RECOMMENDATION
OF THE
SUPREME COURT'S ARBITRATION ADVISORY COMMITTEE
FOR A
PILOT PROGRAM OF FINAL OFFER ARBITRATION
UNDER RULE 4:21A

Recommendation

The Supreme Court's Arbitration Advisory Committee recommends the Court implement a Pilot Program in four counties to study a minor variation on the Rule 4:21A mandatory non-binding arbitration process. The variation has the potential to promote settlements before the arbitration hearing and to foster greater litigant satisfaction with the arbitration process. It is part of building a multi-door courthouse as contemplated by Complementary Dispute Resolution.

The variation is called "Final Offer Arbitration" (FOA). It requires parties to the arbitration to exchange offers and demands before the hearing and to submit their Final Offers to the arbitrator, who is then bound to select one of the Final Offers to make as the award.

This Memorandum discusses the background and how the Arbitration Advisory Committee may implement a FOA Pilot Program.

Background

The mandatory non-binding arbitration program for selected case types under Rule 4:21A began in 1983 in New Jersey. It has generally been successful throughout the state in resolving cases and saving litigant, counsel and court resources in the process.

The Committee's study of implementing a FOA Pilot Program began with a request conveyed to Judge Grant from Judge Sabatino that the FOA idea be considered.

The FOA process is a familiar one. It is most commonly the process used in addressing Major League Baseball player-team salary disputes.[1] It is also part of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-16, governing arbitration of certain public employee salary negotiation disputes.

The advantages of FOA are that it fosters settlements before the arbitration hearing and generally results in greater party satisfaction with the arbitration process because of the somewhat greater control over the process that parties can exercise in terms of making their offers and demands. All of this results from the fact that parties are incentivized to make reasonable offers and demands because the parties know that an unreasonable offer or demand has less chance of being selected for the award by the arbitrator. As parties make reasonable offers and demands to each other, they evaluate what they receive from the other party and re-evaluate their own offer or demand in light of what they expect an arbitrator to award as the most reasonable one in the circumstances of the case. The experience in the case of Major League Baseball is that it tends to foster settlements without the need for an arbitration hearing. The available social science literature validates

[1] *See* Jeff Monhait, "Baseball Arbitration: An ADR Success," Harvard J. of Sports and Entmt. Law, Vol. 4 at 112 (2013) ("MLB salary arbitration employs a format commonly known as 'high-low arbitration' or 'final offer' arbitration. The player and team each submit a single number to the arbitrator. After a hearing during which the player and team each have the opportunity to make a presentation, the arbitrator chooses one of the two numbers as the player's salary for the upcoming season.").

that experience with experimental evidence.[2] See also the bibliography of sources studied by the FOA subcommittee in developing this recommendation.

The implementation of a FOA Pilot Program on a test basis for randomly selected cases in four vicinages has the potential to inform the Court and the Arbitration Advisory Committee of the potential benefits of FOA. It will broaden the resolution toolbox of lawyers and neutrals. The Committee recommends that this Pilot Program be implemented and studied for two years.

Description of the Proposed FOA Pilot Program and Its Implementation

1. Definition of the Program: FOA is a requirement on both the parties participating in arbitration and on the arbitrator. In short, after hearing the presentation of the case, the arbitrator is to enter an award limited to accepting one of the Final Offers of the parties.
2. Vicinages Involved: The Committee proposes that four vicinages from diverse areas of the state be selected to participate in the FOA Pilot Program. The Committee proposes Burlington, Mercer, Middlesex, and Union Counties.

[2] Benjamin A. Tulis, "Final-Offer 'Baseball' Arbitration: Contexts, Mechanics & Applications," Seton Hall J. Sports and Entmt. Law, Vol. 20: Iss. 1 at 89 (2010) ("When an arbitrator's discretion is limited to a choice between two final offers, each party may worry that if his or her final offer is too extreme, an arbitrator will choose the final offer of the opposing party. As a result, it is to the strategic advantage of each party to present a final offer that is closer to the middle than the opposition's offer, since that position should win out in arbitration. When each party feels pressured to make a more reasonable offer, the parties are brought together toward a middle ground, which promotes settlement prior to an arbitration hearing. The idea of final-offer arbitration is to avoid arbitral hearings altogether in favor of an efficient, negotiated resolution . . . . Although the purpose of final-offer arbitration is to avoid an arbitration hearing, it is the presence of the final-offer arbitration process that promotes good faith bargaining and drives the negotiations toward settlement, not the negotiations themselves . . . . The parties not only save the time and expense of a hearing, but also seek a compromise in order to prevent the arbitrator from selecting the other party's final offer. The parties also benefit from avoiding the adversarial nature of a lengthy hearing.").

