United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 30, 2005

TO : Curtis A. Wells, Regional Director
Region 16

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Pepsi Bottling Group, Inc.
Cases 16-CA-24101, 24219

530-6050-2575
530-6067-4000
530-5056-4001
530-8049
530-8054-9000

These cases were submitted for advice on whether the Employer violated Section 8(a)(5) and (1) when, without prior notice to or bargaining with the recently certified Union, it unilaterally instituted Monday layoffs of drivers, assertedly pursuant to a past practice of imposing short-term layoffs during business slowdowns. The cases were also submitted for advice on whether the Union waived its right to bargain over the Monday layoffs.

We conclude that the Employer violated Section 8(a)(5) and (1) by unilaterally imposing the Monday layoffs. In so concluding, we find that the Union did not waive its right to bargain over this issue.

FACTS

Background:

On December 6, 2002, Teamsters Local 657 (the Union) was certified to represent a unit of the Employer's drivers, among other employees, at its Austin, Texas facility. Since about February 2003, the Employer and the Union have been negotiating for their first collective-bargaining agreement; to date, no contract has been reached, and neither party has declared impasse.

On April 10, 2004, the Region issued a Complaint and Notice of Hearing in Case 16-CA-23365 alleging that the Employer engaged in dilatory bargaining tactics (i.e., refusal to meet at reasonable times). On June 24, 2004, the Region issued a Consolidated Complaint incorporating allegations in Case 16-CA-23625 that the Employer acted unilaterally by failing to grant cost-of-living wage increases to bargaining unit employees and by granting a wage increase to an employee who had filed a

decertification petition.[1] The Consolidated Complaint further alleged that the Employer told employees that they did not receive a cost-of-living wage increase because of the Union. On July 23, 2004, the Region also found merit to an allegation in Case 16-CA-23700 that the Employer engaged in direct dealing with the employee who filed the decertification petition and unilaterally created a position for him.

On October 8, 2004, the Regional Director approved an informal Board settlement agreement resolving all then-pending charges. Pursuant to this agreement, the Employer agreed to, inter alia, grant a retroactive wage increase to unit employees and a modified Mar-Jac remedy requiring that bargaining between the parties continue for an additional seven months.

The Monday Layoffs and the Employer's "Flexing" Policy:

The Employer employs about 24 drivers who are at issue in this case. A majority of the drivers typically work Monday through Friday from 6 a.m. until the end of their routes.

In early December 2004,[2] the Plant Supervisor held a meeting with drivers. During the meeting, he stated that the Employer was coming to the slow part of the season and some changes would have to be made to drivers' schedules. When the drivers became upset, the Plant Supervisor informed them that the Plant Manager had told him that the Employer was going to have to either temporarily lay off some drivers or eliminate one workday for all drivers in order to reduce costs.[3] The Plant Supervisor also stated that he had told the Plant Manager of his preference to reduce costs by having Monday layoffs of all drivers rather than temporarily laying off some drivers on a longer-term basis. Upon hearing these comments, various drivers became vocal and upset, at which point the Plant Supervisor said, "If you prefer, we can go around the room right now and you

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[1] This petition was ultimately dismissed.

[2] The Employer asserts that this meeting was not held until January 2005. However, as discussed below, it appears that the Employer began to implement the Monday layoff policy on December 6, 2004. Therefore, it is more likely that the meeting occurred in early December.

[3] The Employer claims that the Plant Manager's superiors instructed him to reduce costs by 20%.

can all let me know who to lay off and we can go back to five-day work weeks." The drivers then stopped talking.

On the following Monday, December 6, 2004, the workweek for drivers was cut to Tuesday through Friday. However, about 6 drivers worked that day; 17 drivers were off.[4] The following week, the Employer returned to the regular five-day workweek for drivers.

