City v. PBA, 15 OCB 5 (BCB 1975) [Decision No. B-5-75 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

CITY OF NEW YORK, DECISION NO. B-5-75

Petitioner

- and - DOCKET NO. BCB-206-74

PATROLMEN'S BENEVOLENT
ASSOCIATION,

Respondent

DECISION AND DETERMINATION

On December 11, 1974, the City of New York served and filed its Petition requesting a determination whether two matters are within the scope of bargaining pursuant to §1173-4.3 of the NYCCBL The City alleges that "a controversy has arisen between the parties in negotiations" involving the right of the City "to take unilateral action as a managerial prerogative" with respect to withdrawing letters from former Police Commissioner Murphy to former Patrolmen's Benevolent Association President McKiernan concerning the manning of radio motor patrol cars and the determination of Patrolmen's schedules.

The City has requested a scope of bargaining determination as to the manning of precinct radio motor patrol cars and the scheduling of Patrolmen's work so that it will know whether it may take unilateral action with respect to these two items. The City has asserted the right to take such unilateral action, but it has stated: "if the City is incorrect it will take these issues

before a fact-finder and if it is correct we will take unilateral action as proposed."[1]

On December 23, 1974, the PEA served and filed its Motion to Dismiss the City's Petition on the ground that there is no "cause of action" conferring Jurisdiction on the Board of Collective Bargaining under §1173-5.0a(2) of the NYCCBL as amplified by §7.3 of the Revised Consolidated Rules of the Off ice of Collective Bargaining. Further arguments were exchanged in a City letter of December 30, 1974 and a PBA response dated January 2, 1975.

In a letter dated January 7, 1975, the Board of Collective Bargaining requested that "the PBA serve and file its papers setting forth its position on the merits of the scope of bargaining issues raised by the City". The PBA, in its letter of January 15, 1975, declined to submit its argument on the merits and requested that the Board decide only the pending motion challenging its jurisdiction in order to permit the PBA to test a possible assumption of jurisdiction in the courts.

The parties are at present in impasse proceedings before a panel appointed pursuant to §1173-7.Oc of the NYCCBL.[2] The issues concerning the manning of radio motor patrol cars and the determination of Patrolmen's and Policewomen's[3] schedules have not been submitted to the panel, no formal demands on these subjects having been made by the Union in bargaining. However, the parties agree that throughout the collective bargaining negotiations the City has asserted to the Union that it has the right unilaterally to withdraw

two letters dated October 3, 1972 and October 4, 1972 which, respectively, commit the Police Department to the so called "24 squad

---

[1] Transcript of Oral Argument before the Board of Collective Bargaining, December 9, 1974, p.54.

[2] Docket No. 1-115-74. The panel began taking evidence on January 21, 1975 and is expected to continue in hearing until at least February 19, 1975.

[3] The contract covers employees in the titles of Patrolman and Policewomen; it refers to both titles under the general term "Patrolmen".

work system" and the maintenance of "current policies" concerning the number of men assigned to radio motor patrol cars. In effect, it is the City's intention not to renew the commitments in these two letters; and to delete them from any new agreement.[4] The PBA has consistently informed the City that these items are mandatory subjects and that unilateral action would be the subject of an im proper practice charge-before the Public Employment Relations Board.[5]

JURISDICTION OF THE BOARD

The PBA argues that the Petition of the City requests an advisory opinion in advance of threatened unilateral action which may, in fact, never take place. The Union alleges that it had made no bargaining demand with respect to the two matters at issue, nor has it sought to present them to the impasse panel. In the absence of a demand for bargaining and a refusal to bargain, it urges, there can be no controversy for the Board to resolve. The PEA contends that BCB jurisdiction in scope of bargaining cases is "ancillary to and in aid of" bargaining or impasse, and jurisdiction does not lie anticipatorily to determine whether a matter is a subject of mandatory negotiations or one in which the City may take unilateral action. Further, the Union contends, a determination of scope of bargaining by this Board would be a "nullity" the threatened unilateral action of the City would constitute, in the PBA view an unfair labor practice and as such would lie solely within the jurisdiction

[4] City letter of December 30, 1974, p. 1; City Brief, p. 5; Union Brief, p. 2.

