

**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD  
REGION 25**

Cordova Dredge, )  
a Division Of RiverStone Group, LLC )  
 )  
Employer, )  
 )  
and )  
 )  
Nicholas Allen Broline, )  
 )  
Petitioner, )  
 )  
and )  
 )  
International Union of Operating )  
Engineers, Local 150, AFL-CIO, )  
 )  
Union, )

Case No. 25-RD-138605

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**LOCAL 150'S  
REQUEST FOR REVIEW  
AND SUPPORTING BRIEF**

**ORAL ARGUMENT REQUESTED**

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## **REQUEST FOR REVIEW**

The International Union of Operating Engineers, Local 150, AFL-CIO (“Union” or “Local 150”), files this Request For Review (“RFR”) of the Regional Director’s November 20, 2014, Decision And Direction Of Election (“Decision”) pursuant to Section 102.67 of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”). Pursuant to Section 102.67(c)(1) of the Board’s Rules and Regulations, Local 150 contends that there is a substantial question of law to which there was a departure from Board precedent, specifically that the Decision erroneously holds that the bargaining unit consists of the employees from two separate and distinct facilities because the Board would never have certified a combined bargaining unit initially. Pursuant to Section 102.67(c)(2) of the Board’s Rules and Regulations, Local 150 contends that the Regional Director’s Decision on a substantial factual issue is clearly erroneous and such error prejudicially affected its rights, because the record reveals that there are two recognized bargaining units, not one as determined by the Regional Director. Additionally, pursuant to Section 102.67(c)(4) of the Board’s Rules and Regulations, Local 150 contends that there are compelling reasons for reconsideration of an important Board rule or regulation, specifically that the Board should extend the three-year contract bar rule to a five-year bar when the contract is agreed upon by the parties and ratified by the membership. As part of this RFR, Local 150 provides the following supporting brief. Local 150 requests oral argument.

### **I. STATEMENT OF THE CASE**

On October 14, 2014, Nicholas Allen Broline filed a petition with Region 25 of the NLRB (Case No. 25-RD-138605) seeking decertification of the Union as the collective

bargaining representative for the employees working for Cordova Dredge, a Division of RiverStone Group, LLC (“Cordova,” “Employer” or “Company”) (Bd. Ex. 1(a)).<sup>1</sup>

On October 27, 2014, SubRegion 33 conducted a hearing. There, Local 150 made two arguments. Its first argument was that there are two separate and distinct bargaining units, a water-based unit known as MC 14 and a land-based unit known as MC 17, each consisting of three employees, and therefore the decertification petition should apply to only the land-based unit (Tr. 11).<sup>2</sup> Local 150’s second argument was that the contract bar should be extended from three years to five years if the employees, as in this case, covered by the collective bargaining agreement freely ratify the five year contract (Tr. 12). Before closing the record, the Hearing Officer set the due date to file briefs at November 3, 2014 (Tr. 120).

On November 3, 2014, the Union filed its Post-Hearing Brief. On November 20, 2014, the Regional Director issued his Decision. There, the Regional Director found that (Decision at 2):

For the reasons discussed in detail below, including the parties’ recognition of the employees as a single unit, the parties’ bargaining history, and since the recognized unit is an appropriate unit, there is no need to disturb the recognized unit contained in the current collective bargaining agreement.

Additionally, for the reasons discussed in detail below, based on the record and relevant Board law, I conclude that the contract bar applies only for the first three years of a collective bargaining agreement, and thus, there is no contract bar in the instant case. Therefore, an election will be held on the following unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

All production, service and maintenance employees used in the operation of power driven equipment, which is recognized as being within the jurisdiction of the I.U.O.E., at the Employer’s Cordova, Illinois facility,

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<sup>1</sup> Record references from the hearing conducted October 27, 2014, will be referenced, “Tr. \_\_\_\_” and “Bd. Ex. \_\_\_\_”, “Er. Ex. \_\_\_\_” for Employer exhibits, and “U. Ex. \_\_\_\_” for Union exhibits.”

<sup>2</sup> The Union raised a showing of interest issue, but the Hearing Officer ruled that she would not take evidence on that issue (Tr. 11-12).

but excluding office clericals, guards, and supervisors and professionals as defined in the National Labor Relations Act, as amended.

In arriving at the Decision that there is only one bargaining unit consisting of the employees at both facilities, the Regional Director determined that there is one collective bargaining agreement covering the employees at both facilities (Decision at 5); that there is no evidence that the parties or employees thought that the employees were in separate bargaining units, or otherwise were recognized as two separate units (Decision at 6); and that a bargaining unit comprised of the employees at both facilities is an appropriate unit and the Board would have certified it as such initially (Decision at 7). On this issue, the Union respectfully requests that the Board reverse the Regional Director and find that there are two bargaining units.

In arriving at this Decision concerning the three-year contract bar, the Regional Director pointed out that:

the undersigned clearly has no authority to overrule or ignore what is clear precedent and policy. The contract bar applies only for the first three years of a collective bargaining agreement, *General Cable Corp.*, 139 NLRB 1123 (1962), and thus, there is no contract bar in the instant case. Any changes to Board policy would have to be considered by the Board” (Decision at 4, footnote omitted).

The Union respectfully requests that the Board revisit the contract bar rule, and find that the decertification petition filed here is barred by the current five-year collective bargaining agreement.

## **II. STATEMENT OF FACTS**

### **A. Local 150 and Cordova**

#### **1. Local 150**

Local 150 represents heavy equipment operators throughout northern Illinois, eastern Iowa and northwest Indiana (Tr. 29). Local 150 represents the production and maintenance employees used in the operation of power driven equipment, which is recognized as being within

the jurisdiction of Local 150 at MC 14 and MC 17 (Jt. Ex. 1, at Art. 1, Sec 1). Prior to 1991, the International Union of Operating Engineers, Local 537 (“Local 537”) represented the same employees and then it merged into Local 150 (Tr. 30). Representation of the employees was seamlessly transferred from Local 537 to Local 150.

Stephen Russo is an Organizer/Business Agent for the Union and his duties include, in part, processing grievances, negotiating contracts and participating in political functions (Tr. 29). Russo represents some of the employees working for RiverStone, including those at MC 14 and MC 17 (Tr. 30).

