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CENTRAL ADMINISTRATIVE TRIBUNAL
GUWAHATI BENCH : GUWAHATI-5

Original Application No. 184 of 1994.

Date of decision 22.1.1999

Sri Prabir Sankar Bose, PETITIONER(S)

By Advocate Mr. G.K.Bhattacharyya, ADVOCATE FOR THE PETITIONER(S)

VERSUS

Union of India & Ors. RESPONDENT(S)

Mr. B.K.Sharma ADVOCATE FOR THE RESPONDENT(S)

THE HON'BLE Mr. JUSTICE D.N.BARUAH, VICE-CHAIRMAN.

THE HON'BLE SHRI G.L.SANGLYINE, ADMINISTRATIVE MEMBER.

1. Whether Reporters of local papers may be allowed to see the Judgement?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of the Judgement?

4. Whether the Judgement is to be circulated to the other Benches?

Judgement delivered by Hon'ble Vice-Chairman.

CENTRAL ADMINISTRATIVE TRIBUNL

GUWAHATI BENCH

Original Application No. 184 of 1994.

Date of decision : This the 22nd day of January,1999.

Hon'ble Mr. Justice D.N.Baruah, Vice-Chairman.

Hon'ble Shri G.L.Sanglyine, Administrative Member.

Shri Prabir Sankar Bose,
Son of late Sudhir Ranjan Bose,
Clerk in the Division Personnel Officer's Office,
N.F.Railway,
Lumding

...Applicant

By Advocate Mr. G.K.Bhattacharyya.

-versus-

1. Union of India,
represented by the General Manager,
N.F.Railway,
P.O. Guwahati-11,
District-Kamrup.

2. The Divisional Railway Manager,
N.R.Railway,
P.O. Lumding,
District-Nagaon,
Assam.

3. Shri K.P.Das,
Ex-Divisional Personnel Officer,
N.F.Railway, Lumding,
Now Senior Personnel Officer in
Headquarters office at Maligaon,
P.O. Guwahati-11.

4. Shri S.C.Tapader,
Ex-Divisional Personnel Officer,
N.F.Railway, Lumding,
now Senior Personnel Officer/RP,
Maligaon, P.O. Guwahati-11,Rs
District-Kamrup, Assam.

5. The Divisional Personnel Officer,
N.F. Railway, Lumding,
P.O. Lumding,
Dist-Nagaon, Assam.

6. Shri B.B. Paul,
Ex-Vigilance Officer/Accounts,
N.F.Railway, Maligaon now
Deputy Chief Accounts Officer,
N.F.Railway, Construction,
P.O. Guwahati-11, Dist-Kamrup,
Assam.

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7. Shri Amit Cowshish, Commissioner for Departmental Inquiry, Central Vigilance House, Akbar Road, New Delhi-110011 ...Respondents

By Advocate Mr. B.K.Sharma, Railway Counsel.

O R D E R

BARUAH J (V.C.).

In this application the applicant has challenged the Annexure-16 order dated 12.2.1993 passed by the Divisional Personnel Officer, Lumding, Respondent No.5, imposing penalty and the Annexure-17 Appellate Order dated 2.11.1993 passed by the Senior Divisional Personnel Officer, N.F.Railway, Lumding confirming the penalty imposed by the Disciplinary Authority and also to restore him to the pre-revision stage with further increment due and admissible to him. Facts for the prupose of disposal of this application are :

The applicant joined service under the RAilway as Junior Clerk in the month of March 1981 and he was later on promoted to Senior Clerk in the year 1987. In April, 1990 a disciplinary proceeding was initiated under Rule 9 of the Railway Servants (Discipline and Appeal) Rules, 1968. This proceeding was drawn up on the basis of charges levelled against the applicant on a vigilance report. Article of charges were served on the applicant. On receipt of the said charges the applicant submitted six representations on various dates from June 1990 to February 1991 requesting the Disciplinary Authority for supply of the documents to enable him to submit reply in his defence. While making the request for supply of documents the applicant in his representations drew the attention of the Disciplinary Authority to the Railway Board's instructions communicated under letter dated 5.12.1985 regarding supply of documents to the charged employees. The Disciplinary

