

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

*It's interesting, but
would be hard for
103 people to follow
probably better to
use the column*

(1:51 p.m.)

1 CHAIRMAN DUNLOP: Well, will the meeting
2 please come to order? As you know from my closing
3 remarks in the morning session, we have three
4 presidents of labor organizations to begin the
5 afternoon and then to be followed by John Ong of The
6 Business Roundtable.
7

8
9 Our first presentation this afternoon is
10 Albert Shanker, President of the American Federation
11 of Teachers and particularly appears as Chairman of
12 the Board of the Department of Professional Employees
13 of the AFL-CIO.

14 Al, it's great to see you and delighted
15 to hear from you.

16 MR. SHANKER: Thank you. It's good to be
17 here. Thank you for giving the department this
18 opportunity to present our views on what we feel is
19 a very important issue in the consideration of changes
20 in labor law.

21 I guess we've gone through more than a
22 decade now of various individual books and Commission
23 reports dealing with the nature of the new workforce
24 and high-performance workplaces and so forth. So I
25 would just drop that at the beginning and say that I

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1 accept most of what's been written about what's needed
2 and what's coming in.

3 A very important element in this is some
4 downsizing of organizations, greater employee
5 participation, a certain flattening of structures, a
6 certain movement of tasks that used to be performed
7 by management in distant places, distributed to people
8 who are closer to the job, and that all of this, of
9 course, if it holds true, as it does for many workers
10 closer to production lines, it's especially true for
11 professional employees. The very nature of
12 professionalism is to have expertise in a given field
13 and to have the power to exercise judgment.

14 And so the particular issue that I want
15 to raise is the issue of the Supreme Court Yeshiva
16 decision, which I would urge that the Commission would
17 propose that it be reversed legislatively because I
18 think it does exactly the opposite of what we want to
19 do in terms of encouraging, in terms of changing, the
20 law insofar as the law stands in the way of desirable
21 practices in terms of the new type of workplace.

22 Now, if you'll recall, the employees at
23 Yeshiva, the faculty, formed an independent union.
24 And Yeshiva went to the NLRB. NLRB turned them down.

25 Yeshiva essentially said that the members

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1 of the faculty by virtue of being members of a faculty
2 senate and by virtue of engaging in peer review and
3 by virtue of being consulted on various matters for
4 the university constituted management. And the
5 Supreme Court went along five to four. Now, this, of
6 course, is a private sector decision and so far has
7 not been applied in the public sector.

8 Now, I think you're familiar with the vast
9 growth of professional and technical employees, a 283
10 percent increase since 1950 and about 16 percent of
11 the workforce at the present time. And they also
12 represent a part of the workforce which is highly
13 unionized. Twenty-six percent of professionals were
14 represented by unions in 1992, a higher rate than that
15 of the workforce in general.

16 Now, you referred to my wearing a hat as
17 Chair of the Board of the Department for Professional
18 Employees that was formed in 1977 and started with 13
19 unions, most of which had a fairly small number of
20 professionals at that time. And it has grown
21 substantially over that period of time.

22 So that we now have 26 national, unions
23 and we've got people in the music and art fields.
24 We've got doctors and nurses and people in the film
25 industry and people in various technical fields.

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1 Now, this particular decision actually
2 forces people to choose between having a union and
3 engaging in what are considered desirable practices
4 in the modern workplace.

5 Let me give an example. Some years ago
6 we sought to represent and did gain representation
7 rights for the College of Osteopathic Medicine and
8 Surgery. It's in Des Moines, Iowa.

9 The reason that the people in that college
10 decided they wanted a union is that they were doctors
11 and they were being not treated very well and not
12 listened to. They eventually decided that the only
13 way they could get to the table and talk to people
14 about various professional issues was to have a union.

15 Well, we were elected, and we sat at the
16 bargaining table. And we negotiated various faculty
17 committees on various professional issues.

