Privy Council Appeal No. 68 *of* 1921.

A. Hatrick and Company, Limited - - - - - *Appellants*

v.

The King - - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH NOVEMBER, 1922.

Present at the Hearing:

LORD ATKINSON.
LORD SUMNER.
LORD PARMOOR.
LORD CARSON.

[*Delivered by* LORD ATKINSON.]

This is an appeal from a judgment of the Court of Appeal of New Zealand in an action instituted by the respondent against the appellants on the 27th November, 1919, and by order dated the 4th March, 1920, removed for argument and determination from the Supreme Court of New Zealand into the Court of Appeal.

The appellant company carries on business in the town of Wanganui, which is situated at the mouth of a river of the same name in the North Island of New Zealand.

The appellant company carry on in this town the business of merchants, and are in the habit of importing into the Port of Wanganui merchandise for the purposes of that business. The action out of which this appeal arises was brought to recover, amongst other sums, a sum of £23 19*s.* 5*d.*, dues and charges in respect of the handling of some of this merchandise in a particular manner, styled sorting, after it had been discharged from the ship that carried it, and before it had been loaded into the appellants' carts or vehicles, and thus finally delivered to them. The defence of the appellants to this claim is that it is made without any legal right or authority, and that the regulation made on

behalf of the Crown, purporting to impose the dues and charges constituting the sum of £23 19*s*. 5*d*., was in respect of the goods of the appellants so sorted *ultra vires*. The validity of that defence is the real question for decision. The Port of Wanganui is governed and managed by a Board styled the Harbour Board.

This Board was constituted and incorporated under the provisions of the Harbour Act of 1878. By that statute it was empowered, amongst other things, to construct and maintain harbour works as defined, and to erect such machinery as might be necessary for the carrying out of the objects of the Act. Harbour works were by its 8th section defined as including, amongst other things, any pier, quay, wharf or jetty. The Board was also empowered to appoint such officers (including a wharfinger) to assist in the execution of the Act as it might deem necessary; to make bye-laws not repugnant to the provisions of the statute, (enforceable by penalties for breaches thereof), for the general control and conduct of the business and proceedings of the Board, and, amongst the other things mentioned in its 215th section, for the fixing and levying of fees and port charges, for regulating the use of wharves, docks, quays and landing places, and the traffic on the same; and for fixing the scale of fees, tolls and charges to be paid for the use of such wharves or docks; and further for fixing the times, modes and places for shipping and unshipping, landing, warehousing, storing and depositing goods, landing and embarking of passengers; for fixing the tolls and charges to be paid not only for the use of wharves and docks, but the scale of charges to be paid for the storage of goods, and also for the taking of the same into and delivering the same from all warehouses and buildings belonging to or in the occupation of the Board.

It is clear that the bye-laws authorised by this Section 215 apply only to property belonging to or, in the case of warehouses and buildings, in the occupation of the Board, and have no application whatever to property or buildings belonging to or in the occupation of any other body. They do not empower either the Board or such other body to exact any dues or charges in respect of the use or enjoyment of property of the latter description. By Section 69 of this Act it is made imperative on the Board to provide all servants and labourers proper for the working at all reasonable times, any cranes and weighing or other machines or conveniences erected or provided by the Board for the use of the public in loading or unloading any goods on any of the wharves belonging to the Harbour Board. Section 70 forbids the giving preference in the loading or unloading of goods. Section 71 requires the Board to provide and maintain in good order receiving and examining sheds for the accommodation of customs house officers; and Section 72 enacts that goods shall not be allowed to remain on any wharf or the approaches thereto, or in any store or warehouse in which they may be placed, for a longer time than shall be allowed by the bye-laws of the Board; while Section 73 provides for the removal and disposal of goods so left.

By the Government Railways Act, 1894, it is provided that a Minister of the Crown shall be appointed by the Governor on behalf of the Crown to be styled the Minister of Railways, and in the Act called "the Minister," who shall, in addition to the powers thereby conferred, exercise all the powers and functions and have all the duties in respect of the Government railways open for traffic (except the power of taking land for railway purposes) which the Minister for Public Works hitherto exercised. Section 4 provides that after the coming into operation of the Act the railways in the Colony then vested in the railway commissioners appointed under the Government Railway Act of 1887, shall again be vested in the Crown, and the management thereof shall pass to the "Minister" to be controlled and regulated under the Public Works Act, 1882, and the Acts amending the same, and that this Act of 1894 and the aforesaid Act of 1887 shall thereupon be repealed.