[5] Transcript of oral Argument before the Board of collective Bargaining, December 9, 1974, pp. 42-3, 45; Union Brief, p. 2.

of PERB. The Union argues, in sum, that this Board has jurisdiction over disputes in bargaining while the PERB has jurisdiction over unilateral actions.

The City argues that a determination of scope of bargaining is necessary herein so that it will know whether its assertion of the right to take unilateral action is correct. The City has stated that "if the City is incorrect it will take these issues before a fact-finder and if it is correct we will take unilateral action as proposed."[6]

We do not agree that we are without jurisdiction in this matter. We find that it is the purpose of the NYCCBL to provide a full range of procedures whereby labor disputes may he resolved expeditiously in such a manner as will minimize conflict and the need for litigation between the parties.

Section 1173-5.0a of the NYCCBL provides:

> "The board of collective bargaining, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty:
>
> (1) on the request of a public employer or public employee organization which is a party to a disagreement concerning the interpretation or application of the provisions of this chapter, to consider such disagreement and report its conclusion to the parties and the public;
>
> (2) on the request of a public employer or certified or designated employee organization to make a final determination as to whether a matter is within the scope of collective bargaining;

[6] Transcript, p. 54.

> (3) on the request of a public employer or a certified or designated employee organization which is party to a grievance, to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure established pursuant to section 1173-8.0 of this chapter
>
> (4) to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 1173-4.2 of this chapter. For such purposes, the board of collective bargaining is empowered to establish procedures, make final determinations, and -issue appropriate remedial orders;
>
> (5) to recommend any needed changes in the provisions of this chapter of an executive order;
>
> (6) to compel the attendance of witnesses and the production of documents;
>
> (7) to adopt rules and regulations for the conduct of its business and the carrying out of its powers and duties including rules and regulations governing the procedures to he followed by mediation and impasse panels constituted pursuant to subdivisions b or c of section 1173-7.0 of this chapter;
>
> (8) where either party to collective bargaining negotiations has rejected in whole or in part the recommendations of an impasse panel, to review such recommendations as provided in paragraph four of subdivision c of section 1173-7.0 of this chapter.

This Section sets forth the various determinations the Board of Collective Bargaining may issue in the performance of its duties under the law. Subparagraph (1) deals with conclusions of the Board where "a party

to a disagreement concerning the interpretation or application" of the NYCCBL requests a ruling by the Board. Subparagraph (3) deals with a "final determination as to whether a dispute is a proper subject for grievance and arbitration" where a "party to a grievance" requests such a determination. Subparagraph (8) provides review by the Board where "either party to collective bargaining negotiations has rejected" such recommendations. Subparagraph (2) of §1173-5.0a, the provision at issue in the instant case, empowers the Board "to make a final determination as to whether a matter is within the scope of collective bargaining" upon "the request of a public employer." Unlike the language in subparagraphs (1) 1 (3) and (0), which require that there be, respectively, a request by "a party to a disagreement", a request by a "party to a grievance", or a rejection by a "party to collective bargaining negotiations", subparagraph (2) calls for Board action simply upon "the request" of a public employer or public employee organization. It is manifest that §1173-5.0a. (2) of the NYCCBL does not require a-formal bargaining demand and a formal refusal to bargain nor does it require that one party have resorted to claimed unlawful unilateral action as a prerequisite to the Board's jurisdiction to make a final determination. Nowhere in the cited section does any requirement appear that a "case or controversy" exist in the form which the PBA alleges is necessary to confer jurisdiction on the Board in the instant case.

