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Background and Characteristics of our Dispute Resolution Program

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Brown & Root, Inc.

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Background and Characteristics of our Dispute Resolution Program

Comments

Report Submitted to the Commission on the Future of Worker-Management Relations

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Hot Topic "Future Worker
Management"



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September 28, 1994

Ms. June Ann Robinson
Commission on the Future of
Worker Management Relations
2318 U.S. Department of Labor
200 Constitutional Avenue, NW
Room C
Washington, D.C. 20210

RE: Alternative Dispute Resolution in the Workplace

Dear Ms. Robinson:

Brown & Root would like to relate to the Commission its experience with an alternative form of conflict management for workplace disputes. In the following letter I will:

- discuss the background for our decision to create a conflict management system, and summarize its key features;
- describe the development and disadvantages of the present litigation-based system for employment dispute resolution;
- analyze the legal foundation for the use of alternative dispute resolution (ADR) in employment disputes; and
- present our experience under our new Dispute Resolution Program.

I have also attached two articles from national publications reviewing our new program (Attachments 2 and 3).

BACKGROUND AND CHARACTERISTICS OF OUR DISPUTE RESOLUTION PROGRAM (DRP)

Brown & Root is an international engineering and construction company with approximately 45,000 employees world-wide, and about 30,000 in the United States. Within the United States, Brown & Root has employees in almost 40 states, in positions ranging from highly skilled engineering professionals to field construction and labor positions.

Since Brown & Root's principal business is the selling of services rather than products, its principal asset is its employees. Preserving employment relationships is essential to the company's long term survival. Over the years, Brown & Root has been involved in many employment litigation cases. While we had prevailed in most of those decisions, we soon realized that there are only victims in the employment litigation process – and no winners. The company was the victim of excessive legal fees; the employees, of ruined careers, disrupted families and other high social costs.

As a result of our negative experience with the litigation process, Brown & Root began an evaluation of alternative dispute resolution programs for employment matters in 1990. First, we implemented a conflict management system for our employee benefit programs. This proved to be so successful that in 1991, we began an evaluation of a company-wide conflict management system for employment matters. After extensive study and consultation with outside experts, and as a result of various task forces and employee surveys, the company approved the adoption of such a Program in February, 1993.

Formal implementation of the Brown & Root Dispute Resolution Program occurred in June, 1993 (Attachment 1). The Program is a comprehensive employment dispute resolution system for all employees in the United States, from the chief executive officer to the entry-level field craft employee. The outline of the DRP, which was supplied to all employees, is included as Attachment 1. We believe it is critical to summarize some key features of our DRP:

- The DRP was designed with input from employees at all levels - from field employees to senior management.
- The DRP is a four option program - it provides multiple processes, both inside and outside the company, for resolving disputes.
- In keeping with employee input and expert opinion, the DRP encourages collaborative approaches to dispute resolution by offering multiple

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channels for direct talk, or negotiation, and for informal and formal mediation.

- The DRP promotes the resolution of disputes at the lowest possible level through in-house options, in keeping with the views of those we surveyed. Most disputes are resolved within a month, through in-house options.
- The DRP provides some options that offer very high standards of confidentiality, and prohibits retaliation for use of the system.
- As an employee benefit designed to ensure fairness, the DRP offers to each employee access to legal counsel of the employee's choosing.
- To ensure its independence, the DRP reports to a Dispute Resolution Policy Committee composed of senior executives, rather than to a department or a single individual.
- Brown & Root routinely collects data and analyzes it to evaluate utilization, cost benefit and employee satisfaction.

The latter portion of this letter deals with the experience Brown & Root has had during the first year of operation of its new system. However, before addressing our current experience, I present a brief historical perspective on how employment conflicts have been handled in the United States.

DEVELOPMENT OF THE PRESENT LITIGATION-BASED SYSTEM FOR EMPLOYMENT DISPUTE RESOLUTION

The present heavy dependence on the judicial system to resolve employment disputes is probably the result of the convergence of a number of factors. These factors include the civil rights movement and the expansion of tort law.

