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The NLRB's Enforcement of the NLRA Against Tribal Employers and the Tribal Labor Sovereignty Act of 2015, H.R. 511 and S. 248

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Summary

The National Labor Relations Act (NLRA) provides workers with the right to collectively bargain with employers and requires employers to bargain in good faith. The NLRA excludes from the definition of the term "employer" "the United States or any wholly owned government corporation or any state or political subdivision thereof." The NLRA does not specify whether Indian tribal employers are covered.

Prior to 2004, the National Labor Relations Board (NLRB), the agency responsible for enforcing the NLRA, followed a rule that excluded from the NLRA tribal employers located on tribal land, but included tribal employers located off of tribal land. In 2004, in *San Manuel Indian Bingo and Casino*, the NLRB adopted a new position and held that the NLRA applied to all tribal employers, regardless of their location, unless its application would interfere with treaty rights or quintessentially governmental functions. In *San Manuel Indian Bingo and Casino v. NLRB*, the U.S. Court of Appeals for the D.C. Circuit upheld the NLRB's application of the NLRA to the tribal casino.

In recent years, the NLRB has asserted jurisdiction over a number of tribal casinos, relying on its analysis in *San Manuel*. In June 2015, in *Little River Band of Ottawa Indians v. NLRB*, the U.S. Court of Appeals for the Sixth Circuit upheld the NLRB's reasoning and application of the NLRA to a tribal casino, despite the fact that the tribe had adopted its own labor ordinance to regulate tribal labor relations and asserted that application of the NLRA would impair this exercise of its inherent sovereignty. In July 2015, the same court considered whether the NLRA applied to another tribe's casino. Because the panel was bound to follow the precedent of *Little River Band*, it upheld the NLRB assertion of jurisdiction. However, the panel indicated that it would have applied a different analysis and reached a different result, but for the *Little River Band* precedent.

The Tribal Labor Sovereignty Act of 2015, H.R. 511 and S. 248, would amend the NLRA's definition of employer to exclude "any enterprise or institution owned and operated by an Indian tribe located on its Indian lands." In effect, it appears that the bills would reinstate a location-based test similar to the one used by the NLRB prior to 2004, when it decided *San Manuel*.

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Introduction

Indian tribes are unique in that they are quasi-sovereign entities that enjoy all the sovereign rights not divested by treaties or Congress, or inconsistent with their dependent status.[1] As "domestic dependent nations,"[2] "Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government."[3] However, they are subordinate to the sovereignty of the United States.[4] Because of tribes' unique status, courts have wrestled with the issue of whether statutes that do not mention tribes apply to tribes.

The National Labor Relations Act (NLRA),[5] which does not mention tribes, gives employees the right to collectively bargain with employers, and imposes on employers the obligation to bargain with employees in good faith. Section 2(2) of the NLRA defines the term "employer" to exclude "the United States or any wholly owned government corporation or any state or political subdivision thereof."[6] In 1976, the National Labor Relations Board (NLRB), the agency responsible for enforcing the NLRA, concluded that tribal employers were "implicitly" exempted from the NLRA as governmental entities. Later, it decided the exemption did not extend to tribal employers located off tribal land. In 2004, the NLRB abandoned the location-based test in favor of a test that presumes the NLRA applies, but allows exceptions if application of the NLRA interferes with a tribe's right of self-governance in intramural matters or treaty rights. Since 2004, the NLRB has been enforcing the NLRA against tribal casinos. The Tribal Labor Sovereignty Act of 2015, H.R. 511 and S. 248, would amend the NLRA's definition of employer to exclude, "any enterprise or institution owned and operated by an Indian tribe located on its Indian lands" effectively reinstating the Board's position before 2004.

The remainder of this report discusses how the NLRB developed its current position on applying the NLRA to tribal casinos, considers how it has applied the NLRA since 2004, and discusses how the Tribal Labor Sovereignty Act of 2015 relates to the history of the NLRB applying the NLRA to tribal enterprises.

Background on the NLRB's Position

The NLRB's position on enforcing the NLRA against tribal employers has changed over time. This section explains the reasoning behind the Board's positions.

Fort Apache Lumber Co.

