

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

PULAU Corporation,

Employer

and

Case 31-RC-153856

**TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN, INDUSTRIAL AND
ALLIED WORKERS OF AMERICA,
LOCAL 166, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,**

Petitioner

**PULAU CORPORATION’S REQUEST FOR REVIEW OF THE REGIONAL
DIRECTOR’S DECISION AND CERTIFICATION OF REPRESENTATIVE**

Pursuant to Section 102.67 of the National Labor Relations Board’s Rules & Regulations, 29 C.F.R. 102.67, PULAU Corporation (“Pulau” or the “Company”), by and through undersigned counsel, respectfully submits its Request for Review of the Regional Director’s Decision and Certification of Representative in the above captioned matter, which is supported by the following memorandum:

INTRODUCTION

Pulau, a Florida Corporation headquartered in Orlando, Florida, provides a full range of services in the areas of training, logistics and supply chain management, supporting virtual medical solutions, government solutions and global missions within U.S. Military installations around the world. Pulau’s operations at issue in the instant matter are located at the U.S. Army’s National Training Center in Fort Irwin, California.

On June 9, 2015, Local 166 of the Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, International Brotherhood of Teamsters (“the Union”), filed a petition for election seeking to represent a unit of all Stock Clerks, Supply Technicians, and

Electronics Technicians I and II employed by Pulau at Building 822, MILES Warehouse, in Ft. Irwin. The National Labor Relations Board (“NLRB” or “the Board”) conducted the election on June 26, 2015, which resulted in a tally of 10 ballots cast in favor of the Union, and 2 ballots cast against representation.

The Union’s petition was processed in accordance with the procedures set forth by the Board in its new election rule, entitled “Representation – Case Procedures; Final Rule,” 29 C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74308, 74439 (“the Final Rule”), which became effective April 14, 2015. The Final Rule is intended to “remove unnecessary barriers to the fair and expeditious resolution of representation cases, simplify representation-case procedures, codify best practices, and make them more transparent and uniform across regions.” *See NLRB Guidance Memorandum on Representation Case Procedure Changes*, Memorandum GC 15-06 (April 6, 2015). According to the Board, the Final Rule provides “targeted solutions to discrete, specifically identified problems to enable the Board to better fulfill its duty to protect employees’ rights by fairly, efficiently, and expeditiously resolving questions of representation.” *Id.*

The reality, however, is that the Final Rule enacted comprehensive modifications to the Board election process. Viewed as a whole, those modifications severely abbreviate the pre-election period, burden employers with new and onerous administrative tasks upon pain of waiver, and all but eliminate formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit. Specifically, the Final Rule incorporates the following modifications:

- a. The Final Rule requires employers to post a notice of election within 2 business days after service of the notice of hearing and prior to any determination by the Board that the petition has sufficient merit to justify an election. *See* 29 C.F.R. §102.63(a).

- b. The Final Rule abbreviates the time between the filing of the union petition and the first day of a hearing, except in limited cases shown to be sufficiently “complex” to warrant delay for a limited additional time period or under undefined “special circumstances” and/or “extraordinary circumstances.” *See* 29 C.F.R. §102.63(a).
- c. The Final Rule requires employers, during the critical initial days following the filing of a petition for election, to prepare and file a burdensome written “statement of position” addressing, *inter alia*, the basis for any employer contention that the petitioned-for unit is inappropriate, the basis for any employer contention for excluding individual employees from the petitioned-for unit, and the basis for all other issues the employer intends to raise at the hearing, upon risk of waiving employers’ legal rights to contest any omitted issues at the hearing. *See* 29 C.F.R. §§102.63(b); 102.66(d).
- d. The Final Rule requires employers to prepare and include with the statement of position a list of all employees in the petitioned-for unit, including their work location, shifts, and job classifications, as well as a second list (together with the above described additional information) of all individuals in any alternative unit contended for by the employer; and a third list (together with the above described additional information) of all individuals who the employer contends should be excluded from the petitioned-for unit. *See* 29 C.F.R. §102.63(b).
- e. The Final Rule contemplates that the pre-election hearing required under Section 9(c) of the Act be conducted solely “to determine if a question of representation exists,” and provides that “disputes concerning individuals’ eligibility to vote or inclusion in an appropriate unit,” which have traditionally been deemed necessary and appropriate issues for pre-election consideration, “ordinarily need not be litigated or resolved before an election is conducted.” *See* 29 C.F.R. §102.64(a).
- f. Relatedly, the Final Rule limits the parties’ right to introduce evidence at the Section 9(c) hearing solely to that which is “relevant to the existence of a question of representation.” *See* 29 C.F.R. §102.66(a).
- g. The Final Rule requires parties to prepare and present “offers of proof” at the outset of the Section 9(c) hearing, and authorizes Regional Directors to bar the parties from entering evidence into the record if such offers of proof are deemed to be insufficient to sustain the proponent’s position. *See* 29 C.F.R. §102.66(c). Employers are further precluded from introducing evidence into the record on issues that were not previously addressed in the newly-required statement of position. *Id.*
- h. The Final Rule precludes employers from presenting post-hearing briefs and from reviewing a record transcript prior to stating their post-hearing positions, except upon special permission from, and addressing only subjects permitted by, the Regional Director. *See* 29 C.F.R. §102.66(h).

