

Occupational Health  
and Safety Tribunal Canada



Tribunal de santé et  
sécurité au travail Canada

Ottawa, Canada K1A 0J2

**Citation:** Lower Lakes Towing Ltd., 2013 OHSTC 37

**Date:** 2013-12-18  
**Case No.:** 2012-89  
**Rendered at:** Ottawa

**Between:**

Lower Lakes Towing Ltd., Appellant

**Matter:** An appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer.

**Decision:** The direction is varied

**Decision rendered by:** Mr. Michael McDermott, Appeals Officer

**Language of decision:** English

**For the Appellant:** Mr. Marc D. Isaacs, Counsel, Isaacs & Co.

Canada

## REASONS

[1] . This decision concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) of a direction issued by Health and Safety Officer (HSO) David Loudon on November 23, 2012, pursuant to subsection 145(1) of the Code. The appellant is Lower Lakes Towing Ltd. of Port Dover, Ontario. There is no respondent. An application for a stay of the direction was denied with reasons on April 9, 2013. (2013 OHSTC 14).

### Background

[2] The subject direction was issued by the HSO following an inspection of a work place operated by the appellant. More specifically, the work place is the Motor Vessel (MV) Manitoba moored at the time of the inspection at a grain terminal in Thunder Bay, Ontario. The HSO concluded that certain provisions of the Code were being contravened and pursuant to paragraph 145(1)(a) directed the employer to terminate the contraventions no later than March 15, 2013, and pursuant to paragraph 145(1)(b) to ensure that the contraventions do not continue or reoccur.

[3] Only the second contravention of the three part direction is identified by the appellant as the subject of its appeal. That contravention reads as follows:

**2. Paragraph 125(1) (a) of Part II, section 10(b) of the MOHSR and Part X, section 224(1) of the Hull Construction Regulations**

The crew accommodation in the Forecastle deck does not have the required two separate means of escape. The removed stairway between the Forecastle deck and the Texas deck is to be re-installed, or an alternative arrangement to be installed. The use of port holes as a means of escape does not meet the requirements of the regulations.

For reference, subsection 125(1) of the Code and paragraph (a) read:

125. (1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

(a) ensure that all permanent and temporary buildings and structures meet the prescribed standards;

Subsection 10(b) of the *Maritime Occupational Health and Safety Regulations* (MOHSR), regulations under the enabling authority of the Code, reads:

10. The employer must ensure that the design and construction of every structure on a vessel meets the applicable requirements set out in one or more of the following regulations:

(b) Hull Construction Regulations;

The Hull Construction Regulations (HCR) come under the enabling authority of the Canada Shipping Act (CSA). Part X of the HCR addresses fire protection for cargo ships of 500 tons gross tonnage or more and includes subsection 224(1) that reads as follows:

224(1) All accommodation spaces and spaces in which the crew is normally employed, other than machinery spaces, shall have at each deck level at least two separate means of escape that comply with the following requirements:

- (a) the two means of escape shall be separated as far from each other as is practicable so as to minimize the possibility that both means of escape could be blocked at the same time as a result of one incident;
- (b) at least one means of escape shall be independent of watertight doors;
- (c) in the case of decks below the uppermost continuous deck, one means of escape shall be a stairway and the other means of escape shall be either a trunk or a stairway and both means of escape shall give direct access to a means of escape to on the deck above;
- (d) in the case of the uppermost continuous deck and decks above that deck, each means of escape shall either be a stairway, a door or a combination of both and both means of escape shall give direct access to an open deck and thence to lifeboats or liferafts; and
- (e) where stairways are used as a required means of escape, they shall be of sufficient width having regard to the number of persons who have access to such stairways for escape purposes.