## **2. Cordova, a Division of RiverStone**

RiverStone is an aggregate producer and seller. RiverStone’s main office is located at 1701 5th Avenue, Moline, Illinois. Marshall Guth is the Vice-President of Operations for RiverStone (Tr. 13). Guth’s office is located in the main office in Moline, Illinois. Guth oversees various crushed stone and sand and gravel operations of the RiverStone Group (Tr. 13). Each division of RiverStone has a superintendent who reports to Guth (Tr. 13-14). Cordova Dredge is a division of RiverStone (Tr. 14). Guth interacts with the Cordova Dredge superintendent every week or two (Tr. 14). Josh Balleger is the current superintendent of Cordova Dredge (Tr. 26). He was promoted to superintendent full time within a few weeks of the hearing however, and for the preceding month he was working as a trainee (Tr. 26). On May 15, 2013, in Case No. 25-RD-105145, Balleger, immediately before he was promoted to superintendent, filed the first decertification petition of a RiverStone Group quarry that had a contract with the Union.

### **3. Petitioner**

Nicholas Broline is the Petitioner. He was hired July 29, 2013.

#### **B. The Two Bargaining Units – MC 14 and MC 17**

##### **1. The Two Facilities – MC 14 and MC 17**

Since as early as the 1960s, the employees of RiverStone have been represented by the International Union of Operating Engineers.<sup>3</sup>

##### **a. MC 14**

MC 14 is the water-based facility (Tr. 14) and is located in Albany-Cordova, Illinois (U. Ex. 9). The total operation is completely and exclusively on the Mississippi River (Tr. 62). There is no land-based operation at MC 14. MC 14 has been in operation for approximately 50 years (Tr. 15). There are three Local 150 represented employees at MC 14. MC 14 typically has three employees (U. Ex. 2). Since 2010, Tim DeCock, Ward Fuller and Thomas Carroll have worked at MC 14 (U. Ex. 2 and Tr. 27). DeCock is the push boat operator (Tr. 101), Fuller is the plant operator (Tr. 83-84), and Carroll is the dredge operator (Tr. 83). Carroll started working for RiverStone at its fabrication shop in Rock Island in 2005 (Tr. 79), but his seniority reflects a start date of May 18, 2009 which is when he began working at MC 14 (Tr. 80). Since 1990, MC 14 typically has had three employees working at all times, the exceptions being that occasionally there will be fewer than three employees working in the first quarter of the year (U. Ex. 9,<sup>4</sup> and Tr. 53). Layoffs may occur during the winter, December or January, but typically last only one to three months (Tr. 60, and U. Ex. 9).

In 2003, Walter Ray Bowker began working at MC 14 (Tr. 53). He was the push boat operator, which is a towboat (Tr. 54). The push boat operator pushes empty barges up to the

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<sup>3</sup> In or about 2005, the Employer changed its name from Moline Consumers to RiverStone.

<sup>4</sup> U. Ex. 9 is a Mine Safety Health Administration (“MSHA”) Mine Quarterly Production Information report for MC 14. MSHA is a Federal agency.

dredge plant to be filled and pushes filled barges and hooks them together to be towed away (Tr. 54-57). Bowker worked with a plant operator and a dredge operator (Tr. 54). The dredge sucks up material and takes it to the top of the plant where it is separated into two barges (Tr. 55). The tube used to evacuate the material is 18 inches (Tr. 55). The barges are on opposite sides of the dredge and one barge collects sand and the other collects rock (Tr. 55). The dredge is 150 feet long and 30-35 feet wide (Tr. 83). The barges are 150 feet long and 30 feet wide (Tr. 56). The dredge operator moves the dredge back and forth to sweep the bottom of the Mississippi River to collect the material (Tr. 56). The plant operator operates the equipment to separate the sand and rocks to make sure the sand goes in one barge and the rocks go in the other barge (Tr. 57).

In 2009, Bowker moved to MC 17 (Tr. 57). In 2009, there were four employees at MC 14 and the Company asked him if he wanted to go from MC 14 to MC 17 (Tr. 57). This was a voluntary move and Bowker accepted it (Tr. 57-58). He lost his seniority because he moved to MC 17 (Tr. 58).<sup>5</sup>

**b. MC 17<sup>6</sup>**

MC 17 is the land-based facility (Tr. 15) and is located in Cordova (U. Ex. 8). The operation is not on the Mississippi River (Tr. 62 and 73). The land-based operation pulls material from a man-made hole and conveys it to the plant located on land (Tr. 62-63). It is approximately one and one half miles from MC 14 (Tr. 15 and 89). The employees at one facility cannot see the operations at the other facility (Tr. 89). MC 17 opened on June 30, 2009

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<sup>5</sup> Robert Davis, Bowker's superintendent, told Bowker he would lose his seniority (Tr. 74). The parties stipulated that Davis, now retired, was a Section 2(11) supervisor (Tr. 74).

<sup>6</sup> Guth testified that both sites, MC 14 and MC 17, have dredges that pull up sand and gravel and pump the material to a processing plant (Tr. 14). While it is true that both sites have equipment to vacuum sand and gravel, as discussed throughout this brief, the differences between the two operations are significant, warranting a determination that there are two separate bargaining units.

(U. Ex. 8).<sup>7</sup> This year, there are three employees at MC 17, Nicholas Broline, Petitioner, hired July 29, 2013, Barajas, hired August 25, 2014, and Griffin, hired September 8, 2014 (U. Ex. 2 and Tr. 20 and 27). Broline is the yard loader operator (Tr. 112). In 2013, there was only one employee at MC 17 (Tr. 20-21) and the facility was not open the first quarter of the year (U. Ex. 8). In 2012, the facility had no employees working there (U. Ex. 8). In 2011, there was one employee and at times two employees working at MC 17 (U. Ex. 8). In 2010, there was only one employee and the facility was not open the first quarter of the year (U. Ex. 8). In 2009, the facility did not operate the first two quarters and there was either one or two employees working the third and fourth quarters (U. Ex. 8).