Before World War One, the principal use of the legal system in employment matters seems to have been the trial of personal injury actions related to the workplace. Then, as now, a consensus developed that the costs, delays and inefficiencies of the judicial system made it unsuitable for employment matters. With the widespread adoption of workers' compensation systems in the early decades of this century, this practice died out.

The period between the two World Wars, particularly the New Deal period, was characterized by active distaste for the judicial system in employment matters. The Norris-LaGuardia Act of 1932 went perhaps as far as constitutionally permissible in withdrawing federal court jurisdiction over "labor disputes". The National

Labor Relations Act of 1935 created an administrative body, the National Labor Relations Board, to resolve the most significant labor issues of the time. Even the Fair Labor Standards Act of 1938, which does provide for private enforcement through the court system, delegated significant enforcement powers to the Department of Labor.

Finally, growing labor organizations increasingly pressed for private, nonjudicial dispute resolution as an alternative to contract litigation. Labor organizations had split over support for the Federal Arbitration Act of 1925. However, by the 1950s, organized labor heavily promoted nonjudicial remedies. This effort culminated in the Supreme Court's "Steelworkers Trilogy" of 1960, in which the Court ceded wide spread authority to labor arbitrators. This trilogy consists of Steelworkers v. American Mfg. Co., 363 U.S. 564, 46 LRRM 2414 (1960), Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416 (1960), and Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 46 LRRM 2423 (1960).

On the other hand, beginning in the 1940s, the civil rights movement pioneered the use of the federal courts to overcome discriminatory practices. This effort was increasingly successful during the 1950s and early 1960s. Thus, when the Civil Rights Act of 1964 was adopted, it seemed natural to turn to the federal courts for enforcement of these individual employment rights. This use of the courts was enormously productive, particularly during the late 1960s and 1970s.

Because of the success of the 1964 Act, with its emphasis on individually litigated employment rights, subsequent labor legislation adopted the same model. That is, federal labor policy began to be implemented in terms of individual rights against "discrimination", designed to be enforced primarily by individual plaintiffs in federal court. Examples include the Age Discrimination in Employment Act and the Americans With Disabilities Act. Not surprisingly, state employment legislation since the 1970s has followed the federal model.

It is widely believed that the designers of the 1964 Civil Rights Act feared that the legislation would be undone by hostile local juries. Accordingly, litigation under the Act was designed to be tried without a jury. This feature limited the damages recoverable to traditional equitable remedies. In the meantime, however, tort law – and tort damages – were expanding rapidly in state courts. These cases were tried to state court juries which, by the 1980s, could no longer be perceived as being hostile to discrimination claims. Thus employees increasingly began to bring cases under state law, using tort concepts to avoid federal limits. The Civil Rights Act of 1991 reflected the shift to this paradigm of employment dispute resolution, expanding the remedial options to include tort-like damages and introducing trial by jury.

DISADVANTAGES OF THE CURRENT EMPHASIS ON LITIGATION

What the preceding discussion demonstrates is that the present reliance on tort-like litigation to resolve individual employment disputes is not a matter of logical necessity. Rather, it is the result of legal and historical forces which developed outside the employment context. However, American employees, lawyers and managers have become so used to this mechanism that we seldom appreciate that this is a fundamental design characteristic, one that separates American practice from most other national systems of employment regulation.

Most of the world manages employment by direct government regulation of management, direct political involvement of trade unions as political parties, and specialized, quasi-political labor tribunals. In this model, resolution of employment disputes is part of the political and legislative process. By contrast, the American model requires individuals to vindicate broad, rights-based policies through litigation, usually in independent courts of general jurisdiction. American labor regulation is thus made part of the judicial process and, specifically, tort law.

Recent statutes, such as the Americans with Disabilities Act and the Family Medical Leave Act operate in a similar fashion.¹ Not only does such litigation suit our history and national character, it is undeniably inexpensive for the government to impose. Rather than creating expensive bureaucratic controls paid for in tax dollars, the system places the cost of regulation on employers and employees. Further, these costs are imposed by a court system with little political accountability to the legislature. This system does, however, have the virtue of allowing thorough investigation and individualized determinations.