This statute applies to railways and to these alone, and does not touch or affect harbours and harbour works. The Harbour Board, at a date not specially given, but probably acting under the powers conferred by the Harbour Act of 1878, had erected a wharf on one of the banks of the River Wanganui. It adjoins a railway station and yards. The property of the Government Railway System is vested in the Minister under the provisions of the Act of 1894.

In the year 1900 there was erected by and at the expense of the Minister, on a piece of land contiguous to that upon which this wharf stands, a shed. As first constructed it was only 182 feet long by 42 feet broad. In the year 1908, the Minister caused it to be extended by an addition 200 feet in length. On the 9th July, 1900, the Harbour Board, by an agreement entered into between it and the Minister sought to divide between itself and him the exercise of the rights conferred, and the duties and obligations imposed upon it by the Harbour Act of 1878.

The Agreement runs as follows:—

"1. The control of the wharves in connection with the railway shall be solely in the hands of the Minister, who shall also work the traffic on the wharves subject to the bye-laws, rules, regulations and rates now or hereafter in force on the New Zealand Railways.

"2. The Board shall undertake and be responsible for the berthing, mooring and unmooring of ships at the wharves, and the removal when necessary of ships to such berths as may be found most convenient for working.

"3. The Minister reserves the right to levy such charges for haulage, handling, storage or carriage as he may from time to time deem necessary.

"4. The Minister shall maintain the wharves at the expense of the Board.

"5. The Board shall determine the wharfage and harbour improvement rates and berthage dues.

"6. Collection of such rates and dues shall be made by the Railway Department. Two and a half per cent. commission on Board receipts so collected to be payable to the Minister.

"7. For handling, receiving and delivery of ships' goods or from ships from or to carts, ninepence per ton shall be paid by the Board to the Minister.

"8. All goods requiring labour in any shape or form shall be subject to such charge, except in the case of coal and ballast, which owners providing all labour and appliances may receive from or deliver to ships.

"9. The Minister shall deduct from the moneys collected for the Board the commission and any other amounts due from the Board to the Minister, and shall pay four-weekly any balance due to the Board within fourteen days after the accounts are made up.

"10. The Minister shall not make any charge against the Board in respect of labour for discharging, sorting, or loading goods received by the Railway Department by rail for direct shipment, or received from ships to be forwarded direct by rail.

"11. This Agreement shall be deemed to have come into operation on and inclusive of fifth day of February, One thousand nine hundred, and shall remain in force up to and inclusive of the fourth day of February One thousand nine hundred and one.

"12. Should this Agreement not be renewed on or before the expiration thereof the Board shall, if required by the Minister so to do, purchase the shipping shed in connection with the wharves, at a price to be determined by two valuers, one to be appointed by the Minister and the other by the Board, or, if they are unable to agree, then at a price to be fixed by a third valuer to be appointed by the two valuers aforesaid before entering upon the valuation; or, the Minister may, at his option, remove the said shed from the wharves."

This agreement has been informally renewed from time to time and is treated by the parties thereto as being still in force, except that the rate mentioned in Clause 7 thereof has been raised by agreement between the Railway Department and the Harbour Board to tenpence per ton.

No question was raised in the Courts in New Zealand as to whether or not this Agreement was *ultra vires* of either of the contracting parties, but it is obvious it could not, as regards an exporter or importer of goods, affect his rights or increase the dues which he was liable to pay. Their Lordships concur with the Chief Justice in thinking that by and under this agreement the true relation in which the Minister stood to the Harbour Board was that of agent appointed to exercise and discharge on its behalf the respective rights and duties purported to be assigned to him.

If that be so, it necessarily follows that the Minister as such agent could not exact from an importer or exporter of goods, dues or charges other than or in excess of those which the Board, his principal, could itself exact without the intervention of the Minister. Before the year 1900, the dues and charges fixed by the Harbour Board for the services rendered and accommodation provided in connection with the receipt of goods from a ship and the delivery of them to the consignees was, as to general goods, 3*s*. per ton.