In early January 2005, the Employer held a "town hall meeting" with all employees. At this meeting, the Plant Manager told employees that the Employer had had a good year in 2004. He stated that the Employer still wanted to keep costs down and would therefore have to return to the four-day Tuesday through Friday workweek. The Plant Manager then stated that the Employer planned to reinstitute the shorter workweek only for about six weeks and then it would return to the regular five-day workweek. A few days later, the Plant Supervisor held another meeting with drivers and reiterated that the workweek would be shortened. He told employees that they could use vacation time, sick pay, etc., in place of the extra day off.

The schedule change was to go into effect on January 17, 2005, but because January 17 was a holiday, the change instead went into effect on January 24. On that date, 4 drivers worked and 19 drivers were off. The schedule change was also apparently implemented on the next consecutive Mondays -- i.e., January 31 and February 7, 2005.[5] Ten drivers worked on January 31 and 14 were off; 8 drivers worked on February 7 and 15 were off.[6]

The Union became aware of the Monday layoffs in late January; however, it did not request bargaining on the issue. Rather, the Union filed the charge in Case 16-CA-

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[4] Since drivers were apparently allowed to use vacation, sick pay, or personal days on that day, it is not clear whether all of the drivers who were off had been laid off or whether some may have been absent for another reason, such as vacation, illness, etc.

[5] It also appears that there may have been Monday layoffs on February 14, 2005, when only 6 drivers worked and 17 were off. The Charging Party is not alleging that the Employer unilaterally laid off employees on February 14.

[6] Again, since drivers were allowed to use vacation and sick pay on the Mondays of the layoffs, it is not clear whether all of employees who were off on these days had been laid off or whether some may have been absent for another reason.

24101 on February 2, 2005, alleging that the Employer violated Section 8(a)(5) and (1) by unilaterally changing the workweek of drivers by eliminating one workday without providing notice to or bargaining with the Union. The Union amended its charge on February 11, 2005, to allege that the Employer violated Section 8(a)(5) and (1) by dealing directly with employees regarding the change in their workweeks.[7]

In mid-February, the Employer again returned to the regular five-day workweek for drivers. Accordingly, the Employer employed about 17 to 23 drivers on the Mondays between February 21 and March 22, 2005; anywhere from 2 to 6 drivers were off on these Mondays.[8]

About one week before Monday, March 28, 2005, the Plant Supervisor met on a one-on-one basis with some of the drivers and informed them that they would be off on March 28. On March 28, the Employer employed 11 drivers and 11 drivers were off.

On April 8, 2005, the Union filed a charge in Case 16-CA-24219 alleging that the Employer had again violated Section 8(a)(5) and (1) by unilaterally eliminating one workday for drivers on March 28. The Union did not request bargaining on this issue before filing the charge.

The Employer admits that it never notified or bargained with the Union over any of these Monday layoffs. The Employer claims that it was privileged to unilaterally institute the layoffs pursuant to its past practice of flexing drivers' schedules during business slowdowns. According to the Employer, when there is a slowdown in business, it has historically instituted short-term layoffs of drivers, which the Employer refers to as "flexing" the drivers' schedules.[9] The Employer contends that, for at least the past four or five years, drivers have been laid off on the Friday after Thanksgiving, and, almost every Monday, several drivers have been laid off because there is

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[7] The Region has not submitted the direct dealing issue for advice.

[8] See fn. 6, supra.

[9] We note that the Employer's contention that it had a past practice of flexing drivers' schedules has not been corroborated because of employees' unwillingness to cooperate in the investigation, nor has it been substantiated by Employer personnel records or other relevant documentation.

typically a lower volume of deliveries on that day. The Plant Supervisor decides when volume is low enough to flex the drivers' schedules; he then decides how many and which of the drivers will be temporarily laid off. In deciding whom to lay off, the Plant Supervisor does not follow any written criteria, nor does he make the decision on the basis of seniority. Rather, he attempts to "share the pain," or spread the impact of the layoffs on drivers over time so that all are equally affected. On the occasions when drivers are temporarily laid off, they have the option of using a paid sick, personal, or vacation day for the day of the layoff. A self-generated scheduling chart provided by the Employer shows that from October 2003 until December 2004, the Employer employed anywhere from 14 to 26 drivers on any given Monday.[10] Thus, a "handful"--usually around 4, but sometimes as many as 8 or 9--drivers were apparently off on these various Mondays, excluding the Mondays that fell on holidays when all or most of the drivers were off.[11] Two drivers, one of whom had been a driver at the Employer since 1994, who were among those scheduled to be laid off on March 28 stated that, prior to that date, they had never been forced to be off on Monday, nor had they ever heard of the Respondent's practice of "flexing" drivers' schedules.

