

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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**MINNESOTA TIMBERWOLVES  
BASKETBALL, LP, *RESPONDENT***

**and**

**Case 18-RC-169231**

**INTERNATIONAL ALLIANCE OF  
THEATRICAL STAGE EMPLOYEES,  
MOVING PICTURE TECHNICIANS,  
ARTISTS AND ALLIED CRAFTS  
OF THE UNITED STATES,  
ITS TERRITORIES AND CANADA,  
AFL-CIO, *PETITIONER***

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**RESPONDENT'S MOTION FOR RECONSIDERATION OF THE BOARD'S AUGUST  
18, 2017 DECISION AND ORDER AND FOR STAY OF THE ELECTION**

Dated: September 15, 2017.

FELHABER LARSON, P.A.

By /s/ Paul J. Zech

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## **I. INTRODUCTION**

Pursuant to Section 102.48(d)(1) of the Board's Rules and Regulations, Respondent Minnesota Timberwolves Basketball, LP, ("Timberwolves" or "Respondent") moves for reconsideration by the Board of its Decision on Review and Order of August 18, 2017. As explained below, in finding that the crew members who perform production work on game nights for the Timberwolves are employees, the Board materially erred in its application of the common-law agency test.<sup>1</sup> As the Regional Director concluded, and as the Dissent by Chairman Miscimarra would affirm, the evidence "overwhelmingly indicates that the crew members are independent contractors based on the distinct skills they possess, the fact that they are paid on a per-game basis, their freedom to take other work, and the fact that Timberwolves Basketball does not control the details of their work or supervise them." *Minnesota Timberwolves Basketball, LP*, 365 NLRB No. 124 (August 18, 2017), slip op. at 21 ("Decision"). The Decision fails to adhere to controlling judicial authority, departs from longstanding Board precedent, and is not supported by substantial evidence in the record as a whole.

Additionally, Respondent requests that the Board stay the election proceedings in this case pending its Motion for Reconsideration.

## **II. FACTS AND PROCEDURAL HISTORY**

On February 8, 2016, the Petitioner filed a petition ("Petition") seeking an election to represent a group of individuals for the purposes of collective bargaining. A full recitation of the facts is provided in the Respondent's previous filings in these proceedings and is incorporated

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<sup>1</sup> Alternatively, the Respondent moves for a rehearing and and/or opening of the record, pursuant to 29 C.F.R. § 102.48(c)(1). To the extent that the Board has found five factors to be inconclusive, Respondents request that the record be reopened and additional testimony and evidence be introduced.

herein by reference.<sup>2</sup> Briefly, Respondent owns and operates NBA Minnesota Timberwolves and the WNBA Minnesota Lynx. The Petition seeks to represent individuals who perform production work for a four-sided video display hung over the center of the basketball court (“center-hung board”) at Target Arena in Minneapolis, Minnesota. The video display shows live content from the games as they progress. Regional Director’s Decision and Order, slip op. at 2 (March 3, 2016) (“D&O”). Timberwolves Basketball produces the content that appears on the video display using a crew of 16 positions, including utility, camera operators, replay operators, engineers, technical director, and director, all of whom are drawn from a roster of crew members. *Id.* at 3.

The parties stipulated to amend the Petition’s Proposed Unit description as follows:

Included:

All regular part-time freelance technicians, including Directors, Technical Directors, Audio/Tape Operators, Engineers in Charge, Engineers, Camera Operators (including stationary, mobile, and remotely operated), Font Operators, Thunder Operators, Replay Operators, Utilities and others in similar technical positions performing pre-production, production and post-production work in connection with closed circuit telecasts displayed on the in-house video system within the Employer's home arena, including such telecasts of Minnesota Timberwolves games, Minnesota Lynx games, pre-game shows and post-game shows.

Excluded:

All other employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

(Petitioner Ex. 1).<sup>3</sup>

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<sup>2</sup> Respondent filed an Opposition to Petitioner’s Request for Review of the Regional Director’s Decision and Order on March 24, 2016, and a Response to NLRB Order Granting Petitioner’s Request for Review of the Regional Director’s Decision and Order on August 2, 2016.

