

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FEDEX CORP.,
Petitioner,

v.

HUMAN SCIENCES HC LTD.,
Patent Owner.

Case IPR2017-01761
Patent 7,046,138 B2

Before JOHN F. HORVATH, ELIZABETH M. ROESEL,
and CHRISTA P. ZADO, *Administrative Patent Judges*..

ZADO, Administrative Patent Judge.

DECISION
Denying Petitioner's Request for Rehearing
37 C.F.R. § 42.71

I. INTRODUCTION

Fed Ex. Corp. (“Petitioner”) seeks rehearing (Paper 12, “Request” or “Req. Reh’g”) of the following issues in our Decision Denying Institution of *Inter Partes* Review (Paper 7, “Decision” or “Dec.”): our “preliminary construction of [the claim term] ‘agent[.]’” as requiring “monitoring a physical location” of an asset; and, our “conclusion that the Petition does not show sufficiently that *Richards* discloses” an “agent,” as recited in claim 11, that satisfies the “monitoring a physical location” requirement. Req. Reh’g, 1 (citing Dec. at 7–9, 14–17).

We have considered Petitioner’s Request, but for reasons that follow, we decline to modify our Decision.

II. LEGAL STANDARD

A party requesting rehearing bears the burden of showing that the decision should be modified. 37 C.F.R. § 42.71(d). “The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.” *Id.* “When rehearing on petition, a panel will review the decision for an abuse of discretion.” 37 C.F.R. § 42.71(d).

III. DISCUSSION

A. Claim Construction

The Request argues that the Board improperly construed the term “agent” and should have adopted Petitioner’s proposed construction. Req. Reh’g 1. According to Petitioner, “the Board overlooked that the Petition correctly construed ‘agent.’” *Id.* We disagree that we misapprehended or

overlooked Petitioner’s proposed construction and evidence and arguments presented in support thereof.

The Petition addresses the claim construction of “agent” in a single paragraph:

The specification *defines* the claimed “agent”: “In this disclosure, the term ‘agent’ refers to a self-powered electrical or electromechanical sensing and communicating device for monitoring a physical location and a security status of a cargo container.” Ex.-1001 4:42–44. Independent claims 11 and 44, however, already explain that the agent “ha[s] a sensor for sensing at least one of a physical security and an environmental security of the asset.” Thus, the language “for monitoring a physical location and a security status of a cargo container” is superfluous of claim language and unnecessary in the construction. Accordingly, “agent” means a self-powered electrical or electromechanical sensing and communicating device. Ex.-1004 ¶[056].

Paper 2, 6 (“Petition” or “Pet.”) (emphasis added). We considered Petitioner’s arguments and determined Petitioner’s proposed construction improperly omitted portions of the express definition of “agent” set forth in the specification of the ’138 patent. Dec. 7–9. The Board’s mere disagreement with Petitioner’s proposed construction does not amount to misapprehending or overlooking any matter. Based on our statement in the Decision that our construction at the institution stage is not final, Petitioner incorrectly states we “invited” Petitioner to address claim construction through rehearing. Req. Reh’g 1. Our claim construction in the Decision is based on the record at the time of institution, rather than on the record at the time of a final determination under 35 U.S.C. § 316(a)(11). A request for rehearing is limited to *previously addressed* matters that were misapprehended or overlooked. It is not for the purposes of further

developing the record through introduction of new evidence and arguments.
37 C.F.R. § 42.71(d).

Rather than identify any matter we misapprehended or overlooked, Petitioner's Request introduces new arguments that were not presented in the Petition. Petitioner's new arguments include:

1. the '138 specification does not provide a "clear expression of intent" to define the term "agent" (Reh'g Req. 3–4, 6–9);
2. dependent claim 2 includes language that creates a presumption the term "agent" should not be construed to require location-monitoring (*id.* at 4–5, 12–13); and
3. the Board's construction of "agent" improperly limits the claims of the '138 patent to a preferred embodiment (*id.* at 9–12).

Petitioner also argues, incorrectly, that the Petition's "Overview" section for the '138 patent separately shows the patentee did not intend to define "agent" to require monitoring a physical location because none of the agent's sensors disclosed in the patent are described as monitoring a physical location. *Id.* at 5–6. Petitioner's extensive rehearing arguments stand in sharp contrast to the single argument made in the Petition, i.e., that the specification language, "for monitoring a physical language and a security status of a cargo container," is "superfluous of claim language and unnecessary in the construction." Pet. 6.

A rehearing request is not a supplemental petition. Nor is it an opportunity to present new arguments or evidence that could have been presented and developed in the first instance in the Petition. We could not have misapprehended or overlooked arguments or evidence that were not presented or developed in the Petition. Petitioner offers no explanation as to why its new claim construction arguments were not made in the Petition. The Petition recognizes the '138 specification expressly defines the term

“agent.” *Id.* (“The specification *defines* the claimed ‘agent.’”) (emphasis added). The Petition quotes the ’138 specification’s definition and proposes a construction that adopts only a portion of that construction. *Id.* The Petition asserts that we should disregard the remaining portion of the definition, which requires monitoring a physical location of a cargo container, as superfluous of language appearing elsewhere in the claim. *Id.* Accordingly, the Petition places at issue whether the term “agent” should be construed to require monitoring a physical location of a cargo container. At the Petition stage, however, Petitioner chose to provide only the single argument noted above, and did not present any of the new arguments raised for the first time in the request for rehearing.