Bowker worked intermittently at MC 17 from 2009 to 2013 (Tr. 58). He was laid off after Thanksgiving, 2009, and called back in April, 2010 (Tr. 58). In 2010, he was the only employee at MC 17 and was laid off after Thanksgiving (Tr. 59 and U. Ex. 8). He was recalled in April, 2011, and laid off after Thanksgiving, 2011 (Tr. 59). In May, 2012, he was recalled and was laid off after only one month, and recalled again in October but only for two weeks (Tr. 60, and U. Ex. 8).<sup>8</sup> Bowker was recalled in April, 2013, and worked to August, 2013 (Tr. 60).

## **2. Differing Skills and Abilities**

The skills and abilities of the employees at the two facilities differ significantly. Guth admits that the experience and expertise of the MC 14 employees is significantly higher than the experience and skills of the MC 17 employees (Tr. 18). Guth acknowledges that MC 14 employees will assist MC 17 employees “to make sure we get the work done properly” (Tr. 18). The MC 14 employees are trained and can operate the equipment at MC 17 (Tr. 102 and 108-

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<sup>7</sup> U. Ex. 8 is a Mine Safety Health Administration (“MSHA”) Mine Quarterly Production Information report for MC 17. MSHA is a federal agency.

<sup>8</sup> U. Ex. 8 confirms that Bowker worked infrequently at MC 17 in 2012.

109). However, the employees at MC 17 cannot operate any of the equipment at MC 14 (Tr. 115).

### **3. Limited Employee Interchange and Contact**

The employees at MC 14 do not take lunch breaks or other breaks with the employees from MC 17 (Tr. 67). They do not have regular meetings with each other (Tr. 67). On very limited occasions, employees from MC 14 are sent to MC 17 to assist the employees there (Tr. 80). Davis told the MC 14 employees that when they go to MC 17, they are there to “help” and that they carry no seniority over the MC 17 employees (Tr. 80). In 2013, after they completed their work at MC 14, they went to MC 17 to splice a belt which took about three hours (Tr. 80-81). There may have been a couple other times the MC 14 employees helped at MC 17, but on those occasions they worked for three or fewer hours (Tr. 81).

The longest stint that the MC 14 employees worked at MC 17 was June, 2014. In June, 2014, MC 14 employees were sent to MC 17 to start the plant and they worked there for about two months (Tr. 17 and 19). There were three employees at MC 14 and only one employee, the Petitioner, at MC 17 (U. Ex. 2, Barajas started 8/25/2014 and Griffin started 9/8/2014 and thus were not employees when this occurred). The MC 14 employees were tasked with getting MC 17 operational (Tr. 81). The MC 14 employees started their work day at MC 14 and then went to MC 17 and worked there from 1:00 p.m. to 6:00 p.m. as help (Tr. 90). This was an unusual situation (Tr. 103). Prior to this, MC 14 employees did not work at MC 17 for “chunks of time” (Tr. 103).

Guth has sent the MC 14 employees to MC 17 to perform maintenance type work because their experience and expertise levels are higher than the MC 17 employees (Tr. 18). MC 17 employees never work at MC 14 (Tr. 22). After Bowker moved from MC 14 to MC 17, and was laid off from MC 17, he asked if he could fill in for the employees at MC 14 when they were

on vacation, for example, however, he was not allowed to do that (Tr. 63-64). Occasionally, employees from other RiverStone facilities, not MC 14, have come to MC 17 to assist with the operations (Tr. 113).

#### **4. Equipment and Product Collected at Each Facility**

##### **a. MC 14**

Each facility utilizes different heavy equipment operated by Local 150 represented employees. The employees at MC 14 operate the dredge which is 150 feet long and 30-35 feet wide and digs 50 feet deep (Tr. 83). One MC 14 employee operates the push boat which pushes empty barges from the empty-barge tow to the dredge and full barges from the dredge to the full-barge tow (Tr. 83). There is also a plant operator who makes sure the material is going on the proper barge (Tr. 83-84). There is no front end loader, skid steer, or man lift on the dredge (Tr. 61 and 82).<sup>9</sup> MC 14 can only collect two materials – one material in each barge, and the materials collected at MC 14 include FM1A and GR (Tr. 96 and U. Ex. 1). Gravel goes on the starboard side barge and sand goes on the port side barge (Tr. 84). After these materials are loaded onto the barges, the barges are taken down the Mississippi River to either LeClaire, Bettendorf, or Moline (Tr. 84). These materials are not delivered to MC 17 (Tr. 84).

##### **b. MC 17**

At MC 17 there is a front end loader, skid steer, and man lift (Tr. 61). The front end loader is used every day at MC 17. Likewise, the man lift is used every day at MC 17 (Tr. 66). There is a MudCat at MC 17, which is a mini version of a dredge (Tr. 61-62). The MudCat is not located on the Mississippi River (Tr. 73). The MudCat is approximately 50 feet long and sits in a man-made hole dug out to the waterline (Tr. 62 and 73). The man-made hole is approximately 500 feet square (Tr. 75). The MudCat is connected to the plant located on the

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<sup>9</sup> Occasionally, MC 14 will borrow a man lift for maintenance purposes, but this is infrequent (Tr. 65-66).

land by a tube that the material flows from the MudCat to the plant to be separated (Tr. 63). The MudCat can dig only 20-25 feet deep (Tr. 83).

Because MC 17 is a land-based operation, it can collect a number of materials and separate them. The materials produced at MC 17 include FA6, S9, as well as the two materials produced at MC 14 – FM1A and GR (U. Ex. 1). The materials are dumped on the ground into big piles and do not go to MC 14 (Tr. 67, 84, and 94). The materials are sold to customers, loaded onto their trucks, and hauled away (Tr. 94-95).

#### **5. No Functional Integration Between and Amongst MC 14 and MC 17**

After the materials collected at MC 14 are loaded onto the barges, and the barges are taken down the Mississippi River to either LeClaire, Bettendorf, or Moline (Tr. 84). These materials are not delivered to MC 17 (Tr. 84). Likewise, the materials collected at MC 17 are dumped on the ground and do not go to MC 14 (Tr. 67 and 84). The materials from MC 17 are sold to customers, loaded onto their trucks and hauled away (Tr. 94-95). Neither facility is dependent on the other – they operate independently. In fact, MC 14 has operated for approximately 50 years, whereas MC 17 has operated intermittently and only since fall/winter, 2009 (U. Ex. 8).