<sup>3</sup> “Ex.” refers to Exhibits received into evidence at a Hearing on February 18, 2016.

The Timberwolves argued that the crew members are independent contractors, not statutory employees. A hearing was held before Region 18's Hearing Officer on February 18, 2016, at which the Timberwolves submitted substantial evidence in support of its position. On April March 3, 2016, then Regional Director Marlin O. Osthus dismissed the Petition, holding that the petitioned-for crew members are independent contractors and not employees under Section 2(3) of the National Labor Relations Act.

Weighing all of the particulars of the crew members' relationship with the Employer, I conclude that the Employer has met its burden to establish that the crew members are independent contractors. The crew members exercise significant control over the details of their work. They are engaged in an occupation that is distinct from the Employer. The crew members are highly skilled. They perform their work without substantial supervision by the Employer. Their work is not part of the Employer's regular business.

(D&O at 15).

The Petitioner filed a request for review, which the Timberwolves opposed. On July 19, 2016, the Board granted the Petitioner's Request for Review of the Regional Director's D&O. This Motion for Reconsideration follows the Board's August 18, 2017, Decision on Review and Order, and is being filed within the 28-day time period specified in Section 102.48 of the Board's Rules.

### **III. ARGUMENT**

#### **A. Legal Standard.**

Section 102.48(d)(1) of the Board's Rules and Regulations provides that "a party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order." In addition, "A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on." 29

C.F.R. § 102.48(c)(1). Pursuant to 29 C.F.R. § 102.49 of the Board’s Rules and Regulations, “until a transcript of the record in a case shall have been filed in a court, within the meaning of Section 10 of the Act, the Board may at any time upon reasonable notice modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it.”

**B. Material Errors That Warrant Reconsideration.**

The Board erred in its conclusion that the Employer has not carried its burden to establish that the crew members are independent contractors, particularly with regard to its analysis of the common-law agency factors of control, skill, supervision, distinct-occupation, and method of payment. The Board also erred in concluding that the crew members’ work is part of Respondent’s regular business and that the crew members are engaged in the same business as Respondent. As Chairman Miscimarra’s strenuous dissent underscores, the Board incorrectly determined the crew members are employees by failing to properly analyze and apply the 10 common-law factors (from Restatement (Second) of Agency § 220(2) (1958)), along with the Board’s recently articulated factor of considering a worker’s “significant opportunity for entrepreneurial gain or loss.” *See FedEx Home Delivery*, 361 NLRB No. 55 (2014) (*FedEx II*), *enf. denied* 849 F.3d 1123 (D.C. Cir. 2017), *petition for rehearing en banc denied* No. 14-1196 (June 23, 2017).

In analyzing whether an employee is an independent contractor or an employee, the U.S. Supreme Court instructs that “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.” *NLRB v. United Ins. Co.*, 390 U.S. 254, 258 (1968). Here, the Board failed to properly analyze each factor in light of the relevant agency principles. The Board’s decision exaggerates the importance of minor facts and

downplays the significance of material facts. When viewed as a whole, a reasonable evaluation of the factors leads to the conclusion that the crew members are independent contractors of the Respondent: “They are engaged in an occupation that is distinct from the Employer. The crew members are highly skilled. They perform their work without substantial supervision by the Employer. Their work is not part of the Employer's regular business.” D&O at 15. In disregarding the Regional Director’s conclusion and reinstating the Petition, the Board materially erred in its analysis of the following factors:<sup>4</sup>

### **1. Control.**

The Board erred in finding that “the control factor weights in favor of employee status.” Decision at 6. The Board primarily focused on three aspects of the relationship between the crew members and Respondent: (1) Timberwolves Basketball Director of Live Programming and Entertainment Chad Folkestad (the “DLPE”) controls the content of the game by creating a “run-down” for each game that directs non-game elements like the “kiss-cam”; (2) the Timberwolves retain the right to determine how many crew members it needs for a game and assign roles as needed if more than one crew member signs up for a particular slot; and (3) the Timberwolves can remove individuals from its roster of crew members. *See id.* at \*4-6.