The problem is that the labor litigation system and federal agencies set up to assist in the investigation and adjudication of labor matters are becoming unmanageably slow, expensive and cumbersome. The Equal Employment Opportunity Commission now has the highest backlog it has had in many years. The creation of new rights and the passage of federal legislation has done nothing to ease this burden. A simple employment dispute, involving no more than \$5,000 in lost wages and benefits, can easily cost several times this much to resolve – no matter who prevails. Furthermore, administrative investigation and litigation may take years to complete. By the time of trial, the perceptions of the parties and witnesses have been irreversibly colored and polarized by years of conflict. Relatively cost-free remedies, such as reinstatement, have often become impossible. Emotional and economic damages which did not exist at the time of the dispute have accumulated, compounded, and assumed an importance far out of proportion to the nature of the dispute.

¹ Both the Americans with Disabilities Act and the 1991 Civil Rights Act of 1991 specifically encourage the use of mediation.

To a significant degree, these economic and emotional costs are products of the system itself. An employee who has recently been terminated may be shocked and depressed. These conditions are directly related to the termination. However, these difficulties are normally neither devastating nor permanent. But, a former employee who has spent several years in the litigation system is in an altogether different position. This individual has spent years building mistrust and suspicion, locked in conflict and absorbing the financial and emotional impacts of litigation. Quite often, because of the long-term alienation from former co-workers, he or she has lost an important part of the network of acquaintances that support any career. Further, he or she may become strongly focused on past wrongs, at the expense of present and future career. Naturally, the larger the potential damage award, the more this is likely to occur². Inevitably, earning capacity and employment skills suffer.

Such economic losses are not a natural result of the wrong suffered. They are a natural result of a litigation based dispute resolution system. What converts this from a highly arbitrary tax on employers to an economic tragedy is that employees do not obtain substantial recoveries with any great frequency. Reliable statistics are not readily available, but practical experience shows that, in the great majority of cases, the employees lose or must settle for far less than what they think they are entitled to receive. Actual large recoveries are quite rare. This is not a defect in law or procedure. It simply reflects a fact of life: the judicial system does not provide ordinary employees who must work for a living any real hope of obtaining significant economic relief in any time period that is realistic from the employee's standpoint.

In short, litigation, as a system of employment dispute resolution, is highly inefficient, both economically and morally. It wastes time, money and careers. This is true even if, as assumed here, the end result is always correct³. To the extent that the results through litigation are wrong, the social loss can only be greater.

These observations do not prove that contractually resolved disputes are better decided, or even that contractual dispute resolution is more efficient. However,

² Given a high potential legal recovery and a low present stream of earnings, this is rational economic behavior. However, in the economic terms, this behavior is self-reinforcing. The more the employee is distracted from his career, the lower his earning capacity, which in turn increases the relative value of his potential legal recovery, which results in a further investment in litigation and disinvestment from a career. The economics of employment litigation thus seem to bear a close relationship to the economics of both "repeat offender" criminal activity and state lottery systems.

³ This may or may not approximate reality. Of the 132 appellate employment discrimination decisions reported in Fair Employee Practice Cases (BNA), vol. 62, 58, or 44% resulted in at least a partial reversal or vacation of the trial court's judgment (excluding 4 unclassifiable dispositions). This sampling, while certainly unscientific, is at least sufficient to justify questioning any claims of unique accuracy for litigated results at the trial level.

this discussion should dispel any illusion that private litigation has any automatic claim to historical, legal, moral or economic merit.

Before turning to existing alternatives in detail, including Brown & Root's experience, it is worth describing the legal framework for other types of dispute resolution.

PRESENT LEGAL BASIS OF ALTERNATIVES TO LITIGATION

Employment dispute resolution mechanisms come in almost limitless variety. Even if discussion is restricted to more or less formal corporate policies, the list is impressive. The most typical types include: open-door policies, assisted open door, informal investigation and internal mediation, Ombudsman Programs, third-party mediation, peer-review, employee hotlines, various forms of collaborative decision-making groups which also serve grievance functions, arbitration, and fact-finding. In most cases, more than one procedure is used, either sequentially, as in a "step" grievance procedure, or as alternatives. Brown & Root's DRP makes use of most of the features listed above.