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Authority by Annexure-2 letter dated 27.7.1990 directed the applicant to collect the records from the office of the Chief Vigilance Officer (for short CVO) at Maligaon. By Annexure A-3 letter dated 5.10.1990 the Disciplinary Authority directed the applicant to collect records from Chief Vigilance Officer, It was also however stated that supply of documents under Railway Board's instruction was not obligatory. In July, 1990 the applicant was allowed to inspect certain documents in the office of the CVO and in October of the said year the applicant was allowed to inspect some further documents in the office of the CVO. Before the submission of reply, the Disciplinary Authority in the month of November, 1990 decided to hold inquiry and accordingly Shri R.Venkataraman was appointed Inquiry Officer. However, Venkataraman did not complete the enquiry. A new Inquiry Officer was appointed in July, 1991 by Annexure A-5 letter. After the appointment of Inquiry Officer in the month of August, 1991, the applicant was directed by the Inquiry Officer to attend the preliminary hearing on 23.9.1991. The applicant on the said day appeared before the Inquiry Officer and submitted his representation. He also informed the Inquiry Officer regarding non-supply of documents including the complaint lodged by the Vigilance Department and also his objections to the appointment of Inquiry Officer before submission of his defence as this was contrary to the mandatory provision of the Rule. A few days thereafter the Inquiry Officer directed the applicant to submit list of additional documents required by him ad accordingly the applicant submitted list of 7 additional documents and also the list of defence witnesses. On 6.3.1992 the Inquiry Officer directed the Presenting Officer to allow the applicant to inspect the 7 documents mentioned by him. The Presenting

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Officer informed the applicant that out of 7 documents, 3 documents were not available, Applicant threafter, in May 1992 submitted his reply to the show cause notice denying the charges. The inquiry was held and thereafter report was submitted. In the month of November, 1992 Deputy Director Vigilance sent a letter to the General Manager, Vigilance recommending that one major penalty be imposed on the applicant and accordingly by Annexure-16 letter dated 12.2.1993 impugned order of penalty of reduction in rank for a period of five years was imposed. Being aggrieved, the applicant preferred an appeal before the Appellate Authority. By Annexure-17 order dated 2.11.1993 the appeal was rejected by confirming the penalty imposed by the Disciplinary Authority. Hence the present application.

2. The respondents have entered appearance and filed written statement. In paragraph 6.12 of the application, the applicant has made an averment that the inquiry was conducted in complete denial of the reasonable opportunity. In the said paragraph it has also been mentioned that out of 7 additional documents the respondents gave only 4, and 3 was stated to be non-existence in records. The contention of the applicant is that this statement of non-existence of the documents was to deprive the applicant his opportunity of looking those documents. The preliminary investigation report conducted by the Vigilance Officer which was the foundation of the charges has been denied. In the said paragraph it has also been stated by the applicant that while denying the documents the inquiry officer did not follow the Railway Board's instruction. It is further stated that because of the failure of the Inquiry and the

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Presenting Officers to give the documents, it was not possible for the applicant to examine the defence witnesses. In reply to the said averments the respondents in paragraph 14 of the written statement have stated as follows :

> "That with regard to the statements made in paragraph 6.12 of the application, the answering respondents do not admit anything contrary to the relevant records. The applicant has been found guilty based on the evidence on record and this Hon'ble Tribunal would not seat (sic - sit) on appeal over the evidence on record re-appreciating the same."

