BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BUFFALO COUNTY HEALTH & HUMAN SERVICES EMPLOYEES, LOCAL 1625-A, WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO

and

COUNTY OF BUFFALO

Case 63
No. 56914
MA-10456

(Auto Insurance Grievance)

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656-3755, appearing on behalf of Buffalo County Health & Human Services Employees, Local 1625-A, Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, referred to below as the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Richard J. Ricci**, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of County of Buffalo, referred to below as the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of the Professional and the Paraprofessional/Clerical bargaining units which constitute Local 1625-A.

The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on January 6, 1999, in Alma, Wisconsin. The hearing was not transcribed. The parties filed briefs by February 22, 1999.

ISSUES

The parties stipulated the following issues for decision:

Did the County violate the collective bargaining agreement by the implementation of the Evidence of Insurability Policy?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 4 – MANAGEMENT RIGHTS

Section 1 The County possesses the sole right to operate the County and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to, the following:

A. To direct all operations of the County;
B. To establish reasonable work rules and schedules of work . . .

ARTICLE 24 – ENTIRE MEMORANDUM OF AGREEMENT

This Agreement constitutes the entire agreement between the parties and no verbal statement shall supercede any of its provisions. Any amendment supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. The parties further acknowledge that, during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make proposals not removed by law from collective bargaining and that the agreements arrived at are set forth in this Agreement. Therefore, the County and the Union for the life of this Agreement agree that the other shall not be obligated to bargain further with the respect to any subject.

> Waiver of any breach of this Agreement by either party shall not constitute a waiver of any future breach of this Agreement. Nothing contained in this provision shall be interpreted as granting to either party hereto authority (sic) unilaterally implement changes in wages, hours, or conditions of employment or as a waiver by the Union to bargain the impact of management decisions which affect wages, hours, or conditions of employment. . . .
>
> **APPENDIX "A" WAGE SCHEDULE**
>
> . . .
>
> **TRAVEL, MEALS, AND LODGING EXPENSE**
>
> The County shall reimburse employees for the use of their automobile on County business at the rate of twenty-six cents . . . per mile or County policy, whichever is greater, effective January 1, 1996. . . .

BACKGROUND

The Union originally prepared the grievance for filing in late February of 1998. The parties agreed, however, to delay formal processing of the grievance until the matter had been discussed with the County's insurer. Those discussions produced no resolution, and the grievance was formally filed on April 28, 1998. The grievance form states the "Circumstances of Facts" thus: "The County is unilaterally establishing requirements regarding personal vehicle insurance and safety issues." The grievance form states the "corrective action required" thus: "Cease & Desist . . . Any changes to be submitted for contract negotiations."

The changes challenged by the grievance turn on a Safety Policy, referred to below as the Policy, adopted by the County Board as of December 16, 1997. Under the Policy, the Board promulgated an Employee Safety Handbook. Section 7.6 of that handbook reads thus:

> **Evidence of Insurance**
>
> When employees or elected officials operate their personal vehicles on county business, evidence of insurance coverage must be provided to Risk Management. Upon passage of this policy and then upon each policy renewal thereafter, employees are responsible for supplying to their supervisor a copy of proof of insurance. This information should then be provided to Risk Management for cataloging. County elected officials are responsible for supplying proof of insurance directly to Risk Management. The recommended

> limits of coverage the employee should have (per Wisconsin County Mutual) are $100,000/per person, $300,000/per accident, $50,000/per accident property damage or $300,000 combined single limit. The employee is also evidencing insurance coverage when signing mileage logs.
>
> For volunteer workers, proof of insurance is required on the automobile used. Proof of insurance must include evidence that liability coverage is maintained.

The County does not maintain a fleet of vehicles for employe use. Prior to the adoption of the Policy, the County informed those new hires who were expected to use a vehicle to perform their work that a vehicle would be required to perform their job. The County neither asked such employes whether they had insurance on the vehicle, nor did the County specifically inform them what insurance the County provided. As part of the implementation of the Policy, the County altered its mileage reimbursement forms to include the following sentence, which preceded the signature line provided for each claimant: "I FURTHER CERTIFY BY MY SIGNATURE, THAT MY VEHICLE WAS, AND IS, CURRENTLY INSURED WITH LIABILITY COVERAGE."