Currently, most systems are founded on contract and depend on state contract law. The exception is arbitration. Arbitration is regulated under the Federal Arbitration Act ("FAA"). The FAA makes agreements to arbitrate enforceable on the same basis, and only to the same extent, as other contracts. Thus, Section 2 of the FAA provides that an agreement to arbitrate shall be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract". It is not entirely clear what this phrase includes. However, it is clear that it does not include either defenses to the contract as a whole, or state law restrictions on arbitration.

Federal courts have also uniformly applied the rule that valid arbitration clauses are enforceable despite any restrictions in state arbitration law. This general rule applies to both state statutes and common law, and applies with equal force to actions brought in state or federal court. Thus, in Perry v. Thomas, 482 U.S. 483, 107 S.Ct. 2520 (1987), the Supreme Court held that the FAA preempted a provision of the California Labor Code which permitted an employee to pursue claims in a judicial forum despite an arbitration agreement. Otherwise, the FAA has no effect on general state contract law. However, it does restrain a state from singling out arbitration clauses for unfavorable treatment.

Finally, in Gilmer v. Interstate-Johnson Lane Corp., 111 S.Ct. 1647 (1991), the Supreme Court held that federal statutory claims of discrimination such as those under the Age Discrimination in Employment Act, may be subject to a valid binding agreement to arbitrate such disputes. There were several policy and legal

issues left open after Gilmer, but the Gilmer case has clearly refocused attention on the use of private conflict resolution in the workplace.

POLICY IMPLICATIONS OF NONLITIGATION DISPUTE RESOLUTION PROCEDURES

The FAA has carved out a relatively litigation-free zone around arbitration that has, particularly in recent years, allowed arbitration to develop and flourish. The "halo effect" of the FAA has also tended to protect other forms of dispute resolution which are probably not "arbitration" under the FAA. This trend has been hastened by recent strong state legislative and judicial initiatives toward alternative dispute resolution of litigated matters. The trend has also been reinforced by experience with the EEOC and analogous state agencies, whose principal function has been to attempt to "conciliate" (mediate) employment disputes. Indeed, this is one of the ironies of the resistance to employer-initiated dispute resolution procedures. If the case is litigated, one of the first steps the court or agency is likely to take is to pressure the parties to undertake an alternative means of resolution. This procedure, typically mediation, is likely to be less well adapted to the particular employment environment than the system the employer would have adopted if left to its own devices.

This versatility is one of the principal advantages of a private dispute resolution mechanism. The particular method adopted can be adapted to fit each individual corporate structure. Indeed, Brown & Root's DRP looks unlike other systems, although many of them share common features.

In addition to avoiding the one-size-fits-all approach typical of litigation (and perhaps required by Due Process), private mechanisms avoid most of the other inherent problems with the litigation system. Even the most complex private dispute resolution systems are substantially faster than litigation, and are almost always cheaper, at least for the employee. Because the principal social costs of litigation derive from its delay and expense, private systems offer a greater advantage.

Litigation is, or at least is assumed to be, extremely good at finding the truth. However, important as this function may be to resolving disputes, it is also a weakness. Litigation's single-minded search for complete disclosure and legal correctness short-changes other, equally valid goals of a dispute resolution system.

One of these objectives is reconciliation, which is best achieved by early mediation where each party retains some level of credibility with the other. Another is the opportunity to "tell one's story" to an outside decision-maker. Many social scientists believe that this is an important act of catharsis, even if the teller loses. In litigation, the opportunity comes only years later and is hemmed in by elaborate and expensive trial procedures. The litigation process is also largely inscrutable to the average

citizen. Americans have always felt that even a confessed criminal is entitled to understand what is happening to him and why he is being punished. Yet, litigated employment matters are governed by procedural and substantive rules which are rarely understood by the parties, other than the most sophisticated employers and litigants. Arbitration cannot completely avoid substantive complexity, but it can radically simplify the procedural rules of the road.