First, regarding the “run-down” and implementation, the Board observes that “the director receives significant input from the DLPE for each and every game, both in meeting with the DLPE before the game to review the DLPE’s rundown and in implementing the DLPE's rundown and live calls while the game is in progress.” Decision at 4. However, The Board’s

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<sup>4</sup> The Respondent did not address the factors of tools, length of time, and mutual understanding in its briefing objecting to the Board’s review because those issues were not raised by Petitioner. Nevertheless, it remains the Respondent’s position that those factors also support independent-contractor status.

analysis overstates the direction given by the DLPE and understates the role of the non-employee director. As the Regional Director explained, the

Employer exerts very little control over the essential details of the crew members' work. Rather, the director, who is included in the petitioned-for unit, meets with certain crew members before the game and directs the crew via headset during the game. There is scant evidence that the crew members take direction from the Employer's supervisors or managers. The record contains only a few sporadic examples of Employer control and *there is no evidence that crew members take anything approaching regular direction from the Employer's supervisors and managers*. Although the Employer's DLPE creates a run-down for the game, it is limited to what should be done during breaks and half-time. Moreover, adherence to the rundown is not absolute as live calls take precedence. During the game, the director [who is a crew member] is responsible for deciding how the cameras will operate and what will appear on the center-hung board, although the record reflects that she may entertain input from the DLPE. There are no guidelines from the Employer on how the control room staff and floor camera staff are to carry out the technical aspects of their positions. *In short, although the Employer has a "run-down" of the content type and its order of presentation, the crew members independently carry out the technical requirements necessary to display the content on the center-hung board.*

D&O at 6 (emphasis added).

Unlike in *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 12, Respondent does not exercise "pervasive control over the essential details of the [crew members'] work." To the contrary, crew members generally do not interact with the Timberwolves' employees or management. (Tr. 71-72, 76-77.) "Once the game begins, the director decides what the cameras will shoot, what feed from the television trucks will be displayed, and other aspects of the live coverage." D&O at 4. Consequently, while Respondent may set the general requirements for the game, the "particular manner of fulfilling that requirement is left to the discretion" of the crew. *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 847 (2004); *see also DIC Animation City*, 295 NLRB 989, 991 (1989) (no control when animation studio determined end product, through specification of characters, goals, and tone of series, but writers create the story idea, the premise, the outline, and the script); *Lerohl v. Friends of Minnesota Sinfonia*, 322 F.3d 486, 490

(8th Cir. 2003) (“Work by independent contractors is often, if not typically, performed to the exacting specifications of the hiring party.”)

Second, the Board found that the Timberwolves exercised control because the majority determined which classification a crew member would be given for a particular game if more than one qualified crew members signed up to work. Decision at 5. But as Chairman Miscimarra countered, “someone has to make these determinations.” *Id.* at 17. Moreover, the Board ignores significant evidence regarding game assignments that clearly favors independent contractor status, namely that the crew members simply indicate which games they would be available to work, and there is “neither a requirement that the crew members be available for a minimum number of games nor is there a limit on the maximum number of games they could work.” D&O at 3. In addition, “crew members may ask to be removed from certain positions without adverse consequence.” *Id.*; *see also Crew One Prods. v. NLRB*, 812 F.3d 945, 949 (11th Cir. Feb. 3, 2016), *denying enf. to* 361 NLRB No. 8 (2015) (independent-contractor status supported where a company e-mails workers to offer work at concerts and other live events, and they are free “to accept or decline the offer without repercussions.”); *Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847 (“the extent to which the [workers] control their own schedules and earnings strongly supports independent contractor status.” Additionally, crew members’ start times are dictated by the schedule of the NBA/WNBA and cannot be considered evidence of the Timberwolves’ control. (Tr. 55.)