[4] The MV Manitoba is a described as a Great Lakes cargo vessel of close to 11,000 tons, built in 1966 and previously in service under different names and different owners since that time. Rand Logistics acquired the vessel in 2011 and operates her through its subsidiary Lower Lakes Towing Ltd., the employer for purposes of the Code. The specific matters that led the HSO to issue the direction under appeal concern the forecastle deck where an external door provides access to crew accommodation, cabins and sleeping quarters and where he reports he found “ signs that an internal stairway had once been fitted, leading up to the next deck (the Texas deck).” With the stairway removed the HSO concluded that the forecastle deck no longer had the two means of escape required by the regulations. It is that stairway which the direction under appeal requires “to be re-installed, or an alternative arrangement to be installed.” HSO Louden first raised the matter with the employer’s representatives following inspection visits to the vessel in November and December, 2011. He reports that his suggestions to the employer concerning a possible assurance of voluntary compliance (AVC) did not bear fruit with respect to the means of escape issue. It was after a subsequent inspection visit on November 22, 2012, during which the HSO found that no corrective action had been taken and also confirmed his opinion that the port holes in the forecastle deck were of insufficient diameter to serve as means of escape, that the direction was issued.

[5] In the year that elapsed between the HSO’s initial inspection visits to the MV Manitoba and his issuing the direction under appeal, there were interactions relevant to the circumstances of the appeal. For example, there was correspondence between

Mr. Walter Stewart, Engineering Superintendent for Lower Lakes Towing Ltd., and Mr. Michael Dua, Manager, Marine Inspection and Security Services for Transport Canada's Sarnia District, Sarnia, Ontario. Mr. Dua's initial involvement in the events leading subsequently to the direction was when he responded to an e-mail sent to him by Mr. Stewart on January 30, 2012, seeking his advice on the AVC suggested by the HSO. Mr. Dua's reply e-mail sent on January 30, 2012, indicated: "[T]he vessel was surveyed in May 1982 for compliance with the Cartiercliffe Hall recommendations Annex B. At that time the Owners were instructed by TC to fit grab bars in way of cabin sidelights which were to be used as the second means of escape. This item can be removed from the deficiency notice."

[6] Other correspondence, internal to Transport Canada and included in the HSO's file, indicates that authority for Mr. Dua's advice was questioned by another departmental official responsible for regulatory analysis. Also, HSO Loudon continued to disagree with Mr. Dua's opinion and advice proposing removal of the deficiency and, on February 1<sup>st</sup> and 2<sup>nd</sup>, 2012, engaged in an e-mail exchange with Mr. Dua in which the HSO detailed his views on the limitations of port holes as a safe means of escape and his preference for stairways or doors to an open deck that he termed "the conventional approach to two means of escape (that) is standard throughout the world". (The reference to the Cartiercliffe Hall recommendations relates to recommendations made by an Inquiry into a fire in 1979 aboard the Great Lakes bulk carrier Cartiercliffe Hall that destroyed crew living accommodations and resulted in fatalities).

[7] Another example that the appellant pointed to in the stay proceedings as evidence that the vessel has a history of successfully passing Transport Canada's required annual safety inspections and of receiving operating approval each sailing season, is an inspection report regarding MV Manitoba issued to Lower Lakes Towing Ltd. by Transport Canada's Marine Safety Ontario Region on August 29, 2012. The document, signed for the Regional Director by Mr. Dua, is a response to a request from the vessel's owners for enrolment in Transport Canada's Delegated Statutory Inspection Programme (DSIP) that the appellant maintained would not have been agreed to if outstanding safety issues had been identified.

### **The Marine Technical Review Board**

[8] The mandate of the Marine Technical Review Board (MTRB) is relevant to the appeal proceedings as is its decision, issued on August 12, 2013, in response to an application from the appellant. It is therefore useful to explain that mandate and the manner in which it is carried out. The establishment of the MTRB is provided for in subsection 26(1) of the Canada Shipping Act, 2001 (CSA). The subsection reads as follows:

26(1) For the purposes of ensuring the safety of the marine industry, the Maritime Technical Review Board is hereby established to make decisions on applications for an exemption from, or the replacement of, any requirement under the regulations in respect of a Canadian vessel or in respect of the issuance of a maritime document to a person, other than one with respect to fees.