In 1976, the NLRB considered for the first time whether the NLRA applied to tribal employers in *Fort Apache Timber Co.*[7] In this case, the White Mountain Apache Tribe (Tribe) owned and operated the Fort Apache Timber Co. on its reservation. The Board did not indicate whether the timber company employed non-Indian employees, but mentioned that it participated in interstate commerce. The NLRB identified the question presented as: "whether an Indian tribal governing

[1] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

[2] Cherokee Nation v. Georgia, 30 U.S. 1, 18 (1831).

[3] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (citations and internal quotation marks omitted).

[4] *Oliphant*, *supra* note 1.

[5] 29 U.S.C. §§151 *et seq.*

[6] 29 U.S.C. §152(2).

[7] 226 N.L.R.B. 503 (1976).

council *qua* government, acting to direct the utilization of tribal resources through a tribal commercial enterprise on the tribe's own reservation, is an 'employer' within the meaning of the Act."[8] The NLRB explored the legal status of Indian tribes, focusing on their sovereignty and right of self-government. Although the Board did not find that the tribal timber company was excluded from the definition of "employer" under section 2(2), the Board concluded that it was "implicitly exempt" within the meaning of the NLRA.[9] In a footnote, the NLRB noted that the Supreme Court found that a utility district owned by private individuals was exempt because the utility district was responsible to public figures, making it a political subdivision of a state. Using that reasoning, the NLRB concluded, "the Fort Apache Timber Company is an entity administered by individuals directly responsible to the Tribal Council of the White Mountain Apache Tribe, hence exempt as a governmental entity recognized by the United States, to whose employees the Act was never intended to apply."[10]

The Board applied the reasoning of *Fort Apache* in *Southern Indian Health Council*[11] to conclude that the employer at issue, which was a consortium of a number of tribes and operated on a reservation, was exempted from the NLRA as a governmental entity because the employer, and its personnel policies, were controlled by the tribes.

Sac and Fox Industries Ltd.

In 1992, the NLRB considered whether its reasoning in *Fort Apache Timber Co.* applied to a tribal employer that was located outside the tribe's reservation in *Sac and Fox Industries*.[12] In this case, the NLRB determined that *Fort Apache* and *Southern Indian Health Council* were inapplicable because those cases involved tribal employers located on reservations and application of the NLRA would have interfered with the tribes' "right of internal sovereignty."[13] The NLRB noted that in *Fort Apache* and *Southern Indian Health Council* it had found the tribal employers implicitly exempt as governmental entities, but determined that the *Fort Apache* reasoning was not binding because it applied to tribal employers on land within the tribes' reservations. This case, however, involved a tribal employer located far away from the reservation.[14]

Having concluded that *Fort Apache* was not binding, the NLRB turned to the jurisprudence governing when statutes of general applicability apply to tribes to determine whether the NLRA applied to Sac & Fox Industries. The NLRB first quoted the Supreme Court's opinion in *Federal Power Comm'n v. Tuscarora Indian Nation*:[15] "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." [16] However, the NLRB noted exceptions to this rule, and cited *Donovan v. Coeur d'Alene Tribal Farm*,[17] a case decided by the U.S. Court of Appeals for the Ninth Circuit. The so-

[8] *Id.* at 504.

[9] *Id.* at 506.

[10] *Id.* n. 22.

[11] 290 N.L.R.B. 436 (1998).

[12] 307 N.L.R.B. 241 (1992).

[13] *Id.* at 242-243.

[14] *Id.* at 243.

[15] 362 U.S. 99 (1960).

[16] 307 N.L.R.B. at 243.