- i. The Final Rule requires employers to disclose to unions unprecedented personal and private information pertaining to employees, including home phone numbers and personal email addresses. *See* 29 C.F.R. §102.67(1). The Rule drastically shortens the time in which such information must be prepared and provided by employers and requires such personal disclosures even as to employees whose eligibility to vote has been contested and not yet determined.

The practical impact of these modifications is to effectively eliminate any meaningful opportunity for an employer to lawfully communicate with its employees concerning campaign issues during the pre-election timeframe the Board has traditionally referred to as the “critical period” – “a period during which the representation choice is imminent and speech bearing on that choice takes on heightened importance.” *See* 79 Fed. Reg. at 74,439-40 & n.591 (Dec. 15, 2015)(dissent) (citing *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962); *E.L.C. Elec., Inc.*, 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc.*, 710 F.3d 308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir. 2012); *NLRB v. Curwood Inc.*, 397 F.3d 548, 553 (7th Cir. 2005)). Such a result is not only contrary to the spirit and intent of the National Labor Relations Act (“the Act” or “NLRA”), but threatens the express rights granted to both employers and employees by the Act.

The harms implicated by the Board’s adoption of the Final Rule were on full display in the instant proceeding, and resulted in the violation of fundamental rights guaranteed to both Pulau and its employees in two significant ways. First, by improperly truncating the campaign period of informed debate prior to the election, the Final Rule severely restricted Pulau’s rights under Section 8(c) of the Act. Second, the application of the Final Rule interfered with the full exercise of the rights guaranteed Pulau’s employees under section 7 of the Act by severely limiting their access to information concerning the consequences of representation before the election took place. For these reasons, the Company submits that the application of the Final

Rule materially affected the outcome of the instant election. The Regional Director's failure to adequately address these issues provides compelling reasons for the Board to grant review of the Decision and Certification of Representative for the purpose of reconsidering the application of the Final Rule in the instant proceedings.

RELEVANT FACTS AND PROCEDURAL HISTORY

On June 9, 2015, the Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters ("the Union"), filed a petition for election seeking to represent a unit of all Stock Clerks, Supply Technicians, and Electronics Technicians I and II employed by Pulau at Building 822, MILES Warehouse, in Ft. Irwin. The Union's petition was processed according to the procedures set forth in the Final Rule.

On June 10, 2015, the Board issued its Notice of Representation Hearing, directing that a hearing would be conducted on Thursday, June 18, 2015, and on consecutive days thereafter until concluded, at its offices in Los Angeles, California. Pulau was directed to post the Board-approved Notice of Petition for Election by Friday, June 12, 2015, and complied with the Board's directive. Pulau was also required to complete and file a statement of position, including all required attachments, and did so in compliance with the Final Rule on June 17, 2015, in anticipation of the hearing. In support of its position statement, and for the reasons articulated by the Plaintiffs in *Chamber of Commerce of the United States v. NLRB*, 1:15-cv-00009 (D. D.C. 2015), *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D. Tex. 2015), and *Baker DC, LLC v. NLRB*, 1:15-cv-00571 (D. D.C. 2015), Pulau objected to the application of the Final Rule to the instant election proceeding. Among other objections, Pulau maintained that the Final Rule was contrary to the National Labor Relations

Act, was arbitrary and capricious under the Administrative Procedure Act, and unconstitutionally compels employer speech in violation of the First Amendment.

On June 18, 2015, prior to the scheduled hearing, Pulau and the Union entered into a stipulated record which formed the basis of the Decision and Direction of Election entered on June 19, 2015 by the Regional Director. As it had in its prior position statement, Pulau generally objected to the lawfulness of the Final Rule and to its application to the instant election process. The Regional Director, however, declined to allow Pulau's objections to the Final Rule to be litigated. As a result, and without waiving its objections, Pulau entered a factual stipulation that formed the basis of the stipulated record.