Lance Wilson is the County's Administrative Coordinator, and has served the County in that capacity for eight years. He testified that the Policy grew out of a County change in its liability insurance carrier. Prior to the change, the County used Wausau Insurance Company. The change implemented by the County was to purchase liability insurance through the Wisconsin County Mutual Insurance Corporation (WCMIC). The agent for this insurance coverage was the Aegis Corporation. To obtain incentives to reduce the premium costs under the new liability insurance, the County implemented the Policy.

As part of the implementation of the Policy, Stuart Berg, the Director of the County's Department of Health and Social Services, issued a memo, dated April 17, 1998, to "all staff" which states:

> Attached you will find a copy of the newly passed Employee Safety Handbook. I ask that all employee's (sic) review this manual carefully and relay any questions and/or concerns that you have to your immediate Supervisor. This handbook was written in response to the newly formed Risk Management Team. The objective is to reduce cost for liability and Workmen's Compensation insurance by providing a safe work place and reducing injuries. Attached to the handbook is an acknowledgement of each employee's responsibility toward creating a safe work environment. Please sign this sheet and return it with your next record of hours worked.

> Please note that page 12. section 7.6 Evidence of Insurance, states that when employee's (sic) use their personal vehicles on County business they must provide evidence of insurance coverage. Employee's (sic) will not be allowed to use their personal vehicles on County business unless proof of insurance has been furnished. If you have not already done so, please provide this proof of insurance . . . within the next **five working days**.
>
> Thank you for your **immediate attention** to this matter.

The implementation of the Policy, however, caused controversy. It was the first notice for many, if not all, employes that the County was not the primary insurer of vehicles used for business use. Unit employes provided the County with the proof of insurance, but many did so through the following memo:

> I/we are supplying the county with proof of insurance under protest as a group and under the guidance of our Union Council 40 staff representative.
>
> In good faith with our employers, we comply by showing proof of insurance. In no way do we agree that this is a matter of past practice. In no way does complying to proof of insurance state that we will accept any offers not agreed to in writing by the two parties involved.
>
> We hope this matter can be solved in a diplomatic manner which benefits all involved.

Ann Keller is a Social Worker employed by the County. She provided the County, on April 22, 1998, a copy of the memo set forth above, with a copy of the "insurance identification card" supplied by her insurer to be kept with her car. The card states no information on what the policy provides, but does state the name and address of her insurer, together with the number and effective duration of her policy. This was sufficient to comply with the Policy.

As noted above, the Union formally grieved the Policy on April 28, 1998. Berg, on behalf of the County, formally denied the grievance the same day. As part of the processing of the grievance, the County provided the Union a copy of a fax from Aegis concerning the "primary insurer" issue. That fax, dated March 3, 1998, states:

> This fax is to confirm our recent phone conversation with regard to employees/volunteers using their personal vehicle while working for the county. The insurance follows the vehicle. In other words, the personal auto policy would apply should an accident occur while driving on behalf of the county.

> The county's liability policy would provide secondary, or Excess, coverage, above the personal policy, should those limits be exhausted. Anyone who regularly drives a vehicle for their position with the county, should provide the county with evidence of their own insurance. . . .

Attached to the original of this fax was a copy of Section III of the County's insurance policy with the WCMIC. That copy was not provided to the Union during the initial processing of the grievance, but states:

> **SECTION III – WHO IS AN *INSURED***
>
> *Insured* means:
>
> 1. *You*, and . . .
> 3. Anyone else is an *insured* while using with *your* permission, an *automobile you* own, hire or borrow, except this insurance shall apply excess of any insurance maintained by:
>
> . . .
>
> b. An owner of an *automobile you* hire or borrow.