18 After a couple of contracts and after we
19 got all of these things into place, which developed
20 in the form of faculty participation, management went
21 to the Labor Board and said, "Well, now these people
22 need to be Yeshivaed because they're being consulted."
23 Sure enough, we lost bargaining. Through the process
24 of bargaining, we lost our bargaining rights.

25 Well, now that's a model which any group

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1 of unionized employees in the private sector really
2 has to fear. Let's say there is a union in place and
3 let's say the union is willing and wants to have a
4 different type of workplace, a type of workplace in
5 which some of the rigidities of some of the work rules
6 are removed and a lot more decision-making is right
7 there at the work site level.

8 If you move enough of that decision-making
9 over, management at some point can then come along and
10 file and say "These workers no longer have a right to
11 a union because now they're doing some of the work or
12 making some of the decisions that management used to
13 make traditionally."

14 That's a private sector case. There are
15 some public sector cases which are important. I
16 realize that that's not the focus of this Commission,
17 but these are illustrations, I think, of work
18 practices that you might want to encourage in the
19 private sector as well. We almost lost bargaining
20 rights in the public sector here, too, because it was
21 a similar issue.

22 In Toledo, Ohio, for many years the voters
23 turned down their millage votes and the schools would
24 close in March and teachers would go out on strike to
25 collect their salaries. More and more parents left

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1 the city and left the school system.

2 Finally, a new superintendent and a new
3 union leader came along, and they decided they had to
4 reverse the process. They did a lot of very
5 interesting things.

6 One of the things they did was they
7 decided that the superintendent and the head of the
8 union would select 8 or 10 of the teachers that they
9 felt were the best teachers in the district.

10 And they would delegate to these teachers
11 the responsibility of hiring all new teachers and
12 training them during the probationary period and
13 effectively making a decision at the end of the
14 training period whether they should get tenure or not,
15 whether they should stay. So, in other words, it's
16 a form of peer training, peer assistance, and peer
17 review as a final result.

18 In addition to that, these same teachers,
19 if an experienced teacher were found to be falling
20 apart, maybe somebody who was fine, but now something
21 was happening, a team of three of these teachers would
22 be assigned to give assistance, they called it, an
23 intervention program.

24 At the end of that, the team either said
25 that this person has been assisted and has profited

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1 through this assistance and no further action need be
2 taken or they would issue a report that the person had
3 not sufficiently improved and that that report could
4 then be used in proceedings against that teacher.

5 Well, a complaint was filed that we were
6 not fairly representing our employees because the
7 union was involved in selecting union members, who
8 served on a committee, who could effectively hire or
9 fire. And we had to get to the legislature.

10 By one vote we managed to preserve a
11 program which the Rand Corporation in its study of
12 school reform practices across the country said that
13 this was an outstanding district in terms of their
14 practices. But this and other practices which Rand
15 pointed to would have been reversed had Yeshiva been
16 sustained in the public sector.

17 Now, there's another example similar,
18 again the public sector, but a practice that you might
19 find desirable in other places as well. In Rochester,
20 New York, there was a longstanding constant periodic
21 dispute every time the contract was renegotiated.

22 The teachers had in their contract a
23 typical kind of transfer seniority provision, where
24 if there was an open slot, a senior person could bid
25 for it and get it. Management always argued the

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1 senior person wasn't necessarily the best person to
2 do the job, and they wanted to have the power to
3 decide who transferred.

4 There was a resolution I think five or six
5 years ago where both management -- the union gave up
6 its seniority provision. Management retreated from
7 its management's rights position. Instead, they
8 decided that the teachers in each school would elect
9 a committee.

10 The committee would consult with the
11 entire faculty to see what the needs of the school
12 were, "Were they weak in this subject or that?" and
13 that the committee meeting with the principal on the
14 basis of the priorities set by the faculty would then
15 interview applicants and would make decisions on the
16 basis of the needs of the school.