Moreover, even if we were to consider Petitioner’s new claim construction arguments, they do not persuade us to modify our construction of the term “agent.” Petitioner’s new arguments underestimate the significance of the linguistic conventions employed by the patentee in the ’138 patent specification. When the specification provides a special definition for a claim term that differs from its ordinary meaning, then “the inventor’s lexicography governs.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (en banc); *see also Sinorgchem Co v. Int’l Trade Comm’n*, 511 F.3d 1132, 1136 (Fed. Cir. 2007); *3M Innovative Props. Co. v. Avery Dennison Corp.*, 350 F.3d 1365, 1374 (Fed. Cir. 2003). Here, the ’138 patent specification uses linguistic conventions characteristic of patentee lexicography. The claim term is set off by quotation marks, is preceded by the words “the term,” and is followed by the words “refers to.” Ex. 1001, 4:42–48. These linguistic conventions unmistakably identify what follows as an express definition for the term, “agent.” *Sinorgchem*, 511 F.3d

at 1136 (claim term “is set off by quotation marks—often a strong indication that what follows is a definition”); *see also Medicines Co. v. Mylan, Inc.* 853 F.3d 1296, 1306 (Fed. Cir. 2017) (“in defining terms, the patentees use[d] a similar format: the defined term in quotation marks, followed by the terms ‘refers to’ or ‘as defined herein’”) (internal quotation marks omitted).

Petitioner’s arguments in the Request do not persuade us to ignore the patentee’s clear, deliberate, and unambiguous intent to define the term “agent” in the ’138 patent specification. Regarding dependent claim 2, we are not persuaded by Petitioner’s argument that the claim creates a presumption that location monitoring is not a requirement of the term “agent.” Req. Reh’g 12–13. Claim 2’s recitation of a “position guidance system” and “position data” is narrower than the phrase “monitoring a physical location,” and therefore, is not duplicative. Ex. 1001, 11:47–50. Petitioner admits as much in the Request, arguing that “the phrase ‘for monitoring a physical location’ is broad and does not require monitoring a specific type of location, e.g., GPS coordinates, latitude/longitude, street address, home/away status, etc.” . Req. Reh’g 14.

We decline to address the remainder of Petitioner’s arguments, which Petitioner did not present in the Petition. Based on the current record, Petitioner’s arguments do not persuade us to modify our construction of “agent.”

B. Petitioner’s Ground of Unpatentability Based on Richards

Petitioner argues that even under our construction of the term “agent,” we overlooked that the Petition shows Richards satisfies our construction. Req. Reh’g 13. The Petition does not argue Richards satisfies our construction. In the aftermath of our Decision, Petitioner has pieced

together new argument that monitoring the physical presence/absence of an asset satisfies monitoring its “physical location.” *Id.* at 14–15. In support of this new argument, the Request identifies portions of the Petition that cite Richards’ disclosure of monitoring physical presence/absence. *Id.*

However, the Petition cites such disclosure for a purpose other than the one now argued by Petitioner. This amounts to new argument, and therefore, is not something we could have misapprehended or overlooked.

The pages of the Petition identified in the Request do not include argument that monitoring the physical presence/absence of assets such as cargo satisfies the “monitoring a physical location” requirement. Req. Reh’g 14 (citing Pet. 14, 20, 23, 24, 29, 51, 52, 68, 69). For example, at page 23 of the Petition, Petitioner argues physical presence is a type of physical *security* of an asset, but nowhere argues monitoring physical presence is a type of monitoring physical *location* of the asset. Pet. 23. The other cited pages of the Petition also do not argue that the agent’s function of monitoring physical presence/absence satisfies the requirement of “monitoring a physical location.” *Id.* at 14, 20, 24, 29, 51, 52, 68, 69. To the extent the Petition mentions Richards’ disclosure of monitoring physical presence/absence, Petitioner does not argue Richards discloses an agent that monitors the physical location of an asset by monitoring the asset’s physical presence/absence. *See, e.g., id.* at 23.

Notwithstanding the ’138 patent specification’s express definition of “agent,” the Petition makes no attempt to show that Richards discloses an “agent” that monitors physical location of a cargo container. *See, e.g., id.* at 22, 59. Instead, the Petition relies on its argument that the feature “monitoring a physical location” need not be shown because it is

“superfluous of claim language and unnecessary in the construction.” *Id.* at 6.

The arguments Petitioner presents in its Request were not presented in the Petition, and therefore, could not have been misapprehended or overlooked by the Board. Accordingly, we are not persuaded to modify our Decision.

IV. CONCLUSION

After considering Petitioner’s arguments for rehearing, we determine Petitioner has not shown that the Decision denying institution of *inter partes* review should be modified.

V. ORDER

Accordingly, it is:

ORDERED that the Request for Rehearing is *denied*.

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