

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

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**UNITED STATES POSTAL SERVICE**

**and**

**Case No. 02-CA-219434**

**NATIONAL ASSOCIATION OF LETTER CARRIERS**  
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**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF  
TO EXCEPTIONS FILED BY RESPONDENT TO THE DECISION  
OF THE ADMINISTRATIVE LAW JUDGE**

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**Dated at New York, New York  
This 12<sup>th</sup> Day of June, 2019**

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## I. STATEMENT OF THE CASE

### A. The Decision of the Administrative Law Judge

By Decision dated May 3, 2019, Administrative Law Judge Jeffrey P. Gardner found that the United States Postal Service (Respondent) violated Section 8(a)(1) of the Act by denying Christopher White a *Weingarten* representative and by terminating him for asserting his *Weingarten* rights.<sup>1</sup> (ALJD, pg. 9). Therein Judge Gardner wholly credited the testimony of White over the testimony of Respondent's witnesses. (ALJD, pg. 4, fn. 8, pg. 5, fn. 11, pgs. 6-7). Respondent did not except to these credibility determinations.

The crucial findings made by Judge Gardner pertain to April 6, 2018, the day White was terminated. On that date, the Judge found that White appropriately requested Union representation three times: when he was alone with supervisor Anthony Bardis; again when he and Bardis met manager Angela Cail; and immediately prior to his termination by Postmaster Edward DiPasquale. (ALJD, pg. 4, Ins. 30-40; pg. 5, Ins. 1-7; pg. 6, Ins. 44-50; pg. 7 Ins. 17-38, pg. 8, Ins. 22-26). The Judge found that Respondent violated the Act by denying Union representation to White in each instance and by terminating him for making such requests. (ALJD, pg. 5, Ins. 5-10; pg. 7, Ins. 29-38; pg. 9, Ins. 15-17).

The ALJ held that the defenses asserted by Respondent – refusal to follow instructions, poor attendance, and insubordination – were pretextual and “by definition” failed to carry its burden under *Wright Line*. (ALJD, pg. 8, Ins 16-38, pg. 9, Ins. 1-2). In that regard, the Judge further noted that nothing of significance

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<sup>1</sup> Herein citations to the Decision include pages, and where helpful, line numbers.

occurred between White's request for union representation and his discharge, and that such timing, given the totality of the circumstances, could not be ignored. (ALJD, pg. 9, Ins 6-13).

Judge Gardner issued a recommended order requiring Respondent to: (1) rescind its unlawful discipline; (2) reinstate White; (3) compensate White for loss of earnings, other benefits, and related expenses; and (4) to post an appropriate notice.<sup>2</sup> (ALJD, pgs. 10-11).

**B. The Exceptions Filed by Respondent**

Respondent filed timely exceptions to the Decision. While conceding the ALJ's credibility findings, Respondent argues that the ALJ erroneously found that: a) White requested Union representation in the presence of Postmaster Edward DiPasquale before DiPasquale terminated him; b) DiPasquale was aware of White's previous requests for representation or was motivated by animus to terminate him; and c) the defenses proffered by Respondent were pretextual and therefore insufficient to show that it would not have terminated White because of its animus towards him.

**II. STATEMENT OF THE FACTS**

**A. Background**

Christopher White was a City Carrier Assistant ("CCA") represented by the National Association of Letter Carriers ("Union"). His primary duty was to deliver mail. He worked out of the New Rochelle Post Office located at 255 North Avenue. White relied on public transportation to get to work. As a CCA, he did not have a

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<sup>2</sup> On June 3, 2019, Respondent reinstated White to employment.

regular delivery route and was frequently assigned to nearby post offices in Mount Vernon, Pelham and Larchmont. Typically, White received his next work location assignment before the end of his work day. Since there was no posted schedule, White received his assigned location each day directly from his supervisor, Anthony Bardis. At times, Bardis did not give White his work assignments until the evening, usually by phone or text. Sometimes, if White had not heard from his supervisor, White called him to find out where to report the following morning or he went to the New Rochelle Main Branch, only to be sent elsewhere to work that day. (ALJD, pgs. 2-3).