17 Well, there's another one. And that's a
18 practice that you might want to see elsewhere, would
19 be applicable in terms of teams of employees making
20 decisions as to who should be a member of a team.
21 And, yet, clearly that's a decision that might very
22 well lead an employer who had second thoughts about
23 the union at some later point to file.

24 I'll just give one final example, then
25 conclude. Some years ago there was the beginning of

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1 something called the National Board for Professional
2 Teaching Standards. Carnegie has put a lot of money
3 into it. The U.S. government has invested \$25 million
4 now into research.

5 The whole idea was that just as there are
6 board-certified pediatricians and anesthesiologists,
7 et cetera, that there ought to be an opportunity for
8 practicing teachers to strive for something higher
9 than minimum licensing, which most states have.

10 And the idea was that teachers who could
11 show that they were really super, not on the basis of
12 a traditional merit pay scheme, but on the basis of
13 a national professional board that would certify to
14 this, could then be used as team leaders, that you
15 might get rid of the bureaucracy at the center and
16 have people who continue to be practicing teachers
17 working with others, that they would have somewhat
18 different compensation and a different role somewhat
19 of a leadership and perhaps quasi-management role.

20 In the discussions, now the national board
21 will issue its first certificate next year. And one
22 of the big issues that's out there on the part of
23 local unions that would have to negotiate provisions
24 for different relationships of salaries is: Well, if
25 people are board-certified and they have a different

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1 role, do they move over to management?

2 So I put these issues before you, those
3 in the public sector, not asking you -- there's one
4 other reason that I put them before you. And that is
5 that with this exception, with the exception of
6 Yeshiva, which we've so far managed to fend off in the
7 public sector, most public employee relations boards
8 do want to parallel what's happening in the private
9 sector.

10 I don't know how long we're going to keep
11 Yeshiva in the private sector and maintain public
12 employee relations boards and have a different policy
13 on this. We came very close on this issue in
14 Pennsylvania.

15 So on the basis of different types of
16 workplace practices, a workplace which doesn't have
17 the clear distinction between supervisors and workers
18 that was contemplated when the law was originally
19 written, Yeshiva stands in the way by compelling
20 unionized employees or employees that may want a union
21 to choose between either a workplace in which they
22 participate and forego collective bargaining or one
23 where they have collective bargaining and after they
24 have it, make sure they don't negotiate any provisions
25 which enable them to participate.

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1 Thank you.

2 CHAIRMAN DUNLOP: Thank you very much, Al.

3 Are there any questions from my colleagues
4 about this presentation? How would you amend the
5 statute with respect to this boundary line for
6 professional employees?

7 MR. SHANKER: Well, I'm not sure that it
8 should only be for professional employees, but suppose
9 that there is a provision that employee participation
10 -- something that would recognize that employee
11 participation in -- I don't know. I guess it needs
12 some broad categorization of what you would call these
13 things. These change from year to year.

14 "Shall not be the basis for denying
15 collective bargaining rights to employees." I would
16 have a very general provision which would sort of
17 indicate an effort to encourage broad-scale employee
18 participation.

19 CHAIRMAN DUNLOP: Al, would you say that
20 the vice presidents of a bank are a suitable unit for
21 bargaining with management? How far would you go?

22 MR. SHANKER: No, not the vice president
23 of our union either.

24 (Laughter.)

25 MR. SHANKER: I don't think the union is

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1 eager to negotiate that to get that vice president nor
2 do I think that he's eager to come in. So while I
3 think that's an interesting example, it's also an
4 unlikely one.

5 MR. WEILER: If I can just add these two
6 comments, and I'd like your reactions to them. First,
7 as you were intimating as you were going along, it is
8 important to underline the fact that Yeshiva's
9 significance is not confined to professional
10 employees.

11 MR. SHANKER: No.

12 MR. WEILER: The Yeshiva doctrine is one
13 which threatens the ability to exercise rights under
14 the National Labor Relations Act for anybody who is
15 involved in any serious team system of production and,
16 indeed, any such team system of production that is
17 instituted unilaterally by the employer as well as one
18 that is collectively negotiated by the employees with
19 the employer; and that, secondly, there is actually
20 no statutory predicate for Yeshiva.