Moreover, the language of §1173-5.0a (2) represents a significant revision by the legislature of an earlier provision which did in fact

restrict the Board's jurisdiction. Prior to the amendment of the NYCCBL in 1972,[7] the powers and duties of the Board of Collective Bargaining were defined by §1173-5.0a as follows:

> "The board of collective bargaining, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty:
>
> (1) on the request of a party to a disagreement concerning the interpretation or application of the provisions of this chapter, or whether there has been full faith compliance with such provisions, to consider such disagreement and report its conclusion to the parties and the public;
>
> (2) on the request of an employer or certified public employee organization engaged in negotiations, to make a final determination as to whether a matter is within the scope of collective bargaining in such negotiations under the terms of the applicable executive order, and on the request of a public employer or a certified employee organization which is party to a grievance, to make a final determination to whether a dispute is a proper subject for grievance and arbitration procedure established pursuant to section 1173-8.0 of this chapter;
>
> (3) to recommend any needed changes in the provisions of this chapter or of an executive order;
>
> (4) to compel the attendance of witnesses and the production of documents in connection with the proceedings of an impasse panel constituted pursuant to subdivision c of section 1173-7.0 of this chapter; and
>
> (5) to adopt rules and regulations for the conduct of its business and the carrying out of its powers and duties, including rules and regulations governing the procedures to be followed by mediation and impasse panels

[7] Local Laws 1 and 2 of 1972 amended the NYCCBL in various respects.

> constituted pursuant to subdivisions b or c of section 1173-7.0 of this chapter." (emphasis added)

It is evident that prior to the 1972 amendments, scope of bargaining jurisdiction could be asserted only upon request of a party "engaged in negotiations", whereas the Law, as it is now written permits a scope -of bargaining determination whenever a request is made. The purpose of the amendments in 1972 was to provide two proceedings for the resolution of bargainability disputes; one proceeding upon "request" and another proceeding as part of an improper practice finding.[8]

The 1972 amendments were the result of the same tripartite structure of consultation and negotiations as that which produced the initial enactment of the NYCCBL. Numerous conferences including representatives of the Municipal Labor Committee, the City of New York and members of the Board of Collective Bargaining preceded the sub-mission to the City Council of the proposed amendments to the NYCCBL, and these amendments are the product of tripartite agreement as to their substance and procedure.

The policy inherent in the statutory structure comports with the duty of the Office of Collective Bargaining to administer mediation and impasse procedures under §1173-7.0 and with the duty of the Director of the office to "maintain communication" with parties in collective bargaining under, §1173-5.0c. That policy is directed toward finding solutions to labor relations problems without forcing the parties into an adversary position and in the instant case, the Policy permits the Board to make a finding without creating a situation where one party must take unilateral action in order to

[8] Jurisdiction of improper practices is row exercised State-wide by the PERB.

obtain a determination from the Board. In the instant case, as in other cases where good faith doubts exist as to the scope of bargaining, the policy carried out by the statutory structure permits a finding by the Board as to the bargainability of the subjects at issue without requiring the parties to come before the Board in a procedural posture where one party may be found guilty of an improper practice. Instead, the matter may be decided by the Board as a scope of bargaining case and the delays and escalation of the dispute between the parties which inevitably arise if one party resorts to unilateral action may thereby be avoided.

Moreover, it is clear that a controversy does most definitely exist between the parties as to the bargainability of the manning of precinct radio motor patrol cars and the scheduling of Patrolmen's tours of duty. One party, the Employer, has stated its intention to discontinue two provisions of the prior contract which it regards as voluntary subjects of bargaining[9] the other party, the Union, has stated its intention to file an improper practice charge if any action is taken by the Employer pursuant to its decision to discontinue the provisions of the prior contract at issue herein. It is our duty, as we perceive it, to deal with this controversy expeditiously by issuing the determination requested by the City so that further unrest and litigation may be avoided, and so that the impasse panel now sitting may issue a determination that will dispose of all issues between the parties.

We have also considered the PBA's argument that the Board's assertion of jurisdiction herein would be an interference with PERB's jurisdiction to

[9] The City has stated, however, that if either or both of the matters are found to be mandatorily bargainable it will submit them to the impasse panel now sitting.

find and remedy improper public employer practices. We do riot find that such a conclusion is warranted by the language of the Taylor Law or by the NYCCBL. Section 1173-5.0a employers the Board "on the request of a public employer ... to make a final determination as to whether a matter is within the scope of collective bargaining." We have such a request before us in the instant Matter. Although the failure of the State Legislature to continue OCB jurisdiction over improper practices has rendered impossible a proceeding under subparagraph (4) of §1173-5.0a, it has not affected our jurisdiction pursuant to subparagraph (2) which provides a separate and distinct type of proceeding. Similarly, §205.5 (d) of the Taylor Law establishes procedures to deal with improper practices as defined in §209-a including a refusal "to negotiate in good faith." We do not read this language as depriving this Board of jurisdiction in this case inasmuch as we have a request from one of the parties for a determination as to scope of bargaining. There is nothing in the state statute to indicate that OCB does not retain all of the powers conferred upon it by law except the power to deal with improper practices.