Notwithstanding the fact that CCAs were not required to answer their personal phones outside of working hours,<sup>3</sup> Respondent's supervisors routinely attempted to communicate with CCAs outside of working hours. (ALJD, pg. 3, Ins. 2-3).

White was still within his probationary period on April 6, the date he was terminated. (ALJD, pg. 2, fn.4).

#### **B. The Events Leading to White's Termination**

On the day of his termination, White was assigned to work at his regular facility, the New Rochelle Main Branch. The previous day, White had received his assigned location after hours by text from Bardis. (ALJD, pg. 3, Ins. 33-36).

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<sup>3</sup> On August 8, 2016, the Union and the Employer entered into a settlement agreement which provided that the Tappan Post Office would not require CCAs to answer their private telephones or to wait by the telephone for such calls. Subsequently, the agreement was forwarded to all Westchester Post Offices, including the New Rochelle Main Branch, with the admonition from Labor Relations - "We are NOT permitted to do that!" (GC Exhs 2, 3 and 4). White was informed of this rule by representatives of Respondent and the Union during his training. (ALJD, pg. 2, Ins. 39-42, fn. 5, pg. 8, fn. 13).

On the morning of April 6, White received multiple missed calls from Bardis and Cail. While on the bus en route to New Rochelle, White called Bardis, who advised that he wanted White to report to Respondent's Scarsdale facility that day, rather than to the New Rochelle Main Branch where he was scheduled. White had never been assigned to this facility and did not know where it was located. So White told Bardis that since he was already on his way to New Rochelle, he would speak to him when he got there. Bardis said okay. (ALJD, pg. 3, Ins. 38-44; pg. 4, Ins 1-11).

When White arrived at the New Rochelle Main Branch, he went directly to Bardis who asked White why he was not at Scarsdale. White told Bardis that since he was already on the bus to New Rochelle, he just came in, but that he was fine with going to Scarsdale. However, Bardis replied that it was too late, that White was already in trouble and that they would have to speak with the Postmaster, Edward DiPasquale. First, they proceeded to an office near the Postmaster's office. Once there, Bardis closed the door and the two men were alone in the room. (ALJD, pg. 4, Ins. 13-23).

While they were alone, Bardis repeated that White was in trouble, and was either going to be fired or assigned to a rural route as punishment. Bardis gave White a paper to sign, an employee evaluation form, which White glanced over briefly. At that point, White told Bardis that he needed someone to help him review the paper before signing it. White did not specifically say he needed a Union representative, but Bardis apparently understood the request, and told White he

was only a CCA and did not have that right. White refused to sign the document. (ALJD, pg. 4, Ins. 25-33).

The two men then left that office and went to a conference room next door where manager Angela Cail was present. Cail testified that she was there because she and DiPasquale could hear the two men yelling and she was going to bring them to meet with her and DiPasquale. While in the conference room, in Cail's presence, White reiterated his request to speak to someone who could help him, but neither DiPasquale or Cail responded to his request. (ALJD, pg. 4, Ins. 35-40).

When Postmaster DiPasquale entered a few minutes later, White began to tell him that he was not refusing to go to Scarsdale, just that he was already on the bus en route to New Rochelle. White asked again for someone to speak to, but DiPasquale told White that this was not his time to talk. White responded saying that he had rights and wanted to talk to somebody. DiPasquale replied, "You have no rights."<sup>4</sup> White replied that "I'm an American, and I know I do," but DiPasquale just told him that he was terminated and instructed Cail to call the police.<sup>5</sup> (ALJD, pg. 5, Ins. 1-11; pg. 7, Ins. 17-34).

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<sup>4</sup> DiPasquale testified that he thought White was asserting his rights to ignore his instructions, to "be in America, with the verbiage" and to do what he wants. (Tr. 117).