As noted above, the parties were unable to resolve the grievance informally. Wilson issued the County's final formal response to the grievance in a letter dated May 19, 1998, which states:

> I have been in contact with Aegis Corporation, the administrator for Wisconsin County Mutual Insurance Corporation. They have informed us that they will not be the principle insurer for vehicles that the county does not own. The county's liability policy would provide secondary, or excess, coverage above the employee's personal policy, should those limits be exhausted.
>
> The Personnel Committee has denied this grievance and requests that evidence of insurance be provided by employees that drive their vehicle for their position with the county. . . .

Wilson testified that the County's insurance policy with Wausau also provided excess coverage to the employe's personal insurance, which was taken to be the primary source of liability coverage.

The County has not generally distributed its insurance policy. Keller obtained a copy during the processing of the grievance. She discussed the primary/secondary insurer issue with her insurance agent, who indicated to her that her personal policy was probably good for one accident occurring during business use of her car. Her insurance agent felt she would probably be dropped after the occurrence of an accident occurring during her business use of her car. Beyond that, her agent informed her that she could expect to pay roughly $100 annually above her personal insurance coverage rates to obtain business coverage for her car. Barbara Broen, who serves the County as a Social Worker and Juvenile Court Worker also discussed the insurance dilemma with her insurance agent, who concurred in the opinions Keller received. In June or July of 1998, Karen Weis informed Broen that she could not receive mileage reimbursement until she had provided the County with proof of insurance. Keller and Broen were concerned with the wide variety of contexts in which County employes use their personal vehicles to perform County work. Broen, for example, may have to transport juveniles to facilities located far from Buffalo County. Keller and Broen both feared that the cost of insurance could affect the willingness and ability of employes to provide needed services.

It is undisputed that, prior to the implementation of the Policy, the County, "bit the bullet" on those employes who maintained no insurance coverage. It is also undisputed that some, if not all, employes have not informed their insurer that they use their vehicles for business use.

Further facts will be set forth in the **DISCUSSION** section below.

THE UNION'S POSITION

After a review of the evidence, the Union notes that its "main concern . . . is that when the county required proof of auto insurance for employees using their personal vehicle, while on County business, it also informed the employees that the employees' personal auto insurance would be primary." The implementation of this requirement constitutes "an unreasonable work rule in violation of Article 4, Section 1, Subsection B of the contract."

Beyond this, the Union contends that "the County's action changes a mandatory subject of bargaining." This unilateral action violates established past practice and the provisions of Article 24. The impact on unit employes is direct and apparent. Two employes testified that the change increased their auto insurance premiums by $100 annually. Beyond this, the County, in violation of Appendix A, threatened to deny mileage reimbursement "if there was no proof of insurance." That mileage reimbursement increased in 1999 has no bearing on the grievance, since the increase "was implemented well after the grievance was filed," and since there was no increase in mileage reimbursement in 1998.

The Union notes that the provisions of the County's liability policy can play no role in the resolution of the grievance since the Union had no notice of the terms of that policy. That the County was aware that at least one unit employe had no insurance at the time the Policy was implemented makes it difficult to conclude the terms of the County's liability policy can, standing alone, make employes the primary source of insurance. The provisions of Sec. 895.46, Stats., underscore that County policy cannot affect its role as the primary insurer of its employes, while those employes act within the scope of their employment.

The Union concludes that the grievance should be sustained and states its view of the appropriate remedy thus:

> As a remedy, the Union would request that employees not be required to show proof of auto insurance coverage and that the County be ordered to carry the primary liability insurance for employees who use their personal vehicles for County business.

THE COUNTY'S POSITION

After a review of the evidence, the County contends that Article 4 grants it the authority to establish reasonable work rules. In this case, the County reasonably acted by "changing its liability insurance carrier, increasing its maximum coverage, and responding to the carrier's recommendations with respect to implementation of safety standards." Since the contract does not limit these actions, the County's requiring proof of insurance coverage must be considered a reasonable work rule.