Third, the Board further erred in relying on the fact that the Timberwolves—on one occasion—removed a crewmember from the roster due to his behavior towards other crew members. Decision at 5. As Chairman Miscimarra observed, this action proves nothing regarding the employer’s control over the details of the crewmembers’ work, nor does it have anything to

do with the Timberwolves' right to discipline crew members. "To the contrary, the rights to select which individual will provide services and to terminate that relationship are inherent in every independent contractor arrangement. It defies reason to find that the exercise of these rights demonstrates employee status." *Id.* at 17. Indeed, the Board majority would seem to suggest that in an independent-contractor relationship, the contracting enterprise would need to be devoid of any ability to cease using a contractor's services, as having such a right would suggest employee status, which is an absurd result. There is no rational basis for the Board to conclude that the details of the crewmembers' work are subject to the control of the Timberwolves.

## **2. Distinct occupation.**

The Board also erred in finding the distinct-occupation factor "inconclusive." Decision at 6. The Board stated: "As the Regional Director explained, crewmembers do not conduct business in the Employer's name or hold themselves out as employees of the Employer. Nor do they receive Employer credentials, handbook, or written guidelines related to their work for the Employer, wear uniforms, or attend Employer meetings or events such as holiday parties. These facts suggest that crewmembers are not well integrated into the Employer's organization." *Id.* Moreover, three crew members have formally registered separate businesses of their own with the State of Minnesota, indicating that certain crewmembers do maintain a separate identity. *Id.* And while the video display on which the crewmembers work is undoubtedly significant to the basketball games, there was uncontroverted testimony at the hearing that Timberwolves and Lynx games would be played "even if the video board was not operational." *Id.* at 17. It was material error for the Board to find this factor inconclusive in light of the evidence above.

### **3. Supervision.**

The Board erred by determining that the evidence was inconclusive as to whether the crew members work under the supervision of the Timberwolves. *See id.* at 7. The Board observed that “crewmembers are not required to report to the Employer when they arrive,” the Timberwolves “do not evaluate crewmembers’ performance or require crewmembers to submit records of their work performed,” and the “Employer does not provide the crew with regular or routine supervision over the minute-by minute performance of their jobs.” *Id.* Moreover, crew members are not subject to any employment policies. (Tr. 136). Nor are they are subject to discipline. (Tr. 50, 73.)

As the Regional Director determined, and as Chairman Miscimarra found, these factors strongly support independent contractor status. Unquestionably, while “Timberwolves Basketball could readily station one of its officials in the control room, for example, to directly oversee the 10 crewmembers stationed there,” the organization has affirmatively chosen not to do so. Decision at 17-18; *Contra Michigan Eye Bank*, 265 NLRB 1377, 1379 (1982) (noting that the employer “does ... effectively oversee the technicians’ work through the weekly monitoring meetings, which it requires them to attend” and explaining that “these meetings provide the opportunity for the [employer] to try and understand the kinds of problems that they are having on the job .... And, hopefully improve performance....”). The Board erred by minimizing the substantial evidence put forth regarding this factor, which plainly suggests independent-contractor status.

### **4. Skill Required.**

The Board erred in finding the skill factor “inconclusive,” despite the overwhelming evidence that the highly skilled crew members are not trained by the Timberwolves and

Respondent only places crew members on the roster who already possess the requisite skills. The record is clear that the vast majority of crewmember positions—director, technical director, camera operator, and engineer—involve highly technical skills. (Tr. 28, 32, 35, 36, 39, 148-49, 183-84, 201.) The record is equally clear that the Timberwolves do not provide these individuals with any technical job training; rather, the crewmembers have these skills when they walk on to the facility. (Tr. 35-37, 39, 47-48, 114-15, 183-84, 201.) Nevertheless, the Board holds out this factor as inconclusive, emphasizing that one position, the utility classification, is entry-level and “a crewmember need only have basic technical knowledge of computers and an understanding of the sport of basketball” to work as a font operator or replay operator. Decision at 8. Aside from noting that for many, an understanding of computers and basketball *are* in fact skills that could be trained, the testimony was clear that the Timberwolves “require[] each crewmember to possess the relevant skill and experience at the time they were placed on the list and did not provide training with rare exceptions.” *Id.* at 18. As Chairman Miscimarra explained, the Board should not disregard un rebutted evidence “merely because it could have been stronger, more detailed, or supported by more specific examples.” *Id.* (internal citation omitted). The majority erred in giving excessive weight to sparse instances of training and minimizing the clear record evidence that the overwhelming majority of the crew consists of highly skilled workers who have received no training from Respondent. Plainly, as the Regional Director concluded, “the skills factor weighs heavily in favor of independent contractor status.” D&O at 10.

