UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of ARAMARK EDUCATIONAL SERVICES, INC. and UNITE HERE LOCAL 26	Case 1-CA-43486
In the Matter of ARAMARK d/b/a HARRY M. STEVENS, INC. and UNITE HERE LOCAL 26	Case 1-CA-43657
In the Matter of ARAMARK SPORTS, INC. and UNITE HERE LOCAL 26	Case 1-CA-43658

BRIEF IN SUPPORT OF CROSS-EXCEPTIONS

Michael D. Keffer
ARAMARK
ARAMARK Tower
1101 Market Street
Philadelphia, PA 19107
(215) 238-6107 (telephone)
(215) 238-3344 (facsimile)
keffer-michael@aramark.com

Table of Contents

Respondents ARAMARK Educational Services, Inc. ("ARAMARK Educational"), ARAMARK d/b/a Harry M. Stevens, Inc. ("ARAMARK Stevens"), and ARAMARK Sports, Inc. ("ARAMARK Sports") (collectively, "ARAMARK"), by their undersigned counsel, submit the following Brief in support of their Cross-Exceptions to the May 13, 2008 Decision of the Administrative Law Judge.

I. STATEMENT OF THE CASE

To avoid unnecessary repetition, the following Statement of the Case focuses on the factual background directly relevant to ARAMARK's Cross-Exceptions. The legal context out of which this case arises, ARAMARK's national bargaining with UNITE HERE over its response to no-match letters, and ARAMARK's response to Local 26's information requests are spelled out in greater detail in ARAMARK's Brief in Answer to the General Counsel's Exceptions.

All facts set forth below are drawn from the Administrative Law Judge's Decision (ALJD) unless otherwise noted. Citations to the record are provided where they are supportive of ARAMARK's Cross-Exceptions or might otherwise be helpful to the Board. Citations to the hearing transcript are designated as "Tr. at __."

A. ARAMARK's Operations and Collective Bargaining Agreements at MIT, Hynes, and Fenway

ARAMARK provides managed services internationally and throughout the United States at over 5,000 locations. (Tr. at 54-55, 118.) Among these locations are Massachusetts Institute of Technology ("MIT"), Hynes Convention Center ("Hynes"), and Fenway Park ("Fenway"). At each location, UNITE HERE Local 26 ("Local 26") represents food service employees. At all times relevant to this case, each of the three locations was covered by a separate, then-effective

collective bargaining agreement. The substance of those collective bargaining agreements is described in greater depth in ARAMARK's Brief in Support of Cross-Exceptions.

At all times relevant to this case, each of the three locations was covered by a separate, then-effective collective bargaining agreement. The MIT and Hynes agreements contained identical language concerning immigration and social security number no-match issues:

> In the event that an employee who has completed his/her probationary period has a problem with his/her right to work in the United States, or upon notification by the INS that an immigration audit or an investigation is being initiated, or when the Hotel receives No Match letter(s) from Social Security, the Employer shall immediately notify the Union in writing, and upon the Union's request, agrees to meet with the Union to discuss the nature of the problem or investigation to see if a resolution can be reached. Whenever possible, this meeting shall take place before any action by the Employer is taken.
>
> The Employer will furnish to any employee terminated because he/she is not authorized to work in the United States of America, a statement stating the employee's rights and obligations under this section of the Agreement.
>
> Upon request, employees shall be released for up to five (5) unpaid working days per year during the term of the Collective Bargaining Agreement in order to attend INS proceedings and any related matters for the employee and the employee's immediate family (parent, spouse and/or dependent child). The Employer may request verification of such leave.
>
> No employee employed continuously since November 6, 1986 (or before as amended by Congress) shall be required to document immigration status.
>
> In the event that an employee is not authorized to work in the United States following his/her probationary or introductory period, and his/her employment is terminated for this reason, the Employer agrees to immediately reinstate the employee to his/her former position, without loss of prior seniority (i.e. seniority, vacation or other benefits that do not continue to accrue during the period of absence) upon the employee receiving proper work authorization within twelve (12) months from the date of termination.

> If the employee needs additional time (beyond twelve (12) months), the Employer will rehire the employee into the next available opening in the employee's former classification, as a new hire without seniority, upon the employee(s) providing work authorization within a maximum of twelve (12) additional months. The parties agree that such employees would be subject to a probationary period in this event.

(ALJD, p. 8, line 52 through p. 9, line 36; ALJD, p. 10, lines 31-32; see also Exhibit GC-3, Article 36; Exhibit GC-12, Article 19).[1] Brian Lang, Vice-President of Local 26, testified that this language covered how ARAMARK was to respond to the receipt of a no-match letter at the two locations. (Tr. at 59.)

Each of the three contracts, including the Fenway contract, includes strong management rights language permitting ARAMARK to establish reasonable working rules. (Exhibit GC-3, Article 7; Exhibit GC-12, Article 5; Exhibit GC-18, Article 34.)

B. Enforcement of ARAMARK's Social Security Number Verification Policy and Notice to Local 26

ARAMARK has had a Social Security Number Verification Policy ("the Policy") since 2000. Although the policy has been revised since that time, the basic structure of the policy has remained constant.[2] However, ARAMARK acknowledges that its enforcement of the Policy was imperfect and sporadic prior to 2006. ARAMARK presently has no evidence that it enforced the Policy at Hynes, MIT, or Fenway prior to 2006. ARAMARK did enforce the policy at certain other locations.