This sum was collected from the importer or exporter by the Railway Department, 9*d*. per ton (subsequently increased to 10*d*.)

was retained by the Minister out of it, and the balance paid over to the Harbour Board. In cases where the consignees did not take delivery of their goods before nightfall on the day of discharge, the goods were stored in a shed, and a charge of 1*s*. per ton was made for removing them from the wharf to the shed and there storing them. If delivery was not taken within 24 hours, a further charge was made.

The operation styled "sortage" is described by the plaintiff witnesses, and their evidence is practically uncontradicted. It appears from the plan put in evidence that the wharf is very much longer than the respondent's shed, which is styled a "shipping shed," to distinguish it, apparently, from another shed styled the "goods shed." If the shipping shed never existed, it could scarcely be considered a reasonable delivery by the ship to a local consignee of his goods if ten or twenty separate packages of these goods were scattered along their lengthy wharf, so that the consignee's carter, when he came to take delivery of them for his employers, would have to search for them over a considerable length of wharf and pick them out from the other portions of the ship's cargo which had been unloaded upon the same wharf. Those in charge of the ship are naturally anxious to get her cargo discharged and delivered with all reasonable despatch, so that she may get away or take in other cargo. It is in the interest of the local consignee to have the various packages of his goods collected and placed together at one spot upon the wharf, so that his carters can quickly load and carry them away. If this collection and segregation of the local consignee's goods took place upon the open wharf, it would prima facie be a matter with which the respondent, as owner and operator of the adjoining railway, had no concern.

From the year 1900 to the year 1917 the Department retained for itself, in addition to the 10*d*. per ton already mentioned, 2½ per cent. on the gross sum collected by it for the Harbour Board. The action out of which this appeal has arisen was brought by the Railway Department or the "Minister" in the name of the Sovereign, not at all by or on behalf of the Harbour Board, to recover the sum of £142 11*s*. alleged to be due and owing by the appellants to the Crown. The statement of claim, in its 2nd paragraph, alleged that between the 13th April, 1918, and the 25th May, 1918, the New Zealand Government Railway Department received and sorted goods for the appellants at the railway premises at Wanganui. In the 3rd paragraph it is alleged that the sum sued for is due and owing by the appellants to the King in respect of freight and wharfage on, and the sorting and handling of these goods. In the 4th paragraph it is alleged that of this sum of £142 11*s*. the sum of £23 19*s*. 5*d*. is due in respect of sorting charges levied on goods received by the respondent into the railway sheds at Wanganui delivered from the Wanganui wharf.

In the 5th paragraph it is alleged that these sortage charges are made and levied by the plaintiff in the action, the Crown,

under the authority of Regulation 47, made under the Government Railway Act of 1908, on the 14th November, 1917, and published in the *New Zealand Gazette* of the 22nd November, 1917. It will be observed that the claim of the Crown is not rested in any respect upon any right, power, or authority emanating from, or conferred by, the Harbour Board. On the contrary, the right sought to be enforced is an independent statutory right claimed to be vested in the Crown by the provision of this Regulation 47, founded on the provisions contained in the 10th section of the Government Railways Act, 1908. The appellants filed a statement of defence in which they admit that a sum of £118 7*s*. 7*d*., portion of the sum sued for, was owing to the Crown in respect of charges other than sortage charges, and alleged a tender of this sum of £118 7*s*. 7*d*., and brought that sum into Court; but as to the sum of £23 19*s*. 5*d*., denied that this or any other sum was due by them to the Crown in respect of sortage charges as alleged: that the storage charges claimed were as respects the appellants' said goods not made under any lawful authority; and that Regulation 47, purporting to impose such charges, was as to them *ultra vires*.

If no shed had been erected, and this sortage had taken place on the wharf, it could not be reasonably contended that the Railway Department had any concern with it; since the consignee's goods would never have been in fact carried on the railway, never delivered to or placed in the custody or under the control of the Railway Department with the intention or for the purpose of being so carried by it anywhere. That Department would have rendered no service to the consignee in respect of these goods which would entitle it to receive any remuneration from him. One special peculiarity about the practice is that through traffic pays no charges such as those sued for. If goods are carried by the railway to the wharf for shipment, or discharged upon the wharf to be carried by the railway inland, no dues such as those sued for are levied in respect of them, though they may have been collected and put in one place just as the appellants' goods have been. This goes to show that the claim made in this case is not based upon any work performed by the Department in their character of carriers of goods by rail.