The Employer also contends that the Union waived its right to bargain over its practice of flexing Monday schedules because it never requested bargaining on this issue.

On April 22, 2005, the Regional Director issued a Complaint and Notice of Hearing in Case 16-CA-24101 alleging, inter alia, that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing the workweek of drivers on December 6, 2004, and January 24, January 31, and February 7, 2005, without providing notice to or bargaining with the Union. The hearing in Case 16-CA-24101, which was scheduled for June 16, 2005, was postponed as a result of the allegations in Case 16-CA-24219 and the Region's subsequent decision to submit the instant issues to Advice.

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[10] The number of drivers on the Employer's payroll varied somewhat throughout this period, ranging from 18 to 27. However, from December 2004 to March 2005, the time period at issue, the number of drivers on the payroll was consistently between 22 and 24.

[11] It is not clear whether the drivers who were off on the Mondays preceding December 2004 had been laid off pursuant to the Employer's flexing policy or whether they were absent for some other reason.

Following the Region's submission of these issues to Advice, the parties entered into a non-Board election agreement on July 20, 2005, in which they agreed to allow an arbitrator to conduct an election to determine whether the Union continues to represent a majority of employees in the unit. The agreement provides, inter alia, that, after the election, the parties may file objections with the arbitrator who conducted the election. The agreement further states that if--after the tally of ballots and the consideration of any challenged ballots and objections--the arbitrator determines that the Union is the representative of the unit employees, the Employer will continue to recognize and bargain with the Union in an attempt to reach an agreement. If, however, the arbitrator determines that the Union is not the representative of the employees, then the Union will withdraw all pending unfair labor practice charges. The arbitrator's rulings with respect to the election are final and binding.

The Union lost the election, which was held on August 3, 2005. The Union filed objections on August 10, and a hearing on the objections is scheduled for October 6 before the arbitrator.

ACTION

Absent settlement, the Region should issue a Consolidated Complaint alleging that the Employer violated Section 8(a)(5) and (1) by instituting the Monday layoffs of drivers without providing notice to or bargaining with the Union. As discussed below, we find the Employer's ostensible past practice of instituting short-term layoffs, or "flexing" employees' schedules, did not relieve the Employer of its obligation to bargain with the Union over the Monday layoffs. Further, the Union did not waive its right to bargain over this issue.

It is settled that, once a union is certified as the collective bargaining representative of an employer's employees, the employer may not unilaterally change terms and conditions of employment of the employees in the represented bargaining unit without first giving the union notice and an opportunity to bargain over the proposed changes.[12] Layoffs and employees' work schedules are mandatory subjects over which an employer must bargain.[13]

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[12] NLRB v. Katz, 369 U.S. 736, 743 (1962).

[13] Lapeer Foundry & Machine 289 NLRB 952, 954 (1988) (layoffs); Sheraton Hotel Waterbury, 312 NLRB 304, 307 (1993) (employees' hours).

On the other hand, the Board has recognized that schedule and hour changes that are consistent with an employer's past practice and have effectively become terms and conditions of employment do not constitute unilateral changes in working conditions; and, the employer does not violate Section 8(a)(5) and (1) by failing to bargain over such changes.[14] In order to find that a past practice has become a term and condition of employment, the Board requires that the practice be satisfactorily established by practice or custom.[15] In other words, the practice must be "so commonplace as to be a basic part of the job itself."[16] However, the Board has found that actions that involve unlimited employer discretion are not "practices" that an employer can unilaterally implement, even when there is a history of such discretionary conduct predating the union's certification.[17] Rather, these actions are "precisely the type of action[s] over which an employer must bargain with a . . . Union."[18]

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[14] See Kal-Die Casting Corp., 221 NLRB 1068, 1068 n.1 (1975) (routine scheduling and production adjustments relating to diminishing available hours of work did not violate Sec. 8(a)(5) and (1) because this activity did not vary from the employer's past practice).