Despite these advantages, arbitration and other dispute resolution mechanisms are sometimes criticized for denying employees important substantive rights. We believe these criticisms to be unfounded as applied to a properly designed and managed dispute resolution system which preserves the substantive employment rights of the employees, while providing increased procedural benefits through expedited resolution and cost efficiency. This allows the parties to reach closure on the matter while the events are fresh and the employee can still pursue his career. By a properly designed and managed system, we mean one that includes such features as the key characteristics of our system listed on page 2. It is critical to note that under a system with such characteristics, few disputes reach adjudicatory mechanisms such as arbitration or the courts; the vast majority are resolved by the mutual agreement of the parties, achieved through collaborative processes.

Ultimately, the greatest beneficiary of private employment dispute resolution system, if it is allowed to flourish, may be the court system itself. Many federal courts are today awash in paper generated by relatively small cases. The Southern Districts of New York, Florida, Texas and California are cases in point. The greatest contributors to the problem are federal drug cases and prisoner habeas petitions. However, federal employment cases probably run a close third. The courts have responded to this crisis by restricting and formalizing discovery, pressuring settlements, placing arbitrary limits on trial time, and developing ever more rigid and complex procedures designed to increase paper flow and decrease the time judges (but not lawyers) spend on each case.

In short, the court system, with regard to employment cases, is being stifled by overload. Its primary virtue, careful and deliberate reconstruction of the past, is becoming a casualty of the pressing need for judicial efficiency. Yet, unlike private dispute resolution, the sacrifice is not offset by any substantial progress toward other legitimate objectives of the litigants, for example, reconciliation, catharsis, closure or comprehension. Certainly there are more settlements of litigated cases than in times past. But these settlements are not driven by reconciliation. They are, as often as not, driven by the litigants' dawning realization that one's day in court may be too long in coming, too short to tell the story, too expensive to afford, and too hard to understand.

BROWN & ROOT'S EXPERIENCE UNDER ITS NEW FOUR-OPTION SYSTEM

Private employment dispute resolution has enormous promise. There is every reason to believe that it will deliver superior justice, superior speed and reduced cost. Yet the field is quite new. Not only are employers just beginning to implement ambitious, sophisticated systems of dispute resolution, but dispute resolution, as a field of serious academic study, is in its infancy. The hard data have yet to be gathered, and perhaps the hard questions have yet to be asked -- about both litigation and private methods.

A few observations can be made with a high degree of certainty. First, the litigation system has no special claim to delivering justice, or even truth. Second, the litigation system is, even assuming perfect efficiency in achieving the "right" result, an extremely slow expensive device imposing heavy monetary and non-monetary costs on the participants. If another system is available, it ought to be given a chance to succeed. Third, as stated above, we have little concrete information on the vast array of alternatives. The existing studies do not contain sufficient statistical data from which to draw reliable conclusions.

What is needed is experience. This experience can only be achieved if the process is given some breathing room; a reasonable chance to learn what works, what is acceptable to employees, employers and courts, and even what questions we should be asking. A brief look of Brown & Root's experience during the first year of its DRP does offer much reason for optimism.

Almost 500 employees utilized some aspect of the system. Of these 500 cases, over 75% were resolved within 4 weeks of the employee's initial contact. The vast majority were resolved within the company. Even more impressive is the fact that the overwhelming majority of these cases are resolved through collaborative, in-house processes such as informal or formal mediation. Of the 500 cases, over 300 have been resolved in-house. Only about 25 have gone to outside mediation and only 4 have gone to outside arbitration.

Even with an employee benefit plan which compensates employees for their legal expenses, fewer than 35 employees requested the assistance of counsel. In the four arbitrations which occurred, none of the employees felt the need to be represented by counsel.

While the total cost of this Program is still being analyzed, it is clear that the annualized expense for this type of Program is substantially less than what one large litigated employment case can cost both Brown & Root and the employee in legal expenses, while doing a much better job of delivering justice in the workplace to the average employee.

The Brown & Root DRP provides the employee four options for the resolution of a dispute. These options may be employed, or bypassed for another option, at the employee's discretion. The options are:

- A. The Company's Open Door Policy -Under this option, the employee may speak to his or her immediate supervisor or to a higher level manager in the chain of command.
- B. A Conference -Under this option, the employee meets with a company representative from the DRP office to talk about their dispute and to choose a method for resolving it. One method available is an internal informal mediation involving the use of a Brown & Root advisor.
- C. A Formal Mediation -This option involves the case of a neutral third party using an AAA mediator.
- D. A Formal Arbitration -This option involves the use of the AAA's arbitration program.

