

Ontario Energy
Board

Commission de l'Énergie
de l'Ontario



EB-2013-0268

IN THE MATTER OF the *Ontario Energy Board Act*
1998, S.O.1998, c.15, (Schedule B);

AND IN THE MATTER OF section 99 of the Act;

AND IN THE MATTER OF an application by Dufferin
Wind Power Inc. for authority to expropriate interests
in certain lands for the purpose of constructing a new
transmission line and associated facilities.

BEFORE: Ken Quesnelle
Presiding Member and Vice Chair

Peter Noonan
Member

DECISION AND ORDER

May 1, 2014

BACKGROUND

The Application

Dufferin Wind Power Inc.¹ has applied to the Ontario Energy Board under section 99 of the *Ontario Energy Board Act* (the “Act”) for authority to expropriate interests in certain lands. The purpose of the expropriation is to allow Dufferin Wind Power Inc. to implement an authorization granting it leave to construct an electrical transmission line and associated facilities, in order to connect its planned Dufferin Wind Farm to the provincial power grid. The Board granted leave to construct authority to the Applicant in Decision No. EB-2012-0365 dated July 5, 2013.

To implement the project, the Applicant negotiated easement agreements with many, but not all of the landowners along the proposed route of the transmission line. In those instances where a negotiated agreement was impossible to obtain DWPI decided to seek authority from this Board to expropriate the interests in the affected lands that it requires to construct, operate and maintain its transmission line and associated facilities. The land interests sought by the Applicant include temporary construction easements and, for a term of 45 years, transmission easements, distribution easements, and access and maintenance easements.

The Applicant initially sought approval of the Board to expropriate interests over fifty-two properties. Over the course of this proceeding, DWPI settled with all but two property owners, Atkinson Farms Limited, and Marc Atkinson. A legal description of the affected properties that are the subject of this application is attached as Appendix A to this decision.

DWPI is seeking a 45 year non-exclusive easement interest in the remaining lands to construct and operate an overhead 230 kV transmission line. Atkinson Farms Ltd. and Marc Atkinson requested that the 230 kV transmission line be placed underground, within a subsoil easement.

¹ In this decision Dufferin Wind Power Inc. will be referred to by name, or as the Applicant, or DWPI.

For the reasons set out below, the Board finds the proposed takings described at Appendix A to be appropriate, and the requested expropriation in the subject lands to be in the public interest pursuant to section 99 of the Act.

The Proceeding

On July 19, 2013, DWPI filed this expropriation application with the Board, following which the Board issued a Notice of Application on September 17, 2013, and directed DWPI to serve and publish the Notice.

The Board received and granted intervention requests from Hydro One Inc., and the following landowners: the Corporation of the County of Dufferin (the “County”), David Coe, Atkinson Farms Ltd., Marc Atkinson, and James Daniel Black and Marian Arlene Black (the “Blacks”). An application for intervenor status was also received from D&G Ferguson Farms but it was placed in abeyance, and subsequently withdrawn after it was determined that the lands proposed to be taken did not include any of the lands of D&G Ferguson Farms.

The Blacks and the County filed preliminary motions on October 15, 2013, and October 18, 2013, respectively, asking for a stay of this application until a pending judicial review of the Board’s leave to construct order was heard and decided by the Divisional Court, and an appeal of an REA decision was heard and decided by the Environmental Review Tribunal, as well as the issuance of a pending arbitral award in relation to the Blacks.

On October 30, 2013, the Board issued Procedural Order No. 1 which established dates for submissions by the Applicant and all parties on the Blacks and the County’s Motions for a Stay of Process, and dates for reply submissions by the Blacks and the County.

On December 16, 2013, the Board issued Procedural Order No. 2 and a Decision denying the County and the Blacks’ preliminary motions. Prior to its decision, the judicial review of the leave to construct order had been decided in favour of the Applicant by the Divisional Court. Therefore, the Board was only concerned in its Decision with the pending arbitral award and the appeal to the Environmental

Review Tribunal. The Board determined that in respect to the arbitration “there is nothing determinative in the arbitration that would change the Board’s expropriation process”. With respect to the appeals to the Environmental Review Tribunal the Board noted that the issuance of a stay of process was a discretionary act, and “it is well established that a regulatory tribunal should not postpone the determination of an application brought within its jurisdiction by matters not relevant to the proper discharge of its duty to make such determination. To do so could, in effect, amount to a declining of jurisdiction.” Accordingly, the Board elected to proceed with the hearing, and its Order specified dates for staff and intervenor interrogatories, and for DWPI’s responses to those interrogatories. The Order also established dates for the filing of proposed issues by staff and intervenors and set dates for a Pre-hearing Conference on Issues and Process.