#### **6. General Working Conditions**

##### **a. MC 14**

All work at MC 14 is on floating vessels. The three employees get to the dredge by way of the push boat (Tr. 94). They wait for each other and when all three arrive they go to the dredge together (Tr. 95). They start at 5:45 a.m. and continue working until they are done pumping, which may be as late as 9:30 p.m. (Tr. 92 and 108). They have a quota of four barges per day (Tr. 99 and 108). They may load five barges (Tr. 100). There is no time clock, rather the superintendent writes them in and out (Tr. 93).

There are numerous hazards that MC 14 employees may encounter. Dredge operation hazards include snapping cables that are used to hold the dredge in place, which, if they snap, can cut a person in half (Tr. 76-77). Other hazards include falling overboard and drowning (Tr. 76-77).

Hazards accompanying the operation of the push boat include falling over board; drowning; crashing into private boats; and crashing barges into the dredge (Tr. 76-77). Operating on windy days can be particularly hazardous because it is difficult to control the barges because the wind pushes them and the push boat cannot direct the barges properly (Tr. 76-77). Because of the amount of private boats, they have to be careful not to run over skiers, or people on inner-tubes (Tr. 91).

Barges can be damaged if they crash into the dredge (Tr. 77). Barges can break and Bowker has seen one flip (Tr. 77). There is a crane on the dredge and there are hazards associated with its operation, including fall hazards (Tr. 82).

**b. MC 17**

The work at MC 17 is land-based. The employee(s) start at 6:00 a.m. (Tr. 112) and work to 4:00 p.m. (Tr. 113). They punch in and out using a time clock (Tr. 95 and 113). They have no quota of material they must collect (Tr. 115).

The hazards at MC are very limited. There are no other people in the man-made hole to be concerned about (Tr. 77). There are no barges, no push boat, etc. and therefore the MC 14-type hazards cannot occur at MC 17. There is no crane at MC 17 (Tr. 82). The MudCat operates with hydraulics and not cables so there is no risk of snapping cables (Tr. 82).

## **7. Supervision**

Josh Ballegeer supervises MC 14 and MC 17. Typically, he is not on the dredge at MC 14, rather he spends most of his time at MC 17 (Tr. 99). Ballegeer does not supervise the day-to-day operations at MC 14, rather the employees will call him if they have an issue (Tr. 100).

### **C. The Bargaining Process**

There is one collective bargaining agreement covering the employees at MC 14 and MC 17 (Jt. Ex. 1). It is effective from May 3, 2010 through May 3, 2015 (Jt. Ex. 1). The 2010 negotiation process was the same as the prior negotiations. The Union's 2010 bargaining team consisted of Marshall Douglas, Union Treasurer, Stephen Russo, and three employees – Jim Cheville, Roger Hampton, and Steve Carlson (Tr. 31). Prior to negotiations, Douglas and Russo met with the employees at the Union's Rock Island Hall to discuss contract issues (Tr. 31). The employees discussed pay and a few language issues (Tr. 32). As in the prior negotiations, the three employees were chosen by the employees at the initial meeting when all the employees met to discuss the contract issues (Tr. 32).

The Company's bargaining team consisted of Guth and Bob Boeye (Tr. 32, and U. Ex. 3, at pp. 1, 3, 4). The Union and RiverStone met on April 23, 2010 to begin negotiations (Tr. 33 and U. Ex. 3, at p. 1). RiverStone made a proposal which included that the term of the contract extend for five years (U. Ex. 3, at p. 2 and Tr. 33). The parties next met on April 28, 2010 (U. Ex. 3, at p. 3 and Tr. 34). The third and final bargaining session was May 17, 2010 (U. Ex. 3, at p. 4 and Tr. 35). The parties reached a tentative agreement on that date and on May 22, 2010, Guth sent the tentative agreement to the Union (Tr. 35, and U. Ex. 3, at pp. 5-6) so that it could be explained to the employees and voted on by the employees (Tr. 35).

The Union scheduled a ratification meeting and invited all of the employees to attend (Tr. 35-36). The meeting was held at the Union's District 8 Hall in Rock Island, Illinois. The

Union's bargaining team explained what occurred during negotiations and explained the tentative agreements to the employees (Tr. 37). Then there was a vote by secret ballot to accept or reject the contract (Tr. 37). Ballots were distributed, the employees voted and then the ballots were counted (Tr. 37, and U. Exs. 4 and 5). The tally from the secret ballot vote was 22 in favor of ratification and 1 against ratification (U. Exs. 4 and 5). Three employees, not Douglas or Russo, counted the ballots (Tr. 37-38 and U. Ex. 5). After the employees ratified the contract, the Union notified RiverStone of the outcome of the ratification vote. The tentative agreement was then incorporated into the collective bargaining agreement and signed by the parties (U. Ex. 1).

The May 22, 2010 ratification vote included that the contract term was five years, May 3, 2010 through May 3, 2015, and included the total financial increase for each year, but did not include the allocation of the financial increases for the fourth and fifth year of the contract because of the uncertainty with the new health care law (Tr. 39, and U. Ex. 3, at p. 5). Douglas and Russo explained this to the employees prior to the ratification vote and further explained that they would meet at some later date to vote on how to divide the increases for years four and five (Tr. 39). If the employees vote down the contract, the Union schedules another negotiation session with the Employer and tries to resolve the issues (Tr. 41-42).<sup>10</sup>

Bowker was at the Union meeting before negotiations started in 2010 (Tr. 67). He was also at the ratification meeting in 2010 (Tr. 68). He understood the ratification process to be a three-year contract with a two year extension for 2013 and 2014 (Tr. 68). Bowker also participated in the 2013 re-ratification of the contract (Tr. 68).

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<sup>10</sup> The normal procedure during a contract ratification is to explain to the employees that if they reject the contract the bargaining team will further discuss the issues with the employees and then notify the employer to explain that the employees rejected the contract and to schedule further negotiations. The parties then would meet and negotiate further and then the Union would schedule another ratification vote with the employees.

