FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 9, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-76-M
Petitioner	:	A. C. No. 41-00906-05503 B96
v.	:	
	:	Docket No. CENT 98-166-M
F & E ERECTION COMPANY,	:	A.C. No. 41-00906-05504 B96
DIVISION OF CCC GROUP, INC.,	:	
Respondent	:	Sherwin Plant
	:	
	:	Docket No. CENT 98-113-M
	:	A.C. No. 41-00320-05515 B96
	:	
	:	Bayer Alumina Plant

DECISION

Appearances: Erica Rinas, Esq., Mary K. Schopmeyer, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner; Gary Klatt, Assistant Safety Director, CCC Group. Inc., San Antonio, Texas, for the Respondent.

Before: Judge Feldman

These proceedings concern petitions for assessment of civil penalties filed by the Secretary of Labor against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. ' 820(a). The petitions seek to impose a total civil penalty of $825.00 for three alleged significant and substantial (S&S) violations of the mandatory safety standards in 30 C.F.R. Part 56 of the regulations. Also at issue is a 107(a) imminent danger order associated with one of the alleged violative conditions.

These matters were heard on November 17, 1998, in San Antonio, Texas. F & E Erection Company is a division of CCC Group, Inc. (CCC). Gary Klatt, CCC=s Assistant Safety Director, appeared on behalf of the respondent corporation. The parties stipulated that CCC=s contracting work at the Bayer Alumina Plant located in Port Lavaca, Texas, and the Sherwin Plant located in Corpus Christi, Texas, is subject to the jurisdiction of the Mine Act.

I. Findings of Fact and Conclusions

A. Docket No. CENT 98-113-M

Bauxite is processed into alumina at the Bayer Alumina Mine in Port Lavaca. The alumina process requires the separation and removal of waste materials consisting primarily of mud and clay. The waste material is transported from the processing plant by haulage trucks driven by F&E employees or employees of a subcontractor hired by F&E. The waste material is transported on site and deposited into vast mud lakes that consist of approximately 840 acres. The mud lakes range in depth from 40 to 100 feet. At the edge of the mud lake where waste materials are to be unloaded from the haulage truck bed, a dumping pad is constructed by compacting an area of clay and layers of dry material rising approximately six to eight inches above the level of the mud bank. The waste material is unloaded from the truck on the loading pad where the material is pushed to the rear of the pad and into the mud lake by a bulldozer operator.

On August 19, 1997, Mine Safety and Health Administration (MSHA) Inspector Ralph Rodriguez inspected the Bayer Alumina Mine. Immediately after conducting his opening conference, Rodriguez proceeded to the mud lakes to observe the unloading operation. Rodriguez testified that the unloading pad should be inspected for stability in the morning, and, thereafter, an individual should be assigned as a spotter to direct the dump truck driver to dump his load on a stable portion of the pad, preferably the center of the pad. Rodriguez further testified that the area of compacted material should be delineated with pylons, or other markers, in order to prevent the truck from backing onto an unstable edge, and that each load should be dumped at least one truck length away from the edge of the pad.

At the time of Rodriguez= 9:00 a.m. inspection, nine ten-wheel dump trucks and a dozer were being used at the pad site to dump and deposit the waste material. The haulage dump trucks weigh approximately 20,000 pounds and carry a maximum load of 16,000 to 20,000 pounds. Thus, a loaded vehicle weighs as much as 40,000 pounds. (Tr. 31). At the time of Rodriguez= inspection, eight loads of muddy waste material, totaling approximately 56 cubic yards, had already been dumped on the unloading pad and pushed by the dozer into the mud lake. (Tr. 96-7).

Upon arriving at the dumping site, Rodriguez observed a loaded haulage truck weighing approximately 20 tons begin to lift its bed to dump a load at the Aedge@ of the pad. However, Rodriguez conceded, absent clear markers identifying the outer perimeters of the pad, it was difficult to determine the edge of the pad because of the residual mud left from the eight previous loads that had been pushed from the pad into the mud lake by the dozer. (Tr. 89). The respondent asserts the stable area of the underlying pad was seen easily by the dozer operator, and that truck drivers could determine the stable pad area by tracks made by the dozer.

