U.S. Department of Labor

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Issue Date: 08 January 2015

Case No.: 2014-AIR-00025

In the Matter of

CHARLES HALL
Complainant

v.

SOUTHWEST AIRLINES CO.
Respondent

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION AND GRANTING IN PART COMPLAINANT'S CROSS MOTION FOR SUMMARY DECISION

Procedural History

This matter involves a dispute concerning alleged violations by the Respondent, Southwest Airlines Co., ("Southwest") of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21", "the Act" or "Wendell H. Ford Act"), 49 U.S.C. § 42121 (2000). The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure. Implementing regulations are located at 29 C.F.R. Part 1979, published at 67 FED. REG. 15,453 (Apr. 1, 2002).

On July 22, 2014, the Complainant filed a formal complaint with the Occupational Safety and Health Administration ("OSHA") alleging that the Respondent discriminated against him in violation of the Act. The alleged protected activity involved maintenance the Complainant performed on a Boeing 737-700 aircraft, tail number N208WN, on July 2-3, 2014, and a resulting Letter of Instruction that Respondent sent to Complainant.

On August 27, 2014, OSHA issued its Report of Investigation. The Secretary dismissed the case, finding that the Complainant did not suffer an unfavorable personnel action relative to his compensation, terms, benefits, and privileges of employment. The Complainant requested a hearing before an Administrative Law Judge ("ALJ") in a letter dated August 29, 2014.

On October 9, 2014, I issued a "Notice of Hearing and Pre-hearing Order," where I scheduled the hearing for January 28, 2015 through January 29, 2015 in Dallas, Texas. I also set the discovery deadline for January 5, 2015; the deadline to submit a pre-hearing statement for

January 16, 2015.[1] Finally, I requested that any dispositive motions be filed no later than December 19, 2014.

On December 19, 2014, the Respondent, through counsel, timely filed its Motion for Summary Decision. On December 29, 2014, Complainant filed a "Cross Motion for Summary Judgment"[2] and "Combined Brief in Opposition to Respondent's Motion for Summary Judgment and in Support of Complainant's Cross Motion for Summary Judgment."

Facts Alleged

The record before me is comprised of the following relevant documents:

- Complainant's Complaint with attached exhibits A – E, dated July 22, 2014;
- U.S. Department of Labor's "Secretary's Findings" letter, dated August 27, 2014;
- Complainant's Reply to the "Secretary's Findings" letter, dated August 29, 2014 with Exhibits A and B attached;
- Complainant's Response to September 11, 2014 Notice of Assignment, dated September 19, 2014;
- Respondent's Response to September 11, 2014 Notice of Assignment, dated September 22, 2014;
- Motion of Respondent For Summary Decision, with attached exhibits A-H, dated December 19, 2014; and
- Complainant's Cross Motion for Summary Judgment and Combined Brief in Opposition to Respondent's Motion for Summary Judgment and In Support of Complainant's Cross Motion for Summary Judgment, both dated December 29, 2014. Complainant's motion includes Exhibits (hereafter CE) 1-61.

Complainant's Allegations

On the evening of July 2, 2014, the Complainant was assigned by Respondent's agents to perform a Maintenance Visit 1 (hereafter MV-1) check on a Southwest Boeing 737-700 aircraft, N208WN. This maintenance check is part of Southwest's Maintenance Procedural Manual (MPM). The check requires a mechanic to follow a MV-1 task card which details the tasks to be accomplished. Item 28 of this task card requires the mechanic to sign an airworthiness release.[3]

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[1] I also set January 16, 2015 as the date for the pre-hearing conference.

[2] Although the Respondent titled this document "Motion for Summary Judgment," the relevant motion for this tribunal is a "Motion for Summary Decision." I will, therefore, refer to Respondent's Motion as its "Motion for Summary Decision" throughout this Order. Additionally, The Rules of Practice and Procedure For Administrative Hearings Before the Office of Administrative Law Judges 20 C.F.R. § 18.40 provides the opposing party ten days after service of the Motion to respond.

[3] *See* 14 C.F.R. § 121.703(b)(3). Before an aircraft may be considered airworthy, it (1) must conform to its type certificate, if that certificate has been modified by supplemental type certificates and by Airworthiness Directives; and (2) must be in condition for safe operation. *See Administrator v. Nielsen*, NTSB Order No. EA-3755 at 4 (1992) (citing *Administrator v. Doppes*, 5 NTSB 50, 52 n. 6 (1985)). In

This release is required prior to returning the aircraft to service.[4] Part of the MV-1 task card requires the mechanic to "walkaround" the aircraft to visually inspect the fuselage. During his inspection, the Complainant discovered two cracks on the aircraft's fuselage and documented them. Discovery of these cracks resulted in the aircraft being removed from service to be repaired.