### **5. Method of Payment.**

The Board also erred in its determination that the payment factor was inconclusive as to employment status. The crew members are generally paid a per-game rate, which varies with the skill level of the position. *Id.* at 11. The Respondent sets that per-game rate, although crew

members can and have negotiated it. *Id. See Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847 (independent contractor status supported when workers were “paid per class, not by the hour or on a salary basis”). The crew members complete W-9 tax forms and are furnished with 1099 forms, rather than W-2 forms, for their own individual tax purposes. *Id. See Crew One Prods.*, 811 F.3d at 952 (absence of tax withholdings reflects independent-contractor status); *Argix Direct, Inc.*, 343 NLRB 1017, 1021 (2006) (same). The crew receives no “fringe benefits such as health insurance, life insurance, vacation, sick time or paid holidays.” D&O at 11. Employers are not on the Respondent’s “payroll.” (Tr. 131.) Rather, like any other of Respondent’s vendors, they submit invoices for their services in order to be paid. Invoices to the crew members are paid once per month; if a crew member fails to submit an invoice in a timely manner, the crew member will not be paid until the following month. D&O at 11; *See BKN, Inc.*, 333 NLRB 143, 143-144 (2001) (television writers who are paid per episode pursuant to invoices they submit is a factor that supports independent-contractor status).

The Board emphasized that “although crewmembers are paid by the game, it is clear that their rates correspond to the number of hours worked, as the Employer will pay them a mutually agreeable special rate for games that are longer than usual, such as a home opener game when the call time is earlier or a game that goes into overtime.” Decision at 10-11. This misstates the testimony in the record, which is clear that the negotiated higher rate is only for “special circumstances like the home opener.” (Respondent Ex. 3.) Thus, the Board’s analogy to the circumstances in *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1765-1766 (2011) rings false. In *Lancaster*, as the Board explained, “the musicians were paid by the job (either a rehearsal or concert) but received additional compensation for each 15 minutes that a performance exceeded 2.5 hours.” Decision at 11. Here, the record is devoid of evidence that

would suggest that the crew was paid, by way of example, a standard rate for a three-hour game, and routinely received incremental payments for work that went above that set time frame. Rather, as the Regional Director found, any higher rate of pay is only *considered* when a game runs “exceptionally long.” D&O at 12.

## **6. Regular Business.**

As the Eleventh Circuit has succinctly articulated, the relevant inquiry for this factor is whether or not the work is a *part of the regular* business of the employer, not whether the work is *essential* to the business of the company. *Crew One Prods.*, 812 F.3d at 953; *see also FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 14 (Sept. 30, 2014) (this factor weighs in favor of employee status if the individuals “perform functions that are not merely a regular or even an essential part of the Employer’s normal operations, but are the very core of its business”) (internal quotations omitted). In *FedEx*, the Board found that this factor weighed heavily in favor of employee status for drivers, because FedEx is in the business of delivering packages and the drivers effectuate that business. Here, conversely, Respondent is plainly not in the business of producing closed circuit telecasts during sporting events. Respondent’s business is the performance of games in the NBA and WNBA. The fact that the entertainment that crew members produce for the center-hung board at Target Arena “enhances the overall entertainment experience,” D&O at 12, does not render that work a regular part of Respondent’s business. Indeed, it is “undisputed that if the center-hung board was not operational, the basketball game would continue to be played; conversely, if the basketball game were not played, there would be nothing to display on the center-hung board.” *Id.* at 13. Nevertheless, the Board determined that this factor weighed in favor of employee status because the work for the center-hung board “is an essential component of the Employer’s business.” Decision at 12. The Board “misapplied the

law” in so concluding, and “confused” work that is essential to a business with work that is part of a business. *Crew One Prods.*, 812 F.3d at 953; *see also* Restatement (Second) of Agency § 220(2)(h).