It may well be that the Department should receive from the Harbour Board remuneration for the facilities they afford for proper delivery of goods discharged on the wharf, by permitting the sorting of them to be done in their shed with the aid of some of their staff. That, however, is not at all the matter for decision. The question for decision is wholly different. It is this—whether the Crown, acting through the Railway Department, and entirely independently of the Harbour Board, has a statutory right to exact dues and charges in respect of this sortage, in their shed, of goods never carried on the railway, or delivered to the Department, or placed under its control for the

purpose or with the intention of their being so carried. Sortage is in such a case not an operation in any way ancillary to the proper business of the Department as carriers of goods by rail.

Mr. A. K. Harris, the District Manager of the respondents at Wanganui, in his evidence described in detail the nature of this operation of sortage. He said :—

> "When the general cargo is received from the ship by the railway men it is placed in a mixed condition upon trollies or sack-barrows at the ship's side. The goods are then removed to the shed, and are sorted into lots according to marks and numbers, so that they may be easily identified when the agent's order is presented. Taking sugar, for example. It is landed under various original brands, such as 'A,' 'A1' etc.: the numbers indicate the different classes of sugar. The bags are very seldom marked with the consignee's name or mark. When the consignee calls we just give out so many bags from each heap according to the ship's agent's orders for delivery. These goods are taken into the shed. Hatrick and Co.'s goods would be placed together as near as possible in a stack, or they may be kept separate, but still together, so that delivery of the number required may be effected of any particular line. Up to that point of putting it into heaps the work is done by waterside workers employed by the Railway Department. Then the railway staff of casual labourers deliver the goods to the consignees' carters. In addition to casual labourers, our permanent staff in the shed engaged in the delivery and handling of goods is five clerks and two storemen. Casual hands are employed intermittently, and number from fifteen to thirty. The number of casual labourers varies, but it may go up to thirty. The railway gets three copies of the ship's manifest from the ship's agent. The storeman has one. The sorting and stacking would be carried out under the supervision of the storeman. The sorting is done by the waterside workers. From delivery from ship's slings to delivery from sheds to carts the work is paid for by the Railway Department. The Department collects from the Harbour Board 10*d*. per ton for the work done on the wharf. The 10*d*. paid by the Harbour Board covers work done on the wharf only. That charge does not include the use of the shed or the work done by staff in the shed."

In answer to the Court he then said: "The watersiders bring the goods into the shed, and carry them to stacks under the storeman's supervision. The 10*d*. is credited to the Railway Department by the Harbour Board." He admits that the sorting was done for many years, namely, from 1900 to 1917, as it is now done, without any charge having been made on the consignees. He says that the claim now put forward is a new claim, a war charge, for the doing of something which was formerly done without charge, and was taken to be covered by the 10*d*. per ton retained by the Department out of the money collected by it as agent for the Harbour Board. He then proceeds to show that owing to the rise in the wages of labour, etc., this sum did not cover the cost of the services rendered to consignees by the Department, hence the necessity of exacting this new charge. On the question of *ultra vires* these considerations are irrelevant. It may well be, however, that there is another way in which the financial needs of the Department might be met, namely, that the Harbour Board should increase its dues from 3*s*. per ton to 4*s*. per ton, and allow its agent, the Department, to increase its

remuneration to 1*s.* 10*d.* and deduct that amount from the sum it collects on behalf of its principal. But however this may be, the question is not what the Department can obtain when acting through and on behalf of the Board, but what it can exact independently of the Board.

Mr. Burgess, the Managing Director of the appellant company, when giving evidence, said :—

> "Certain classes of goods do not go into the shed, such as timber, bar iron, cement, and benzine. They are removed by the consignees from the wharf at the end - the foreshore, you may say - in their own conveyances. To so remove them they must cross two sets of rails on the wharf, which are close to the outer side of the wharf where the ship lies. It is necessary to cross the Government Railway property to remove the goods from the wharf into the town. This is allowed. There is nothing to prevent the cargo from being removed from the wharf by consignees.
>
> "Cross-examined. Ships usually come with general cargo. The cargo could not conveniently be removed from the wharf without going into a sorting-shed. The quantity of cargo which arrives makes it commercially impracticable to sort on the wharf."