[15] Eugene Iovine, 328 NLRB 294, 297 (1999), enfd. mem. 242 F.3d 366 (2d Cir. 2001), citing Exxon Shipping Co., 291 NLRB 489, 493 (1988), and cases cited therein.

[16] KDEN Broadcasting Co., 225 NLRB 25, 34-35 (1976) (employer's unilateral changes in employee work schedules were not unlawful because the employer established that it had a past practice of instituting frequent schedule changes before the advent of the union, and such changes were "so commonplace" that they had become a basic part of employees' jobs).

[17] See e.g., Eugene Iovine, 328 NLRB at 294 (employer must bargain with the newly-certified union over the discretionary reduction in employee hours); Adair Standish Corp., 292 NLRB 890 n.1 (1989), enfd. 912 F.2d 854 (6th Cir. 1990) (employer could no longer continue to unilaterally exercise its discretion with respect to layoffs after the union was certified).

[18] Eugene Iovine, 328 NLRB at 294, quoting NLRB v. Katz, 369 U.S. at 746.

For example, in Eugene Iovine, Inc., the Board found that an employer violated Section 8(a)(5) and (1) when it unilaterally reduced employees' work hours despite the employer's contention that it had a past practice of reducing work hours during business slowdowns. The Board emphasized that there was no "'reasonable certainty' as to the timing and criteria for [the] reduction in employee hours; rather, the employer's discretion to decide whether to reduce employee hours 'appear[ed] to be unlimited.'"[19] Significantly, the Board clarified that it is the employer's burden to establish that its action was consistent with a past practice and has become a term and condition of employment; the General Counsel does not have to show a departure from past conduct.[20]

Applying these principles to the instant cases, we find that, even assuming that the Employer had a past practice of "flexing" drivers' schedules during business slowdowns,[21] this did not privilege its unilateral imposition of the Monday layoffs on December 6, 2004, and January 24, January 31, February 7, and March 28, 2005. In this regard, the Employer has failed to show that these layoffs were consistent with the Employer's ostensible past practice of "flexing" drivers' schedules during business slowdowns. Rather, all these layoffs constituted a separate unilateral change on the part of the Employer that was different than flexing.

First, although the Employer did employ some drivers on the Mondays in question, rather than laying off all

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[19] Id. at 294. See also Adair Standish, 292 NLRB at 890 n.1 (despite past practice of instituting discretionary economic layoffs, employer must bargain with union regarding layoffs after the union was certified); NLRB v. Katz, 369 U.S. at 746 (1962) (employer must bargain with union over merit increases which were "in no sense automatic, but were informed by a large measure of discretion.").

[20] Eugene Iovine, 328 NLRB at 295 n.2.

[21] For the purposes of this memorandum, we assume that the Employer had a past practice of flexing drivers' schedules. [*FOIA Exemption 5*

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drivers, as it previously stated it would, the Employer ultimately laid off significantly more drivers than it ever had when it supposedly "flexed" drivers' schedules in the past. As noted above, it appears that the majority of the Employer's approximately 22 or 23 drivers were off on these dates, whereas, prior to December 6, around four drivers were off on any given Monday, or whatever other day the Employer may have decided to flex employees' schedules.

Second, the fact that the Employer felt it was necessary to hold meetings with drivers to announce these layoffs indicates that it was taking an unprecedented action, as opposed to following a longstanding policy. Further, the drivers' reaction of anger and surprise to the first announcement of the layoffs at the December meeting demonstrates that the Employer was instituting a policy that was unfamiliar to the drivers. Had the Employer simply been following the flexing policy that it has assertedly followed for the last four or five years, it would not have been necessary for the Employer to make formal announcements to that effect. And, the drivers at the December meeting likely would not have been so surprised and upset upon hearing that they would be laid off because, at that point, they should have been accustomed to having their schedules flexed on occasion.