3. Again in paragraph 6.14 of the application, the applicant has alleged that the departmental proceeding was conducted by the Inquiry Officer in violation of principle of natural justice and therefore the Inquiry Report was vitiated for non-observance of principles of natural justice. In reply to the said averment, respondents in paragraph 14 have stated that the respondents do not admit anything beyond records. The applicant has also alleged that the Appellate Order passed by the Appellate Authority on the appeal was not a speaking order. No reason has been given while disposing of the appeal. It was a cryptic order. This was simply denied by the respondents. The applicant has also alleged that both the Disciplinary Authority and the Appeallate Authority passed the order imposing penalty without proper application of mind. In paragraph 20 of the written statement the respondents have stated thus:

> ".....disciplinary authority imposed the penalty upon the applicant for the definite charges as mentioned above which were established by CVC during enquiry. The instruction issued by the Railway Board has also been misinterpreted by the applicant."

4. We have heard both sides. Mr G.K. Bhattacharyya submitted before us that the Disciplinary proceeding was conducted in utter violation of Rule 9 of the Railway Servants (Discipline and Appeal) Rules, 1968, inasmuch as the Disciplinary Authority appointed the Inquiry Officer before receiving of the show cause reply. Mr Bhattacharyya also pointed out that the reply of the show cause was accepted by the Disciplinary Authority after appointment of the Inquiry Officer. According to Mr Bhattacharyya the Disciplinary Authority should first apply its mind to the reply submitted before it by the charged officer and only after such application of mind it should decide as to whether disciplinary proceeding should continue or not. If disciplinary authority after consideration of the reply to the show cause decides to continue the disciplinary proceedings only then he should proceed with the disciplinary proceeding by appointing an Inquiry Officer. According to Mr Bhattacharyya the appointment of Inquiry Officer was made before receiving of defence. This was contrary to the provision of Rule 9 of the Railway Servants (Discipline) Rules, 1968. Mr Bhattacharyya also submitted that the applicant was not allowed to inspect the relevant documents of the charges and as a result there was a complete denial of reasonable opportunity of being heard. He further submitted that the Disciplinary Authority imposing the penalty without application of mind at the instance of the Central Vigilance Commission and thereby the Disciplinary Authority abdicated his power and simply passed the order at the dictation of Vigilance Commission who has no authority under the provision of rule.

5. The learned Railway Counsel Mr B.K. Sharma on the other hand refuted the claim of Mr Bhattacharyya. According to Mr Sharma the impugned orders were just and proper. On the rival cntentions of the learned counsel for the parties we take up the following points for determination.:

A. Whether the disciplinary authority violated the Rule 9 of the Railway Servants (Discipline and Appeal) Rules 1968 by appointing an Inquiry Officer before receiving the defence.

B. Whether the inquiry proceeding was vitiated for non-compliance of the provision of Rule 9 of the Railway Servants (Discipline and Appeal) Rules, 1968.

C. Whether penalty imposed by the Disciplinary Authority on the basis of the inquiry can sustain in law.

D. Whether the Appellate Order can sustain in law.

Before we consider the rival contentions of the parties on the points formulated above it will be apposite for us to look to some of the provision of Rule 9 of the Railway Servants (Discipline and Appeal) Rules 1968. Rule 9 of the Part IV of the Rules prescribed the detail procedure for imposing major penalties. As per the said rule an order imposing any penalty specified in clauses v to ix of Rule 6 shall not be made except after an inquiry held, in the manner prescribed in Rule 9 and also Rule 10. Under Rule (2), whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against

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Railway servant, it may itself inquire into, or appoint under this rule or under the provisions of the Public Servants (Inquiries) Act, 1850, as the case may be, a Board of Inquiry or other authority to inquire into the truth thereof. As per the explanation to Rule 9 the disciplinary authority may itself hold the inquiry and reference in sub-rule (12) and in sub-rule (14) to sub-rule (25), to the inquiring authority shall be construed as a reference to the disciplinary authority. Where it is proposed to hold an inquiry against a railway servant under Rule 10, the disciplinary authority shall draw up or cause to be drawn up the substance of imputations of misconduct or misbehaviour into definite and distinct articles of charge; a statement of all relevant facts including any admission or confession made by the railway servant; a list of documents by which, and a list of witnesses by whom, the articles of charge are proposed to be sustained. The Disciplinary authority shall deliver or cause to be delivered to the railway servant a copy of the articles of charge, the statement of the imputations of misconduct or misbehaviour and a list of documents and witnesses by which each article of charge is proposed to be sustained and shall require the railway servant to submit a written statement of his defence within 10 days or such further as the disciplinary authority may allow. Note to the said rule shows that if the copies of documents have not been delivered to the railway servant alongwith the articles of charge and if he desired to inspect the same for the preparation of his defence, he may do so within ten days from the date of receipt of the articles of charge to him and complete inspection within ten days thereafter and shall state whether he desires to be heard in person. The railway servant may, for the purpose of his defence, submit