As the truck backed onto the pad and its bed began lifting to unload, Rodriguez noted one set of rear dual wheels on the driver=s side had sunk approximately ten inches into what he concluded was unstable material. Rodriguez was concerned that the truck could turn over in the mud, thus exposing the driver to serious injury. Consequently, Rodriguez issued Citation No. 4446894 citing an alleged S&S violation of the mandatory safety standard in section

56.93046, 30 C. F. R. ' 56.9304(b). Citation No. 4446894 stated:

> A 10 wheel end dump truck was observed dumping material on unstable ground at a dump site at the mudd (sic) ponds. The driver side rear dual=s sunk app. 10 inches into the **soft material on the dump pad**, creating the danger of a truck turn over to the driver. There is a dozer also working the pad who could be struck by the truck in case of a turn over, the truck bed would be extended. (Gov. Ex. 1) (Emphasis added).

The citation was later modified to reflect that the dozer operator was not exposed to any hazard.

Section 56.9304(b) provides:

> Where there is evidence that the ground at a dumping location **may fail to support mobile equipment**, loads shall be dumped a safe distance back from the edge of the unstable area of the bank. (Emphasis added).

Immediately upon observing this condition, Rodriguez requested the driver to stop unloading and to drive forward on the pad. Significantly, when asked if the truck had any difficulty moving forward, in terms of getting stuck, Rodriguez stated, ANo. He came right out of there.@ (Tr. 90-1).

As a threshold matter, the Secretary has not cited the respondent for failing to use markers or a spotter to guide the truck drivers on the dumping pad. Although Rodriguez testified MSHA=s policy manual normally requires spotters when there is no truck stop to prevent trucks from going over a high embankment, the evidence does not reflect spotters were required in this instance as the pad was only six inches above the level of the mud lake bank. (*See* Tr. 82-4). In any event, the Secretary has not charged the respondent with a violation of section 56.9305, 30 C.F.R. ' 56.9305, which deals with safety procedures to be followed Aif truck spotters are used.@

Turning to the operative language of the cited mandatory standard, the issue to be determined is whether the area cited in Citation No. 4446894, upon which the rear wheels of the 40,000 pound truck had sunk ten inches in Asoft material on the dump pad,@ constituted Aan area that may fail to support mobile equipment.@

The Secretary argues the truck=s rear tires were on the unstable outer edge of the pad, or, in the alternative, on an unstable area on the pad that had deteriorated during the course of the dumping operations from the mud that was unloaded and pushed by the dozer. (Tr. 86-8). On the other hand, the respondent asserts the cited area was merely residual mud left by the dozer from previously dumped loads. Consequently, the respondent contends the area cited by Rodriguez was a pad area that continued to provide stability.

In resolving this disputed issue of fact, it is axiomatic that the Secretary has the burden of proving that a violation of a mandatory safety standard has, in fact, occurred. *Southern Ohio*

Coal Co., 14 FMSHRC 1781, 1785 (November 1992) (*citations omitted*). Since Rodriguez concedes he could not determine the outer perimeter of the dumping pad, the Secretary seeks to establish the instability of the area by relying on circumstantial evidence, *i.e.*, the truck=s tires sank 10 inches. However, the circumstantial evidence relied upon by the Secretary, that the 40,000 pound truck sank a grand total of 10 inches, lends greater support to the respondent=s assertion that the appropriate inference to be drawn is the subject soft material was mud that had been dumped on the pad, and, that the underlying pad remained stable.

It is unlikely that such a heavy truck would sink only 10 inches if the underlying ground was unstable. It is similarly unlikely that this vehicle would encounter no difficulty in moving forward if the rear wheels were mired in unstable ground. In the final analysis, if the Secretary=s version of events is unlikely, it follows that the Secretary has failed to carry her burden of proving the alleged violation occurred. Consequently, Citation No. 4446894 shall be vacated.

B. Docket No. CENT 98-166-M

On October 15, 1997, MSHA Inspector Benny Lara conducted an inspection of the Sherwin Plant in Corpus Christi. Lara observed F&E personnel cutting bolts off of the main structure at the No. 5 digester. The digesters are a series of large circular tanks containing raw materials that are stored during the alumina process. The digesters are supported by surrounding I-beams and angle beams depicted in the illustration in Respondent=s Ex. 1. There was an elevated scaffold constructed around the entire inner area of the structure to a height of four feet below the I-beams. (Gov. Ex-6).