The Board also determined that it would proceed by way of an oral public hearing in this case because the language of subsection 99(2) of the Act stipulated that in an expropriation proceeding the Board must set a specific date for the hearing of an application not sooner than 14 days after the application was filed. Such particular language was understood to create a requirement that an oral hearing be offered to parties in expropriation proceedings. Furthermore, the Board was cognizant of the gravity of an expropriation case, involving as it does the compulsory taking of a person’s property or an interest in their property, without their consent². The Board therefore determined that it was proper that an oral hearing be convened. However, the Board did offer to hold a written hearing if the landowners preferred a written hearing, which none did.

In accordance with Procedural Order No.2, Board staff submitted a Draft Issues List to assist the Board and the parties, and the draft list of issues was circulated for comment. The intervenors David Coe, Marc Atkinson, and Atkinson Farms Ltd. proposed three additional questions. Two of those questions raised the issue of whether the impact of the proposed land taking by DWPI would be minimized if the Board specified that the transmission line be placed underground, in a subsoil easement, while the third question raised the issue of whether a decision by the Board to grant a subsoil easement for the transmission line would contravene its

² See *Dell Holdings v Toronto Area Operating Authority*, [1997] S.C.J. No. 6, para. 20

earlier decision (EB-2012-0365) which granted the Applicant its leave to construct authority for an overhead line.

The Applicant filed submissions on the Draft Issues list in which it stated that it concurred with Board staff's proposals and did not propose the addition of any new issues or any revisions to the Draft Issues List. The Applicant opposed the proposed additional issues sought by Atkinson Farms Ltd., Marc Atkinson and David Coe.

On January 24, 2014, the Board convened an oral Pre-hearing Conference on Issues and Process in the Board's hearing room to hear submissions on the Draft Issues List. DWPI, Board staff, counsel for Atkinson Farms Ltd., Mr. Atkinson, and Mr. Coe, counsel for the Blacks, and counsel for the County of Dufferin, all took part in the Pre-hearing Conference. The Board heard submissions from the parties on two questions; firstly, whether the Board was precluded from adjudicating upon a proposal by the intervenors Marc Atkinson, Atkinson Farms Ltd., and David Coe seeking an order that the transmission line be placed underground in a subsoil easement as a result of the conclusions reached by the Board in its earlier decision to grant leave to construct authority, and, secondly, whether the public interest in section 99 of the Act was of sufficient breadth to permit the Board to consider the placement of the transmission line underground.

On February 7, 2014, the Board issued Procedural No. 3 and rendered its Decision on the Issues. On the first question the Board decided, following the long-ago laid down principle in *Henderson v Henderson* (1843), 3 Hare 100, that it was not precluded by its earlier decision from ordering that the transmission line be placed underground on the intervenors' property. Secondly, the Board ruled that the public interest in section 99 of the Act was of sufficient breadth to permit the Board to examine all aspects of the proposed taking in making its decision under that section of the Act. In reaching that conclusion, the Board reviewed its own precedents in *Re Hydro One Service to Toyota Canada Inc.* EB-2006-0352, *Re Canadian Renewable Energy Corp.* EB-2008-0050 and *Re Bruce to Milton* EB-2010-0023. In particular, the Board found favour with the conclusion reached in *Re Bruce to Milton* where the Board stated:

While the leave to construct order cannot be challenged in a section 99 proceeding, the intervenors are entitled to raise the issue of whether an unduly negative impact will occur as a result of the taking, and whether there are practical solutions that would alleviate the impact of the taking on a particular parcel of land.

Accordingly, the Board accepted two of the proposed additions to the Draft Issues List (the third proposal was no longer required as a result of the Board's decision), and the Board approved the Issues List set out in Appendix B of this Decision.