On July 5, 2014, the Complainant was directed to attend a meeting to discuss the issue of working outside the scope of his assigned task. Following this meeting, on July 9, 2014, Respondent issued Complainant a "Letter of Instruction" advising Complainant that he had acted outside the scope of work outlined on the MV-1 check. CE 24.[5] This "Letter of Instruction" concluded with the sentence: "Please be aware that any further violations of MPM may result in further disciplinary action." On July 22, 2014, the Complaint filed this AIR-21 complaint. Subsequent to his filing of this complaint, Complainant received a second "Letter of Instruction." CE 25. Although dated July 9, 2014, Complainant did not receive this letter until mid-August. This revised letter omitted any language concerning the Complainant's discipline. Complainant maintained that even this second letter was a form of punishment and that it placed him "on the horns of a dilemma" fearing termination if he should ever find another crack. In his Complaint to OSHA, he asserted that "Southwest's disciplinary letter was calculated to, or had the effect of, intimidating Complainant and dissuading him and other Southwest AMT's[6] from reporting discovery of cracks, abnormalities or defects out of fear of being disciplined." Complaint at ¶45.

Respondent's Position

Respondent acknowledged that it is an air carrier covered by the Act and that the Complainant has worked for it since January 2002. CE 8. The Respondent contended that Complainant went outside the scope of his responsibilities when he observed a crack in N208WN's wheel bases and reported it. It was the Complainant's conduct of going outside the scope of his duties that resulted in him receiving a Letter of Instruction, not a result of Complainant's report of a safety concern. Respondent asserted that it is critical that its mechanics perform the specific inspection assigned and not deviate from that work scope. Respondent acknowledged that its initial July 9, 2014 letter did state that further violations of the MPM could result in further disciplinary actions. However, on or around August 7, 2014, Respondent revised Complainant's Letter of Instruction, and emphasized that the letter was not

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addition to the foregoing requirements, an aircraft must pass all required inspections before an aircraft is considered airworthy. *See In the Matter of USAir, Inc.*, FAA Order No. 1996-25, Docket No. CP94EA0045, 1996 WL 509937. *See generally,* 14 C.F.R. § 21.183.

[4] 49 C.F.R. § 121.702(b)(2) requires a certification that:

> (i) The work was performed in accordance with the requirements of the certificate holder's manual;
> (ii) All items required to be inspected were inspected by an authorized person who determined that the work was satisfactorily completed;
> (iii) No known condition exists that would make the airplane unairworthy; and
> (iv) So far as the work performed is concerned, the aircraft is in condition for safe operation.

[5] The abbreviation "CE" will be used throughout this Order to refer to exhibits contained in Complainant's Motion for Summary Decision.

[6] An AMT is an aviation maintenance technician. *See generally*, 14 C.F.R. Part 67.

disciplinary in nature and that the letter would not be kept in the Complainant's personnel file. Respondent further asserted that the Complainant suffered no adverse employment action as a Letter of Instruction is not part of its discipline-model. It maintained that Complainant cannot show that he suffered an unfavorable personnel action in response to protected conduct, as required under the Act.

Legal Standard

The purpose of summary decision is to promptly dispose of actions in which the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. 29 C.F.R. § 18.40, *see also* Federal Rule of Civil Procedure 56(c).[7] An issue is genuine if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). A fact is material and precludes a grant of summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *See Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *See Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001). If no issues are present, the moving party is entitled to a judgment as a matter of law. 29 C.F.R. 18.41(a)(1) ("Where no genuine issue of a material fact is found to have been raised, the administrative law judge may issue a decision to become final as provided by the statute or regulations under which the matter is to be heard.")

The burden of proof in a motion for summary decision is borne by the party bringing the motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Because the burden is on the moving party, the evidence presented is construed in favor of the party opposing the motion who is given the benefit of all favorable inferences that can be drawn from it. *See id.* A non-moving party may not rest upon mere allegations or denials in his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby*, 447 U.S. 242 (1986). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *See Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *See Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988).

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[7] 20 C.F.R. § 18.1(a) states that "The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules . . . ."