During the course of his inspection, Lara, while standing at ground level, observed an F&E employee standing on I-beams, while working on the No. 5 digester structure. Although the employee had wedged his lanyard between I-beams, Lara observed that he was not tied off to a safety line. Consequently, Lara issued Citation No. 7858114 citing an alleged S&S violation of section 56.15005, 30 C.F.R. ' 56.15005. This mandatory safety standard, in pertinent part, requires that Asafety belts and lines shall be worn when persons work where there is a danger of falling.@

Lara also considered this condition to be an imminent danger and immediately ordered the employee to descend from the structure. The citation was abated by installation of a safety cable that was stretched across the I-beams to allow personnel to attach safety belts and lines.

The respondent admits the employee was not tied off to a safety line. However, the respondent, relying on the dimensions of the supporting structure, disputes the imminent danger order issued by Lara, as well as the serious gravity and S&S nature of the violation alleged by the Secretary.

Lara, who had observed the structure from the ground, did not take any measurements of the height or dimensions of the structure. In the absence of measurements by Lara, the respondent=s representations concerning the height and dimensions of the I-beams, and the spaces between them must be credited. The respondent states the outer perimeter of the structure=s I-beams are approximately 15 feet from the ground, and the I-beams are approximately 16 **2** inches wide. The respondent also asserts the I-beams are 5 **2** inches apart.
Although Lara could not recall the I-beams being as close as 5 **2** inches apart, absent evidence to the contrary, I accept the respondent=s measurements.

Accepting the respondent=s measurements as reflected in Respondent=s Ex. 1, the subject employee was exposed to the hazard of standing without being properly tied off on outer perimeter I-beams, including the 5 **2** inch space between each beam, that were a total of 31 inches in width on the northern perimeter and 38 **2** inches in width on the western perimeter. (*See* Ex. R-1).

As noted above, Lara=s observation that the employee in question was not properly tied off with a safety belt and line as required by section 56.15005 is undisputed. Having, established the fact of the violation, the remaining issues are whether the condition was appropriately designated as S&S and whether the condition constituted an imminent danger.

A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

Determining whether a violation is properly characterized as S&S must be based on the particular circumstances of the violation and must be viewed in the context of continued mining operations without the violation having been abated. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988); *Youghiogheny & Ohio Coal Company*, 9 FMSHRC 2007 (December 1987); *National Gypsum, supra*, 3 FMSHRC at 327, 329*; Halfway Incorporated*, 4 FMSHRC 8, 12-13 (January 1986).

Applying the *Mathies* criteria, the components in (1), (2) and (4) are clearly present in that the violation (failure to use a safety line) created the hazard of falling 15 feet, and, there is a reasonable likelihood that the consequences of such a fall will result in serious injury. With respect to the third *Mathies* criterion, the Commission has repeatedly stated the Secretary must prove the reasonable likelihood of an injury causing event as a result of the hazard contributed to by the cited violative condition or practice. *Windsor Coal Company*, 19 FMSHRC 1694, 1714-15 (October 1997) (Citations omitted).

Viewed in a light most favorable to the respondent, the subject employee was exposed to the hazard of falling 15 feet to the ground while perched on I-beams that ranged from 31 to 38 2 inches in width. While I recognize the respondent=s assertion that the employee was not exposed to the outer perimeter when seen by Lara because he was working on angle beams in the center of the structure, continued operation undoubtedly would have exposed the employee to the outer perimeter of the structure at which time momentary carelessness or stumbling could occur. Consequently, it is reasonably likely that the failure to use a safety line during the course of continued operations will result in a fall causing serious injury. Accordingly, the violation was appropriately designated as S&S and the hazard posed by the violation is of serious gravity.

Turning to the issue of imminent danger, section 107(a) of the Mine Act, 30 U.S.C. ' 817(a), provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in Section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such an imminent danger and the conditions or practices which caused such imminent danger no longer exists. The issuance of an order under this subsection shall not preclude the issuance of a citation under Section 104 or the proposing of a penalty under Section 110.

Section 3(j) of the Act defines an imminent danger as Athe existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.@ 30 U.S.C. ' 802(j). This definition is unchanged from that contained in the Coal Mine Health and Safety Act of 1969.