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with the written statement of his defence a list of witnesses to be examined. Further note to the rule 9 if the railway servant applied in writing, for supply of copies of the statements of witnesses mentioned in the list referred to in sub-rule 6, the disciplinary authority shall furnish him with a copy each of such statement as early as possible and in any case not later than three days before the commencement of the examination of the witnesses on behalf of the disciplinary authority. On receipt of the written statement of defence, the disciplinary authority shall consider the same and decide whether the inquiry should be proceeded with under this rule. Where the disciplinary authority decides to proceed with the inquiry it may itself inquire into such of the articles of chages as are not admitted or appointed under sub-rule (2) a Board of Inquiry or other authority for the purpose. Under sub-rule 12 of rule 9, if the railway servant may, for the purpose preparing his defence give a notice within ten days of the order or within such further time not exceeding ten days as the inquiring authority may allow for the discovery or production of any documents which are in possession of Railway Administration but not mentioned in the list referred to in sub-rule (6).

From reading of Rule 9 it is clear that if the disciplinary authority wants to impose penalty that can be done only after making an inquiry. This inquiry may be made by himself or by appointing other authority to inquire about. Before appointing inquiry officer the disciplinary authority shall issue a notice to the delinquent officer to show cause as to why a

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disciplinary proceeding should not be proceeded and if a reply is given, on the basis of such reply the disciplinary authority shall consider the same and only thereafter if the disciplinary authority finds that an inquiry is necessary to determine whether the delinquent employee is liable to be imposed major penalty. If the disciplinary authority after receipt of the same forms an opinion that an inquiry should be made rearding the article of chages he may do so by himself or by appointing a person as an inquiry officer. If inquiry is held then a notice is to be given to the charged employee for holding inquiry. The charged employee may ask for inspection of documents or inspection of such documents, but while asking he must show the relevance of such documents. If the charged employee wants to inspect those documents, it shall be the duty of the inquiry officer or the disciplinary authority as the case may be to make the documents available to the charged employee, if those documents are relevant for the proper defence. This protection should be given to the delinquent employees to prepare his defence.

POINT NO.A

6. Mr. Bhattcharyya has streneously argued before us that the authority violated the mandatory provision of rule 9 of the Railway Servant (Discipline and Appeal)Rule by appointing the inquiry officer before receipt of the defence statement by way of reply to show cause notice of the delinquent employee after the appointment of inquiry oficer and the said statement. Mr. Bhattacharyaa also submitted that this was contrary to the rule 9 of Railway Servant (Discipline & Appeal) Rules. As per the said rule it was the duty of the disciplinary authority to apply his mind and then

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decide as to whether disciplinary authority should proceed with the case and only then the authority could make the appointment of an inquiry officer. Mr. Bhattacharyya further submitted that this was a mandatory provision of rule and therefore the entire proceeding is vitiated.

7. Rule 9 of the Railway Servants (Discipline and Appeal) Rules 1968 indicates that Disciplinary Authority shall issue notice to show cause as to why the Disciplinary Proceeding should not be initiated giving reasonable time to the charged employee to submit his reply and only after receipt of the reply to the show cause the Disciplinary Authority may appoint inquiry officer if he does not want to inquire himself. On perusal of the said Rule we find the word 'shall' has been used in this regard. Now it is to be seen whether it was obligatory on the part of the Disciplinary Authorityto wait till the time of filing of the reply to the show cause by the charged employee for appointment of the inquiry officer and whether the expression 'shall' indicate in affirmative. Law is settled in the regard. When a statute or rule is made for the purpose of enabling something to be done and prescribes the formalities in which are to attend its performances may be called an absolute enactment or a directory enactment. The absolute enactment must be obeyed or fulfilled exactly but it is sufficient if a directory enactment be obeyed or fulfilled substantially i.e. that the act permitted by an absolute enactment is lawful only if done in accordance with the conditions annexed to the statutory provision.. If an absolute enactment is neglected or contravened, a court of law will treat the thing which is being done as invalid and altogether void, but if an enactment is merely