As a result of the Board's decision, on February 11, 2014 Mr. Crocker, counsel for Atkinson Farms Ltd., Mr. Atkinson, and Mr. Coe, wrote to the Board requesting an adjournment of the hearing from February 18, 2014 to mid-March 2014, in order to allow his clients to prepare their evidence, and to obtain and provide expert evidence to the Board with respect to the feasibility of placing the transmission line underground.

Subsequently, the Board, in Procedural Order No. 4, issued on February 13, 2014, decided that some additional time should be afforded to the intervenors to produce written evidence, and written expert evidence with respect to the established list of issues, and the Board established a new date for the hearing.

On February 11, 2014, the Board also received a letter from the Applicant advising that it was withdrawing the expropriation application associated with the Blacks' property, the results of an arbitral award having rendered further expropriation proceedings unnecessary in relation to the Black's property. The Board accepted the withdrawal of the expropriation application in so far as it affected the Blacks' property.

On February 28, 2014, counsel for the intervenors advised the Board that the expert evidence it proposed to submit would, of necessity, have to be provided under compulsion and therefore the intervenors applied for the issuance of a Summons to Attend to compel testimony from a witness that the intervenors proposed to qualify as an expert. In the interim, the intervenors submitted a Statement of Anticipated Evidence of Jack Kottelenberg, to fulfill their obligations pursuant to Procedural Order No. 4.

In letters to the Board dated March 3rd and 4th, 2014, the Applicant objected to the testimony of Mr. Kottelenberg as an expert witness stating that the failure by the intervenors to provide written expert evidence in advance of the oral hearing would place the Applicant at a disadvantage for the purposes of cross-examination of the expert. The Board decided that it would hear submissions regarding Mr. Kottelenberg's participation in the proceeding as a preliminary matter at the commencement of the oral hearing.

On March 7, 2014, counsel for the County informed the Board that the County had executed an easement agreement with DWPI, and as such no longer needed to participate in the proceeding and would not appear by counsel, or otherwise, at the forthcoming hearing.

On March 10, 2014, the Board convened an oral public hearing. At the outset of the hearing, Mr. Crocker indicated that Mr. David Coe had executed a transmission easement agreement with DWPI and was therefore no longer an active party.

The Board proceeded firstly to hear submissions on the preliminary question of whether the expert testimony of Mr. Kottelenberg should be received *viva voce*,³ in the absence of pre-filed expert evidence. After hearing from both parties, the Board decided that it would not receive expert evidence from Mr. Kottelenberg, owing to the fact that his evidence would not have been provided in accordance with the Board's rules, thus causing prejudice to the Applicant, and also because it was clear from the submissions of counsel that the proposed evidence would not add value to the proceeding.

The Applicant proceeded to enter its case, and the Board then heard evidence from Mr. Hammond, the Senior Vice-President of DWPI, and Mr. McAllister, the Senior Project Developer of DWPI. Both witnesses proceeded to adopt DWPI's pre-filed evidence and its answers to interrogatories as the case for the Applicant. Both witnesses were then cross-examined by Mr. Crocker. Following the presentation of the case for the Applicant, Mr. Marc Atkinson testified on behalf of

³ The evidence was also proposed to be received via a Skype connection, as the witness was not present within the jurisdiction.

himself and Atkinson Farms Ltd. He was cross-examined by Mr. Smith, counsel for the Applicant. Following the admission of the parties' *viva voce* testimony and subsequent cross examination, the parties then prepared and submitted oral argument, and reply argument to the Board.

In addition to the evidence provided to the Board by the Applicant and the Intervenor, the Board also received several letters of comment from members of the public which also form part of the record of this proceeding. The letters of comment are referred to in Appendix C of this decision.

The Legislative Framework

The Board's power to grant an applicant authority to expropriate is derived from section 99 of the Act. Under that section, any person who has been granted leave by the Board under section 92 of the Act may apply to the Board for authority to expropriate land for a work.

Section 99(5) of the Act establishes the test for approving an expropriation: "If after the hearing the Board is of the opinion that the expropriation of the land is in the public interest, it may make an order authorizing the applicant to expropriate the land."