The Fourth Circuit has held that Aan imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.@ *Eastern Associated Coal Corporation v. IBMA, 491 F.2d 277, 278 (4th Cir 1974).* This reasoning was also adopted by the Seventh Circuit in *Old Ben Coal Corp. v. IBMA*, 523

F.2d 25, 33 (7th Cir. 1975). The Commission applied these holdings in *Rochester & Pittsburgh Coal Company v. Secretary of Labor,* 11 FMSHRC 2159, 2163 (November 1989), where it stated (*quoting Senate Report 187, 95th Cong., 1st Sess. 38* (1977)):

> [A]n imminent danger is not to be defined ›in terms of a percentage of probability that an accident will happen. . . . Instead, the focus is on the potential of the risk to cause serious physical harm at any time.= The Committee stated its intention to give inspectors ›the necessary authority for the taking of action to remove miners from risk.= *Id.* at 2164.

The Commission, in *Rochester & Pittsburgh Coal Company,* recognized that inspectors must be given wide latitude in making on-the-spot determinations of whether an imminent danger exists, noting that:

> ›Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners= lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb . . . . We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority.= 11 FMSHRC at 2164, *quoting Old Ben Coal Corp. supra,*523 F.2d at 31 (7th Cir. 1975).

Thus, the controlling question is whether the inspector abused his discretion at the time he determined that an imminent danger existed. *Id.*

In *Utah Power & Light Co.*, 13 FMSHRC 1617 (October 1991), the commission clarified its decision in *Rochester & Pittsburgh,* by stating the imminent danger focus on the potential of a risk to cause harm Aat any time@ (11 FMSHRC at 2164), was intended to denote a potential to cause harm Aat any moment,@ that is, Awithin a short period of time.@ 13 FMSHRC at 1622. The Commission did not depart from its previous conclusion that wide discretion must be given to inspectors to issue ' 107(a) orders. Thus it stated, in *Utah Power & Light*:

> We reaffirm our holding in *Rochester & Pittsburgh* that an inspector must have considerable discretion in determining whether an imminent danger exists. This is because an inspector must act immediately to eliminate conditions that create an imminent danger. We also reiterate here that the hazardous condition or practice creating an imminent danger need not be restricted to a threat that is in the nature of an emergency, and that section 107(a) withdrawal orders are Anot limited to just disastrous type accidents.@ Coal Act *Legis. Hist.* at 1599.
> 13 FMSHRC at 1627-1628.

Thus, inspector Lara=s imminent danger order is sustainable if he acted reasonably and did not abuse his discretion. Given Lara=s alternatives of permitting the employee to remain on the elevated structure without being tied to a safety line, or, ordering his immediate removal, it cannot

be said that Lara abused his discretion. In such instances inspectors must be encouraged to err on the side of safety. Accordingly, Imminent Danger Order No. 7858114 shall be affirmed.

Applying the penalty criteria in section 110(i) of the Act, the evidence supports the Secretary=s determinations of moderate negligence and serious gravity. The violation was timely abated and it has not been asserted that the $500.00 civil penalty proposed by the Secretary is disproportionate to the size of the respondent=s business, or that payment will effect the respondent=s ability to remain in business. Accordingly, the $500.00 civil penalty initially proposed by the Secretary for Citation/ Imminent Danger Order 7858114 shall be assessed.

Although I have affirmed Citation/ Imminent Danger Order 7858114, I cannot ignore the argument advanced on behalf of the Secretary that Inspector Lara=s recollection, as it differs from evidence provided by the respondent, of Afewer beams and more spaces between the beams where the employee could have fallen [and] . . . Inspector Lara=s observations and judgment about the immanency of this danger[,] are entitled to deference.@ *Sec=y=s Prop. Findings* at pp.11-12 (emphasis added).

While Athe Secretary=s interpretations of the law and regulations shall be given weight by both the Commission and the courts,@ S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted* in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978), and deference accorded by the Commission to the Secretary=s interpretation of her own regulations is appropriate in certain instances, *See*, *e.g.*, *Pfizer v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984), the Secretary=s claim that she is Aentitled@ to deference with regard to disputed factual issues is misguided and disturbing. The assertion that deference should be afforded to MSHA=s version of disputed events is tantamount to a presumption of guilt. Rather, the burden of proving violative conduct must remain where it belongs - - with the government.