If Mr. Burgess be right in this last statement it is difficult to see why the Harbour Board, which receives dues and charges from ships carrying cargo to their port, and discharging it on their wharf, should not themselves provide sheds for the purpose of this necessary sorting, either by erecting them or by hiring or otherwise procuring the use of them for this purpose. It is not pretended by the Department that the appellants' goods were brought into the shipping shed for any purpose other than that of being sorted as a step in the delivery of them to the consignees, the appellants.

It was, in the arguments before their Lordships, suggested somewhat faintly but not pressed, that from the fact that the practice of sortage was resorted to without protest, an agreement might be implied as against local consignees to pay to the Department reasonable remuneration for this work of convenience. This point was not raised in the Courts in New Zealand. Evidence was, in consequence, not directed to it. Their Lordships had not before them materials which would enable them to deal with it, and they, therefore, abstain from expressing any opinion upon it. The statute of 1908, upon the relevant provisions of which the question for decision turns, is expressed to be an Act to consolidate certain enactments of the General Assembly relating to the maintenance and management of Government Railways, and to the management, classification and superannuation allowances of the Government Railway Departments. In its second section it is stated to be a consolidation of the enactments mentioned in the First Schedule thereto, and enacts certain provisions which are to apply to them.

These enactments are eleven in number. By the first of them (the Government Railway Act of 1900) (1900 No. 27), the two previous statutes (the Government Railway Acts of 1887 and 1894) are respectively repealed. Its provisions closely resemble those of the Act of 1908, and the 10th section of the latter, so

much relied upon, is little more than a reprint of Section 11 of the earlier Act. The remaining ten enactments mentioned in the Schedule deal with matters entirely irrelevant to the present inquiry; and none of them refer expressly in any way to harbours or harbour works, or to the discharge or delivery to local consignees of any cargo or any portions thereof discharged in a port of harbour. There is no indication in any of them that the handling or delivery of goods (part of a ship's cargo consigned to local consignees) is an operation ancillary to the proper business of the Department as carriers by rail.

The second section of the Act of 1908 proceeds to enact that licences, regulations, rules, bye-laws, proclamations, etc., and, generally, all acts of authority which originated under any of the enactments mentioned in the Schedule or of any of the enactments thereby repealed, and are subsisting and in force on the coming into operation of the Act of 1908, shall enure for the purposes of this latter Act as fully and effectually as if they had originated under the corresponding provisions of the latter statute itself.

This Act of 1908 is by Section 3 divided into three parts. The first, comprising Sections 4 to 48, deals with the maintenance and management of railways. The second (Sections 49 to 68) with the classification of the Department, and the third (Sections 69 to 96) with the Superannuation Fund. By Section 6 it is enacted that, subject to the provisions of the Act, the Minister shall have the management, maintenance and control of every railway and of the Department. By Section 7 Sub-section 2 it is provided that it shall not be lawful for any local authority or for any person other than the Minister named in the statute, to exercise upon any railway land, any of the powers by the section conferred upon such Ministers. All the sections from 4 to 8 inclusive deal exclusively with the railway works. The use or management of them (Section 9) deals with locomotives and their use. Then comes Section 10, dealing with what the Minister so charged with the maintenance, management and control of railways may do by notice published in the Gazette, in discharge, presumably, of the authority conferred and the duty imposed upon him in respect of railways or any specified railway or any part thereof. He may (*a*) fix scales of charges to be paid for persons carried on or using a railway; for goods carried on a railway or received on or into or stored in or delivered from any wharf, pier, jetty, shed or yard in *connection with a railway*, or for passengers failing to take out tickets from the booking office of the station whence they started, or for demurrage of any rolling stock, or for the use of cranes, hoists or other machinery for loading or unloading goods, or for the use by any vessel of any wharf, jetty, mooring, building, crane or other appliance in *connection* with a railway, or for goods loaded or unloaded from any wharf, pier, jetty, berthage or mooring in *connection* with a railway, or for goods received from or delivered from or to any vessel lying at or adjacant to any *such* wharf, pier, or jetty, berthage or mooring.