Noting that "(e)mployees are not required to maintain any specific level of coverage, nor . . . evidence of the level of coverage," the County concludes that the Policy cannot be considered unreasonable. More specifically, the County urges that the Policy can be considered unreasonable under arbitral precedent only if it fails to reasonably relate to a legitimate management objective. Its "legitimate interest in limiting potential liability against the County and therefore in employees who drive their personal vehicles in the course of their work for the County" is, according to the County, obvious. The development of the Policy was itself "a legitimate response by the County to recommendations made by and incentives offered by the liability carrier to improve safety standards."

Nor can the implementation of the Policy be considered a violation of Article 24. That the agreement does not cover proof of insurance cannot obscure that it authorizes the County to promulgate reasonable work rules. Presuming that employe displeasure reflects their need to buy business coverage for their personal vehicle, the County argues that "it is common knowledge that insurance companies may charge higher premium rates for insureds who drive their personal vehicles for business purposes" and that "it is not the County's responsibility to

inform employees with respect to their personal automobile coverage." Beyond this, the County argues it is speculative to assume that insurers would not require business coverage even if the County's liability insurer elected to be a primary insurer.

The County then argues that the requirement that employe insurance be primary "is not a new policy." Noting that "the County's liability insurance carrier . . . determines who shall be primary insurer," the County concludes that the "change" asserted by the Union rests only on unit employes' mistaken assumptions.

Nor can the Union's assertion that the change is unilateral be accepted. The County contends "the Union has already bargained over the issue by agreeing to language which provides a mileage reimbursement for miles driven on County business." IRS regulations establish that reimbursement "is intended to cover more than the cost of gasoline." Nor can there be any finding that the County has violated Appendix A. That employes may not have been truthful with their insurers cannot establish County misconduct.

The County concludes that "(t)here clearly has been no violation of the collective bargaining agreement." Even if there had been, the County concludes that the sole real remedy available to the Union "is to address the issue at the bargaining table and attempt to seek a higher mileage reimbursement rate." In any event, the County contends that the grievance should be dismissed in its entirety.

DISCUSSION

The issue is stipulated, and questions the County's implementation of the Policy. The parties advance a series of arguments putting Articles 4, 24 and Appendix A at issue. Ultimately, Articles 4 and 24 govern the grievance.

Appendix A can play no direct role in the resolution of the Policy. Addressing its role in the grievance does, however, preface the more difficult issue concerning the application of Articles 4 and 24. The parties do not dispute that Appendix A establishes a specific rate for the reimbursement of employe expenses in providing a personal vehicle for use on County business. By the clear terms of the provision, a debt is created. More specifically, the "County shall" pay the "greater" of "twenty-six cents per mile" or "County policy." It is apparent that the reference to "County policy" is to a rate only. Thus, the County policy governs only if the rate set by that policy is greater than twenty-six cents per mile. The language of the provision and its placement in an Appendix which covers County payment of various benefits to employes underscores that it creates a debt from the County to the employe upon the employe's provision of a service.

Standing alone, Appendix A does not make the debt owed conditional. Thus, employe use of their personal vehicle triggers the reimbursement obligation. The reference to "County policy" is to a rate only. Thus, the conditioning of the reimbursement on compliance with the Policy cannot be rooted in Appendix A. The reference to "County policy" does not, for example, give the County the authority to condition the payment on anything other than the provision of a personal vehicle for County business. If it did, the County could, by policy, revoke the reimbursement or so severely condition its issuance to eliminate the reimbursement obligation. To exemplify the point, the County cannot, under the terms of Appendix A, condition the payment of reimbursement on a supervisor's statement of satisfaction with the job performance of an employe. Such a policy reads the clear mandate of Appendix A out of existence. County concern with the quality of employe performance rests, then, on other agreement provisions. The same is true of the link between liability insurance and mileage reimbursement.