C. Docket No. CENT 98-76-M

Inspector Lara spoke to the subject employee after he descended from the elevated I-beam structure. Based on information provided by the employee, Lara determined the employee had climbed, or pulled himself, through an opening in an angle I-beam from the scaffold located four feet below. The angle I-beam is located in the center of the structure and did not expose the employee to the perimeter I-beams that are 15 feet above ground level. (*See* Tr. 147; Ex. R-1). Inspector Lara concluded pulling oneself up four feet onto this I-beam from the scaffold was an unsafe means of access. Consequently, Lara issued Citation No. 7858113 citing an alleged violation of the mandatory safety standard in section 56.11001, 30 C.F.R. ' 56.11001. (*See* Gov. Ex. 6). This mandatory standard requires that a A[s]afe means of access shall be provided and maintained to all working places.@

As a general proposition, mandatory safety standards cannot contemplate every condition encountered during the mining process. Thus, mandatory safety standards must be broadly adaptable to a myriad of circumstances. *Kerr McGee Corp.*, 3 FMSHRC 2496- 2497 (November 1981). Ordinarily, the Secretary=s interpretation of her own regulations should be given deference ... unless it is plainly wrong@ so long as it is Alogically consistent with the language of the regulation and ... serves a permissible regulatory function.@ *Buffalo Crushed Stone*, 19 FMSHRC 231, 234 (February 1997) (citations omitted). It follows that the Commission normally should not substitute its own reasonable interpretation of a mandatory standard if the Secretary=s interpretation of that standard is also reasonable. *Thunder Basin Coal Company*, 18 FMSHRC 582, 592 (April 1996) (citations omitted).

However, the policy of deferring to the Secretary=s reasonable interpretation of a broadly worded mandatory standard is outweighed by the due process requirement that application of the standard must afford an operator adequate notice. *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982). Thus, standards, as applied, cannot be Aso incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.@ *Id.*

Thus, while it is difficult to quarrel with the goal of Asafe access,@ the Secretary=s application of such a broadly worded mandatory standard cannot be so obscure as to deprive an operator of adequate notice of the condition or practice sought to be prohibited. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990). Here, MSHA seeks to broadly apply its safe access standard to a construction site that requires accessing storage tanks by way of scaffolding and I-beams. In determining the propriety of MSHA=s application of the Asafe access@ standard in this case, the test is whether a reasonably prudent person familiar with the task of constructing and maintaining steel tanks and surrounding structure, and the protective purposes of the standard, would have recognized that climbing through steel framework from a scaffold positioned four feet below was prohibited.

The services performed by the respondent are in the nature of demolition or construction work. Such projects do not always lend themselves to conventional means of passage such as stairs, ladders or platforms. I am unconvinced that a person familiar with the contracting industry, as it relates to maintenance and construction of steel tanks and supporting structures, would recognize that entering the center of a steel support structure from a scaffold approximately four feet below, without any danger of falling from the outside perimeter I-beams to the ground, constitutes a violation of the safe access provisions of section 56.11001. Such access would facilitate the transfer of tools and equipment, and may be a preferred method of entry to climbing a ladder, particularly from the ground below.

My conclusion that this method of access, under these circumstances, is not unsafe is entirely consistent with MSHA=s abatement action in this case. Significantly, the respondent was not required to provide a different means of access than the one cited to abate Citation No. 7858113. On the contrary, personnel were permitted to continue to access the structure from the scaffold as long as a cable was installed across the I-beams to allow employees to attach a safety belt and line to prevent them from falling once they accessed the structure. This same falling hazard was not a consideration in the process of accessing the structure because the scaffold was located directly below. Accordingly, the Secretary has failed to demonstrate the fact of occurrence of the violation.

Additionally, even if the Secretary satisfied her burden of proof with respect to the violation, Citation No. 7858113 must be vacated as duplicative. Citations are duplicative if the standards involved do not impose separate and distinct duties on an operator. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-04 (June 1997) *citing Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462-63 (August 1982); and *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (January 1981). In this case the duty imposed on the respondent in Citation No. 7858113 (installation and use of a safety cable) was identical to the duty imposed in Citation/Imminent Danger Order No. 7858114 affirmed herein. Consequently, the duplicative nature of Citation No. 7858113 is an additional basis for setting it aside.

ORDER

In view of the above, **IT IS ORDERED** that Citation No. 4446894 **IS VACATED** and Docket No. CENT 98-113-M **IS DISMISSED**.

IT IS FURTHER ORDERED that Citation No. 7858113 **IS VACATED** and Docket No. CENT 98-76-M **IS DISMISSED**.

IT IS FURTHER ORDERED that the respondent **SHALL PAY**, within 30 days of the date of this decision, a civil penalty of $500.00 in satisfaction of Citation/Imminent Danger Order No. 7858114. Upon timely receipt of payment, Docket No. CENT 98-166-M **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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