The Union would have us adopt a policy whereby the Employer, desiring to clarify its rights to take unilateral action with respect to a particular subject, would have as its only recourse the possible commission of an improper practice.[10] The NYCCBL was designed and amended to avoid such confrontations. The statutory scheme provides for determinations of bargainability independent of allegations of improper practice.

[10] The Union's position in this matter does not take into account one significant element of the City's presentation to the Board, namely, that upon a finding that either or both of these subjects is mandatorily bargainable, the City is prepared to submit the issues to the impasse panel appointed in this case.

Therefore, based upon the clear language of the NYCCBL, we find that we have jurisdiction to determine the issue before us.

Although the Union has not acceded to the Board's request to serve and file its argument on the merits, we believe that a prompt determination of the scope of bargaining between the parties herein will promote an orderly and peaceful resolution of the issues raised by the City. Ile shall turn, therefore, to the merits of these issues.

MANNINIG
OF PRECINCT
RADIO MOTOR PATROL CARS

As set forth above, the City has informed the Union that it will not continue, subject to the finding of the Board, the provisions of its prior agreement which stated:

> ". . . the Department's current policies concerning the number of patrolmen assigned to patrol duty in a precinct Radio Motor Patrol car will not be changed prior to expiration of the current collective bargaining agreement."

The City relies on §1173-4.3b, the management rights provision of our statute:

> "It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on, those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above maters have on employees, such as questions of workload or manning, are within the scope of collective bargaining."

Pursuant to this section, we have heretofore hold that management has the right under §1173-4.3(b) "to determine the standards of services to be offered, and "the methods, means and personnel by which governmental operations are to be conducted."[11] The statute recognizes, however, that the Employer's decisions such as decisions on manning, may have a "practical impact" on employees, and the last sentence of the quoted section provides that "questions concerning the practical impact" of the employers decisions "such as questions of workload or manning" are within the scope of bargaining.
Therefore, if the City's proposal to change the manning of precinct radio motor patrol cars raises questions of practical impact on the employees,

[11] Decision Nos. B-4-71; B-16-74. Accord, Matter of City School District of New Rochelle, 4 PERB 3704 (1971); Matter of City of White Plains, 5 PERB 3031 (1972)

then the City must bargain with the Union concerning that practical impact.[12]

We note, however, despite the lack of formal pleadings to this effect, that the PEA contentions with regard to precinct radio motor patrol car manning have consistently been associated with claims that reductions in current manning levels would adversely affect the safety of policemen involved In analogous cases, PERB has hold that the element of safety in manning render such matters bargainable; we concur.[13] Therefore, without passing upon the validity of the specific contention raised here, we find that the introduction of questions of safety into consideration of bargainability constitutes basis for a finding by this Board that a practical impact may attach to any change in precinct radio motor patrol car manning. We have no detailed information as to the nature or scope of safety of each and every contemplated change. Conceivably, some such changes may affect safety; others may not. Where it is apparent to this Board that a particular exercise of management prerogative would constitute a threat to employee safety, we believe there is warrant for is finding which will require bargaining at the time when implementation of any projected change is proposed. Our finding is intended to afford the Union the opportunity to show how the specific, elements of any such plan infringe upon employee safety and to enable this Board to evaluate the issues thus raised. We believe that since issues of safety are allegedly involved, those issues should be resolved prior to implementation, and that bargaining and impasse

[12] Decision Nos. B-9-68; B-1-74; B-7-74.