directory it is immaterial, so far as relates to the validity of the thing which is being done, whether it is complied or not. Therefore if we find that the provision is mandatory the procedure prescribed by the statute shall be done in the same manner but in case of a directory it may not be necessary for any authority to fulfil the procedure as prescribed. A substantial compliance would be enough to make the action valid. In case of non-compliance of the procedure prescribed which is directory in nature a person who challenges such action shall have to show the prejudice caused to him but in case of a mandatory provision, the prejudice shall be presumed.

Now the next question is what makes an act absolute or directory. On looking to the provision contained in Rule 9 we find that the ultimate aim of the Rule is to ensure fair hearing enabling the charged employee to persuade the authority as to whether it would be necessary for the Disciplinary Authority to appoint an inquiry officer. The rule indicates that the inquiry officer shall be appointed only after recipt of the written statement. This provision is incorporated in the Rule with a view to enable the disciplinary authority to consider as to whether it is necessary for him to go for departmental inquiry or not. Therefore it is advisable for the disciplinary authority to wait till the receipt of the written defence. However, the rule does not prohibit such appointment. In our considered view the rule contained in Rule 9 regarding appointment of inquiry officer is only a directory and not mandatory and therefore, appointment of inquiry officer before the receipt of the written statement, will not vitiate the Disciplinary Proceeding.

A similar point came up for consideration before the Full Bench of the Central Administrtive Tribunal, reported in Full Bench Judgements, Vol. II at page No.

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This indictes that inquiry shall be held, as far as may be, in the manner provided in this Rule and Rule 15. The expression "this rule" refers to Rule 14 and that includes sub-rules (2), (4),(5) (a), (b) and (c). Therefore, the procedure that is to be followed has to be, as far as may be, in the manner provided in this Rule. The use of expression "as far as may be" gives liberty to the disciplinary authority to follow the procedure as far as possible to denude the mandatory nature of the provision. However, if the order causes prejudice to the party, in that event, it would give rise to a question as to whether the delinquent Government servant has been prejudiced in his defence and inquiry proceedings."

In the said decision the Full Bench observed that no prejudice was caused. In the instant application also we do not see that any prejudice is caused to the applicant for appointment of the Inquiry Officer before receipt of the reply to the show casue. Therefore we do not find any force in the submission of Mr. Bhattacharyya. We agree with the submission of Mr. B.K.Sharma, learned Railway counsel.

Point No.(B).

Rule 9 provides that if a charged employee during the time of disciplinary proceeding requests for supply of documents and if the authority after proper consideration is satisfied about the relevancy of such documents, it shall be the duty of the disciplinary authority or the inquiry officer as the case may be, to supply those documents and if those copies cannot be supplied because of voluminious in nature at least the authority shall give an opportunity to the charged employee to inspect those documents and make note for the purpose of his defence. Copies of 7 documents were asked for and from the records it appears that the inquiry officer having found those documents relevant for the purpose of defence of the

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523. This was in connection with the provision under Rule 14(5) of C.C.S. (CCA) Rules,1965 regarding appointment of Inquiry Officer. The provision contained in the said rule regarding appointment of inquiry officer is para metria with the present provision. The Full Bench after considering the rule observed thus :