This is similar to the approach taken with the initial implementation of the presumptive mediation program in the late 1990s.

3. Selection of Cases: Only non-auto, non-Lemon Law personal injury cases will be selected initially to participate in the FOA Pilot Program. FOA typically works best in cases that involve a subjective evaluation of value (*i.e.*, the value of a baseball player to a team or the "value" of pain and suffering from an injury). By contrast, commercial disputes such as book account or lease guaranty cases generally turn on there being sufficient proof of liability or the interpretation of an agreement.

4. Selection Process: The arbitration staff in each pilot vicinage shall be instructed to select for participation in the FOA Pilot Program one-half of the non-auto personal injury, non-Lemon Law cases that are to be sent notices of arbitration. Specifically, the cases selected shall be every case that has an even-numbered docket number. All other cases shall proceed to Rule 4:21A arbitration in normal course.

5. Application of the Provisions of Rule 4:21A: Cases participating in the FOA Pilot Program shall be governed by the provisions of Rule 4:21A except as follows:

   a. Instructions to Counsel in the Selected Cases: In the cases selected for participation in the FOA Pilot Program, the arbitration staff shall send counsel in those cases both the regular notice of arbitration along with a supplemental notice of participation in the Program. The supplemental notice shall be in the form attached in the Appendix to this Memorandum. It instructs counsel to exchange offers and demands in the two weeks before the scheduled arbitration. It also instructs counsel to complete a position statement in the form attached in the Appendix to this Memorandum.

b. Requirements on the Parties: Parties in cases assigned randomly to participate in the FOA Pilot Program will be required to make settlement offers and demands to each other after receiving notice of the arbitration hearing and in the two weeks before the hearing. There is no limit on the number of offers and demands that may be made, and each party is free to make as many offers or demands as the party and counsel see fit. Parties will also be required to present to the arbitrator their Final Offer at the beginning of the arbitration hearing on a Position Statement Form. The parties will then present their cases to the arbitrator just as they would in any other case under Rule 4:21A.

c. Requirements on the Arbitrator: The arbitrator will be required to make an award limited to the Final Offer of the party whose offer is closest to the amount the arbitrator decides is appropriate. The arbitrator must choose one of the parties' Final Offers.

6. Training for Arbitrators: If the FOA Pilot Program is approved for implementation, the Committee will develop a short training video as outlined in the attachment in the Appendix to this Memorandum. The video will be presented, and the program introduced, to all arbitrators in the selected vicinages in the next regularly scheduled arbitrator continuing education training program in those counties. The program in each of those vicinages would then be scheduled to begin one month after the training.

7. Involvement of Insurance Carriers**:** The principal insurance carriers and defense firms in the selected vicinages will be identified and invited to a meeting/conference call explaining the FOA Pilot Program and permitting them to ask any questions about it.

8. Data about Cases Assigned to the Program: The arbitration staff in each pilot vicinage shall keep the same records in the ordinary course that they currently keep about all cases assigned to arbitration. There is no change in how court staff keeps records of the arbitration cases. Members of the

Supreme Court's Arbitration Advisory Committee who designed and are most familiar with the FOA Pilot Program will, on a quarterly basis, obtain all available data from the Administrative Office of the Courts about all the cases assigned in that calendar quarter to arbitration from the vicinages selected to participate in the FOA Pilot Program. They will then tabulate any differences between all the cases assigned to the FOA Pilot Program (cases with even numbered docket numbers) and all the other cases. Those members of the Committee will also, on a monthly basis, obtain from the court staff in each vicinage selected to participate in the FOA Pilot Program information about which cases were assigned to arbitration under the FOA Pilot Program. Then they will randomly call counsel in 20% of those cases to obtain information about the operation of the program, as reflected on the attached checklist. (This is estimated to be between 4 and 10 randomly sampled cases per month per vicinage in the pilot program, depending on the volume of cases in that vicinage). Then on a quarterly basis they will tabulate the responses for further evaluation.