Carroll attended the pre-negotiation meeting in 2010, during which Douglas and Russo explained the process and discussed the options (Tr. 85). He also attended the May, 2010 ratification meeting when they agreed to keep the last two years of the contract, 2013 and 2014, open (Tr. 85-86). He also participated in the re-ratification 2013 and 2014 financial allocation (Tr. 86). Carroll thought there was a five year contract and that they would meet after three years to determine if it was still working (Tr. 87).

**D. The Financial Distribution for Years Four and Five of the Collective Bargaining Agreement**

Although the employees had previously ratified the total financial increases for all five years of the contract, they had not decided the distribution for years four and five (Tr. 39 and U. Ex. 3, at p. 5). On March 20 and 21, 2013, Guth and Russo exchanged emails concerning the distribution of the increases (U. Ex. 6, at p. 1). Russo initially explained to Guth that the \$1.20 increase for year four would be split \$.80 for health care and \$.40 as determined by the employees (Tr. 40 and U. Ex. 6, at p. 1). The week following March 21, 2013, Douglas and Russo met with the employees to discuss the distribution for years four and five (Tr. 40). These are the same employees who ratified the contract on May 22, 2010 (Tr. 41). Douglas and Russo discussed the distribution issue with the employees and the employees voted to divide the increase, providing \$.70 for health and welfare and \$.50 for pension for 2013, and \$.75 for health and welfare and \$.50 pension for 2014 (Tr. 41 and U. Ex 6 at pp. 2 and 3 and U. Ex 7). After the employees voted on the distribution, Russo notified Guth of the outcome (Tr. 42, and U. Ex. 6, at pp. 2 and 3).

### III. ARGUMENT

#### A. **The Regional Director Erroneously Determined That There Is One Bargaining Unit. He Should Have Determined That There Are Two Distinctly and Separately Recognized Bargaining Units – Water-Based MC 14 and Land-Based MC 17**

In its Post-Hearing Brief, Local 150 argued that there are two separate and distinct bargaining units. The Regional Director disagreed, determining that “the recognized unit is all employees employed at the Employer’s facility” (Decision at 5). He found that the employees are covered by one collective bargaining agreement. (*Id.*) He found some factual similarities between the two worksites, such as the basic work performed, processing of sand and gravel, is similar; one employee at MC 14 worked at MC 17 when MC 17 became operational; all six employees are supervised by the same superintendent; employees at MC 14 have been required to assist the employees at MC 17; employees at MC 14 assisted employees at MC 17 to start operations this year; all employees operate similar equipment; all employees receive the same rate of pay and the same benefits; and there is one seniority list covering all the employees (Decision at 7).

However, the Regional Director did not consider the numerous facts that distinguish the two groups, making them separate and distinct. As fully discussed above, the Regional Director did not address the facts that MC 14 is completely and fully water-based and MC 17 is not; the primary equipment used is different (MC 14 utilizes a floating dredge and a boat where as MC 17 utilizes land-based equipment such as a front end loader and skid steer); the number of employees at MC 14 is consistently three whereas the number of employees at MC 17 ranges from zero to three; the experience and expertise of the employees at MC 14 is significantly higher than the experience and expertise of the employees at MC 17; there is very limited interchange and contact between and amongst the employees at each site; the Employer has

identified MC 14 and MC 17 as distinct and separate entities (*see* U. Exs. 8 and 9); the product collected is different at each site; there is no functional integration between and amongst the employees at MC 14 and MC 17; and the general working conditions and hazards are different (MC 14 is water-based and MC 17 is land-based). Therefore, by determining that there is only one bargaining unit, the Regional Director made an erroneous finding of fact, which prejudicially affected the Union's right as well as the employees' rights. As a result of the Regional Director's erroneous finding of fact, he departed from officially reported Board precedent.

The general rule is that the bargaining unit in which the decertification election is to be held must be coextensive with the certified or recognized bargaining unit. *Campbell Soup Co.*, 111 NLRB 234 (1955) (emphasis added). A "bargaining unit" is an entity which exists independent of any specific contract. Determination of "an appropriate unit" is a statutory process which precedes collective bargaining under Section 9(a) of the Act. 29 U.S.C. § 159(a). It is this reality of the bargaining relationship, *White-Westinghouse Corp.*, 229 NLRB 667 at 672-673 (1977), that determines the bargaining unit, and therefore requires that the decertification petition include only the land-based MC 17 facility or that the petition be dismissed.

The two facilities have never been recognized as one bargaining unit. The two facilities have always been treated as independent and unrelated. Therefore, the election must take place amongst the employees at MC 17 or it must be dismissed. The water-based MC 14 has been in operation for decades, whereas, the land-based MC 17 has been in operation since the summer/fall, 2009 (U. Ex. 8). There were two employees at MC 17 in the third quarter, 2009, which was reduced to one employee in the fourth quarter, 2009 (U. Ex. 8). There were no employees at MC 17 during the first quarter, 2010, and only one employee during the second

quarter of 2010, and the remainder of 2010 (U. Ex. 8). Therefore, when negotiations occurred in the spring, 2010, those negotiations could not have included the land-based operations at MC 17. The bargaining history is too short to find that the two separate groups are one bargaining unit. Moreover, there is no evidence that the Union has recognized the employees at MC 17 as part of the group at MC 14.

Even if the Employer, itself, thought or recognized the land-based facility as part of or merged with the water-based facility, notwithstanding the fact that the Employer held out each facility as separate and distinct in its reports to MSHA (U. Exs. 8 and 9), that fact does not, in and of itself, make it appropriate to merge the two groups. There is no evidence that the Union or the employees thought or recognized themselves as part of a merged or combined unit. There is no evidence that there was a merger or accretion of the land-based facility with the water-based facility and, therefore, the decertification petition must apply to only the land-based facility. *See, Food Fair Stores*, 204 NLRB 75 (1973) (decertification petition in single store bargaining unit appropriate even though a new store was recognized by the employer as an accretion to the existing bargaining unit).