[17] 751 F.2d 1113 (9th Cir. 1991).

called *Coeur d'Alene* exceptions provide that a statute of general applicability will not apply to a tribe if (1) the law touches "exclusive rights of self-governance in purely intramural matters;" (2) application of the law to the tribe would abrogate treaty rights; or (3) there is proof in the legislative history or elsewhere that Congress did not intended that the law would apply to tribes.[18] If any of those exceptions apply, Congress must explicitly express its intention that tribes be subject to the statute. Because the NLRB found that the tribal business did not fit any of the exceptions, it concluded the business was subject to the NLRA.[19]

The NLRB considered its jurisdiction over off-reservation tribal employers again in *Yukon Kuskoksim Health Corp.*[20] The employer at issue was like the employer in *Southern Indian* in that it was a health care organization run by a consortium of tribes. However, it was not located on a reservation. Finding the tribal employer's off-reservation location determinative, the Board found the NLRA applied.[21]

San Manuel Indian Bingo and Casino

The NLRB continued to assert jurisdiction based on whether the tribal employer was located on or off a reservation until 2004, when it decided *San Manuel Indian Bingo and Casino*.[22] In this case, the NLRB was asked to reject the *Fort Apache* / *Sac and Fox Industries* location-based test. In considering whether to do so, the Board noted that as tribal businesses have grown, they have employed increasing numbers of non-Indians and begun to compete with non-tribal employers.[23] It assessed the premises underlying *Fort Apache* and *Sac and Fox Industries* and rejected them.[24] Thus, the NLRB overturned *Fort Apache*, modified *Sac and Fox Industries*, formulated a new rule for when the NLRA would apply to tribes, which it asserted would accommodate both federal labor policy and federal Indian policy, and applied the NLRA to the tribal casino located on a reservation.

In place of the location-based test, the NLRB adopted the *Tuscarora* / *Coeur d'Alene* test, which assumes a statute that does not mention tribes applies to tribes unless application of the statute would trigger one of the *Coeur d'Alene* exceptions.[25] However, the NLRB took an additional analytical step of assessing its "discretionary jurisdiction," by "balanc[ing] the Board's interest in effectuating the policies of the [NLRA] with its desire to accommodate the unique status of Indians in our society and legal culture."[26] This step involved "examin[ing] the specific facts in each case to determine whether the assertion of jurisdiction over Indian tribes will effectuate the purposes of the Act."[27] The NLRB explained that when tribal businesses employ significant numbers of non-Indians, compete with non-tribal businesses, and participate in interstate commerce by catering to non-Indian customers, the "special attributes of tribal sovereignty" are

[18] *Id.* at 1116.

[19] 307 N.L.R.B. at 245.

[20] 328 N.L.R.B. 761 (1999).

[21] *Id.* at 763-764.

[22] 341 N.L.R.B. 1055 (2004).

[23] *Id.* at 1056.

[24] *Id.* at 1057. It identified the premises as: location is determinative of whether a tribal employer is subject to the NLRA; and, the definition of the term, "employer" in section 2(2) supports the location-based test.

[25] *Id.* at 1059-1060.

[26] *Id.* at 1062.

[27] *Id.*

not implicated.[28] Distinguishing a tribal enterprise from a tribal government function, the NLRB wrote that exercising jurisdiction over such tribal enterprises would fulfill its mandate to "protect and foster interstate commerce" and "effectuate the policies of the Act while doing little harm to the Indian tribes' special attributes of sovereignty or statutory schemes designed to protect them."[29] The NLRB explained that application of the NLRA to all tribal activities was not appropriate because at times, when tribes perform governmental functions, they act consistent with their "mantle of uniqueness."[30] Such governmental functions are likely to occur on reservations and likely do not involve non-Indians or interstate commerce. Therefore, when tribes engage in self-government of internal matters, the NLRB wrote, the Board's interest in effectuating the purpose of the NLRA is lesser and the tribal interest in autonomy is greater.[31]

The NLRB applied this analytical framework to the San Manuel Indian Bingo and Casino and concluded that application of the NLRA would fulfill its mandate to effectuate the purpose of the NLRA. First, the NLRB determined that none of the *Coeur d'Alene* exceptions applied.[32] The casino argued that application of the NLRA would interfere with the tribe's self-governance because casino revenue funded the government. However, the NLRB employed a narrow reading of *Coeur d'Alene*'s self-government exception and wrote that the casino's reasoning would result in the self-government exception swallowing the *Tuscarora* rule.[33] Accordingly, the NLRB concluded that the NLRA applied to the San Manuel Indian Bingo and Casino.