9. Potential Expansion of the Program: Upon evaluation of the results of the FOA Pilot Program, the Court may consider expanding the program to other vicinages and to other case types.

Table of Contents of the Appendix to This Memorandum

1. Instruction letter to the Staff of the vicinages selected to participate in the FOA Pilot Program.

2. Exhibit A – Protocol for the Final Offer Arbitration Pilot Program, to be attached to the instruction letter to the Staff.

3. Instructions to be sent to counsel for the parties in cases selected for the FOA Pilot Program, along with Evaluation Forms and the Form of Final Offer Position Statement.

4. Form of Final Offer Position Statement to be submitted by parties to the arbitrator and sent to counsel with the instructions.

5. Instructions to be sent to all arbitrators in the selected vicinages.

6. Form of Award to be completed by arbitrators in cases selected for the FOA Pilot Program.

7. Outline of proposed video training of arbitrators about the FOA Pilot Program.

8. Frequently Asked Questions.

9. Checklist evaluation form to be used by members of the Supreme Court's Arbitration Advisory Committee members in calls to counsel in a random sample of cases participating in the FPA Pilot Program.

10. Bibliography of materials studied by the FOA subcommittee of the Arbitration Advisory Committee in developing the recommendation for the FOA Pilot Program.

[date]

CDR Coordinator

Re: Final Offer Arbitration Pilot Program
Vicinage Instructions

Dear :

Your vicinage will be participating in a Pilot Program that will be part of the Mandatory Non-Binding Arbitration program under *Rule* 4:21A. The Pilot Program will, for the next two years, test a minor variation of the regular arbitration program on select cases that are assigned to arbitration during that time.

This letter explains the Pilot Program and the procedure we ask you to follow.

Attached as Exhibit A is the Protocol For Pilot Program of Final Offer Arbitration Under *Rule* 4:21A. It explains the Program the Supreme Court approved. There is a bibliography attached as Exhibit B providing you with additional information.

This Pilot Program will operate in close parallel to your current *Rule* 4:21A Arbitration Program. Cases that qualify for this Pilot Program include <u>only</u> non-automobile personal injury matters. No automobile Lemon Law cases will be in this Program.

This Pilot Program will require parties to exchange offers and demands before the assigned arbitration date. If the matter is not settled and the case proceeds to an arbitration hearing, the parties are to submit to the arbitrator Position Statement Forms (see Exhibit C). This form reflects the final offer or demand each party made. The arbitrator will be required to choose the final offer that best reflects the value of the case.

The purpose of this, as explained in the Protocol (Exhibit A), is that parties will have an incentive to make reasonable offers and demands since the arbitrator must choose the most reasonable final offer. We expect this will help promote settlement of cases before the arbitration hearing.

Since this is a Pilot Program, only non-automobile personal injury matters will be assigned to the Pilot Program. The cases will be randomly chosen. For example, every non-automobile personal injury case that has an even number as the

last number of the docket number will participate in this Pilot Program. The odd numbered cases will be arbitrated under the current Rule and will not be assigned to the Pilot Program. Please do not vary this pattern of case selection.

There is a separate notice that needs to be sent to the attorneys in cases that are assigned to the Pilot Program to inform them that the case will be handled differently. That notice is the form letter attached as Exhibit D.

The arbitrators who are assigned to those cases will be specially trained. Training will also be provided for attorneys in your vicinage so everyone can become familiar with the new Pilot Program. You do not need to explain the Pilot Program to them. If they call you about it, you can refer them to any of the attorneys listed below.

After you send the separate notice, your role will be exactly the same as it is for all cases assigned to arbitration.

If you have any questions at all about this Program, how it works, or what you are to do, you may contact any of the following members of the Supreme Court Arbitration Advisory Committee:

Theodore K. Cheng	(212) 480-4800
John R. Holsinger	(201) 487-9000
Robert E. Margulies	(201) 333-0400
Paul A. Massaro	(973) 253-3322

These members of the Committee will be calling some of the attorneys after the arbitrations to get feedback about the Pilot Program.