Other subsections of section 26 provide for the appointment by the Minister of Transport of the Chair, the National Vice-Chair and a maximum of five Regional Vice-Chairs, all of whom must be employees of Transport Canada and have expertise in marine matters. Section 27 addresses the constitution of panels to hear and decide applications and section 28 addresses the form in which applications to the Board for exemptions or replacements are to be made and the manner in which panels should determine such applications. Subsection 28(4) is of direct relevance to the matters raised in this appeal; it reads as follows:

28(4) If the panel struck to decide the application is satisfied that the exemption or replacement is in the public interest and would not jeopardize marine safety or the marine environment and, in the case of an application to replace a requirement with respect to safety, the replacement would result in an equivalent or greater level of safety, the panel is to issue a decision granting the application, subject to any conditions for the period that the panel considers appropriate.

[9] I was informed by the appellant that the MTRB is the successor to the Board of Steamship Inspection. In February 1982, in order to provide for equivalency to the recommendations made by the Cartiercliffe Hall Inquiry, the latter Board approved the issuing of standards for fire protection on board existing cargo ships of 2000 tons gross tonnage and above. The specific standards were set down in a document prepared by the Ship Safety Branch of the Canadian Coast Guard, then the competent authority. The document had two annexes that offered a choice of approaches to compliance. MTRB Decision No. 10818, issued on August 12, 2013, is specific to the MV Manitoba and valid for the life of the vessel. It reads in part as follows:

This marine Technical Review Board Decision authorizes the Manitoba to operate in a manner that does not comply with subsections 3(10), 3(11) and 3(12) of the Hull Construction Regulations, if:

#### **CONDITIONS**

a. The vessel complies with the Cartiercliffe Hall recommendations and the arrangements agreed upon in 1981 and 1982, between the Transport Canada attending Inspector and the vessel's owners at that time, related to the structural fire integrity and means of escape from the forward and after accommodations.

#### **Summary of evidence**

[10] A hearing in this appeal was held in Toronto, Ontario, on August 20 and 21, 2013. In addition to HSO Loudon, both Mr. Stewart and Mr. Dua testified. The following paragraphs capture the main points in their respective testimony that I have taken into account.

[11] HSO Loudon essentially repeated the contents of his narrative summary of findings that he had submitted to the Tribunal as his case report along with relevant

supporting correspondence. With respect to his roles as a Marine Safety Inspector pursuant to the CSA and as an HSO pursuant to the Code, he stated that he informs the parties being inspected of the role in which a particular inspection is being performed. Under close cross-examination, he continued to maintain that his direction was correctly issued under the authority of the Code and the MOHSR. HSO Louden was steadfast in his view that the MV Manitoba does not meet the requirements of the HCR concerning two means of escape; he spoke to what he regards as the limited diameter of the forecandle deck port holes and their insufficiency as safe alternative escape routes; and, he insisted that a decision of the MTRB does not take precedence over the Code and its regulations.

[12] While HSO Louden acknowledged that he had not researched certain documents before issuing the direction, notably a Transport Canada current data report entry of April 12, 1985, indicating that the vessel, a ship type c1, complies with Annex (b) of the Coast Guard standards, he firmly rejected the appellant counsel's inference that he had undertaken no relevant research. Asked why he had not agreed to rescind his direction when informed by a senior Transport Canada official that the MV Manitoba had been found to meet all terms and conditions of the August 12, 2013, MTRB decision and that the appellant had made necessary arrangements to comply with the MOHSR, HSO Louden said he had asked for the rationale of this finding but received no response.

[13] Mr. Stewart testified in his capacity as Engineering Superintendent for Lower Lakes Towing Ltd. He spoke to his understanding of how the vessel came to be configured with the stairway from the forecandle deck up to the wheel house on the Texas deck blocked off in order to provide for washroom facilities for the crew members on watch. He believed that it was at the same time that external grab bars were installed above the starboard side portholes to aid in their use as means of escape. In support of his contention that the vessel has enjoyed a good safety record, Mr. Stewart referred to surveys the company had undertaken itself and through a third party in 2011 when it purchased the vessel and renamed it the MV Manitoba. No compliance issues were flagged at that time and he maintained none have been noted in subsequent inspections by Transport Canada under the CSA and its regulations. Mr. Stewart was also aware of the current data report entry in April 1985 referred to in the previous paragraph and the finding it contained of the vessel's compliance with Annex (b) back in April 1985. He agreed when questioned that he had not encountered issues being raised with respect to the two means of escape requirement on similarly configured vessels prior to the matter being taken up by HSO Louden. Mr. Stewart testified that emergency practice drills are held aboard the MV Manitoba that include escaping through a port hole.