The casino appealed the NLRB's decision to the U.S. Court of Appeals for the D.C. Circuit in *San Manuel Indian Bingo and Casino v. NLRB*.[34] The court of appeals upheld the NLRB's decision, but used an analysis different from that used by the Board.[35]

NLRB Enforcement of the NLRA Against Tribal Casinos since *San Manuel*

Despite the fact that the court of appeals upheld the NLRB's decision in *San Manuel* based on different reasoning, the NLRB has used its reasoning based on the *Tuscarora* / *Coeur d'Alene* test from its *San Manuel* decision in subsequent enforcement actions. This section discusses the arguments the tribes have made against applying the NLRA to their casinos and how the NLRB has analyzed those arguments.

[28] *Id.*

[29] *Id.* at 1062-1063.

[30] *Id.* at 1063.

[31] *Id.*

[32] *Id.* at 1063-64.

[33] *Id.* at 1063.

[34] 475 F.3d 1306 (D.C. Cir. 2007).

[35] The court analyzed the case by asking two questions: "(1) Would application of the NLRA to San Manuel's casino violate federal Indian law by impinging upon protected tribal sovereignty? and (2) Assuming the preceding question is answered in the negative, does the term 'employer' in the NLRA reasonably encompass Indian tribal governments operating commercial enterprises?" *Id.* at 1311. The court concluded that the NLRA would impinge on the Tribe's sovereignty to a negligible degree, recognizing that there are governmental elements to tribal casinos. *Id.* at 1314-1315. However, it determined that the governmental elements were ancillary to the commercial character of the casino. *Id.* Therefore, the NLRA did not infringe the Tribe's sovereignty enough to foreclose its application. *Id.* at 1315. The court found the NLRB's interpretation of the term "employer" to include on-reservation tribal employers reasonable. *Id.* at 1317. Therefore, it upheld the Board's decision that it had jurisdiction to enforce the NLRA against the Tribe's casino.

Little River Band of Ottawa Indians Tribal Government[36]

In *Little River Band*, the NLRB enforced the NLRA against a tribal casino owned by the Little River Band of Ottawa Indians (Tribe). The Tribe challenged the Board's jurisdiction by arguing that it exercises "inherent sovereignty" over labor relations on its reservation, that it had exercised that sovereignty in passing a labor ordinance that governed casino workers, and that application of the NLRA would impermissibly interfere with its tribal sovereignty and internal self-governance.[37] The Board rejected the Tribes' argument, applying its reasoning from *San Manuel*. The Board concluded that the Tribe's labor ordinance did not fall within the *Coeur d'Alene* exception for self-government in intramural affairs because the labor ordinance was not related to self-governance – it regulated labor at a business that served and employed non-Indians.[38] The U.S. Court of Appeals for the Sixth Circuit affirmed the Board's ruling.[39] The court considered the law governing tribal jurisdiction over non-members, described that jurisdiction as being at the periphery of the tribe's sovereignty, applied the *Tuscarora / Coeur d'Alene* test, and concluded that regulation of non-Indian labor relations at the casino did not fit within the exception for self-government in intramural affairs.[40]

Soaring Eagle Casino and Resort[41]

The Saginaw Chippewa Indian Tribe of Michigan (Tribe) challenged the jurisdiction of the NLRB to apply the NLRA to its casino. The Tribe argued that the NLRA did not apply because its treaties guaranteed its right to self-government and its right of exclusive use of the reservation.[42] The right to self-government, the Tribe argued, included the right to operate a casino, and the right to exclude included the right to regulate the conduct of its employees and to exclude federal personnel.[43] The NLRA, it argued under the *Tuscarora* / *Coeur d'Alene* test, would infringe its right to self-government and its treaty right to exclusive use of the reservation, and, accordingly, should not apply. The NLRB found that running a casino did not fit within the self-government exception because the casino is a commercial, not governmental, activity and its regulation does not interfere with internal tribal activities because the casino employs non-Indians, competes with non-Indian businesses, and attracts non-Indian customers.[44] The Board cited its opinion in *San Manuel* for support.[45] Although the Board conceded that the Tribe's treaties set aside the reservation for the Tribe's exclusive use, it wrote that such a "general" treaty right was

[36] The NLRB originally decided this case by an opinion published at 2013 N.L.R.B. LEXIS 172 (2013). While the case was on appeal, the Supreme Court held that two members of the Board were improperly appointed, and therefore, were without authority. NLRB v. Noel Canning. 134 S.Ct. 2550 (2014). The appellate court remanded the case back to a properly composed Board, which adopted the previous opinion. 2014 N.L.R.B. LEXIS 709 (September 15, 2014).