The Board's approach to expropriation has been guided by, or articulated, in a number of prior cases that were summarized for the purposes of the present case in the Decision on Issues dated February 7, 2013. In an expropriation application, the Board is required to consider the broad public interest under section 99 of the Act,⁴ balancing that broad public interest against specific local interests, and the interests of the Applicant⁵. Therefore, the fact that a landowner may suffer some harm from an expropriation is not the relevant question (as there will almost always be some form of harm when a property owner loses some of his or her land rights). Rather, the question for the Board to determine is whether that harm can be

⁴ *Union Gas v Dawn* (1977), 76 DLR (3d) 613 (Ont. Div. Ct.)

⁵ *Re Hydro One Service to Toyota Canada Inc.* EB-2006-0352; *Re Canadian Renewable Energy Corp.* EB-2008-0050.

remedied through “practical solutions”⁶ or monetary compensation, or a combination of the two? If the answer to that question is affirmative then ordinarily harm to the landowner’s interest will not, in and of itself, be an impediment to expropriation.

BOARD FINDINGS

The need for the lands in order to construct the 230 kV transmission line was clear. Without the transmission line there would be no way to transmit the electricity generated by the wind farm to the provincial grid, and without the easement sought by the Applicant through expropriation there could be no transmission line.

Mr. Atkinson and Atkinson Farms Ltd. had previously agreed to allow the Applicant to construct a wind turbine tower on their property, and to install an underground electrical collector line within an easement located on the subject properties. While some evidence was adduced that it would be more convenient for Mr. Atkinson and Atkinson Farms Ltd. if the easement straddled their lands and the neighboring lands of a Mr. Vander Zaag, there was no evidence that Mr. Vander Zaag was agreeable to conveying a portion of his lands for an easement. In the circumstances the general location of the easement sought by the Applicant appeared to the Board to be reasonable.

Evidence was submitted to show that the agricultural operations on the lands of Marc Atkinson and Atkinson Farms Ltd. could be affected by the existence of an overhead transmission line. The potential impacts included the reduction or loss of a windbreak as a result of woodlot clearing, the difficulties that may be encountered in the operation of farm equipment between the transmission line and the property line, the impediments to the use of the existing pivot irrigation system once the overhead transmission line is constructed, and possible adaptive concerns with respect to the cattle on the farm lands. In relation to the latter concern, it was stated by Mr. Atkinson that his cattle may be reluctant to continue to use the shade afforded by the woodlot as a result of the proximity of an electrical transmission line.

⁶ *Re Bruce to Milton* EB-2010-0023

In his evidence Mr. Atkinson also stated that the presence of an overhead transmission system would present incremental risk to those who live and work on the farm and that burying the line could resolve those issues. For example, an underground installation would eliminate the possibility of any inadvertent contact between farm equipment and the overhead transmission line.

Under cross-examination it was shown that many of the potential impacts identified by the intervenors could be mitigated through practical measures, while others could be addressed through financial compensation (which is a matter within the jurisdiction of the Ontario Municipal Board, if the parties are themselves unable to reach an agreement on the quantum of compensation).

Regarding the windbreak, it was shown that by shifting the lands to be taken slightly to the west of the currently proposed alignment the existing woodlot, which affords windbreak protection to cattle during the winter months, can be maintained. Shifting the alignment of the lands to be taken slightly to the west in this manner would also have an impact on the use of a portion of the farmlands described as “the headlands” but that impact could be dealt with through financial compensation. The Board has concluded that any harm to the intervenors can be compensated either by financial compensation or, as a practical matter, by an adjustment to the alignment of the easement to protect the existing woodlot, or a combination of the two. A mechanism to allow a minor variation in the alignment has been provided for in the conditions to the Board’s approval.

Secondly, with respect to the impacts of operating farm equipment between the transmission line and the intervenors’ property lines, the Applicant described how it had moved the specific locations of the poles closer to the property line at the request of the intervenors in order to minimize the disruption to the current farming operations. Doing so required the Applicant to install the poles at 100 metre intervals, instead of at 150 metres intervals, in order to prevent the wire from trespassing onto neighboring lands during periods of high winds. The Board notes that DWPI has taken reasonable steps to accommodate the landowners in this regard.

During cross-examination it was also shown that the impact on the use of an excavator and a harvester due to the limited space between the overhead transmission line and the landowners' property line might be minimized by the purchase of smaller farm equipment that could operate in more confined spaces. The potential harm in the form of inefficiency or inconvenience that could result from the presence of the overhead transmission line is therefore a matter for which the intervenors may receive financial compensation.