Against this background, the County's conditioning of the payment of Appendix A reimbursement on employe compliance with the Policy must be seen as a violation of the terms of Appendix A, unless the condition can be founded on other agreement provisions. Contractual support for this aspect of the Policy must be located under Articles 4 or 24, if such support exists. This serves to preface the more fundamental dispute of the parties on the implementation of the Policy. Appendix A, standing alone, will not support either the Union's broad assertion that the contract bars the implementation of the Policy or the County's broad assertion that the contract permits the implementation of the Policy. Rather, Appendix A prefaces the dispute. In the absence of other contractual support, the County cannot condition Appendix A reimbursement on employe compliance with the Policy. In the absence of other contractual support, Appendix A provides no requirement that the County bargain reimbursement rates with the Union. That the parties may not have shared the same understanding of the extent of employe insurance liability when they agreed to Appendix A provides no basis to question its clear terms. To conclude otherwise would open any contractual provision to bargaining based on no more than one party's dissatisfaction with its terms. This defeats the stability a written agreement brings to a bargaining relationship.

The strength of the County's case lies in its assertion that the Policy constitutes a reasonable work rule authorized by Article 4, Section 1, B. The strength of the County's assertion of the reasonableness of the work rule should not be understated. The County forcefully notes that it has a legitimate interest in limiting exposure of public funds to lawsuits; in promulgating safety standards; and in securing premium discounts through its policies. Beyond this, the County accurately notes the Policy has a limited scope. It recommends, but does not require, specific coverage levels. Standing alone, the County's interests cannot be dismissed as unreasonable, and its attempt to assert them through the Policy appears to fall within the scope of Article 4, Section 1, B.

The work rule does not, however, stand alone and its relationship to other agreement provisions precludes accepting the County's view. A series of difficulties arise in attempting to reconcile the Policy, as a work rule, with other agreement provisions. That reconciliation is contractually essential, since Section 1 of Article 4 requires a work rule to be "subject . . . to the provisions of this contract." Immediately apparent is conflict between the Policy and Appendix A. Through the Policy, the County has asserted the unconditional reimbursement of Appendix A can be made conditional. This rewrites the clear language of Appendix A, which creates a debt payable on employe request for reimbursement for mileage already provided to offer a County service. [The Attorney General addressed an issue analogous to that posed here in 59 OAG 47 (1970).] Subsection B of Article 4, Section 1, cannot pit one agreement provision against another under the express terms of Section 1.

More significantly, if the Policy constitutes a reasonable work rule, it can be enforced as a condition of employment. Conditions of employment are governed by Article 24. The terms of the Policy, however, are not reconcilable to the final sentence of that article. The final sentence precludes interpreting Article 4, Section 1, B, as a grant of County "authority unilaterally (to) implement changes in . . . conditions of employment." This reference is followed by a reference precluding the interpretation of the agreement as a Union waiver of impact bargaining rights. The two references respectively address mandatory, then permissive subjects of bargaining.

The Policy addresses mandatory subjects of bargaining. At the broadest level, mandatory subjects of bargaining are matters which primarily relate to wages, hours and conditions of employment, while permissive subjects of bargaining are matters which primarily relate to the formulation or management of public policy. See, BELOIT EDUCATION ASSOCIATION V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 73 WIS.2D 43 (1976), UNITED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 81 WIS.2D 89 (1977), and CITY OF BROOKFIELD V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 87 WIS.2D 819 (1979).

More specifically, mileage reimbursement is a mandatory subject of bargaining. See DODGELAND SCHOOL DISTRICT, DEC. NO. 29490 (WERC, 1/99) citing BROWN COUNTY ATTORNEYS ASSOCIATION V. BROWN COUNTY, 169 WIS. 2D 737 (CT. APP. 1992). Beyond this, there is no apparent basis to warrant concluding that County requirement of employe proof of liability insurance impacts public policy more fundamentally than it impacts employes. Wisconsin statutes impose liability for employe acts within the scope of their employment on the County. See Sec. 895.46, Stats. Thus, the Policy addresses how the impact of this liability is allocated between the County and its employes. This is more a "dollars and cents" issue affecting employes than one of public policy affecting the public generally.