[37] 2013 N.L.R.B. LEXIS 172 at 6.

[38] *Id.* at 16.

[39] NLRB v. Little River Band of Ottawa Indians Tribal Government, 788 F.3d 537 (6th Cir. 2015).

[40] *Id.* at 555.

[41] Like *Little River Band*, this case was first decided by a Board with members whom the Supreme Court determined in *Noel Canning* were not properly appointed. The case, which had been appealed to the court of appeals, was remanded and reconsidered by a properly composed Board. The Board adopted the previous opinion, 2013 N.L.R.B. LEXIS 253 (April 16, 2013), in an opinion published at 2014 N.L.R.B. LEXIS 815 (October 27, 2014).

[42] 2013 N.L.R.B. LEXIS 253 at 32-33.

[43] *Id.*

[44] 2013 N.L.R.B. LEXIS 253 at 30.

[45] *Id.* at 31-32.

insufficient to qualify for the treaty right exception.[46] If such a general right were to prohibit the application of federal law, it reasoned, virtually no federal laws would apply to reservations created by treaties.[47] Finally, the Board weighed the policy interests implicated in the case, stating that when the tribe is fulfilling a traditional governmental function, the Board's interest in enforcing the NLRA is weaker than when the tribe is engaging in a commercial venture involving non-Indians.[48] Because the casino is commercial in nature, competes with non-Indian businesses, and services non-Indian customers, the Board found, the "special attributes of the Tribes sovereignty" are not implicated by application of the NLRA.[49] Therefore, the NLRB concluded that policy considerations weigh in favor of applying the NLRA.

The U.S. Court of Appeals for the Sixth Circuit upheld the NLRB's enforcement of the NLRA against the casino.[50] However, the panel made clear that but for the *Little River Band* precedent, it would have applied a different analysis and reached a different result.[51]

Chickasaw Nation[52]

In this case, the Chickasaw Nation (Tribe) argued that the NLRA should not apply under the *Tuscarora* / *Coeur d'Alene* test because it would violate three treaty rights guaranteed by the 1830 Treaty of Dancing Rabbit Creek: the right to self-government, the right to exclude, and, under Article 4, a right to be free of federal laws, except those passed to address Indian affairs. The Board did not address the first two rights. Instead, it focused on Article 4 of the treaty, which provides, among other things, that the Tribe will not be subject to "all laws, except such as from time to time may be enacted in their own National Councils ... and which may have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs."[53] The treaty also provided that ambiguities in the treaty "shall be construed most favorably towards" the Tribe.[54] The Board concluded that Article 4, "forecloses application of the [NLRA], which is not a law enacted by Congress in legislation specific to Indian affairs."[55] Because no party argued that the NLRA was passed under the Indian Commerce

[46] *Id.* at 33-34.

[47] *Id.* at 35-36.

[48] *Id.* at 37.

[49] *Id.* at 37-38.

[50] Soaring Eagle Casino and Resort v. NLRB, 791 F.3d 648 (6th Cir. 2015).

[51] *Id.* at 662, 662-670. The panel indicated that it believes the proper analytical framework is based on the law governing tribal authority over non-members, as articulated in Montana v. United States. 450 U.S. 544 (1981). Under *Montana*, generally Indian tribes do not have authority over non-members. However, *Montana* has two exceptions. First, when a non-member enters a consensual relationship with the tribe, the tribe may exercise jurisdiction related to the relationship. *Id.* at 555-556. Second, when the non-member threatens the economic security, political integrity, or health and welfare of the tribe, the tribe can exercise jurisdiction. *Id.* at 566. The *Soaring Eagle* panel indicated that it believed that the first exception applied: the tribe had authority to regulate its consensual relationships with non-member employees through its labor ordinance. 791 F.3d at 670.

