of discretion in the Board’s determination that the “heartbeat messages” of Weygant are not an exchange of information between one node and a “*different node.*” *Id.* at 4 (citing Dec. 22). The Decision states that we were not persuaded that Petitioners’ evidence supported the contention that the Weygant “heartbeat messages” meet the

limitation. Dec. 22. That evidence, as pointed out in the Request for Rehearing, is found in the portion of Weygant set out below.

In a cluster, *the high availability software establishes a communication link known as a heartbeat among all the nodes in the cluster* on a subnet known as the heartbeat subnet. These messages allow the high availability software to tell if one or more nodes has failed. This special use of networking must itself be protected against failures. Points of failure in the heartbeat subnet include the LAN interfaces and cables connected to each node.

Ex. 1003, 76 (emphasis added). From this passage, Petitioners conclude that the “heartbeat messages” are transmitted and received from one node to another. Rehearing Req. 4. But the inferences drawn from the passage support a conclusion inconsistent with Petitioners’ contention. Weygant states that the high availability software—which establishes the communication link for the “heartbeat messages”—resides in *all* the nodes. Ex. 1003, 55. Thus, when the passage describes that “the high availability software” can “tell if one or more nodes has failed,” Ex. 1003, 76, the focus is on the software generally, not on whether any particular node or multiple nodes receive the “heartbeat messages” of different nodes. This general description of the software may be regarded as a preview of the node-failure detection borne by the same-node LAN-card failover examples that Petitioners rely on in the Petition. *See* Pet. 14-15 (relying on pages 66, 131 and figs. 2.10, 2.12, 4.1-4.4 of Weygant, all of which are directed to switching communications from a failed active-LAN interface to a standby-LAN or redundant-active-LAN interface in the *same* node); Pet. 37-39 (relying on pages 76, 131, and figs. 2.10, 2.12 of Weygant). None of the other portions and examples cited in the Petition and relied on by Petitioners clarifies the passage further with regard to the role of the “heartbeat messages” when the high

availability software “tell[s] if one or more nodes have failed.” Absent more particularized evidence in that regard, the cited portion of Weygant provides sufficient factual support for the Board’s conclusion that the “heartbeat messages” are received at the LAN interface in one node, but not transmitted to a LAN interface of another node. *See* Dec. 21-22.

As for the second argument, we are not persuaded by Petitioners’ argument that the Board misapprehended or overlooked Dr. Mercer’s opinion that Weygant teaches the “exchanges information” limitation. Rehearing Req. 4. Dr. Mercer, in forming his opinion, relies on the same passages in Weygant described above. *Id.*; Ex. 1006, 109-110 (citing Ex. 1003, 60). According to Petitioners, Dr. Mercer’s declaration shows that the “heartbeat messages are transmitted and received reciprocally node-to-node” (Rehearing Req. 5) as noted in the following portion of the declaration:

See Weygant at p. 60 (“In a cluster, the high availability information software establishes a communication link known as a heartbeat among all the nodes in the cluster on a subnet known as the heartbeat subnet. These messages allow the high availability software to tell if one or more nodes has failed.”), disclosing that the nodes send heartbeat signals to each other.

Ex. 1006, 109-110(emphasis in original). Petitioners contend that the Board has a “technical misunderstanding of Weygant” because we focused on “one type of hardware failure . . . while not appreciating Weygant’s teaching with respect to other types of hardware failures.” Rehearing Req. 5-6.

We are not persuaded that page 60 of Weygant (labeled by Petitioner as page 76 of Ex. 1003) explicitly teaches that which we find lacking: LAN interfaces in different nodes transmitting and receiving, reciprocally. In his declaration, Dr. Mercer does not mention the last two sentences of this disclosure in Weygant. The

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