As regards the impact on the utility of the pivot irrigation system it was admitted by Mr. Atkinson in cross-examination that the location of the irrigation pivot could be flipped so that it pivoted from a different location in an opposite direction, which would lessen the impact on irrigation operations caused by the presence of the overhead transmission line. Furthermore, it was also shown that the purchase of a shorter irrigation system may avoid the transmission poles entirely. The replacement of the existing irrigation system with a revised or different system is a matter that may be the subject of a claim for financial compensation to mitigate the impacts of the expropriation.

While the Board acknowledges that Mr. Atkinson has concerns about whether his cattle will adequately adapt to the presence of an overhead transmission line, there was an absence of specific evidence as to the likelihood of maladaptation by the intervenors' cattle herd. The concerns that were expressed were speculative in nature and in the absence of specific evidence the Board cannot give this concern great weight.

The Board notes that it is the industry standard to construct electrical transmission lines on overhead structures in areas of low population density for reasons of cost, practicality, and reliability. Transmission lines may, however, be placed underground in areas of high population density where there is a greater risk of interference with human activity. While the Board accepts the contention of the intervenors that it would be feasible to bury the 230 kV line, instead of constructing an overhead system, both the Applicant and the intervenors acknowledged that significant incremental costs would be incurred if the line was placed underground in a subsoil easement.

To a degree, the safety concerns expressed by Mr. Atkinson can be mitigated by some of the operational changes that have been discussed earlier in this decision. At the same time there will always be an element of increased risk whenever agricultural operations intersect with utility operations. In such circumstances it will be necessary for both transmission line operators and agricultural operators to take sufficient precautions to ensure that hazards are not manifested. Mr. Atkinson himself acknowledged the presence of risk, and the necessity to take due care during his testimony when he commented on the risk presented by the underground collector line on his property, stating that the existing buried collector line would not manifest risk to his farming operations “unless we put a post hole digger through one of the lines. I think that’s the only concern that I have worried about, that we would hit one at some point but they are well marked as to where they are, and I think that’s safe enough.”

The Board has concluded that any impacts due to the presence of an overhead transmission line on farming operations at this location can be mitigated by a slight variation in the alignment of the specific easement in the case of the woodlot, or otherwise dealt with through financial compensation to the landowners for any necessary operational or equipment changes or any other resulting harm to their farming operations arising through the taking of an easement through the subject lands.

The Applicant has sought to take a non-exclusive 45 year easement of approximately 25-30 metres in width across the lands of Mr. Atkinson and Atkinson Farms Ltd. It was explained during testimony that the width of the easement is required for the installation of the poles and wires, in order to accommodate the maintenance activities relating to the line, and to accommodate the swinging of the wire during high winds so that it will not result in a trespass onto neighboring properties. The Board finds that the extent of the proposed taking is reasonable and that what is proposed will minimize the impact of the taking on the landowners. There will be no significant sterilization of lands for agricultural purposes and any long term impacts are compensable. The non-exclusive easement will permit the utilization of the lands under the wire for continued agricultural purposes, and the length of the easement is consistent with the authority sought by the Applicant in the leave to construct proceeding. Therefore, the Board finds that the proposed

taking is reasonable in the circumstances and that it would be in the public interest to grant the application as applied for, subject to conditions.

THE BOARD ORDERS THAT:

The application by Dufferin Wind Power Inc. is granted in the terms applied for subject to the following conditions:

1. Within 14 days of the date of this Decision, Mr. Atkinson may request that Dufferin Wind Power Inc. move the proposed easement slightly to the west to preserve the existing woodlot as a windbreak for his cattle. If Mr. Atkinson makes such a request, the Applicant shall prepare and file a revised expropriation plan for Board approval and endorsement within 30 days of the date of the request to show a westward shift in the alignment of the easement sufficient to protect the existing woodlot as a windbreak, according to the offer that was made by Dufferin Wind Power Inc. at the hearing of this matter.
2. A cost awards decision will be issued after the steps set out below are completed:
 - a. Intervenors eligible for cost awards shall file with the Board and forward to Dufferin Wind Power Inc. their respective cost claims within 20 days from the date of this Decision.
 - b. Dufferin Wind Power Inc. may file with the Board and forward to intervenors eligible for cost awards any objections to the claimed costs within 25 days from the date of this Decision.
 - c. Intervenors, whose cost claims have been objected to, may file with the Board and forward to Dufferin Wind Power Inc. any responses to any objections for cost claims within 35 days of the date of this Decision.
 - d. Dufferin Wind Power Inc. shall pay the Board's costs of, and incidental to, this proceeding upon receipt of the Board's invoice.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