[52] Like the other cases, this case was originally decided by a Board with improperly appointed members. 359 N.L.R.B. No. 163 (July 12, 2013). The court of appeals vacated the decision and remanded the case back to the Board. The Board delegated its authority to a three member panel, which decided the case. 362 N.L.R.B No. 109 (June 4, 2015).

[53] 362 N.L.R.B. No. 109 at 2.

[54] *Id.*

[55] *Id.*

Clause or directed at Indian affairs, the Board concluded that enforcement of the NLRA would abrogate a "specific" treaty right guaranteed by Article 4.[56]

The Tribe had an 1866 treaty with the United States, which some parties argued abrogated the Article 4 right. Article 7 of this 1866 treaty states that the Tribe agrees, "to such legislation as Congress and the President ... may deem necessary for the better administration of justice and the protection of the rights of persons and property within Indian Territory."[57] However, the NLRB rejected the arguments that Article 7 granted the U.S. broad legislative power over the Tribe and that the NLRA falls within the kind of legislation specified in the treaty. The Board concluded that Article 4 of the 1830 treaty and Article 7 of the 1866 treaty were compatible.[58] Therefore, the Tribe's rights under Article 4 persisted. Furthermore, the Board noted, Article 45 of the 1866 treaty provides "all the rights, privileges and immunities heretofore possessed by [the Tribe] ... or to which they were entitled under the treaties and legislation heretofore made ... shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty."[59] Because the Board read Article 4 of the 1830 treaty and Article 7 of the 1866 treaty to be compatible, it concluded, "asserting jurisdiction [to enforce the NLRA against the casino] would abrogate treaty rights specific to the [Tribe]."[60] Accordingly, it dismissed the complaint.

Summary

In enforcing the NLRA against tribal casinos, the NLRB seems to follow its analysis from *San Manuel*, which relies on the *Tuscarora* / *Coeur d'Alene* test, and a weighing of the labor policy interests and the Indian policy interests. The tribes fighting application of the NLRA to their casinos have made the following arguments. In *Little River Band*, the Tribe argued that application of the NLRA would violate its inherent sovereignty and right of self-government. The NLRB and U.S. Court of Appeals for the Sixth Circuit rejected this argument because they viewed the casino as a commercial enterprise, not a governmental activity, which is not intramural in nature because it employs and serves non-Indians. In *Soaring Eagle*, the Tribe argued that its treaty guaranteed it the right to self-government and the right to exclude, which includes the right to regulate employee conduct. The Board rejected the self-government argument for the same reasons it rejected the argument in *Little River Band*. It concluded that the right to exclude guaranteed by the treaty was a "general" right that did not qualify for the treaty right exception under *Coeur d'Alene*. The U.S. Court of Appeals for the Sixth Circuit, bound by the precedent of *Little River Band*, upheld application of the NLRA to the casino. Finally, in *Chickasaw Nation*, the tribe argued that its treaty right to self-government, its right to exclude, and its right to be free of federal laws that did not concern Indian affairs exempted its casino from the NLRA. The Board accepted that the "specific" treaty right to be free of federal laws, except those concerning Indian affairs, would be abrogated by application of the NLRA. Accordingly, it concluded the NLRA did not apply.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 2-3.

[60] *Id.* at 3.

The Tribal Labor Sovereignty Act of 2015

The Tribal Labor Sovereignty Act of 2015, H.R. 511 and S. 248, would amend the definition of employer to exclude, "any enterprise or institution owned and operated by an Indian tribe located on its Indian lands." It would define "Indian lands" to mean the following:

> (A) all lands within the limits of any Indian reservation;
>
> (B) any land title to which is either held in trust by the United States for the benefit of any Indian tribe or individual subject to restriction by the United States against alienation; and
>
> (C) any lands in the State of Oklahoma that are within the boundaries of a former reservation (as defined by the Secretary of the Interior) of a federally recognized Indian tribe.

It appears, therefore, under this bill, the NLRA would not apply to tribal enterprises located within reservations, on tribal or individual trust or restricted fee land, or, in Oklahoma, within a tribe's former reservation. In effect, it seems that the bill would reinstate a location-based test similar to the one that the Board overturned in *San Manuel*.

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