<sup>5</sup> White recalled their conversation as follows:

I sat down and tried to explain to Ed the misunderstanding, that I was not trying -- I was not saying I didn't want -- I wasn't going to Scarsdale; I just wasn't going there from the bus at that time. If he would have sent me to Scarsdale, I would have no choice but to do it. Ed told me to be quiet, it's not my time to talk. Then that's when I asked them -- that's when I asked if there is anybody I can -- I -- so Ed asked -- Ed told me this -- this is not my time to talk. That's when I then -- that's when we -- that's when I then said, I have rights. I said, I have rights; Ed told me I have no rights. And that's when I got a little snappy and said, I'm an American, I know I have rights. And that's when he terminated me.

(Tr. 51). Respondent's witnesses all recalled White yelling "This is America." (Tr. 114, 117, 144, 147-48, 178, 190, 208, 238, 245-46; R Exhs. 6 and 7). Bardis, and DiPasquale further stated that

Thereafter, White stated that he was not leaving until he was allowed to speak to someone, whereupon he called local Union President Joe DiStefano. After their conversation ended, White left the office. (ALJD, pg. 5, Ins. 9-16).

After speaking with White, DiStefano called DiPasquale. When DeStefano asked DiPasquale why he did not give White a Union representative when he asked, DiPasquale replied that CCAs on probation did not have the right to a Union representative. (ALJD, pg. 5, Ins. 25-31).

By letter dated April 7, 2018, White was informed that he had been terminated for refusing to follow instructions, attendance related issues and insubordination. (GC Exh. 5). At trial, DiPasquale admitted that neither the alleged refusal to follow instructions nor the alleged attendance issues were the real reason for his termination, but that the real reason for White's termination was his alleged insubordination at the April 6 meeting. (ALJD, pg. 5, Ins. 33-37).

The ALJ found the Employer's formal letter of discharge, attributing White's termination first to a refusal to follow instructions, then to attendance related issues, and finally to insubordination, to be pretextual excuses designed to avoid liability and therefore, evidence of Respondent's animus. Accordingly, the Judge found that White's request for Union representation was a substantial and motivating reason for his discharge, and as such, that the General Counsel had established a prima facie case. (ALJD, pg. 8, Ins. 28-33). There being no other credible defenses proffered by Respondent, the Judge found that Respondent violated Section 8(a)(1) of the Act by discharging White. (ALJD, pg. 9, Ins. 5-17)

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White repeatedly declared that he had "rights." (Tr. 84, 114, 117, 144, 147-48, 178, 190; R Exh. 6).

### III. ARGUMENT

1. The ALJ Did Not Err by Finding that Christopher White Requested Union Representation in the Presence of Postmaster Edward DiPasquale Prior to His Termination.
  - A. The Totality of the Record Supports the Reasonable Conclusion of the ALJ that White Requested Union Representation During His Confrontation with DiPasquale.

At the threshold, the undisputed evidence shows that White requested to speak to someone during his meeting with Bardis and again while he was waiting with Bardis and Cail for DiPasquale to appear. The ALJ properly determined that these requests were tantamount to requests for Union representation and that White was entitled to, and unlawfully denied, such representation under *NLRB v. Weingarten*, 420 U.S. 251, 258-263 (1975). (ALJD, pg. 4, Ins. 30-33, 38-40; pg. 7, Ins. 17-20, 36-38). These findings were not excepted to by Respondent.

Consistent with this behavior, the ALJ found that White repeated his request for Union representation after DiPasquale appeared. The record supports this conclusion. After essentially being told by DiPasquale to shut up, White testified, "Then that's when I asked them -- that's when I asked if there is anybody I can --" whereupon DiPasquale told him to stop talking. (Tr. 51). DiPasquale's subsequent and erroneous declaration to White that he had no "rights", lends further credence that DiPasquale understood that White was requesting Union representation before DiPasquale fired him. (ALJD, pg. 7, Ins. 23-34).