The Board conducted the election, just eight days later, on June 26, 2015. The tally of the ballots following the election revealed that 10 ballots were cast in favor of the Union, and 2 ballots were cast against representation.

Pulau timely filed its Objections to the Results of the Election, along with an accompanying Offer of Proof, reiterating its general objections to the lawfulness of the Final Rule. Pulau also asserted that application of the Final Rule in the instant election proceeding materially prejudiced the Company and affected the outcome of the election by, *inter alia*: (1) compelling an election timeframe that interfered with Pulau's rights under Section 8(c) of the National Labor Relations Act, since Company officials did not have an adequate opportunity to exercise the Company's right to free speech in the compressed timeframe imposed by the Final Rule; and (2) prejudicing the Section 7 rights of the bargaining unit employees who were not exposed to a full and fair debate on the relative merits of unionization prior to the election.

On July 9, 2015, the Regional Director issued the Decision and Certification of Representative in the instant matter. The Regional Director found that Pulau's general

objections to the lawfulness of the Final Rule, including those articulated in the above-referenced United States federal district court cases, were fully addressed by the Board's justification for the Final Rule, 79 Fed. Reg. 74,308 (Dec. 15, 2014), and noted that the only federal district court decision addressing the issues to that point had upheld the Final Rule. *See Associated Builders & Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D. Tex. June 1, 2015). Further, with respect to Pulau's specific objection to the Final Rule's violation of its Section 8(c) rights, the Regional Director noted, in sum, that: (1) by its terms, Section 8(c) only applies to unfair labor practice proceedings and has no application to the election process; (2) the Final Rule contains no restriction on the employer's right to campaign or engage in other speech prior to the election; and (3) an employer remains free under the Final Rule to express its views on unionization both before and after a petition for election is filed. Finally, the Regional Director found that, since the Final Rule does not violate Pulau's Section 8(c) rights, and accords with the statutory policy in favor of free debate, it poses no prejudice to employees' Section 7 rights.

STANDARD OF REVIEW

Section 102.67(c) of the National Labor Relations Board's Rules & Regulations authorizes the Board to grant a request for review of a Regional Director's decision "where compelling reasons exist therefor." *See* 29 C.F.R. 102.67. Accordingly, a request for review may be granted if: (1) a substantial question of law or policy is raised because of: (i) the absence of, or (ii) a departure from, officially reported Board precedent; (2) the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party; (3) the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; or (4) compelling reasons exist for reconsideration of an important Board rule or policy.

ARGUMENT

Board review of the Regional Director's Decision and Certification of Representative is justified in the instant matter as a result of the Regional Director's failure to adequately consider the legal and practical ramifications resulting from the application of the Final Rule in the instant election proceedings. First, by improperly truncating the campaign period of informed debate prior to the election, the Final Rule severely restricted Pulau's rights under Section 8(c) of the Act. Throughout the course of these proceedings, Pulau has maintained objections to the application of the Final Rule on this basis. In addressing Pulau's objections, however, the Regional Director improperly limited the application of Section 8(c)'s protections in direct contravention of Supreme Court precedent, and failed to consider significant practical ramifications resulting from the application of the Final Rule which cannot be reconciled with the spirit and purpose of Section 8(c). Furthermore, the Regional Director failed to adequately address Pulau's position that the application of the Final Rule interfered with the full exercise of the rights guaranteed Pulau's employees under Section 7, relying instead on his flawed Section 8(c) analysis as the sole basis for rejecting Pulau's objections. Contrary to the Regional Director's findings, and for the reasons set forth more fully below, the application of the Final Rule to this election proceeding has resulted in a violation of fundamental rights guaranteed by the Act. These prejudicial errors provide compelling reasons for the Board to reconsider application of the Final Rule in this matter.

A. The Final Rule Severely Hindered Pulau's Ability and Opportunity to Respond to the Union's Organizing Campaign in Violation of Section 8(c).

Section 8(c) of the Act provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of

reprisal or force or promise of benefit.” Consistent with Section 8(c), “an employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The Final Rule, however, infringes upon an employer’s Section 8(c) rights in several respects for which the Regional Director failed to account.

1. The Regional Director Failed to Consider Existing Legal Precedent That Dictates Section 8(c)’s Application to All Facets of Labor Relations.