21 There is no managerial exclusion in the
22 National Labor Relations Act, let alone one that
23 applies in this context. The managerial exclusion was
24 developed by the board in the late '60s and endorsed
25 by the U.S. Supreme Court in the early '70s in a case

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1 called Bell Aerospace, which involved, actually,
2 buyers for the Bell Aerospace Company.

3 What was different about Yeshiva in a
4 sense may be a way of responding to the question that
5 Chairman Dunlop put to you. What was different about
6 Yeshiva was that there the managerial authority was
7 exercised by the employees only collectively, rather
8 than individually, that a fundamental difference
9 between a vice president and a faculty member of a
10 senate, for example, is that the vice president, and
11 even the lower-echelon Bell Aerospace buyers, are
12 making their judgments individually, rather than only
13 collectively.

14 And so one possible route, dealing
15 narrowly with the Yeshiva problem, is simply to say
16 that somebody should not be deemed to be an excluded
17 employee or deemed to be excluded from the right to
18 exercise bargaining simply on the grounds that they
19 have some kind of collective responsibility for the
20 firm.

21 CHAIRMAN DUNLOP: Tom?

22 MR. KOCHAN: Al, you have a lot of
23 experience as well with different bargaining units for
24 professionals. And certainly let's take them in the
25 schools: school principals, as opposed to the

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1 teachers, being in separate bargaining units.

2 I would be interested in your view of how
3 that kind of structure can be rationalized where you
4 now have more team forms of work organization, you
5 want to get the engineers to work with the production
6 workers, you want to get the supervisors and the
7 principals to work with the faculty and the staff.

8 Do you see carrying forward our tradition
9 of separate bargaining units for professionals,
10 separate bargaining units for principals in the school
11 system as being a wise course for the future or should
12 we rethink that doctrine as well?

13 MR. SHANKER: Well, there you do have a
14 conflict in terms of the new and the traditional.
15 Obviously the traditional in most of these places
16 where you have a union, you continue to have regular
17 bargaining. You continue to have some grievances.
18 But also you have some new relationships.

19 The principal in the school is usually the
20 person who has made a decision at the school level
21 that results in a teacher bringing a grievance on the
22 principal, the first person acting on behalf of a
23 management, who then makes a decision on accepting or
24 turning down the grievance.

25 So there that's quite different than a

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1 group of employees making a decision that there were
2 -- I mean, that's not true certainly of the people at
3 Yeshiva. They weren't acting under anyone else's
4 orders. They weren't reporting back.

5 I mean, this wasn't the vice president of
6 a bank. This was a bunch of people exercising
7 professional judgment on a number of issues, not on
8 behalf of anyone else.

9 So I would still have some reservations
10 about opening that up, especially where there -- see,
11 although insofar as, let's say, one of these
12 board-certified teachers or insofar as these teachers
13 do have some effective hiring and firing, while they
14 don't do things in terms of other grievances, it does
15 reopen that question to some extent.

16 I don't know where I would come down on
17 it right now. But you're right. It does reopen it.

18 CHAIRMAN DUNLOP: Paula?

19 MS. VOOS: I have a question. In a way
20 it's a follow-up on the degree of authority that is
21 necessary to be considered a supervisor under the law
22 because certainly it's not only whether it's
23 collective or individual authority, but the degree of
24 authority that arises, for example, with nurses very
25 often and whether they are deemed to be supervisors,

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1 college professors. You know, although I'm in the
2 public sector, I'm supervisor of a teaching assistant
3 and I have considerable supervisory authority.

4 Our current law obviously draws the line,
5 as you know, very low. And I wondered if you would
6 comment on what the appropriate line would be.