Very Truly Yours,

Exhibit A

Protocol for the Final Offer Arbitration Pilot Program

Cases participating in the FOA Pilot Program shall be governed by the provisions of Rule 4:21A except as follows:

a. Instructions to Counsel in the Selected Cases: In the cases selected for participation in the FOA Pilot Program, the arbitration staff shall send counsel in those cases both the regular notice of arbitration along with a supplemental notice of participation in the Program. The supplemental notice shall be in the form attached in the Appendix to this Memorandum. It instructs counsel to exchange offers and demands in the two weeks before the scheduled arbitration. It also instructs counsel to complete a position statement in the form attached in the Appendix to this Memorandum.

b. Requirements on the Parties: Parties in cases assigned randomly to participate in the FOA Pilot Program will be required to make settlement offers and demands to each other after receiving notice of the arbitration hearing and in the two weeks before the hearing. There is no limit on the number of offers and demands that may be made, and each party is free to make as many offers or demands as the party and counsel see fit. Parties will also be required to present to the arbitrator their Final Offer at the beginning of the arbitration hearing on a Position Statement Form. The parties will then present their cases to the arbitrator just as they would in any other case under Rule 4:21A.

c. Requirements on the Arbitrator: The arbitrator will be required to make an award limited to the Final Offer of the party whose offer is closest to the amount the arbitrator decides is appropriate. The arbitrator must choose one of the parties' Final Offers.

Dear Attorney,

THIS MATTER HAS BEEN SELECTED AS A FINAL OFFER ARBITRATION CASE. PLEASE FAMILIARIZE YOURSELF WITH WHAT IT REQUIRES OF YOU.

The New Jersey Supreme Court selected ____ County as one of four vicinages to participate in a Pilot Program in the mandatory non-binding arbitration program under Rule 4:21A. It involves a minor variation on the arbitration program with which you are already familiar.

The Pilot Program will take only non-auto personal injury cases to test what is commonly known as "baseball" arbitration. The Pilot Program is a slight variation on the well-known arbitration of team/player disputes in Major League Baseball. Our Pilot Program version is called "Final Offer Arbitration" (FOA).

You will be required to have exchanged offers in the two weeks before the arbitration and to present to the arbitrator a Position Statement Form that contains your last, "Final Offer". Attorneys MUST present to the arbitrator the "Final Offer" that they previously made to the opposing party. A copy of that form is attached.

You will conduct the arbitration exactly as you have before. There is no change in how the parties present their claims or defenses to the arbitrator.

The arbitrator MUST choose one of the parties' final offers that best reflects the value of the case and cannot be higher or lower or in between the final offers.

After the arbitrator makes the award, the parties will retain the same right to file a trial *de novo*.

The Administrative Office of the Courts will evaluate the success of the Pilot Program. If successful, the Program may be extended to different case types and to other vicinages.

Attached to this letter is a copy of the Supreme Court's order explaining the implementation of the Program.

For further information about baseball arbitration please go to the following links: _____; _____. If you desire further information you may contact any of the following members of the Supreme Court Arbitration Advisory Committee:

Theodore K. Cheng	(212) 480-4800
John R. Holsinger	(201) 487-9000
Robert E. Margulies	(201) 333-0400
Paul A. Massaro	(973) 253-3322

One of these members of the Committee may call you after the arbitration to get your feedback about the Pilot Program.

We thank you for your assistance and support with this important initiative.

Very Truly Yours,

SUPERIOR COURT OF NEW JERSEY

_____
Plaintiff

Civil Action
County: _____
Docket No.: _____
Date: _____

v.

_____
Defendant

_____ presented the following final offer to _____:
Name of Party Name of Other Party

_____ and requests the arbitrator to enter an
Contents of Final Offer

award with this final offer as the amount of the award.

_____
_____
_____
_____
Counsel Name, Address and Telephone Number

Dear Arbitrator,

The New Jersey Supreme Court selected ____ County as one of four counties to participate in a pilot program in the mandatory non-binding arbitration program under Rule 4:21A. It involves a minor variation on the arbitration program with which you are already familiar.

The pilot program will take selected cases to test what is commonly known as "baseball" arbitration. The pilot program is a slight variation on the well-known arbitration of team/player disputes in Major League Baseball. Our pilot program version is called "Final Offer Arbitration".

You will conduct the arbitrations exactly as you have before. There is no change in how the parties present their claims or defenses to you.