First, the Regional Director’s finding that Section 8(c) only applies to unfair labor practice proceedings and has no application to the instant election process, is inconsistent with existing legal precedent. Although Section 8(c) makes specific reference to whether speech can constitute or be evidence of an “unfair labor practice,” – a point expressly noted by the Regional Director’s analysis of the Company’s objections - the provision articulates standards that have been applied to employer speech in a more general context. *See, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969) (“[A]n employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board”). Indeed, the United States Supreme Court has recognized that Section 8(c) reflects a “policy judgment, *which suffuses the NLRA as a whole*, as favoring uninhibited, robust, and wide-open debate in labor disputes.” *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68, 128 S. Ct. 2408, 171 L. Ed. 2d 264 (2008) (internal quotation omitted)(emphasis added). Thus, contrary to the Regional Director’s findings, Section 8(c) not only protects an employer’s use of nonthreatening and noncoercive speech in the context of unfair labor practice proceedings, but extends generally to all aspects of labor relations, and

“manifests a congressional intent to encourage free debate on issues dividing labor and management.” *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966).

2. The Regional Director Failed to Consider the Practical Ramifications Resulting from the Final Rule’s Application to the Instant Election, Which Violate the Section 8(c) Policy of Encouraging Uninhibited Debate.

In analyzing the Company’s objections, the Regional Director failed to account for the practical restrictions the Final Rule imposes on an employer’s ability to campaign or engage in other lawful speech prior to the election. The Regional Director correctly noted that the Final Rule contains no express limitations on employer speech, and, on its face, does not limit an employer’s ability to campaign during the now-abbreviated critical period. But, by drastically truncating the critical period between the filing of the petition for election and the election itself, the Final Rule effectively deprives the employer of adequate time to present its views in a meaningful manner to its employees. Such a result is inconsistent with the policies reflected in Section 8(c) favoring uninhibited, robust, and wide-open debate.

This is particularly true given the Final Rule’s imposition of additional and unilateral obligations on the employer, including: (1) the compelled posting of an election notice within 2 business days after service of the notice of hearing; (2) the expectation that the hearing is to be opened within 8 days after the service of the notice of hearing; (3) the requirement that employers prepare and file a comprehensive position statement addressing the issues they wish to litigate at the hearing, among other information, upon risk of waiving their legal rights to contest any issue not presented in the statement; (4) the requirement that the parties prepare and present written “offers of proof” in support of their position at the hearing; and (5) the requirement that employers prepare and provide to the labor organization “a list of full names, work locations, shifts, job classifications, and contact information (including home addresses,

available personal email addresses, and available home and personal cellular ('cell') telephone numbers) of all eligible voters.” These obligations, all of which must be satisfied during a now-truncated critical period, preoccupy and avert employers from the exercise of their lawful rights under Section 8(c), and, when viewed as a whole, render employers unable to effectively respond to a union organizing campaign.

The restrictions imposed by the Final Rule materially prejudiced Pulau in several respects. While Pulau operates internationally, with business operations located within U.S. Military installations around the world, the union organizing efforts in the instant matter were confined to the Company’s operations in Ft. Irwin, California. There is no significant Pulau management presence at the Ft. Irwin operation. As a result, the Company had no knowledge of any union organizing activity at its Ft. Irwin operations prior to the Union’s petition. Pulau’s Vice President of Human Resources, Amy Gausz, who was responsible for responding on the Company’s behalf to matters involving labor relations, is based in Pulau’s Corporate Office located in Orlando, Florida. As a result of the application of the Final Rule to the instant election proceeding, the “critical period” between the filing of the petition and the conduct of the election totaled a mere 17 days. But, as a result of the late notice received by the Company, the preparation for the anticipated Section 9(c) hearing and completion of the new and onerous administrative tasks imposed by the Final Rule, various scheduling conflicts, and travel, Ms. Gausz was only able to be on-site to engage the employees at the Ft. Irwin operation for a total of 5 days prior to the election (June 18, 19, 22 – 25). Under no circumstances could such a limited period of time provide a meaningful opportunity for the Company, and the affected employees, to fully explore, understand, and address the issues fueling the election campaign. The practical

result is that the employees were privy to a one-sided campaign that ended with a resounding victory for the Union at the election.

3. Pre-election Speech, Which the Regional Director Maintains Preserves Pulau's Section 8(c) Rights, Is No Substitute for the Company's Post-Petition Campaign, and the Final Rule's Emphasis on Such Preemptive Efforts Improperly Compels Employer Speech.

The Regional Director failed to consider these obvious and practical disadvantages in his Decision and Certification of Representative, choosing instead to rely on an employer's pre-petition opportunity to communicate to its employees concerning its position on unionization as proof that an employer's Section 8(c) rights are preserved despite the restrictions imposed by the Final Rule. According to the Regional Director, the Final Rule does not violate Section 8(c) because an employer remains free to express its views on unionization before a petition for election is filed. This observation, however, completely misses the mark.