Finally, the fact that two drivers--one of whom has worked for the Employer for 11 years--stated that they had never been laid off on Monday, and that they had never even heard of the Employer's policy of "flexing" drivers' schedules, further indicates that the Monday layoffs were not consistent with any Employer past practice.

Given these circumstances, we conclude that the Monday layoffs on December 6, January 24, January 31, February 7, and March 28 were not consistent with any past practice at the Employer; these layoffs were not "so commonplace" as to have become a pre-existing term and condition of employees' employment that could have been instituted unilaterally by the Employer.[22] Rather, the layoffs constituted a separate unilateral change in such terms and conditions, over which the Employer had an obligation to notify and bargain with the Union. Accordingly, the Employer violated Section 8(a)(5) and (1) by unilaterally instituting the layoffs.

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[22] Compare KDEN Broadcasting, 225 NLRB at 34-35, where the Board, in finding that the employer's unilateral changes in employee work schedules did not violate the Act, emphasized that frequent schedules changes were "so commonplace" at the employer that they had in fact become a "part of the job itself."

Even assuming that the Monday layoffs at issue were consistent with the Employer's ostensible past practice of flexing drivers' schedules, the Employer was still not privileged to unilaterally institute the layoffs. In this case, as in Eugene Iovine, the Employer acted unilaterally with unlimited discretion in an area where there was no reasonable certainty as to the specifics of the Employer's conduct. There is no "reasonable certainty as to the timing and criteria" for the Employer's flexing of employees' schedules; rather, the Employer's discretion to decide whether to flex employees schedules--as well as to decide how many and which drivers to lay off pursuant to this flexing--"appears to be unlimited."[23] As discussed above, the Plant Supervisor decided when the volume of business was low enough that drivers' schedules should be flexed. He then had complete discretion to decide how many and which of the drivers would be laid off. In making these decisions, it does not appear that the Plant Supervisor followed any discernible criteria. Although he allegedly tried to make the decisions so that all drivers "share the pain" of the layoffs equally, there is no evidence that the layoffs he implemented on any given day were based on any objective criteria. As the Board recognized in Eugene Iovine, actions that involve such unlimited employer discretion do not constitute a "practice" that has evolved into a term or condition of employment privileging an employer to implement unilaterally.[24] Rather, these actions are "precisely the type of action[s] over which an employer must bargain" with the Union.[25]

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[23] Eugene Iovine, 328 NLRB at 294.

[24] Id. at 297.

[25] Id. at 294. We acknowledge former Chairman Hurtgen's dissent in Eugene Iovine, supra. In that dissent, Chairman Hurtgen disagreed with the majority's finding that the employer's act of unilaterally reducing employees' hours was unlawful, noting that the employer had a past practice of reducing employees' hours when there was a business slowdown, and that the General Counsel had not shown that the employer deviated from that practice. Id. at 295. The present case will provide the Board an opportunity to revisit the issue of whether an employer has an obligation to bargain with a recently certified union over terms and conditions of employment that have been established by a past practice that affords an employer virtually unfettered discretion.

Accordingly, under Eugene Iovine, even if the Employer was following its stated past practice of exercising unlimited discretion in flexing drivers' schedules, the Employer nonetheless violated Section 8(a)(5) and (1) by instituting those layoffs without notifying or bargaining with the Union.[26]

In sum, for all of the reasons discussed above, we reject the Employer's defense that its past practice of flexing drivers' schedules privileged its unilateral institution of Monday layoffs on December 6, 2004, and January 24, January 31, February 7, and March 28, 2005; we therefore find that the Respondent's actions in this regard were unlawful.