### **7. ‘In the Business.’**

The Regional Director properly found that that the crew members are not engaged in the same business as the Respondent, and that this factor favors independent contractor status. D&O at 13. The Board erroneously posited otherwise, concluding that Respondent “is in the same business as the crewmembers of showing video content on” the center-hung board. Decision at 13. Such a conclusion ignores the reality of the Respondent’s business. Again, the Respondent is in the business of the performance of WNBA and NBA games. The Respondent operates a small video department, staffed by employees, which produces content that is entirely separate from what is displayed on the center-hung board (with the exception of one person). D&O at 13. The fact that Respondent maintains a video department cannot be evidence that the crew members are in the same business as the Respondent—particularly when that department is not responsible for the center-hung board. Respondent “clearly is not a video production company; the video department is an adjunct to the Employer’s core business of professional basketball.” *Id.* at 14.

### **8. Independent Business.**

The Board’s new independent business factor:

encompasses considerations that the Board has examined in previous cases, including not only whether the putative contractor has a significant entrepreneurial opportunity . . . but also whether the putative contractor: (a) has a realistic ability to work for other companies; (b) has proprietary or ownership interest in her work; and (c) has control over important business decisions, such as the scheduling of performance; the hiring, selection, and assignment of employees; the purchase and use of equipment; and the commitment of capital.

*FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 12.

As Chairman Miscimarra properly reasoned, “crewmembers both have a realistic opportunity to work for other employers and regularly do so. Thus, they choose which games they will work and suffer no adverse consequences if they decline a game.” Decision at 20. Indeed, as Senior Broadcast Production Manager Erik Nelson testified:

[T]he Vikings had a playoff game in December that conflicted with a Timberwolves game. You know, the Vikings game wasn't on the schedule. So, all of a sudden, a number of people from the crew that I had scheduled for the Timberwolves game informed me that they would not be available to cover that game on that Sunday. And so then I would go to this roster to find, essentially, replacements. And they might also help me find replacements for themselves.

(Tr. 49.) The Board, however, glosses over crew members’ ability to work for others as “plainly outweighed by the other independent-business considerations,” specifically that crew members lack proprietary or ownership interest in their work or control over important business decisions, such as the scheduling of performance, hiring, selection or assignment of employees, or the commitment of capital. Decision at 13. It is undisputed that the crew members do not commit capital. However, holding out the other two aspects of this factor as indicative of employment status “flies in the face of [] common sense.” *Lerohl*, 322 F.3d at 490 (refuting contention that orchestra musicians are always employees when they perform in a conducted band or orchestra because the conductor controls rehearsal schedule, music choice and how music is played). The crew could not control when they come to work or similar business decisions, which are plainly dictated by the schedules of the NBA and WNBA. Undeniably, as Chairman Miscimarra observed, “[t]he requirement of physical presence at the same place and time as the game is played would apply to these individuals regardless of whether they were independent contractors or employees.” Decision at 20. Quite simply, the evidence is overwhelming that crew members render services as an independent business. They can and do work for other companies (Respondent Ex. 7; Tr. 124, 140, 196) and it was material error for the Board to hold otherwise.

#### **IV. CONCLUSION**

For the reasons stated above, the Board should grant Respondent's Motion for Reconsideration, reconsider its August 18, 2017, decision, and reinstate the Regional Director's dismissal of the Petition. In addition, while the matter is under reconsideration, the Board should issue a stay in Region 18's election proceedings in Case 18-RC-169231.

## STATEMENT OF SERVICE

I hereby certify that on September 15, 2017, true copies of the foregoing

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Dated: September 15, 2017

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