[14] As noted previously, Mr. Dua is Manager Marine Inspection Services for Transport Canada's Sarnia District. In what he described as a flattened structure, each District Manager, including the Manager at Thunder Bay, reports to the Director, Ontario Region. However, Mr. Dua indicated that he also has responsibility for Marine Safety and Occupational Health and Safety advisory services at the regional level, although he said that he has not been designated as a Health and Safety Officer pursuant to the Code. Also with regard to relevant administrative structures, Mr. Dua noted changes to government

organization in the 1990's that saw the Coast Guard moved to another department with Marine Inspection Services remaining at Transport Canada.

[15] Mr. Dua confirmed that Canadian registered vessels are inspected yearly. He agreed that the MV Manitoba has been in service with its present configuration since 1982 with no significant deficiencies, including with respect to means of escape, recorded since that time. Referring to the Cartiercliffe Hall Inquiry, Mr. Dua explained that, following release of its recommendations, the issue arose as to what should be done with respect to existing vessels that would require major modifications and expenditures in order to achieve strict compliance. The outcome of consultations at the time led to the development of the equivalency standards referred to in paragraph nine above. Mr. Dua said that the record indicates four Inspectors carried out the inspection of the MV Mantadoc now named the MV Manitoba. In the light of this inspection, Mr. Dua said that modifications to the vessel were authorized for safety reasons to block off the possibility of smoke rising to the wheel house in the event of a fire on the forecastle deck. It would appear that the provision of washroom facilities for the wheel house crew was a secondary benefit of the modifications rather than their primary objective as Mr. Stewart had indicated. The fitting of grab bars at the port holes was in order to compensate for the removal of one of the two means of escape. Photographs of the MV Manitoba's port holes with grab bars were entered indicating a port hole diameter of some 19 inches. Two of the photographs show a senior Transport Canada Marine Surveyor, Barry Cull, successfully and, I was told, rapidly escaping through a port hole.

[16] Questioned on the need for the port holes to be marked according to regulations and for the access route to them to be signed, Mr. Dua drew a distinction between the meaning of emergency escape hatches and of secondary escape means. The photographs entered included hatches providing for escape from lower decks, "escape up" as opposed to "escape forward", to use Mr. Dua's terms. In his opinion, the port holes on the MV Manitoba's forecastle deck with grab bars serve as secondary means of escape and are not required to be marked and signed as would be the case with emergency escape hatches.

[17] Mr. Dua agreed when questioned by counsel for the appellant that, given the MTRB ruling of August 12, 2013, the MV Manitoba is exempt from compliance with subsection 3(12) of the HCR and therefore not in contravention of subsection 224(1) of the same regulations. He stated that some 25 other vessels with a configuration similar to that of the MV Manitoba are still in service and that no directions under the Code have been issued against them.

## **Issue**

[18] The issue in this appeal is whether or not HSO Loudon was justified in issuing a direction finding that the employer, Lower Lakes Towing Ltd., contravened paragraph 125(1)(a) of the Code, section 10(b) of the MOHSR and subsection 224(1) of the HCR.

## **Appellant's Submissions**

[19] The appellant submitted written argument specific to this appeal at the end of the hearing and followed with a further written submission relating to this and another appeal concerning a different vessel owned by Lower Lakes Towing Ltd. that was heard at the same time. The latter submission contains argument regarding the HSO's credibility. Both submissions address the substance and legal bases of this appeal.

[20] With respect to HSO Louden, the appellant's submission launches into a denunciation of both his credibility and motivation. Without repeating all the details, I note the allegations of the HSO's failure to conduct a thorough investigation and his insufficient consideration of existing evidence that points to the means of escape on the MV Manitoba's forecandle deck not being in contravention of relevant regulations. In this respect, the appellant submits that the HSO failed to consult and listen to knowledgeable colleagues at Transport Canada who held that the configuration of the forecandle deck means of escape was acceptable. The HSO's preparation of his narrative summary report only after it was requested by the Tribunal is styled as evidence of a failure to keep contemporaneous notes and documentation. In all, the appellant alleges that HSO Louden demonstrated a lack of impartiality, singling out the MV Manitoba and maintaining his own view of the situation despite being made aware of counter considerations by more senior colleagues.