E-mail: Boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656

DATED at Toronto, May 1, 2014

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX “A”

TO

DECISION AND ORDER

BOARD FILE NO. EB-2013-0268

DESCRIPTION OF PROPERTIES SUBJECT TO EXPROPRIATION

	Easement Interest	Legal Description of Interest to be Expropriated
1.	Transmission Easements	WEST 1/2 OF LOT 27, CONCESSION 3, OS; MELANCTHON; SUBJECT TO AN EASEMENT IN FAVOR OF THE WEST 1/2 OF LOT 28, CONCESSION 3, OS AND PART LOT 27, CONCESSION 3, OS, EXCEPT AS IN INSTRUMENT MF46600 AND PART 1 ON PLAN 7R3470 AND PART 1 ON PLAN 7R4449, MELANCTHON, OVER PART LOT 27, CONCESSION 3, OS, DESIGNATED AS PART 1 ON PLAN 7R5609 AS IN DC73566
2.	Transmission Easements	EAST 1/2 OF LOT 26, CONCESSION 3, OS; MELANCTHON

APPENDIX “B”
TO
DECISION AND ORDER
BOARD FILE NO. EB-2013-0268

ISSUES LIST

Issue 1

To the extent that the public interest has not already been considered in the Board’s decision in Board File No. EB-2012-0365, are the proposed expropriations in the public interest?

Issue 2

What specific interests in lands for which the authorization to expropriate is requested, are appropriate in the circumstances?

Issue 3

- a. Has DWPI taken appropriate and reasonable steps to minimize the impact of the proposed expropriations on the subject properties?
- b. Do appropriate and reasonable steps to minimize the impact of the proposed expropriations on the Atkinson Farms, Atkinson, and Coe properties include burying the transmissions lines designed to traverse these properties?

Issue 4

- a. Has DWPI taken appropriate steps to minimize the disruption to landowners by requesting easements that are no larger and no more extensive than necessary?
- b. Does minimizing the disruption to Atkinson Farms, Atkinson and Coe require that DWPI request an easement that would only permit transmission lines to traverse the Atkinson Farms, Atkinson, and Coe properties if those lines are buried?

Issue 5

If approval to expropriate lands is granted, what conditions, if any, should be attached to the Board’s Order?

APPENDIX “C”
TO
DECISION AND ORDER
BOARD FILE NO. EB-2013-0268

LETTERS OF COMMENT

In response to the Notice of Application issued by the Board in this proceeding the Board received several letters of comment from concerned members of the public. The list of people who provided their comments to the Board is as follows:

Grant and Valerie Petersen
Janice and Bruce Parrinder
Gail Gaskin and Shawn Sands
Neil Tyler
Lyle and Judy Clayton
Thomas Long
Susan Sandford
Brian and Sharron DeManche

The commenters addressed a number of issues which are mainly outside of the scope of the Board's jurisdiction in an expropriation matter, and which are more relevant to the REA process that is administered by the Ministry of the Environment. The following is a list of the issues addressed by commenters that are outside of the Board's jurisdiction:

- Lack of Community Support/Public Opposition to the Project
- Health effects of EMF (Electro-magnetic Fields)
- Health effects of Infrasound
- Aesthetic (visual) Impacts of the Project
- Loss of Property Values
- Loss of Agricultural Land
- Loss of Wildlife Habitat
- Impact of the Project on Blanding's Turtle

Two commenters did refer specifically to the Atkinson properties and noted that the hardwood bush located on those properties provides a windbreak for the Atkinson cattle herd. The commenters noted that this feature of the properties could be lost if the expropriation was allowed. The issue concerning the windbreak is a matter that is within the jurisdiction of the Board and the Board has dealt with that issue in these reasons for decision, and in its Order.