Discussion

The Respondent argued that this tribunal should grant its Motion for Summary Decision because neither the original Letter of Instruction nor the revised Letter of Instruction met the

standard of "unfavorable personnel action." Respondent further alleged that the collective-bargaining agreement governs not only Complainant's employment, but also the union's and Complainant's dispute process and this process governs whether or not its actions were discipline. This process includes an entity called the "System Board of Adjustment." This Board consists of a union representative and a company representative. System Board "rulings" have found that Letters of Instruction are not disciplinary in nature, but are a training tool.[8] Respondent continued, arguing that under the Railway Labor Act, the System Board's prior rulings – that Letters of Instruction are not discipline – "are the sole, exclusive, and final mechanism for resolving such disputed claims under that agreement."

Respondent's argument is unavailing. First, this proceeding deals neither with the collective bargaining agreement nor the Railway Labor Act. Additionally, this matter does not involve a claim *arising under that agreement*. This claim arises under the separate statutory authority of the Wendell H. Ford Act. Third, the purpose of the Act, to protect the traveling public, is fundamentally different than the purpose of the Railway Labor Act, to protect the free flow of commerce.[9]

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[8] Complainant's brief at Exhibit B includes seven System Board of Adjustment findings: six from Dallas and one from Las Vegas. Two of these findings occurred in June 1989; two in January 1991; one in September 1991; one in November 2011; and one in May 2014. None of these "rulings" recite the underlying facts and circumstances or otherwise provide any relevant information other than the proposition that Letters of Instruction – given unknown facts – were not considered discipline at that time.

[9] AIR 21 is, plainly, an air safety statute. Congress's focus on air safety is illustrated through the following observations. First, Title V of the Enrolled Bill is titled "Safety." Within this "Safety" title is Sec. 519. This section amended Chapter 421 of the United States Code to include § 42121 – the whistleblower protection program that provides the very cause of action under which the Complainant filed his Complaint against the Respondent in the instant action. Second, Sec. 714 amended 49 U.S.C. § 44701 and redesignated subsection (e) of this section as "Bilateral Exchanges of *Safety Oversight Responsibilities*," pursuant to Article 83 bis of the CICA. (Emphasis added). Third, discussing a bill that eventually became AIR 21, the Senate Committee on Commerce, Science and Transportation stated that "[t]itles I through V of the bill reaffirm the commitment of the Committee to ensuring [sic] that the *U.S. continues to have the safest and most efficient air transportation system in the world*." S. Rep. No. 105-278, at 2 (1998) (emphasis added) ("The bill also includes various provisions *to improve aviation safety*, security and system capacity . . . ."); *see also* 146 Cong. Rec. H1002-01, H1009 (daily ed. March 15, 2000) (statement of Rep. Kelly) ("[L]et there be no mistaking that **our fundamental purpose** here for undertaking this initiative is *to ensure the safety of the traveling public*.") (emphasis added). Finally, in his signing statement accompanying AIR 21, President Clinton remarked that "[t]his legislation contains *important measures to improve aviation safety . . . .*" 36 Weekly Comp. Pres. Doc. 14 (Apr. 10, 2000) (emphasis added).

In a larger sense, when enacting AIR 21, Congress was merely continuing a tradition of regulating aviation safety that can be traced back to the Air Mail Act of 1925 and the Air Commerce Act of 1926. Such Acts were codified in the United States Code under Subtitle VII of Title 49. Part A of Subtitle VII

The legislative history of the Wendell H. Ford Act evinces Congress's concern for airline safety when implementing AIR 21's whistleblower provision. *See e.g.,* 146 Cong. Rec. S1247-07, S1252 (daily ed. Mar. 8, 2000) (statement of Sen. Grassley) ("Whistle-blower protection *adds another*, much needed, layer of protection for the traveling public using our Nation's air transportation system)(emphasis added); 146 Cong. Rec. S1255-01, S1257 (daily ed. Mar. 8, 2000) ("[Air 21 provides] whistleblower protection to aid in our safety efforts and protect workers willing to expose safety problems.").

The plain language of § 42121 illustrates well AIR 21's focus as an air-safety statute, rather than a statute aimed at worker protection. For example, § 42121(a)(1) prohibits an air carrier from discriminating against an employee "because the employee . . . provided . . . to the Respondent . . . *information relating to any violation [of] . . . Federal law relating to air carrier safety* . . . ." (emphasis added). The plain language of § 42121 clearly displays Congress's intent to regulate air-safety when enacting AIR 21's whistleblower protection section. Further, I am persuaded by judicial precedent, stating that § 42121 is not primarily a labor law; rather "[it is] a means for incentivizing airline employees to speak up when they observe violation of Federal

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is entitled "Air Commerce and Safety." Section 40101 (the first section under Part A) is entitled "Policy." It defines the following as being in the "public interest:"

> (1) assigning and maintaining safety as the highest priority in air commerce.
> (2) before authorizing new air transportation services, evaluating the safety implications of those services.
> (3) preventing deterioration in established safety procedures, *recognizing the clear intent, encouragement, and dedication of Congress to further the highest degree of safety in air transportation and air commerce*, and to maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public.