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[26] In our view, Monterey County Herald, 2003 WL 259023, JD(SF)-07-03, Cases 32-CA-17970 et al. (February 3, 2003), currently pending before the Board, is not applicable to this case. In Monterey County Herald, the judge found that the employer's unilateral imposition of discipline in accordance with a practice involving significant discretion was not unlawful. While the legal issue in Monterey County Herald was essentially the same as here in that it involved an employer policy that afforded the employer broad discretion, the judge found that the employer was not obligated to notify and bargain with the union prior to implementing each individual instance of employee discipline. The judge reasoned that requiring the employer to do so would be to subject "the managerial minutiae of individual discipline to pre-imposition union scrutiny" that would encumber the employer's day-to-day operation of its business. JD, slip op. at 11.

In contrast, in this case, the Employer's operation of its business would not be unreasonably encumbered if it were required to notify and bargain with the Union prior to imposing short-term layoffs. Unlike certain instances of employee discipline, the layoffs at issue here did not require immediate responsive action on the part of the Employer. Rather, it would appear that layoffs could be anticipated far enough in advance to afford the Employer ample opportunity to notify and bargain with the Union prior to their imposition, which it was required to do under established Board law. See, e.g., Lapeer Foundry & Machine, 289 NLRB at 954 (layoffs are a mandatory subject over which an employer must bargain). Accordingly, even if the Board were to affirm the judge's analysis and decision in Monterey County Herald, that rationale would not require dismissal of this case.

Finally, in agreement with the Region, we reject the Employer's argument that the Union waived its right to bargain over the Monday layoffs that we have found to be unlawful. A waiver of bargaining rights by a union will not be lightly inferred and must be clearly and unequivocally conveyed.[27] However, where a union receives timely notice that an employer intends to change a term or condition of employment, it is incumbent upon the union to request bargaining over the proposed change with the employer; if the union fails to request bargaining in these circumstances, it may waive its right to bargain over the change.[28] To be timely, the notice to the union must be given sufficiently in advance of the actual implementation of the change to allow a reasonable time to bargain.[29]

In these cases, the Employer admits that it did not provide timely notice to the Union before it instituted any of the Monday layoffs; in fact, it did not provide the Union with any notice at all of these actions. The Union apparently learned on its own that the Employer had been instituting such layoffs in late January, well after the Employer's decision to institute the layoffs had already been implemented on at least two, if not three, occasions. The Union filed unfair labor practice charges in Case 16-CA-24101 on February 2, 2005, and in Case 16-CA-24219 on April 8, 2005, without having requested bargaining on the issue of the layoffs. Nonetheless, because the Union had received no notice of the Employer's decision to institute the layoffs prior to the unilateral implementation of that decision, the Union did not waive its right to bargain over the layoffs.[30]

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[27] Caravelle Boat Co., 227 NLRB 1355, 1358 (1977).

[28] See Intersystems Design and Technology Corp., 278 NLRB 759, 759 (1986), citing Ciba-Geigy Pharmaceuticals Division, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3rd Cir. 1983).

[29] Id.

[30] See Eugene Iovine, 328 NLRB at 297 (union did not waive bargaining over changes in employee work hours because the employer gave no notice to the union before unilaterally implementing the changes, and there was no evidence that the union was otherwise aware of the changes before they were implemented); Cisco Trucking Co., 289 NLRB 1399, 1401 (1988) (because the union never received any advance notice of wage and benefit changes prior to their unilateral implementation, the union could not have waived its bargaining rights).

In conclusion, for the above reasons, we find that the Union did not waive its right to bargain over the layoffs at issue in both of the instant cases. Accordingly, absent settlement, the Region should issue a Consolidated Complaint alleging that the Employer violated Section 8(a)(5) and (1) by instituting the Monday layoffs of drivers without providing notice to or bargaining with the Union.[31]

B.J.K.

It is not clear on what date in "late January" the Union became aware of the layoffs. Thus, the Union may have been aware that the layoffs were occurring before the institution of the January 31 layoffs, and certainly before the February 7 and March 28 layoffs, as it filed an unfair labor practice charges regarding the layoffs on February 2 and April 8. We view the January 31, February 7, and March 28 layoffs as merely additional implementations of the Employer's prior unilateral decision to institute Monday layoffs, and they were not therefore events that should have independently sparked the Union's obligation to request bargaining with the Employer.

[31] [*FOIA Exemption 5*

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