Thus, the aspects of the Policy questioned by the grievance constitute a mandatory subject of bargaining. There is no dispute that the requirement that employes submit proof of liability insurance and the requirement that such proof precede County payment of mileage reimbursement changes County practice preceding the move to WCMIC insurance. Those changes were specifically sought by WCMIC and the point of the premium discounts offered the County. These changes were unilateral, and thus prohibited by the final sentence of Article 24. To read the Policy as a work rule permitting the County to unilaterally alter a condition of employment thus flies in the face of Section 1 of Article 4 and of the final sentence of Article 24.

In sum, whether or not the Policy could stand alone as a reasonable work rule under Article 4, Section 1, B, it cannot do so in light of the provisions of Article 24 and of Appendix A. Because the changes noted above are not reconcilable to those provisions, the Policy cannot be considered a reasonable work rule. Thus, the implementation of the Policy on the points noted above, in the absence of bargaining, must be considered a violation of the labor agreement.

Before addressing the issue of remedy, however, the scope of this conclusion must be further examined. More specifically, the Union contends that the Policy sought to change the County from the primary to the secondary insurer of employe vehicles. The evidence does not support this assertion. Initially, it must be noted that the Policy is silent on whether the County or the employe carries primary liability coverage for a vehicle. Section 7.6 of the Safety Handbook promulgated under the Policy would appear to assume that the primary insurance is the employe's policy, but the Policy is silent on the point. More significantly, Wilson testified, without contradiction, that the Wausau insurance policy considered the County's insurance secondary to the employe's. Thus, there is no evidence to support the Union's assertion that the Policy changed County liability insurance from primary to secondary coverage.

This conclusion does not mean the employe's insurance is primary. Rather, it stresses that this issue cannot be resolved under the labor agreement. At least three contracts and the Wisconsin statutes bear on the resolution of whether the County's or the employe's insurance is primary. The only one of those agreements enforceable here is the labor agreement, which is silent on the point. There is, as noted above, no reliable evidence that the employes ever received the benefit of a County liability policy which, by its terms, provided primary coverage. The other two agreements bearing on the issue are the County's liability policy with WCMIC and the contract, if any, between individual employes and their insurer. Neither of these agreements is enforceable here. This poses a potentially significant issue for both the County and the Union. The County's contract with WCMIC asserts it is secondary to other insurance. Individual employes may or may not carry auto insurance. If they carry insurance, their policy may or may not cover business use of the vehicle. Beyond this, it may be that the insurers of individual

employes provide policies which themselves assert secondary coverage for business use. Which policy governs; how those policies relate if both claim to be secondary; and how Wisconsin Statutes bear on either cannot be reached on this record. There is no apparent authority to extend an arbitrator's reach under the labor agreement that far. Even if it was authorized, there is no evidence to support such a reach.

This poses the issue of remedy. Against the background sketched above, it is impossible to order the County to provide "primary" insurance. Such insurance never existed and thus cannot be restored. Thus, the remedy ordered below restores the situation preceding the implementation of the Policy to the extent that is possible. The Award states the County's violation of the labor agreement, then requires that the County stop enforcing the Policy until the parties have collectively bargained its implementation.

At best, the grievance sets the stage for the parties' collective bargaining for a successor agreement to that in effect at the time of the grievance. As the County argues, this is where the true remedy lies. The uncertainty regarding the primary/secondary insurance issue poses a risk neither the County nor its employes can take lightly. This risk is best addressed in bargaining. Costs attributable to insuring the risk of liability for employe business use of personal vehicles must, in any event, be addressed in bargaining before they can be awarded in arbitration.

AWARD

The County did violate the collective bargaining agreement by the implementation of the Evidence of Insurability Policy.

As the remedy appropriate to the County's violation of Articles 4, 24 and Appendix A, and until the County has complied with its contractual duty to bargain with the Union, it shall not require employes to demonstrate proof of liability insurance, nor shall it condition the payment of mileage reimbursement on employe compliance with the Policy.

Dated at Madison, Wisconsin, this 15th day of March, 1999.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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