Citing a social security case, *Talley v. Barnhart*, 2008 WL 2414841 (M.D. Tenn 2008), Respondent argues that the ALJ's foregoing determination was akin to making a finding based on a sentence fragment. This case is immaterial to the issue at bar. *Talley* is inapposite inasmuch as the District Court found, based on

the totality of the record, that the plaintiff's failure to reveal a doctor's note that she was helping to care for a stroke victim was insufficient to destroy her credibility or disability claim. *Id.* at 9.

Here, the record shows that the ALJ properly considered the totality of the circumstances surrounding White's request to DiPasquale for Union representation. In determining what White said to DiPasquale, the ALJ noted the similarity of White's requests for representation that White made immediately before meeting with DiPasquale, their subsequent arguments about his "rights" and, of course, the demeanor of all the witnesses present, which the ALJ resolved in White's favor. Indeed, it would have been improper for the ALJ to ignore the course of events surrounding White's plea to DiPasquale, and to focus on a fragment of the evidence as Respondent is now urging the Board to do.

In sum, the preponderance of the evidence clearly demonstrates that the ALJ did not err when he concluded that Christopher White requested Union representation in the presence of Postmaster Edward DiPasquale immediately before DiPasquale fired him.

B. Board Precedent Supports the ALJ's Finding that White Requested Union Representation During His Meeting with DiPasquale.

Respondent excepts to the ALJ's finding that White's statements to DiPasquale that he was an "American" and had "rights" constituted a request for union representation.

As discussed above, the ALJ's finding that White's request to DiPasquale for someone to speak with constituted a request for *Weingarten* representation

was based on the entire record, including the ALJ's determination that DiPasquale was not a credible witness, and not just on White's assertion about his rights or his nationality. Moreover, the ALJ found that White twice asserted that he had rights and asked "to speak to someone" immediately preceding his meeting with DiPasquale and that these statements constituted requests for Union representation. (ALJD, pg. 7, Ins. 17-34). Respondent did not except to these findings and draws no meaningful distinction between such findings and White's statements to DiPasquale.

Board case law clearly shows that the ALJ did not err by finding that White made a request for Union representation directly to DiPasquale.

In *Consolidated Edison*, 323 NLRB 910, 916 (1997), the Board stated that longstanding precedent shows that "such requests, to trigger *Weingarten* rights are liberal, and need only be sufficient to put the employer on notice of the employee's desire for union representation." Accordingly, the following statements have been found to be valid requests for union representation: "I would like to have someone there that could explain to me what was happening," *Southwestern Bell Telephone Co.*, 227 NLRB 1223, 1227 (1977); "'Do I need a shop steward?" *Consolidated Edison Co.*, *Id.*; "Should I have a union representative present?", *New Jersey Bell Telephone Co.*, 300 NLRB, 42, 47-49 (1990); "Do I need a witness?", *Bodolay Packaging Machinery*, 263 NLRB 320, 325-26 (1982).

As discussed above, the ALJ properly considered a number of factors in concluding that Christopher White directly told Edward DiPasquale that he wanted Union representation: (1) White made two similar requests within minutes of his

meeting with DiPasquale; (2) White knew that he was represented by a Union and that he had "rights"; (3) DiPasquale admitted that he wrongfully thought White did not have such rights because he was a probationary employee; and (4) DiPasquale's explanation that White was simply asserting his "rights" as "an American" to ignore DiPasquale was not credible.

In sum, the totality of the evidence, which was properly considered by the ALJ, clearly establishes that the ALJ properly held that Christopher White made a valid *Weingarten* request for Union representation to Edward DiPasquale which triggered his termination by DiPasquale.

2. The ALJ Did Not Err by Finding that Postmaster Edward DiPasquale Was Motivated by Animus When He Terminated Christopher White.
  - A. The ALJ Correctly Found that Respondent's Termination Letter Was Pretextual and Evidence of Animus Towards White.