**B. The Multi-Facility and Community of Interest Factors Require A Finding That The Two Facilities Are Separate and Distinct and Therefore There Are Two Bargaining Units – Water-Based MC 14 and Land-Based MC 17.**

The Petitioner and Employer are improperly attempting to merge two separately and distinctly recognized bargaining units. The multi-facility and community of interest factors are relevant in this decertification petition because a combined group of land-based employees with water-based employees is repugnant to the Act. Although, as a general rule, the Board is reluctant to disturb a unit established by collective bargaining, which the Union disputes occurred here, it will do so if the unit is repugnant to Board policy or so constituted as to

interfere with employee rights guaranteed by the Act. *See, Canal Caring, Inc.*, 339 NLRB 969 (2002); *Ready Mix USA, Inc.*, 340 NLRB 946 (2003); *Red Coats, Inc.*, 328 NLRB 205 (1999); *Washington Post Co.*, 254 NLRB 168 (1981). If the Board would not have certified the bargaining unit, then the Board will utilize the traditional community of interest factors to determine the bargaining unit. *Arrow Uniform Rental*, 300 NLRB 246, 248 (1989-1990). In the instant case, the Board would not have certified a combined unit; the units have not been combined by collective bargaining; and to combine the units or to allow the units to be combined would deprive the employees of their rights guaranteed by the Act.

**1. Two separate bargaining units is the only option - A fleetwide bargaining unit at water-based MC 14 and a separate bargaining unit of land-based employees at MC 17**

The Regional Director did not adequately address the distinction between the water-based facility and the land-based facility. The Board considers a bargaining unit of fleetwide employees appropriate. *Inter-Ocean Steamship Co.*, 107 NLRB 330 (1954); *Keystone Shipping Co.*, 327 NLRB 892 (1999). The Board will also reject a wall-to-wall bargaining unit in favor of a unit of a ship's employees. *See, Florida Casino Cruises*, 322 NLRB 857 (1997). In the instant case we have two groups, one which the Union, Employer, Petitioner, and employees recognize as water-based MC 14. All of the work performed at that facility is literally, on the water – the employees take a boat to get to the facility. They operate on the Mississippi River exclusively and the only contact they have with land is when they start the day getting off the land and onto the push boat and when they end the day when they get into the push boat to go to land to go home.

Additionally, the Union, Employer, Petitioner, and employees recognize MC 17 as land-based. Those employees operate the land equipment such as end loaders and skid steers, and operate the land-based plant. The MudCat is connected to the land-based plant by a tube that

conveys the material to the land-based plant. MC 14 is exclusively and entirely on the water, whereas the majority of the work at MC 17 is on land. In fact in more years than not, the MudCat at MC 17 was not operating and the single employee, Bowker, operated the loader to load material on trucks. Therefore, combining the units is inappropriate and the only option is to have two bargaining units – one for the water-based MC 14 and one for the land-based MC 17. Additionally, as discussed more fully below, very few of the multi-facility or community of interest factors favor combining the two units. This further establishes that it would be repugnant to the Act to combine these two bargaining units. Therefore, the Decision should be reversed and the petition should be dismissed, or alternatively, the election should be set covering the employees in the bargaining unit of the land-based facility.

**2. The multi-site and community of interest factors favor two separate bargaining units**

The Regional Director did not adequately address the community of interest factors and had he done so, he would have determined that one bargaining unit consisting of the employees at both facilities is repugnant to the Act. The Board considers various factors when assessing the appropriateness of a proposed unit. Many of the multi-site and community of interest factors are common. Those combined factors include: (a) the extent to which the requested smaller unit represents a distinct and identifiable employee grouping; (b) geographic proximity of the various sites; (c) interchange of employees among the sites; (d) similarity in employees' skills, duties and working conditions; (e) functional integration of the employer's operations; (f) centralized control of management and supervision; (g) extent of union organization; (h) desires of affected employees; (i) history of collective bargaining; and (j) general working conditions. *See, NLRB v. Aaron's Office Furniture Co.*, 825 F.2d 1167, 1169 (7th Cir. 1987); *Dezcon, Inc.*, 295 NLRB 109, 111 (1989); *Kapok Tree Inn*, 232 NLRB 702, 703-704 (1977); *NLRB v. Carson Cable TV*,

795 F.2d 879, 884-885 (9th Cir. 1986); *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570, 575-577 (1st Cir. 1983); *Allied Gear & Machine Co.*, 250 NLRB 679 (1980). No single factor alone is determinative. *NLRB v. Chicago Health and Tennis Clubs*, 567 F.2d 331, 335 (7th Cir. 1977). Additionally, the manner in which an employer has organized its plant and utilized its labor force is an important factor in the unit determination. *International Paper Co.*, 96 NLRB 295, 298 fn. 7 (1951). In weighing these factors, the ultimate determination to be made is whether the employees in a proposed unit share a requisite “community of interest.” *Friendly Ice Cream Corp. v. NLRB* at 575-576; *Kapok Tree Inn* at 703-704.

**a. Each Worksite is a Distinct and Identifiable Employee Grouping**

As discussed throughout this brief MC 14 and MC 17 are almost completely independent of each other. The only interchange is when MC 14 employees go to MC 17 because the Employer knows the job will be performed correctly, and those occasions are rare. The MC 14 and MC 17 employees do not take breaks together or share the same facilities. The MC 14 operations are consistently staffed by three employees whereas the MC 17 operation is staffed by one or two and at times does not operate at all. The two sites utilize completely different equipment, produce different materials and collect and move the materials in different ways. The employees at MC 14 have more experience and are more highly trained.

**b. Geographic Proximity of the Two Sites**

Local 150 has demonstrated that although the sites are relatively close to one another, the distance between the sites is irrelevant because there is very little interchange amongst employees, and there is no functional integration between and amongst the sites.

**c. There is Very Little Employee Interchange Between the Sites**

The evidence demonstrates that there is very limited interchange between and amongst employees at the two sites. The interchange is limited to the MC 14 employees starting up the operations for MC 17 this year and the occasional assistance to repair certain equipment at MC 17 and this is so because the MC 17 employees do not have the skills and abilities to perform certain tasks. 2014 was the only year in which MC 14 started the operations at MC 17 and there is no evidence that will ever occur again. Moreover, the MC 14 employees had to complete their work at MC 14 before going to MC 17 to start the operations. On the other rare occasions, in which the MC 14 employees are sent to MC 17, they are sent there to “help” them which is sporadic, i.e. possibly once a month and of limited duration - 3-4 hours for one day. When Bowker worked at MC 17 and was not working because he was on lay off, he was not allowed to work at MC 14 even when MC 14 was short-handed because a MC 14 employee was on vacation, for example. Additionally, other RiverStone employees from other locations, not MC 14, occasionally work at MC 17, but combining those employees with the MC 17 bargaining unit has already been determined to be inappropriate.