49 U.S.C. § 40101(a)(1-3) (emphasis added) (punctuation in the original).

I also note a fundamental difference between laws regulating safety in the air and laws regulating other types of transportation. *See FAA v. Delaware Skyways LLC*, FAA-2002-14059, 2003 WL 23118403 (D.O.T.) (March 12, 2003) ("It is not difficult to understand the Board's reasoning. The promulgation, preservation, and enforcement of standards of safety in the air are among the most critical functions entrusted to any regulatory agency. The field of aviation safety carries special responsibilities because so much is at stake."); *see also* Ralph Bradburd & David R. Ross, Regulation and Deregulation in Industrial Countries: Some Lessons for LDCs 71 (World Bank Publications 1991) ("Unlike trucking, for air transport, safety is a major concern.").

Finally, I find the title of § 42121 persuasive to this same end. *See Church of the Holy Trinity v. United States*, 143 U.S. 457, 462 ("The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature.") The title of § 42121 is "Protection of Employees Providing Air Safety Information." This title indicates that, even though workers are protected under the Act, only specific kinds of workers are protected: those providing air safety information.

On the other hand, the purposes of the Railway Labor Act are to avoid any interruption to commerce; ensure the unhindered right of employees to join a labor union; provide complete independence of organization by both parties to carry out the purposes of the RLA; assist in the prompt and orderly settlement of disputes covering rates of pay, work rules, or working conditions; and assist in the prompt and orderly settlement of disputes growing out of grievances or out of the interpretation or application of existing contracts covering the rates of pay, work rules or working conditions. *See* 45 U.S.C. § 151a.

aviation safety laws." *Dos Santos v. Delta Airlines, Inc.*, OALJ Case No. 2012-AIR-00020 (OALJ January 11, 2013) at *25.

Respondent correctly stated that it is initially Complainant's burden to demonstrate that the personnel action is adverse and that the Letters of Instruction somehow affected the terms, condition, or privileges of his employment. However, Respondent did not address its burden in the context of this Motion. In Complainant's complaint, he alleged that the Letter of Instruction did have an effect on at least the conditions of his employment.[10] He specifically asserted that the letter had the effect of intimidating Complainant and dissuading him and other Southwest AMT's from reporting the discovery of cracks, abnormalities or defects, out of fear of reprisal discipline. *See* Complaint at ¶45. Complainant buttressed this assertion with numerous declarations from fellow line mechanics. *See* CE 38 – 51. Respondent provided little if any evidence, at this stage of the proceeding, to rebut these allegations. Here, I am to apply the facts in the light most favorable to the Complainant, and I reasonably find that Respondent failed to meet its burden for purposes of Summary Decision.

Respondent further argued that the Letter of Instruction was based solely on the Complainant working outside the scope of his assigned duties. However, in Respondent's MV-1 task card, item 13 clearly indicates that the mechanic was to "Perform a general visual inspection of the fuselage (upper and lower) from the ground, no additional access necessary." CE 9. Item 20 on the task card requires the mechanic to check the hydraulic system quantities and service them as required. It was during his completion of this step of the task card that Complainant noticed a crack in the fuselage of N208WN. Respondent has not explained how the Complainant's observation of cracks, while following the steps on his task card, constituted work outside the scope of Complainant's task card.

At a minimum, there remains a genuine dispute over whether the actions of the Respondent constitute an unfavorable personnel action under AIR21.

THEREFORE, the Respondents Motion for Summary Decision is **DENIED.**

Complainant has likewise filed a Motion for Summary Decision. There, Complainant asked this tribunal to find that the Complainant engaged in protected activity as defined by 49 U.S.C. § 42121(a)(1); that Respondent knew that Complainant engaged in protected activity when he reported defects he discovered in the course of his duties on July 3, 2014; that the protected activity was a contributing factor in the subsequent actions taken by Respondent; and that Respondent would not have taken these same actions in the absence of the Complainant's protected activity. Complainant requested that the hearing be limited to whether Respondent's action constituted unfavorable personnel actions, and if so, what the appropriate remedy should be.