[13] Matter of City of Albany, PERB Case No. U-1369, Dec. 19, 1974 (demand for two men in patrol cars held bargainable as affecting safety); Matter of City of White Plains, supra, (manning request by firefighters held bargainable).

procedures should be promptly utilized in dealing with any specific plan of change which is found to entail a practical impact so as to expedite the process of freeing the City to take necessary action to implement.[14]

Thus, while the City is free, outside of status quo period,[15] to withdraw the letter guaranteeing a certain formula for manning of precinct radio motor patrol cars, any particular plan for changing precinct radio motor patrol car manning must be presented by the City to the Union. If the proposed change is challenged as a threat to the safety of affected police officers it must, if there is a dispute as to bargainability, be submitted to this Board which, on the basis of the relevant evidence, will. determine whether or not the Proposed plan in fact involves a threat to safety. Should the Board find that the proposed plan involves a practical impact upon safety, we will direct that there be bargaining for its alleviation. Any such bargaining which fails to produce agreement will be subject to impasse procedures, and if timely completed may be submitted to the present impasse panel. our findings herein and the procedures we have prescribed do not in any way prelude the parties from bargaining voluntarily on any proposed plan the City may develop for changes in the manning of precinct radio motor patrol cars nor are the parties barred from submitting such a matter to impasse procedures by mutual consent.

---

[14] This new method which we have devised for dealing with allegations of safety as a practical impact is in keeping with our announced intention "to determine ... scope of bargaining disputes involving alleged practical impact on a case-by-case basis." City of New York and MEBA, Dec. No. B-3-75.

[15] Section 1173-7.0d requires preservation of the status quo during a certain delimited "Period of negotiations."

DETERMINATION OF PATROLMEN'S SCHEDULES

The letter of October 3, 1972, commits the Police Department to a "24-squad work system" which "shall be maintained in effect for the duration of the current collective bargaining agreement." The duty charts in effect at the present time for Patrolmen are based on the agreed upon 24-squad system which results in duty charts calling for an 8½ hour day. Prior to the implementation of the 24-squad system, the Department had operated on a 20-squad system which had resulted in duty charts providing an 8-hour day for Patrolmen. However, the parties agreed that a change to a 24-squad system would permit the Department more flexibility in assigning its manpower and would provide additional daily time for purposes such as in-service training of Patrolmen. In addition to the letter of October 3, 1972 the parties incorporated the following Article V into the collective bargaining contract:

> "Since the basic 40 hour week has not been changed by this agreement, the proposed modification of the standard twenty-squad chart and use of other tours Shall not affect current standard practice for the computation of compensation for holidays, vacation days, personal leave days, annuity fund contributions and other relevant benefits which shall remain on the basis of an eight hour workday calculation."

This provision was designed to avoid the effect of the restrictions in §971[16] of the Unconsolidated Laws which limited duty charts to "eight consecutive hours". Section 971 provides:

[16] City Brief, p. 3. We do not comment on the method used by the parties in dealing with §971.

> "In the City of New York, the police commissioner shall promulgate duty charts for members of the police force which distribute the available police force according to the relative need for its services. This need shall be measured by the incidence of police hazard and criminal activity or other similar factor or factors. No member of the force shall be assigned to perform a tour of duty in excess of eight consecutive hours excepting only that in the event of strikes, riots, conflagrations or occasions when large crowds shall assemble, or other emergency, or on a day on which an election authorized by law shall be held, or for the purpose of changing tours of duty so many members may be continued on duty for such hours as may be necessary. No member shall be assigned to an average of more than forty hours of duty during any seven consecutive day period except in an emergency or as permitted in this subdivision or for the purpose of changing tours of duty or as otherwise provided for by law"
> (Laws 1969, chapter 177, effective March 30, 1969)
> (emphasis added)

The change to the 24-squad system resulted, therefore, in Patrolmen working 8½ hours per day. In consequence, Patrolmen worked fewer tours per year (although the number of average annual hours remained constant) and thus gained more days off per year. In addition, the Department had a greater number of squads and could manipulate their assignment with greater flexibility and achieve better coverage during "high crime" hours.