**d. The Employees at the Sites Have Differing Skills, Duties, and Working Conditions**

As demonstrated in greater detail in the Facts section of this Brief, the employees at the two sites have completely different skills and abilities. Guth admits that the MC 14 employees have more experience and greater expertise. The equipment at each site is different requiring different skills. Although the MC 14 employees are capable of operating the equipment at MC 17, the MC 17 employees cannot operate the equipment at MC 14 and never work at MC 14. The titles of the employees at each site are different – MC 14 has a dredge operator, plant

operator, and push boat operator, whereas MC 17 has a loader operator and at times a plant operator.

**e. The Worksites are Not Functionally Integrated**

As discussed above, each site operates independently of the other. MC 14 is on the water and produces only two products. Those two products are taken by barge to LeClaire, Bettendorf, or Moline and are never taken to MC 17. MC 17, on the other hand, produces four products because it is a land-based operation, and therefore can store piles of as many different types of material as RiverStone desires. Those materials are sold to customers and are never transported to MC 14 or taken to LeClaire, Bettendorf, or Moline. Neither site depends on the other.

**f. Common Supervision**

Although Ballegeer, the petitioner in the first RiverStone/Local 150 decertification, and the newly promoted superintendent oversees MC 14 and MC 17, he spends the overwhelming majority of his time at MC 17. He shows up at MC 14 to take attendance and when the MC 14 employees call him to let him know that there is a problem. Other than those occasions, the MC 14 employees are self-sufficient.

**g. Extent of Union Organization**

In the prior decertification petition, Case No. 25-RD-105145, the Union took the position that it represented the employees at all of the sites and treated them as one bargaining unit since at least the 1960s. In Case No. 25-RD-105145, the Regional Director found that each facility was separate and distinct from one another and that each facility constituted a separate and distinct bargaining unit. The Union filed a Request For Review, but the Board denied the Union's Request For Review. Consistent with this reasoning, there should be a determination that the water-based MC 14 facility and the land-based MC 17 facility are separate and distinct bargaining units.

**h. Desires of Affected Employees**

Although the Union believes this factor is relevant, the Hearing Officer did not allow the Union to question the witnesses concerning their desires.

**i. History of Collective Bargaining**

As discussed in the Fact section above, there is no history of collective bargaining concerning MC 17, because it became operational at the end of 2009/beginning of 2010, just as the current contract was being negotiated. Prior to the current collective bargaining agreement, there is no history suggesting that the two units should be combined.

**j. General Working Conditions**

As stated in the Fact section above, the general working conditions of the two groups is completely different. First and foremost, MC 14 is completely on the Mississippi River, whereas MC 17 is not, rather it is land-based. Other factors distinguishing the two groups include: start and ending times are different; MC 14 has quotas and MC 17 does not; the equipment used at each facility is different; the product collected is different; where the products go is different; the level of supervision is different (Ballegeer is infrequently at MC 14 and is regularly at MC 17); the skills and abilities of the employees at MC 14 is much higher than those of the employees at MC 17; and the hazards working at MC 14 are substantially greater than the hazards at MC 17, just to name a few differences.

Weighing all of these factors, leads to one conclusion, i.e. combining the two groups is inappropriate. The Board would have never certified these two groups as one bargaining unit, and therefore the Decision should be reversed and the petition should be dismissed, or alternatively, the election should be amongst the employees at the land-based facility.

**C. The Appropriate Election Bar Is Five Years Where The Employer And The Union Agree Upon, And The Employees Vote To Ratify, A Five Year Contract.**

In its Post-Hearing Brief, Local 150 argued that the Board should revisit its three-year contract bar rule and dismiss the decertification petition because the parties negotiated a five-year contract which was ratified by the membership (Brief of Local 150 at 22-25). The Regional Director rejected this argument, pointing out that he “clearly has no authority to overrule or ignore what is clear Board precedent and policy” (Decision at 8). Because the contract bar applies only for the first three years of a collective bargaining agreement under *General Cable Corp.*, 139 NLRB 1123 (1962), the Regional Director found no contract bar in this case (Decision at 8). For the reasons that follow, Local 150 respectfully requests that the Board reexamine the contract bar rule and extend the bar in situations where, as here, the parties negotiate, and bargaining unit employees by secret ballot vote and ratify a collective bargaining agreement of greater than three years and particularly in this case where the bargaining unit employees in effect re-ratified the five-year agreement during its original term.<sup>11</sup>

As stated in J.E. Higgins, Jr., *The Developing Labor Law* at 609 (Bloomberg BNA, 6th Ed. 2012);

In an effort to stabilize the employer-union relationship, the Board has established the *contract-bar* doctrine whereby a current and valid collective bargaining agreement will ordinarily prevent the holding of an election. Although now recognized by implication in Section 8(b)(7), the doctrine is discretionary and not statutorily mandated. The formulation, application, and modification of the Board’s contract-bar rules are committed to the Board’s judgment and are not subject to ordinary judicial review.

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<sup>11</sup> The Regional Director also took administrative notice that in Case No. 25-RD-105145 and Case No. 25-RD-131754, the Union raised the same argument regarding the extension of a contract bar rule and in that case no contract bar was found and the Board denied the Union’s request for review of that Decision and Direction of Election because the Union raised no substantial issues warranting review (Decision at 8, fn. 7). Despite this fact, the Union believes the policy should be changed, and furthermore, record evidence from the employees working under the collective bargaining agreement thought they were protected for five years, not three.