7 I do know, for example, with regard to
8 principals my husband was a teacher in Massachusetts,
9 and the principal of his school was in the bargaining
10 unit; in fact, helped negotiate for the union, not
11 your organization, but the professional National
12 Education Association affiliate there.

13 MR. SHANKER: They used to be
14 professional, but they're now union.

15 (Laughter.)

16 MS. VOOS: But in any case, some of the
17 teachers call them the union, whatever. I know in
18 some states principals are, in fact, in teachers'
19 bargaining units.

20 So would you comment on what should be the
21 level at which we might want to exclude supervisors
22 and what should be the level at which individuals
23 should have the opportunity to choose to join or not
24 join a labor organization?

25 MR. SHANKER: Well, I didn't submit

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1 anything in writing today. I'm going to. And I will
2 respond to that. It's a tough one. I don't have the
3 answer to it yet, which is why I can't respond to it
4 now.

5 CHAIRMAN DUNLOP: Al, may I come back to
6 a similar question by being just a little sharper?
7 When Mr. Kirkland appeared before this Commission, he
8 commented that he was a member of a union, the
9 Masters, Mates and Pilots organization of many years
10 existence.

11 And he expressed the view that it was
12 somewhat reprehensible, I inferred, that they were not
13 privileged as masters, mates, or pilots to have the
14 benefits of protection of law, of the National Labor
15 Relations Act.

16 What's the difference between a master,
17 mate? After all, a master, who runs a vessel across
18 the Atlantic is a pretty responsible fellow. What's
19 his difference in an executive vice president or a
20 vice president of a bank?

21 MR. FRASER: Vice president of a bank
22 can't get you drowned.

23 (Laughter.)

24 MR. SHANKER: Well, financially drowned.

25 MR. FRASER: You can't drown when you can

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1 sink.

2 MS. VOOS: That's right.

3 MR. SHANKER: Well, look, there will be
4 questions of judgment here. You obviously have a
5 concentration of management functions in the vice
6 president.

7 I'm dealing with a situation where you're
8 taking maybe three million teachers and taking bits
9 of functions that used to be exercised by somebody in
10 the central office.

11 And here are people still 95 percent of
12 their time doing what they always did, but you're
13 giving them a little bit more. And practically all
14 the time they're doing exactly what they did before
15 as with there being no question that they were
16 employees, but now you're in terms of this new
17 workplace moving some of that decision-making and
18 getting it to be more teamwork, rather than individual
19 work.

20 None of them ever get to that vice
21 presidency with this. It's very far removed.

22 MR. WEILER: Can I just maybe push you a
23 little further on some of the implications of this
24 Yeshiva doctrine, of the managerial exclusion
25 doctrine, for the broader array of labor law and labor

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1 relations issues?

2 In a sense, the rationale for Yeshiva is
3 the traditional labor law view that there's a hands-on
4 relationship between the employees, on the one side,
5 and the employer, on the other side, of the bargaining
6 table and that in a sense, just as employers have
7 insisted that union members shouldn't be at the heart
8 of management, so alone unions have insisted that
9 employers shouldn't be at the heart of employee
10 organizations.

11 And in a sense the same question can and
12 should be put to employer representatives, who are
13 saying "Don't touch Yeshiva. Don't touch the
14 managerial dividing line." Well, if that's the case,
15 why are you arguing that something should be done
16 about 882 and Electromation?

17 But the other side of the question that
18 I'm putting to you is: If we need a lot more
19 flexibility on the employee side in terms of letting
20 employees at whatever point at least considerably up
21 the organizational ladder have the right to collective
22 bargaining, shouldn't the law also permit comparably
23 a great degree of flexibility to employers in nonunion
24 environments to develop these kinds of team systems
25 of production and employee representation that give

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1 a flexibility to the organization that maybe we need
2 for the upcoming century?

3 MR. SHANKER: Well, I imagine that they're
4 doing these things in a lot of these places. And I
5 know that Electromation raises a new -- I guess at
6 some point you'd need a judgment as to where it's an
7 employee involvement plan.