Now, however, the Department would like to have the freedom to make changes in duty charts in order to change the 24-squad system. The City's Brief argues that a need for further flexibility has arisen and that in order to achieve a greater level of service to the public, the Police Department must be free to make further adjustments in the squad system end in Patrolmen's duty charts.

Under §1173-4.3a of the NYCCBL, "hours" are a mandatory subject of bargaining. The problem in the instant case arises from the various restrictions imposed on the PBA's right to bargain about hours.

We confirm that the City alone has the power and duty to determine the level of manning in the Police Department. However, more is involved herein than the mere "scheduling" of tours of duty. Therefore, if withdrawal of the letter of October 3, 1972 would result in a change in the total hours worked per day or per week by Patrolmen and Policewomen, the question of hours is a mandatory subject of bargaining.

Section 971 of the Unconsolidated Laws imposes certain limits on the number of hours a Patrolman may be required to work pursuant to his duty chart. It is clear that the parties may not bargain over hours in such a way as to reach an agreement contrary to the duty expressly reserved to the Police Commissioner by law.[17] Any PBA or City demand which would require a contravention of law is therefore a prohibited subject of bargaining.[18]

Further, the Police Department is charged with insuring the public safety. Therefore, it has the duty to determine the level of services it will provide to the public and it alone may determine the level of manpower required and the number of Patrolmen who must be on duty at a certain time.[19]

---

[17] Board of Ed. v. Associated Teachers of Huntington, 30 NY 2d 122, 130,331 NYS 2d 17, 23.

[18] Decision No. B-11-68.

[19] Decision Nos. B-4-59; B-6-74; Matter of City of White Plains, supra.

PERB said, in the White Plains case:

> "It is the City alone which must determine the number of firemen it must have on duty at any given time. It cannot be compelled to negotiate with respect to this matter. However, there are many ways in which the schedules of individuals and groups of firemen may be manipulated in order to satisfy the City's requirement for fire protection. It is the manipulation of the schedules of individuals and groups of firemen which is involved in the Fire Fighters' demand. Within the framework which the city may impose unilaterally that a specified number of Fire Fighters must be on duty at specified times, the City is obligated to negotiate over the tours of duty of the Fire Fighters within its employ."

We need not define the duty to bargain over hours more precisely at this time. The question before us is whether the City may unilaterally withdraw the provisions it has heretofore agreed to with respect to duty charts and the 24-squad system. We hold that the City may withdraw the letter relating to a 24-squad system.[20] However, it must bargain on changes in hours. The City must bargain over those aspects of the duty charts and 24-squad, system which affect hours of work, including days of work and days off, and which are not fixed by law and which do not impinge on the City's right to determine the level of manning required to provide police protection to the public. If those aspects of the subject of duty charts which we have found to be a mandatory subject of bargaining are to be included in the contract which is the subject of the present impasse panel proceedings, the City must in timely fashion announce what changes it proposes to the Union and engage in the bargaining referred to above.

[20] The right to take such action is subject to the status quo provisions of the law.

DETERMINATION

Pursuant to the power vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

DETERMINED, that the City may withdraw, the letters of October 3, 1972, and October 4, 1972, subject to the status quo provisions of the NYCCBL; and it is further

DETERMINED, that threats to safety would constitute a practical impact, if so determined to exist by this Board, as a consequence of any plan to change the present manning of precinct radio motor patrol cars and therefore would be a mandatory subject of bargaining pursuant to the conditions described in the body of this decision; and it is further

DETERMINED, that the subject relating to the determination of Patrolmen's schedules is a mandatory subject of bargaining to the extent discussed above subject to the limitation imposed by law.

DATED: New York, New York
February 14, 1975

S/ ARVID ANDERSON
C h a i r m a n

S/ ERIC J. SCHMERTZ
M e m b e r

S/ WALTER L. EISENBERG
M e m b e r

S/ EDWARD SILVER
M e m b e r

S/ THOMAS J. HERLIHY
M e m b e r

S/ EDWARD GRAY
M e m b e r

S/ JOSEPH J. SOLAR
M e m b e r

NOTE: Labor Member Gray and Alternate Labor member Solar concur in this decision except that they dissent from so much of the decision as requires the Board to make a further finding of practical impact.