[21] On the substance of the appeal and the issue of means of escape, the appellant acknowledges that, despite the port holes on the starboard side cabins of the MV Manitoba forecandle deck being modified with external grab bars and therefore providing for more than two escape routes, "this configuration is, technically, non-compliant with the HCR, which as drafted requires two 'doors'." The appellant's argument then proceeds to the MV Manitoba being "the subject of an exemption order based on a government sanctioned equivalency" resulting in a direction "that lacks a legal foundation."

[22] In developing the argument, the appellant cites the application provisions of the HCR, more specifically subsections 3(10), 3(11) and 3(12)(c) that concern the application of Part X and read in relevant part as follows:

(10) Subject to subsections (11) and (12), Part X applies to every

(a) new ship, as defined in Part X, that is a cargo ship of 500 tons gross tonnage or more, other than a tanker or combination carrier as defined in Part IX; and

(b) existing ship, as defined in Part X, that is a cargo ship of 2 000 tons gross tonnage or more.



(11) Except as provided in subsection (12), existing ships of 2 000 tons gross tonnage or more shall comply with Part IX or X, as applicable, on or before April 1, 1985.<sup>1</sup>

(12) Existing ships of 2 000 tons gross tonnage or more shall comply with the requirements of Part IX or X, as applicable, regarding the

(c) means of escape

[23] With the relevant HCR application provisions established, the appellant then cites the CSA provisions relative to the MTRB's authorities to grant exemptions and determine equivalencies arguing that there is an exemption in place for the MV Manitoba. It is submitted that the exemption results from the MTRB decision of August 12, 2013, quoted in paragraph nine above, authorizing the vessel to operate in a manner that does not comply with subsections 3(10), 3(11) and 3(12) of the HCR on condition of compliance with the Cartiercliffe Hall recommendations and the arrangements agreed upon in 1981 and 1982 between the attending Transport Canada Inspector and the vessel's owners at that time. Authority to operate in a manner that does not require compliance with these subsections of the HCR exempts the vessel, it is argued, from application of HCR section 224 and, by implication from a need to comply with subsection 224(1) regarding the means of escape.

[24] In effect, the appellant does not contest that paragraph 125(1)(a) of the Code leads in this case to prescribed standards as set out in subsection 10(b) of the MOHSR that then leads ultimately to subsection 224(1) of the HCR. However, it is submitted that since section 224 of the HCR does not apply to the MV Manitoba by virtue of the exemption, a direction that is based upon enforceability of the section lacks a legal standing, cannot be enforced and must be rescinded.

## **Analysis**

[25] Before addressing the main issue, I believe it is fair for me to comment on the appellant counsel's criticisms of the HSO's credibility and motivation that I regard as somewhat exaggerated. In the first place I do not accept his view that HSO Loudon's appointment as an HSO is a secondary appointment that infers a subordinate status. A second appointment may be, or perhaps a concurrent appointment better describes the status of an HSO alongside a Marine Safety Inspector. On the HSO's lack of contemporary notes and documentation, while I am more accustomed to seeing HSO narrative reports that have been written up closer to the events and to the issuing of directions, his file does include contemporary correspondence covering the nature of his findings and rationale for the same. To say that he kept no file is an overstatement.

[26] On the alleged failure by the HSO to consult and take account of senior colleagues' views on the means of escape issue, I was not given much evidence of a willingness on the part of colleagues to address HSO Loudon directly. In particular, it

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<sup>1</sup> I understand that this target compliance date has been subject to authorized deferrals.

would seem that Mr. Dua chose to acquaint HSO Louden with his advice that “this item can be removed from the deficiency notice” by means of a cc to his e-mail of January 30, 2012, to Mr. Stewart. There is no record of any consultation, before this message was sent, with HSO Louden who had responsibility for the file and whom I believe should have been consulted. There are similar examples on file where the HSO is only copied responses rather than addressed directly. Then there are HSO Louden’s e-mails to Mr. Dua on February 1 and February 2, 2012, respectively, that set forth his concerns in detail. There is no indication of responses to the HSO in the file and in any event his concerns appear to have been given short shrift. Just who failed to consult whom remains for me an open question.