8 And the whole issue of whether it's really
9 an effort to create a company-dominated union still
10 lurks around there, which I guess is what you're
11 raising.

12 MR. WEILER: The other side is that
13 management complains that any weakening of Yeshiva
14 will create a union-dominated management. And to the
15 extent that the union movement, for example, feels
16 that it's extremely important to stop
17 company-dominated unions, isn't it equally important
18 from the other side to stop union-dominated management
19 or to the extent that we think we don't really have
20 a big problem of union-dominated management, perhaps
21 we really don't have quite as big a problem, as the
22 Wagner Act suggests, of company-dominated unions?

23 MR. SHANKER: Well, I think that the
24 union-dominated management is -- what is it that these
25 teams are going to -- what sorts of decisions are they

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1 making?

2 And I guess you would need to look at this
3 in an industrial workplace and a professional
4 workplace, but if you've got a situation where you've
5 got teams working and there's some sort of an
6 incentive plan to get the teams to function properly;
7 that is, if the company's doing very well, if you get
8 something out of it, and you're not going to make your
9 decisions on the basis of what your personal needs or
10 prejudices are; that is, the assumption is that you've
11 got enough of an incentive system there so you're
12 going to be making them in terms of better
13 productivity and better product, you're not making
14 decisions as to all sorts of top -- I mean,
15 essentially, the teams are asking questions about "How
16 many lemons are we turning out? Why? Is it the
17 quality of the materials? Is it the way we arrange
18 our work? Is it somebody who's on the team who is not
19 performing who needs some help? Is it somebody who's
20 beyond help and needs to be replaced?" or if would
21 think or a bunch of teachers who would ask a bunch of
22 questions, it's not "How do you run the school?" It's
23 "Here are five of us who all teach the fifth grade"
24 or "who are in the mathematics department."

25 So I would think the nature of the

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1 decisions that you're dealing with here, which is the
2 most effective allocation of time, materials, the
3 kinds of training that are necessary, that while in
4 those days when the worker was a hired hand, those
5 sure were somebody else's decisions, but they're
6 pretty far from the corporate board-type stuff.

7 It is not taking over all of management.
8 These are things -- I assume that what's being handed
9 over to these employees are really judgment about
10 issues that are right in front of them that are
11 related to their work and the quality of the product.
12 I distinguish that from being represented on the
13 board. That's a different level thing.

14 I'm now talking about what teams do in
15 terms of their work trying to reduce the number of
16 accidents and improve the quality of product. That's
17 different from the sort of system-wide representation,
18 where there might be issues raised of unionizing
19 management.

20 But I don't see that issue when you're
21 dealing with essentially the issue of the quality of
22 the product and the number of accidents and things
23 like that.

24 CHAIRMAN DUNLOP: Thank you very much, Mr.
25 Shanker.

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1 MR. SHANKER: Thank you.

2 CHAIRMAN DUNLOP: We have enjoyed your
3 presentation. And I take it you will be sending
4 something in writing in response to one of our
5 questions. Thank you.

6 MR. SHANKER: Thank you.

7 CHAIRMAN DUNLOP: Now, the next
8 presentation in this sequence of three is Mr. Robert
9 Georgine, who is the President of the Building and
10 Construction Trades Department of the AFL-CIO.

11 Is Mr. Georgine here? Go ahead. Welcome,
12 Bob. How are you? Do you know the members of the
13 Commission?

14 MR. GEORGINE: Most of them, not all of
15 them.

16 CHAIRMAN DUNLOP: Now, Bob, it is my
17 understanding that you have a paper, but that you
18 prefer to talk informally with us and that we should
19 feel free to ask you our sharpest questions. Is that
20 correct?

21 MR. GEORGINE: Not too sharp so that I
22 can't answer them.

23 CHAIRMAN DUNLOP: Go ahead.

24 MR. GEORGINE: Well, thank you very much
25 for allowing me to come before you.

NEAL R. GROSS

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