Putting aside the ALJ's finding that White was fired immediately after he made a request for Union representation to DiPasquale, Respondent contends that the reasons cited in White's termination letter were valid and established that Respondent would have discharged White notwithstanding his request for Union representation. In that regard, Respondent argues that White's alleged refusal to sit down and shut up were the reasons he was terminated, that these reasons were rightfully included in the letter, and should not have been cited as animus by the ALJ. With respect to the attendance issues cited in the letter, Respondent maintains that White was, in fact, absent without leave, which was a serious offense and not evidence of animus.

Citing *Bali Blinds Midwest*, 292 NLRB 243, fn. 2 (1989), and *Hillside Bus Corp.*, 262 NLRB 1254 (1982), Respondent further maintains, in evaluating whether the General Counsel has presented a prima facie case, the ALJ must view the General Counsel's evidence "in isolation, apart from a Respondent's defense." Thus, Respondent maintains that even assuming the defenses advanced by Respondent were properly found to be pretextual, the ALJ erred by considering such evidence in determining whether a prima facie case had been established.

As noted in by the administrative law judge in *Electronic Data Systems Corp.*, 305 NLRB 219 (1991), "the Board, sub silentio, has overruled the *Hillside Bus* line of cases." See *Golden Flake Snack Foods*, 397 NLRB 594, 595 fn. 2 (1990)("it is the evidence as presented at the hearing, drawn from whatever source, which precisely determines whether or not there is a prima facie case of unlawful conduct.").

In the case at bar, the ALJ correctly set forth the legal framework for determining whether Respondent terminated Christopher White in violation of Section 8(a)(1) of the Act. Under *Wright Line*, the General Counsel must first make a prima facie showing sufficient to support an inference that protected conduct was a motivating factor in the employer's terminating of the alleged discriminatee. *Wright Line*, 251 NLRB 1083 (1980), 10 enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), *Coastal Sunbelt Produce, Inc. & Mayra L. Sagastume*, 362 NLRB 997 (2015). This requires proof that: "(1) the employee engaged in protected activity; (2) the employer was aware of the activity; and (3) the animus toward the activity was a substantial or motivating reason for the employer's

action." *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).

Once a *prima facie* case is established, the burden shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006). An employer "cannot simply present a legitimate reason for its action, but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993).

However, if the employer's proffered reasons are pretextual - either false or not actually relied on - the employer fails *by definition* to meet its burden of showing it would have taken the same action for those reasons absent the protected activity. See *Boothwyn Fire Co. No. 1*, 363 NLRB No. 191, slip op. at 7 (2016); *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003); *Hays Corp.*, 334 NLRB 48, 49 (2001); *Golden State Foods Corp.*, 340 NLRB 382 (2003). Even where the employer's rationale is not patently contrived, the Board has held that the "weakness of an employer's reasons for adverse personnel action can be a factor raising a suspicion of unlawful motivation." *General Films*, 307 NLRB 465, 468 (1992).

As discussed above, the ALJ correctly held that DiPasquale had knowledge of White's request for Union representation and that he immediately terminated White because of his anti-union animus towards the request, as evidenced by the

pretextual reasons set forth in his termination letter. (ALJD, pg. 8. Lns. 28-38; pg. 9, lns. 1-13).

Respondent's arguments fail on all counts. At the threshold, DiPasquale admitted that he did not rely on two of the reasons advanced in the letter for White's termination, his alleged refusal to obey instructions (to go to Hartsdale and to sit down) and his attendance (alleged AWOLs he was unaware of at the time of White's termination). (ALJD, pg. 5, lns. 33-38, pg. 8, lns. 33-39, pg. 9, lns. 1-2; Tr. 84-87, 122-123). Moreover, White's testimony, which was wholly credited by the ALJ, contradicted Respondent's false assertions that he refused to report to Scarsdale or that he engaged in the type of belligerent or insubordinate behavior that would warrant his termination. With respect to his alleged attendance problems, the ALJ noted that White had no previous discipline or counseling, that there was no documentation of his alleged AWOLs, and that his supervisor admitted that White was a good employee. (ALJD, pg. 5, fn. 11).