The only difference is that the parties will be asked to have exchanged offers before the arbitration and to present to you a Position Statement Form (copy attached) that contains their last, "Final Offer". At the beginning of the hearing the attorneys will present to you their "Final Offer" that they had previously made to the opposing party.

You as the arbitrator MUST choose one of the parties' final offers that best reflects the value of the case and cannot be higher or lower or in between the final offers.

Experience with this type of arbitration has shown that it prompts parties to make reasonable offers and demands for fear that the arbitrator will select the more reasonable offer made by the other party. Experience also shows that this process

tends to produce settlements. That is because the parties are encouraged to make reasonable offers and demands.

The Administrative Office of the Courts will be evaluating the success of the pilot program. If successful in promoting settlements or in reducing the *de novo* rate, or both, the program may be extended to different case types in other vicinages.

We thank you for your help with this important initiative. If you desire further information you may contact any of the following members of the Supreme Court Arbitration Advisory Committee:

Theodore K. Cheng	(212) 480-4800
John R. Holsinger	(201) 487-9000
Robert E. Margulies	(201) 333-0400
Paul A. Massaro	(973) 253-3322

Very Truly Yours,

SEAL

SUPERIOR COURT OF NEW JERSEY

Final Offer Arbitration

REPORT AND AWARD OF ARBITRATOR(S)

CIVIL ACTION

_____
Plaintiff

v.

_____
Defendant

County:_____
Docket Number:_____
Date:_____

Final offer (including liability, comparative (if any) and damage consideration) by Plaintiff(s) $_____

Final offer (including liability, comparative (if any) and damage consideration) by Defendant 1 $_____

Final offer (including liability, comparative (if any) and damage consideration) by Defendant 2 $_____

Final offer (including liability, comparative (if any) and damage consideration) by Defendant 3 $_____

Defense presented _____ Yes _____ No

	PARTY	LIABILITY	DAMAGES* Gross	Net
DEF		%		
DEF		%		
DEF		%		
PL		%		
PL		%	$	$

ARBITRATOR(S): Please sign below and print name next to signature.

_____ _____

Parties desiring to reject this award and obtain a trial *de novo* must file with the division manager a trial *de novo* request together with a $200 fee within thirty (30) days of today. Parties requesting a trial *de novo* may be subject to payment of counsel fees and costs as provided by *R.*4:21A-6(c). Note that unless otherwise expressly indicated this award will be filed today.

Counsel and *pro se* litigants acknowledge receipt of this award by signing below. Print name next to signature.

_____ _____

_____ _____

_____ _____

*Exclusive of prejudgment interest

Outline of Arbitrator Training Video

1. Scene of lawyers speaking on the phone to each other about being selected to participate in the pilot program in two separate cases they have with each other.

2. The lawyers exchanging offers and demands on case number 1.

3. The lawyers reaching impasse on case number 1 with their Final Offers.

4. The lawyers submitting their Final Offer forms to the arbitrator and then presenting their arguments on case number 1.

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5. The arbitrator deliberating on which of the Final Offers to accept and then deciding on the one that is to be the Award.

6. The lawyers and the arbitrator completing their evaluation forms.

7. The lawyers exchanging offers and demands on case number 2.

8. The lawyers reaching an agreed settlement figure in case number 2 and commenting how the FOA program helped them reach agreement they might not have reached otherwise.

FREQUENTLY ASKED QUESTIONS
ON THE PILOT PROGRAM
OF
FINAL OFFER ARBITRATION
UNDER RULE 4:21A

What exactly is "baseball arbitration," and how is the Pilot Program a variation of it?

The term "baseball arbitration" refers to the format for arbitrating players' salaries in Major League Baseball in which the player and team each submit a single number representing the player's proposed salary for the upcoming season to a panel of three arbitrators. At the hearing, the two sides submit a signed and executed agreement with a blank space left for the salary figure. The player and team each also have the opportunity to present its case and a rebuttal, after which the arbitrators choose one of the two numbers as the player's salary.

The Pilot Program simply applies the baseball arbitration format to non-auto personal injury cases under Rule 4:21A. The arbitrator will receive final offers from the parties and then make an award limited to the offer of the party that is closest to the amount that the arbitrator decides is appropriate.