> "10. The Rule does not begin with a prohibition that no matter can be inquired or no inquiry officer can be appointed until the written statement of defence is filed. That would have been a mandatory provision of law. Sub-rule () (a) contemplates the filing of the written statement where upon the disciplinary authority to take further action depending on whether the charges have been denied. In case all the charges are accepted, he shall proceed under sub-rule (5) (a) himself and record his finding on each charge after taking such evidence as may be deemed fit. In case there is a denial, he is required to exercise an option whether to be the inquiring officer or appoint someone as inquiry officer. Thus, sub-rule (5)(a) contemplates appointment of an inquiry officer only after the receipt of a written statement of defence which contains a denial of the charge. However, the pertinent question is whether any harm is done in the case of a premature appointment.
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> 11. We are, however, of the view that sub-rule 5(a) is not mandatory in character. The language of the rule does not impose a prohibition in appointing an inquiry officer even prior to the receipt of written statement of defence. The normal procedure is to wait for the written statement of defence to be filed to peruse it and to notice whether any of the charges are denied and then appoint an inquiry officer if the disciplinary authority is not inclined to be the inquiry officer. CCS(CCA) Rules have the authority of law and are to be followed. We may also refer at this stage to the provision of sub-rule (1) of Rule 14 of the CCS(CCA) Rules, which reads as follows :
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> > "(1) No order imposing any of the penalties specified in clauses (v) to (ix) of Rule 11 shall be made except after an inquiry held, as far as may be, in the manner provided in this Rule and Rule 15, or in the manner provided by the Public Servants (Inquiries) Act, 1850 (37 of 1850), where such inquiry is held under that Act."

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charged employee directed the disciplinary authority for supply of those documents. Out of that 7, only 4 had been supplied and the remaining documents had not been supplied stating that those documents were not in existence. By an order dated 4.3.98 records were called for but the records had not been produced. In the absence of the records it is not possible for us to come to the conclusion as to whether those documents were untraceable or not. The respondents have not made any endeavour to prove that those documents were not in existence when asked for. On going through the application and the written statement we are of the opinion that those documents may have some bearing. If the documents were not in existence the matter would certainly be different but the respondents have not come forward to prove that aspect of the matter by producing evidence. Therefore, it is not possible for us to hold that those documents were actually not in existence. Thus the Rule is pari materia with CCS (CCA) Rule. This Rule gives safeguard to the charged employee to make out his defence. It is for the protection of the charged employee and if the charged employee is denied the opportunity, definitely prejudice would be caused to him. On going through the provision of Rule 9 regarding the supply of documents etc. we are of the view that these provisions are mandatory in nature. Therefore, non-supply of those documents without proper explanation would definitely

cause prejudice to the charged employee and violates the violates the provision of Rule 9. Accordingly we hold that the inquiry proceeding was vitiated for non-compliance of Rule 9.

Point No. (C)

As we have already held that the Rule 9 is mandatory so far supply of documents is concerned, this provisions have not been complied with. Therefore, imposition of penalty cannot be sustained in law.

Point No. (D)

Annexure A-17 dated 2.11.1993 is an order passed by the Appellate Authority to the applicant. The following order was passed :

> "I have gone through the charge sheet, enquiry report of the CDI/New Delhi. The first two charges have been established during the enquiry. The resport has been given to D.E. (delinquent employee) and while imposing penalty the disciplinary authority has considered the representatiion of the delinquent employee, on the enquiry report.
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> During the appeal no new points have been brought by the delinquent employee that penalty is harsh and unjustified. The penalty imposed, therefore, is confirmed."

8. The applicant had preferred an appeal raising certain points but we do not find any discussion in respect of those points in the Appellate Order Annexure A-17. It is not a speaking one. No reason has been assigned for rejection of the appeal. Therefore this Appellate Order also cannot be sustained in law.

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In view of the above, we find that the disciplinary action against the applicant on the basis of inquiry cannot sustain in law. Accordingly we set aside the Annexure A-16 order dated 12.2.1993 and Anexure A-17 order dated 2.11.1993.

The application is accordingly disposed of. Considering the facts and circumstances of the case we, however make no order as to costs.

22.1.99

(G.L.SANGLYINE)
Administrative Member

(D.N.BARUAH)
Vice-Chairman

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