The foregoing evidence amply shows that the ALJ rightfully concluded that Respondent's "attempt to supplement and bolster" the reasons for White's unlawful termination, in conjunction with the timing of his discharge, was evidence of its animus towards his request for Union representation. (ALJD, pg. 5, lns. 37-38).

B. The ALJ Correctly Held that the Timing of White's Discharge Was Evidence of Animus Towards White's Request for Union Representation.

As noted by the ALJ, the timing of White's termination constitutes strong evidence of animus, especially in this case where he was terminated immediately after requesting *Weingarten* representation. See *Kag-West, LLC.*, 362 NLRB

1981, 1982 (2015); *Masland Industries*, 311 NLRB 184, 197 (1993) (“Timing alone may suggest anti-union animus as a motivating factor in an employer’s action.”) (quoting *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984), petition for review dismissed, 2017 WL 160821 (D.C. Cir. 2017); *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98 (May 2018).

In the case at bar, the ALJ credited White’s testimony that he was immediately fired after he requested Union representation. Standing alone, the timing of White’s request and his termination are compelling evidence that Respondent fired him in derogation of his right to union representation under the Act.

Furthermore, it is quite clear that DiPasquale bore animus towards White because he dared to request Union representation even though he was a probationary employee who DiPasquale wrongly believed did not have such rights. (ALJD, pg. 7, lns 25-27, fn. 12).

**3. Even Assuming Respondent’s Defenses Were Not Pretextual, the ALJ Did Not Err by Holding that Respondent Failed to Meet its Burden of Showing that It Would Have Discharged White Absent His Request for *Weingarten* Representation.**

Assuming *arguendo* that the defenses proffered by Respondent were not completely specious, it is clear that Respondent failed to meet its burden of showing that it would have discharged White absent his request for representation. The record shows that White had no history of discipline and, in fact, that he was a good employee. (ALJD, pg. 5, lns. 43-45, fn. 12). There is no evidence that White physically threatened DiPasquale or the other managers on April 6 or at any other

time and, as found by the ALJ, there was no probative evidence adduced that he refused to obey orders or was insubordinate. (ALJD, pg. 8, Ins. 29-33).

In its attempt to make the case for insubordination, Respondent cites the testimony of DiPasquale that White stood up and yelled at him, using profanity.

The ALJ implicitly discredited this testimony by finding that White "asked for someone immediately upon DiPasquale's arrival" and that "nothing of significance occurred between his request for a union representative and his discharge except for his insistence that he was entitled to that." (ALJD, pg. 7, Ins. 23-25; pg. 9, Ins. 5-7). In that regard, it should be noted that the ALJ discredited Respondent's witnesses in every instance where their testimony conflicted with White's and that White denied raising his voice or using profanity during his encounter with DiPasquale. (ALJD, pg. 4, fn. 8; pg. 5, Ins. 20-23; pg. 7, Ins. 17-34). Thus, the credible evidence, as found by the ALJ, is devoid of any facts that would support White's termination by Respondent.<sup>6</sup>

In short, Respondent's defenses are weak, if not wholly contrived, and would not surmount the compelling case that White was discharged for requesting Union representation in violation of Section 8(a)(1) of the Act..

#### IV. CONCLUSION

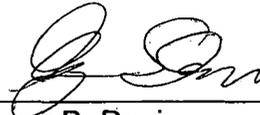
As discussed above, the evidence adduced at trial clearly supports the ALJ's findings of fact and conclusions of law that Respondent violated Section 8(a)(1) of the Act by denying the requests of employee Christopher White for union

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<sup>6</sup> In this regard, Respondent's discharges of other CCAs for failing to report an accident and delaying mail are both immaterial and irrelevant.

representation and by discharging White because of those requests, and therefore it is submitted that the exceptions filed by Respondent be wholly denied.

Dated at New York, New York, this 12th day of June 2019.



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