This, owing to the use of the word such, must mean any wharf,

pier, jetty, berthage or mooring in *connection with a railway,* but all those things must be done in respect of railways or of any specified railway or any part thereof, and must be something done in the management, maintenance, control, work or business of a railway. In the view of their Lordships these words cannot apply to something done on a space or in a building merely contiguous to or abutting upon a railway, even though it be the property of a railway; if the thing done forms no part of or has no connection with the proper business of a railway, as a carrier of passengers and goods by rail, or in other words that the expression " in connection with a railway " means connected with, subserving and being ancillary to, the business of a railway as such carriers. If that were not so the strangest results would follow.

If, for instance, the Minister should allow a shed or yard not at the time needed for the proper work and business of a railway, though contiguous to its lines, to be used by any trader for storing the commodities dealt with in his trade, but which had never been carried on a railway or been sent or intended to be sent anywhere by rail, it would seem to their Lordships impossible to hold that the Minister could, against the will of this trader, fix a scale of charges for the use of the shed or yard by him, or the handling therein of his goods even though their own servant might assist in the handling, for the reason that though the shed or yard might be physically contiguous to the railway, the use of it for the trade carried on or the work done in it was not in any way connected with or ancillary to the business of the railway as carriers of goods.

If the trader should enter into an agreement with the Minister to pay for the use of the yard or shed that would be quite a different matter. There the charge would not be imposed by statute but secured by contract between the parties.

The definition contained in Section 2 of the Act of 1908 of Government Railway is no doubt very wide. It is defined to mean any railway belonging to His Majesty in New Zealand, and in the case of each railway includes all land belonging to His Majesty or formerly part of any public reserves within the meaning of the Public Reserves and Domains Act of 1908, upon which the railway is constructed, or which is, or is reputed to be, held or used in connection with or for the purposes of the railway, and also all buildings, wharves, jetties, etc., and other movable or immovable property of every description or kind belonging to His Majesty, and situated on such land or held or used or reputed to be held or used in connection with or for the purposes of the railway. This definition does not help to a determination of the question at issue in this appeal. The wharf in this case does not come within it. It is, though abutting upon the railway, used for the discharge and loading of goods of all kinds, whether they have been carried on the railway or are intended to be carried upon it or not. The shed is similarly used. When the shed is used for the sorting of goods which have been carried upon the railway, or are delivered

into it for the purpose of being carried by it, the shed is used for the purpose of the railway and in connection with its proper business as a carrier of goods, but none of these conditions were satisfied in the case of the appellants' goods, nor, indeed, in the case of goods consigned to any local merchant and merely delivered upon the wharf to be brought to the consignees' premises. In their Lordships' view the Department by merely permitting the latter class of goods to be sorted in their shed in the manner described cannot acquire the same statutory right in respect of them that they may have with respect to goods of the former class. If the words "in connection with a railway" used in Section 10 meant merely a place physically contiguous to a railway and nothing more, charges similar to those sued for could be exacted in respect of goods such as timber sorted upon the wharf, which is contiguous to the railway, though the goods were never brought within the shed at all. But this it is admitted cannot be done. These words, therefore, must be directed to something different from propinquity or contiguity, and in their Lordships' view, having regard to all the provisions of the statute, mean in Section 10 in connection with the business and operations of a railway as a carrier of goods by rail. In most cases this provision would only be satisfied if the goods were taken to the shed after they had been carried on the railway, or were taken to the shed for the purpose and with the intention of being so carried. Sortage in such a case would form part of the proper business of the railway as a carrier of goods by rail; and the transit of the goods and the handling of them would come within the words of Section 10.

As the goods of the appellants did not fulfil this latter condition in their Lordships' view, the words of this section did not apply to them, nor does Regulation 47 passed under its provision. As regards these particular goods of the appellants, in respect of the sorting for which the sum of £23 19*s.* 5*d.* is sued for, that clause is therefore illegal and indefensible. They are, therefore, of opinion that the appeal succeeds, that the decision appealed against was erroneous and should be reversed, and that in respect of the respondent's claim for £23 19*s.* 5*d.* judgment should be entered for the appellants with costs, and that the respondent should pay the costs of the appellants, and they will humbly advise His Majesty accordingly.

In the Privy Council.

A. HATRICK AND COMPANY, LIMITED,

v.

THE KING.

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