One of the most utilized and cost effective parts of the Brown & Root's DRP is the Advisor Program. In some corporations this is called an Ombudsmen Program. Regardless of its title, the program is generally structured to provide a confidential outlet for current and former employees who have employment related problems, primarily through informal mediation.

All of the Brown & Root advisors are volunteers who receive 50 hours of training in mediation and collaboration skills. Our volunteers are selected on the basis of interest and natural ability. Brown & Root constantly seeks to add to its pool of mediators and advisors in order to honor its commitment to diversity in its DRP. Since all of the employees are employed in full time positions, the cost effectiveness of this DRP is readily apparent. While a portion of their attention is directed towards terminated employees, about two-thirds of advisor matters relate to incumbent employees. With a resolution rate of 67%, the basic goal of preserving the employment relationship is realized in a much greater degree through this process than almost any other within the DRP.

The actual task the advisors perform varies greatly from one case to the other. They may act as mediators, as fact finders, or both, or may practice collaborative techniques – all in an effort to obtain resolution at the earliest phase of the dispute. In some cases they may give advice to the employee as to what avenues may be opened within the organization to assist them. They never serve as an advocate for the employee, and in many situations never actually contact anyone within the company.

The advisors are never in the same chain of command of the employee with whom they are advising, and the advisor has no authority to dictate or impose any solution. To further ensure the independence in serving as advisors, our volunteers have a dotted line reporting relationship to a Dispute Resolution Policy Committee, comprised of senior executives. The rules adopted by the company pertaining to its DRP are designed to maximize the emerging legally recognized privileges of ombudsmen in the judicial system. Much of the 50 hour training the advisors go through stresses the need for confidentiality and respect the privacy expectations of the employees and participants in the process.

Almost half of all the contacts in the Brown & Root DRP are referred to the Advisor Program. Referrals are completely voluntary, but are encouraged because of the confidential, non-confrontational efficiency of the process.

Along with the Advisor Program, the DRP places a heavy emphasis on mediation. During its first year, there were about 25 mediations. The resolution rate of the mediated disputes exceeded 80%. Resolutions reached in the mediations ranged from a simple apology to reinstatement and monetary damages. Their common link is confidentiality, consistent with the expectations of the parties. Furthermore, the determinations come very rapidly when compared to either litigated resolutions, or even mediated resolutions after matters go to litigation.

Timely resolution of the disputed matter is one of the most powerful attributes of the advisor and mediation functions of the Brown & Root DRP.

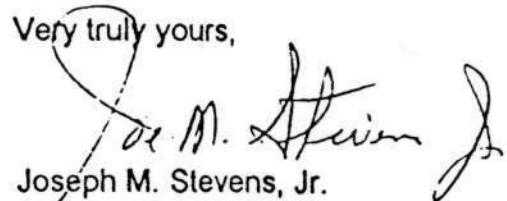
CONCLUSION

We adopted the DRP because it represents a more productive and more efficient way of resolving the inevitable conflicts which arise out of managing employees. We also adopted it because our experience in the litigation system indicated that it produced victims rather than solved problems. The litigation system delivers little in comparison to its cost, a cost imposed on employers and employees.

What the U. S. industry does best is find innovative and efficient ways for doing things better. In response to the failed litigation system, many companies, including Brown & Root, are developing novel methods of resolving disputes created in the workplace. What employees and employers need is time to learn to develop and refine their systems and theories in order to produce tangible results in the diverse workplaces of the U.S. The need for these systems is being recognized both professionally and academically as a recent publication from Business Week indicates (Attachment 2). Indeed our Program has received favorable attention in several national publications within the last year (Attachment 3).

Commission to promote the use of mediation and other forms of alternative dispute resolution in the workplace. We further encourage you to promote policies that encourage experimentation and creativity in responding to the problems that are inherent in an existing dispute resolution system. We appreciate the opportunity to present our experience to you, and we wish you great success in your efforts.

Very truly yours,



Joseph M. Stevens, Jr.
Vice President - Employee
Relations and Corporate Affairs

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Attachments