Aside from the submission of final offers to the arbitrator and the limitations on the arbitrator's award, are there any other differences in the manner in which the arbitration is conducted?

No. The remainder of the arbitration is conducted like any other arbitration under Rule 4:21A. There is no change in how the parties present their claims and defenses to the arbitrator or how the arbitrator conducts the hearing and other proceedings.

In addition to disclosing their final offers to the arbitrator, do the parties disclose them to each other?

Yes. In other contexts, experience has shown that this type of arbitration prompts parties to make reasonable offers and demands because the arbitrator will ultimately select the more reasonable of the two offers. Moreover, experience has also shown that utilizing this kind of process tends to result in more voluntary settlements because the parties are more encouraged to make reasonable demands and offers. Thus, having the parties disclose their final offers to each other is consistent with prior experience with this type of arbitration.

May the parties agree to deviate from the format described in the Pilot Program?

No. The parties may not opt out of participating in the Pilot Program study parameters by agreeing to deviate from the prescribed format.

I have heard of "night baseball arbitration," in which the final offers submitted by the parties are kept confidential from the arbitrator and, upon delivering the decision, the award that is mathematically closest to the arbitrator's award is delivered as the final award. May the parties adopt this variation of baseball arbitration?

No. This kind of arbitration, while a variation of baseball arbitration, is not the format being studied under the Pilot Program. The parties must proceed under the classic baseball arbitration format without introducing any modifications.

If the evidence or equities warrant, does the arbitrator retain the discretion to issue an award other than the parties' respective final offers?

No. The Pilot Program is to study classic baseball arbitration and measure whether more cases are resolved under this kind of process. Under this process, the arbitrator's discretion in arriving at a final award is limited to a choice between the final offers submitted by the parties.

What should the arbitrator do if one or both parties submit an arguably unreasonable offer?

Under the Pilot Program, the arbitrator is obligated to select one of the final offers submitted by the parties, even if the arbitrator believes that both of them are unreasonable. Thus, as in all cases under the Pilot Program, the arbitrator should simply select one of the final offers submitted. The parties reserve the right to file for a trial *de novo* if they believe the arbitrator selected for the award the unreasonable offer or demand from the other party.

Is the arbitrator's decision binding on the parties?

No. As with other court-mandated arbitrations under Rule 4:21A, Final Offer Arbitration is non-binding. The parties retain the right to seek a trial *de novo* review under Rule 4:21A-6.

In which counties will the Pilot Program be conducted?

The Pilot Program will initially be conducted in Burlington County, Mercer County, Middlesex County, and Union County. Depending upon the results of the program, it may be expanded to cover more cases and counties.

Will all cases in the above counties be a part of the Pilot Program?

No. Only one-quarter of the cases that are sent notices of arbitration will be randomly selected for participation in the Pilot Program, specifically, every other case that has an even-numbered docket number.

How long will the Pilot Program run?

Currently, the Pilot Program is anticipated to run for two years.

CHECKLIST FOR ATTORNEY EVALUTION AFTER FINAL OFFER ARBITRATION (FOA)

Preliminary Questions

1. How many times a year do you participate in civil arbitration?
2. Which party did you represent in this case?
3. Did your client settle before the FOA process? [If yes, when? ***THEN GO TO QUESTION 14***]
4. Did your client participate in the proceeding?
5. How many other parties were in the case?

The FOA Process

6. Did the parties comply with the time requirements for exchanging offers in advance?
7. Was there enough time to make meaningful exchanges of offers?
8. Which parties made at least one offer before the arbitration?
9. How many offers did each party make before the Final Offer?
10. Was your client satisfied with the FOA process? If so, how? If not, why not?
11. Did you consider a FOA process useful in resolving your client's case? If so, how? If not, why not?
12. Did you manage your resources (research, time, witness preparation, document preparation, etc.) better or worse by participating in the FOA process? How so?
13. Rate the overall effectiveness of FOA on a scale of 1 (lowest) to 5 (highest).

Other Post-FOA Reflections

14. Were the instructions about the FOA Program clear? If not, what was unclear?
15. What improvements to the process would you recommend?
16. Do you feel that continued participation in FOA will enhance your law practice? How so?
17. Do you think the FOA process could be expanded to other types of cases? If so, what other types?

Bibliography of Materials Considered
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Rule 4:21A

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