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[10] 49 U.S.C. § 42121(a) prohibits discrimination against an employee with respect to compensation, terms, conditions, or privileges of employment.

There is no question that the Complainant engaged in protected activity.[11] Moreover, the Complainant meets the regulatory criteria of an "Employee" under the Act, because he works for an air carrier[12] and is an aviation maintenance technician with an Airframe and Powerplant rating. *See* Complaint at ¶2 and CE 8. The Complainant's acts related to performing maintenance on an aircraft where he reported potential safety related abnormalities. Part of his duties included, if applicable, signing an airworthiness release for the work that he performed. These documents directly relate to safety standards and associated Federal Aviation Administration Regulations.

There is also no question that the Respondent knew that the Complainant engaged in protected activity.[13] Complainant was following the Respondent's maintenance program procedures when he completed non-routine cards, identifying certain abnormalities with the aircraft that he believed rendered the aircraft unairworthy.[14] CE 30. These abnormalities were verified by other mechanics. CE 34. N208WN was out of revenue service for two days until the crack was repaired. *See* CE 8 and CE 9. Further, he reported these discrepancies to Respondent's agents and one of Respondent's manager's conducted a "Fact-Finding" meeting as a result of Complainant's discoveries. The manager named in the Complaint conducted the "Fact-Finding" meeting and issued the Letter of Instruction. CE 22 and CE 24. Plainly, Respondent knew of the Complainant's protected activity.

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[11] Under AIR 21, an employee has engaged in protected activity when the employee has "provided, caused to be provided, or is about to provide (with any knowledge of the employers) to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety." 49 U.S.C. § 42121(a)(1). Such protected activity requires (1) a genuine belief that there was or would be a violation or alleged violation of an FAA order, regulation or standard, or a federal law relating to air carrier safety; (2) this concern was objectively reasonable to the circumstances; and (3) that the complainant expressed the concern in a manner that was "specific" with respect to the "practice, condition, directive or event" that gave rise to the concern. *Rougas v. Southeast Airlines, Inc.*, ARB No. 04-139, ALJ No. 2004-AIR-3, slip op. at 14 (ARB July 31, 2006); *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 03-AIR-35, slip op. at 18 (June 29, 2006); *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (Jan. 30, 2004). The complainant's allegation must only be objectively reasonable in the belief that his or her safety complaint is valid, and need not be ultimately substantiated. *Rooks, supra*, slip op. at 18.

[12] A complainant is an "employee" for the purposes of AIR 21 if the complainant is "an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier…." 29 C.F.R. § 1979.101. The status that Complainant is an "employee" within the meaning of 49 U.S.C. § 42121(3) is not contested.

[13] In a whistleblower case the employer's knowledge of the protected activity is also required, which may be shown by circumstantial evidence. *Rooks, supra*, slip op. at 5; *Kester v. Carolina Power and Light Co.*, slip. op at 9, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 20, 2003). A whistleblower must show that an employee with authority to take the adverse action, or an employee "with substantial input" in that decision, knew of the protected activity. *See id.*, slip op. at 5-6.

[14] It is a violation of the Federal Aviation Regulations for a Part 121 air carrier to operate an aircraft that is not airworthy. *See* 49 C.F.R. 121.153(a)(2). *See also* CE 30 (Respondent's manager purportedly acknowledged the cracks no longer made the aircraft airworthy).

Based upon my review of the submissions, Complainant's Motion for Summary Decision is **GRANTED IN PART**. I find for purposes of these proceedings that the Complainant has established two elements: that the Complainant engaged in protected activity as defined by 40 U.S.C. 42121(a)(1) and that Respondent knew that Complainant engaged in protected activity when he reported defects he discovered in the course of his duties on July 3, 2014. However, the remaining issues relevant to Complainant's complaint reasonably remain in dispute.

SO ORDERED.

Digitally signed by Scott R. Morris
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of Administrative Law Judges,
L=CHERRY HILL, S=NJ, C=US
Location: CHERRY HILL NJ

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

SERVICE SHEET

Case Name: **HALL_CHARLES_v_SOUTHWEST_AIRLINES_**

Case Number: **2014AIR00025**

Document Title: **ORDER DENY RESP'S MOTION FOR SUM DEC AND GRANT IN PART COMPLT'S CROSS MOT FOR SUMMARY DECISION**

I hereby certify that a copy of the above-referenced document was sent to the following this 8th day of January, 2015:

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