[27] On the main issue I find that the appellant’s submission convincing with respect to the lack of a legal foundation for the issuing of the direction under appeal. I agree that on the face of the language of subsection 224(1) of the HCR the MV Manitoba’s forecastle deck configuration is technically non-compliant with the two means of escape requirement. However, I also agree that an exemption of the MV Manitoba from application of that requirement based on a duly authorized equivalency decision renders the direction non-enforceable. MTRB decision 10818 of August 12, 2013, authorizes such an exemption on condition that the vessel complies with the Cartiercliffe Hall recommendation and the arrangements agreed upon in 1981 and 1982 between the then competent authority and its then owners.

[28] There are nagging concerns on such matters as the semantic conundrum raised by Mr. Dua as to when is an emergency escape hatch not an emergency escape hatch, to which he responds when it’s a secondary means of escape; or doubts about a one sized port hole fitting all. Nevertheless, evidence before me indicates that the MV Manitoba’s configuration approved by the competent authority in the early 1980s has not since been altered. Furthermore, I was provided with current documentary confirmation from senior officials of Transport Canada’s Marine Safety Directorate that the vessel’s “existing escapes meet all the terms and conditions as outlined in MTRB 10818.” That opinion from the now competent authority indicates that the conditions of the MTRB decision have been respected.

[29] The direction under appeal identifies a contravention of the Code and the MOHSR that in order to have practical effect requires application of subsection 224(1) of the HCR. The appellant submits that, with the MV Manitoba exempted from application of section 224 of the HCR, the direction lacks a legal foundation, is non-enforceable and should be rescinded. While I accept the lack of legal foundation and non-enforceability arguments, I am conscious that rescinding the direction would impact not just the contravention at issue but the other two contraventions identified that are not included in the appeal. Consequently, I will exercise my authority to vary rather than rescind the direction.

**Decision**

[30] For the reasons given above, I hereby vary, pursuant to paragraph 146(1)(a) of the Code, the direction issued to the employer by HSO Loudon on November 23, 2012, by removing from it the contravention of paragraph 125(1)(a) of the Code, section 10(b) of the MOHSR and subsection 224(1) of the HCR. The direction will now read as appears at Appendix I to this decision.

Michael McDermott  
Appeals Office



## APPENDIX I

### In the Matter of the *Canada Labour Code* Part II – Occupational Health and Safety

#### Direction to the employer under subsection 145(1) AS VARIED BY APPEALS OFFICER MICHAEL MCDERMOTT

On 22<sup>nd</sup> November, 2012, the undersigned health and safety officer conducted an inspection in the work place operated by Lower Lakes Towing Ltd., of Box 1149, 517 Main Street, Port Dover, Ontario, Canada, N0A 1N0, being an employer subject to the *Canada Labour Code*, Part II, the said workplace being sometimes known as the motor vessel Manitoba, O.N. 325744, whilst berthed alongside at the Richardson's International Limited Grain Elevator at Thunder Bay, Ontario, Canada.

The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, are being contravened:

1. Paragraph 125(1) (r) of the *Canada Labour Code*, Part II (Part II) and section 176(4) of the *Maritime Occupational Health and Safety Regulations* (MOHSR).

The pick-up reel for the electrical cable on the cargo hatch cover crane, fitted on the vessel, is not in use. The reel mechanism is to be repaired / replaced and put back into service to perform the intended function of protecting the live electrical cable from damage.

2. Paragraph 125(1) (i) of Part II, and section 61(1) of the MOHSR.

The showers and toilets (shared by unlicensed crew members) located in the forward accommodation are not maintained in a clean and sanitary condition. The facilities are to be upgraded to meet, at least, the minimum requirements.

Therefore, you are hereby directed, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contraventions no later than 15<sup>th</sup> March, 2013.

Further, you are hereby directed, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, to take steps, no later than 15<sup>th</sup> March, 2013, to ensure that the contraventions do not continue or reoccur.

Varied at Ottawa, Ontario, this 18<sup>th</sup> day of December, 2013.

Michael McDermott  
Appeals Officer

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