The time between the filing of a petition and the conduct of the election has long been referenced as the "critical period" for a reason. As noted in the dissent to the Final Rule, the critical period is the point in time in during which "the representation choice is imminent and speech bearing on that choice takes on heightened importance." *See* 79 Fed. Reg. at 74,439-40 & n.591 (Dec. 15, 2015)(dissent) (citing *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962); *E.L.C. Elec., Inc.*, 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc.*, 710 F.3d 308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir; 2012); *NLRB v. Curwood Inc.*, 397 F.3d 548, 553 (7th Cir. 2005)). For this reason alone, an employer's ability to make general, pre-petition statements concerning its position on unionization, based on general observations at a time when no organizing efforts are taking place, is no substitute for post-petition speech. The benefit of the critical period is that it permits an employer to identify and understand the issues fueling the organizing effort and address them

in a specific manner during the campaign, while at the same time lawfully educating its workforce on the lawful changes that would necessarily take place in the event of unionization, such as the collective bargaining process and the impact it might have on their terms and conditions of employment. The artificially abbreviated critical period imposed by the Final Rule's modifications severely and unreasonably restricts the employer's ability to respond to union campaign efforts or to provide a lawful, management-sided perspective on the changes that could result from representation.

Further, while the Regional Director maintains that an employer's ability to express its views on unionization before a petition for election is filed aids in preserving an employer's Section 8(c) rights and does not run afoul of the First Amendment, quite the opposite is true. In reality, the truncated critical period contemplated by the Final Rule, and the administrative obligations imposed upon the employer during that time, effectively *compel* an employer to address the issue of unionization *prior* to the filing of a petition – and quite possibly prior to the onset of any organizing efforts - for fear that it will not have adequate opportunity to do so once a petition is filed. The danger inherent in such compelled speech is obvious. While there undoubtedly are circumstances where preemptive, pre-petition discussions with employees will serve to further an employer's position with respect to unionization, it is also conceivable that, by addressing the issue of unionization prior to the filing of a petition, and at a time when organizing efforts may not yet have occurred, an employer will scatter a seed it does not intend to sow. Employers were not forced to make that choice prior to the implementation of the Final Rule. The First Amendment, which protects “both the right to speak freely and the right to refrain from speaking at all,” *see Wooley v. Maynard*, 430 U.S. 705, 714 (1977), preserves the employer's right to decide when and how to address the issue of unionization with its employees,

or to refrain from doing so at all. The Regional Director's heightened emphasis on pre-election speech fails to account for the interference with those rights posed by the Final Rule.

B. The Final Rule Also Hinders Employees in the Full Exercise of the Rights Guaranteed Them Under Section 7 of the Act.

For the reasons set forth above, the Final Rule severely restricts an employer's rights under Section 8(c) by eliminating any meaningful opportunity to lawfully communicate with employees concerning the issues raised by a union campaign during the pre-election timeframe. These Section 8(c) violations necessarily result in the frustration of the rights of those employees participating in the election. Indeed, as Board Members Miscimarra and Johnson noted in their dissent to the Final Rule: "[T]he inescapable impression created by the Final Rule's overriding emphasis on speed is to *require employees to vote as quickly as possible* – at the time determined exclusively by the petitioning union – *at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues.*" 79 Fed. Reg. 74,460 (emphasis added).

The harm identified in the dissent's analysis of the Final Rule's emphasis on a truncated critical period is precisely the harm that occurred here. Pulau's employees were subjected to a one-sided campaign necessarily initiated by the Union in advance of the petition. The Board's election process permits the Union to act upon its leisure in disseminating information to employees in support of its organizing efforts, and to file its petition at a time when it is confident it has secured sufficient support to prevail in the election. The prior election processes provided an employer – even one with no previous notice of the union's efforts - with ample opportunity to address the relevant issues with its workforce and to meaningfully communicate its response to the union's efforts. The Final Rule, however, unreasonably circumscribed Pulau's opportunity *to respond*. The resulting election, therefore, was decided by uninformed voters.

Such a result flies directly in the face of rights the Act was intended to protect. By its terms, Section 7 of the Act provides: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, ***and shall also have the right to refrain from any or all of such activities . . .***” 29 U.S.C. §157 (emphasis added). But, the right to refrain is only meaningful if the employees have full opportunity and access to information concerning the consequences of representation before the election. The modifications to the election process imposed by the Board’s adoption of the Final Rule ensure that they do not.

CONCLUSION

Based on the foregoing, there are compelling reasons for reconsideration of the application of the Final Rule to the instant election proceedings. Accordingly, the Board should grant review of the of the Regional Director’s Decision and Certification of Representative.

Respectfully submitted,

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