“This rule was formulated by the Board in an effort to reconcile the NLRA’s goals of promoting industrial stability and employee freedom of choice.” *NLRB v. Dominick’s Finer Foods*, 28 F.3d 678, 683 (7th Cir. 1994). Therefore, the Board has “substantial discretion in deciding whether to apply the rule in a particular case and in formulating the contours of the rule.” *Id.*

The Board adopted the current three year contract-bar rule in *General Cable Corp.*, 139 NLRB at 1125. Despite support from “the overwhelming majority of labor and management representatives” in support of a longer bar period, the Board explained that, “Stability of industrial relations would in our judgment be so heavily weighted against employee freedom of choice as to create an inequitable imbalance.” A few years later, in *General Dynamics Corp.*, 175 NLRB 1022, 1023-1024 (1969), the Board again rejected an employer argument that the three year rule should be enlarged to five years for the reason articulated in *General Cable*.

The Board recently reviewed the balance between employee free choice and labor relations stability in *Lamons Gasket Company*, 357 NLRB No. 72 (2011). There, the Board overruled its decision and the procedures for challenging voluntary recognition agreements established in *Dana Corp.*, 351 NLRB 434 (2007). The Board explained that, “The modifications have proved unnecessary to protect free choice and thus unnecessarily undermine the Act’s purpose of encouraging collective bargaining with employees’ freely chosen representative.” *Lamons Gasket*, 357 NLRB No. 72 at 9. The Board’s three year contract-bar rule similarly creates an inequitable balance against stable collective bargaining relationships in favor of a misguided concept of employee free choice.

The Board has recognized the significance of membership ratification in formulating its contract-bar rule. *See, Appalachian Shale Products, Co.*, 121 NLRB 1160, 1162 (1958) (discussing the “general rule” that where membership ratification is made a condition precedent

to contract validity, the failure to achieve timely ratification of the contract will remove it as a bar). If the failure to ratify an agreement can eliminate the three year contract bar, then an employee vote on a contract of greater than three years should extend the contract bar. This protects the employees who by a majority vote opt for the stability and certainty of an extended agreement, as well as the Employer and Union, from a mid-term disruption of their contract.

In this case, the parties have a history of negotiating five-year collective bargaining agreements. It is uncontested that regardless of the scope of the bargaining unit, the parties' current agreement is effective for five years, from May 3, 2010 through May 3, 2015 (Jt. Ex. 1). This five year term is consistent with the agreements between the parties covering the Illinois quarries since at least 2000. Every time the members of the bargaining unit as a group voted to ratify these agreements, they did so knowing that it provided for this five year duration (U. Ex. 3 at p. 5). In fact the employees ratified the contract thinking they were receiving the benefit, security, and stability of a five year contract (Tr. 68 and 87). The tally from the secret ballot ratification vote was 22 in favor of ratification and 1 against ratification (U. Exs. 4 and 5). This informed vote fully satisfies the Board's free-choice policy. The unit employees know that, for good or ill, regardless of future changes in economic circumstances, they are approving an agreement for five years. The Union, the Employer and the employees are entitled to rely on this five year deal. Furthermore, in March, 2013, a majority of the Cordova employees freely ratified the financial distribution for years four and five of the contract (U. Ex. 7). These are the same employees that initially ratified the agreement. At no time did the employees express concern regarding the length of the contract. In essence, the same employees freely reaffirmed or re-ratified the five-year agreement. This reaffirmation or re-ratification is no different than had the parties negotiated and the members ratified a three-year agreement and then negotiated and

ratified a two-year agreement. Therefore, the contract bar should extend the additional two years.

Furthermore, application of the three year bar to this situation permits a small group of dissenters to disrupt this stable bargaining relationship. It is essential to recognize that under the National Labor Policy, employee free choice rests upon traditional American principles of majority rule. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (“The majority rule concept is today unquestionably at the center of our federal labor policy.”); *Dick’s Sporting Goods*, General Counsel Advice Memorandum Case No. 6-CA-34821 (2006) at 18, (“The essence of industrial democracy, as contemplated and enforced by the Act, is fundamentally based on majoritarian principles.”). An extended contract bar thereby “effectuates rather than impedes employee free choice,” *Lamons Gasket*, 357, NLRB No. 72 at 10, where a majority of the unit employees have voted to ratify a contract greater than three years duration. Overreliance on an ambiguous concept of employee free choice to allow the minority to undermine the position of the majority and the Union’s relationship with the Employer is not warranted by the policies of the Act. This is particularly important in the instant case because the three employees from MC 14 have less than one and one half years of seniority (Petitioner hired July 29, 2013; Barajas hired August 25, 2014; and Griffin hired September 9, 2014). Barajas and Griffin were probationary employees when the petition was filed (*see* Jt. Ex. 1 at Art. 7, Sec. 3 at p. 10, probationary period is 90 calendar days, and petition filed on October 14, 2014). Conversely, the MC 14 employees have worked there since 2010 (Carroll hired May 18, 2009; Fuller hired May 16, 2008; and DeCock hired October 5, 2004). Thus, newly hired, inexperienced employees who were not members of the bargaining unit when the initial ratification occurred or when the re-ratification occurred can manipulate and reverse the vote taken by the more senior employees. In

effect, the Employer combined two separate units and then flooded it with employees in an effort to manipulate the Board's policies.

Finally, adopting a contract bar rule which conforms to the collective bargain of the parties and approved by the employees affected is consistent with the National Labor Policy of voluntary, private ordering of labor relations. *Lamons Gasket*, 357 NLRB No. 72 at 8, relying on *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) (object of the Act not to allow government regulation of terms and conditions of employment, rather to insure that employers and their employees could work together to establish mutually satisfactory conditions). Contract bars consistent with the voluntary agreements of the parties "more likely advance the statutory purpose of preventing 'industrial strife or unrest' and 'encouraging the practice and procedure of collective bargaining.'" *Lamons Gasket*, 357 NLRB No. 72 at 8. The Board should modify its contract bar rule to advance better the policies of the Act, and dismiss the petition here.

#### **IV. CONCLUSION**

For all the above-stated reasons, Local 150 respectfully requests that the Board extend the contract bar to five years and dismiss the petition in this matter. Local 150 also respectfully requests that the petition be dismissed because there are two bargaining units, not one, or alternatively, the Board should direct an election amongst the land-based employees at MC 14 only. Local 150 also requests oral argument.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned, an attorney, hereby certifies that he e-filed the foregoing with the Executive Secretary via the National Labor Relations Board's website on December 11, 2014 and served copies on the following individuals via email:

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