In 2006, ARAMARK determined that it would increase its efforts to enforce the Policy uniformly and corporate-wide. (Tr. at 131.) Because of the imperfect enforcement of the Policy

[1] In the MIT contract (GC-3), the paragraphs are numbered. For the sake of simplicity, the quotation above omits those paragraph numbers, which do not appear in the Hynes contract (GC-12).

[2] That structure is described in detail in ARAMARK's Brief in Answer to Exceptions.

prior to 2006, ARAMARK's Labor Relations Department decided to emphasize notification of international and local union leaders regarding the enforcement strategy and the terms of the Policy. (Tr. at 131-32.) On September 7, 2006, Vice President of Labor Relations Rick Ellis conducted a teleconference with the Labor Relations Directors and Senior Directors who report directly or indirectly to him. (Tr. at 131-32.) Ellis instructed the Directors and Senior Directors to provide notice to all local union leaders whose members might be affected by the 2006 enforcement program, and to meet with anyone who requested a meeting on the topic. (Tr. at 132.) Ellis followed up the teleconference by issuing a protocol describing the strategy in represented locations. (Tr. at 132-33.) The new protocol was not a new policy but rather simply contained guidelines for enforcing the Policy in represented locations. (Tr. at 131-33; Exhibit GC-21.)

Concurrent with Ellis' negotiations with UNITE HERE International Union representatives,[3] ARAMARK provided Local 26 with ample advance notice of its 2006 enforcement efforts. On September 5, 2006, Meghan King, Associate General Manager for ARAMARK at MIT, sent a letter to Union Business Agent Eugenio Fernandez notifying him that ARAMARK intended to begin enforcement of the Policy with respect to employees at MIT identified on ARAMARK's 2006 no-match letter. (Exhibit GC-6.) Within days after the September 7, 2006 Labor Relations teleconference, Ted Bennett, ARAMARK's Senior Labor Relations Director responsible for administration of the MIT contract, also notified Brian Lang of ARAMARK's intentions. (Tr. at 156-57, 162.) ARAMARK did not take any action pursuant

[3] These discussions are described in greater depth in ARAMARK's Brief in Answer to Exceptions. ARAMARK excepts to the Administrative Law Judge's finding that Ellis first notified the International Union in *late* September 2006. (Cross-Exception 4.) Ellis' *unrebutted* testimony was that he called International Union representative Kurt Edelman "around September 12." (Tr. at 132.) The Administrative Law Judge's mischaracterization may have resulted from Ellis' subsequent testimony that he began discussions with another International Union representative, Jim Dupont, in late September 2006. (Tr. at 135.)

to the Policy until September 21, 2006, and did not suspend any employees until October 5, 2006. (Exhibits GC-8, R-13.)

ARAMARK supplemented the advance notice provided at MIT with similar efforts at Hynes. On about September 13, 2006, Isaac Jackson, Director of Operations for ARAMARK at Hynes, provided Lang with verbal notice of enforcement of the Policy with respect to employees at Hynes. (Tr. at 36.) Rob Gould, ARAMARK's Labor Relations Director responsible for administration of the Hynes and Fenway contracts, also spoke with Brian Lang. (Tr. at 38-39.) Following notice to Local 26, ARAMARK began enforcement of the policy at Hynes. (Tr. at 36-41.)[4]

At Fenway, when the 2006 baseball season ended, the two active employees who had appeared on the 2006 no-match list were advised that they would have to provide documentation that they had begun rectifying the problem with SSA prior to coming back to work for the 2007 baseball season. (Tr. at 177-78.) During the course of earlier discussions regarding MIT and Hynes, Local 26 already had received notice of ARAMARK's corporate-wide intentions, including its intentions to enforce the policy at Fenway. (Tr. at 39.)

At no time during any of the conversations or communications between ARAMARK and Local 26 did Local 26 request bargaining regarding the Policy. In written correspondence, Brian Lang requested a "meeting on this matter." (Exhibits GC-7, GC-13.) Lang testified that he and Bennett or Gould typically met by telephone and almost never in-person. (Tr. at 68.) Indeed, as outlined above, Lang had several telephone conversations with Bennett about the matter and at

[4] ARAMARK excepts to the Administrative Law Judge's finding that Leigh Thumith, ARAMARK's General Manager at Hynes, refused to bargain about the no-match issue. (Cross-Exception 2.) There is no dispute in the record that Gould was the designated collective bargaining representative for Hynes. (Tr. at 38-39.) Thumith may have stated her impression that no-match issues were not subject to negotiation, but she also referred Lang to Gould to discuss these issues. (Tr. at 38-39.) Clearly, Thumith was in no position to refuse bargaining even if she had tried, which the record shows that she did not. In any event, as this Brief demonstrates, Lang was given advance notice of the policy enforcement at Hynes and chose not to request bargaining.

least one with Gould. In his first conversation with Bennett, Lang claimed that ARAMARK's approach violated the MIT contract and threatened to arbitrate the impending suspensions. (Tr. at 157-79.) Bennett testified that he would have been happy to travel to Boston to discuss the no-match issue had Lang requested it, and indeed Ellis' instructions would have required him to do so. (Tr. at 132, 156-58.) Lang made no such request. (Tr. at 157.) As noted above, Lang and Gould also spoke by telephone, and in Lang's words, they just "agreed to disagree" about the merits of the Policy. (Tr. at 39.)[5] Bennett and Gould testified unequivocally that Lang never requested bargaining regarding the no-match issue (Tr. at 84, 86, 157), and Lang made no assertion to the contrary (Tr. at 11-75). Even in the General Counsel's rebuttal case, when Lang was permitted by evidentiary ruling to clarify matters about which he had already testified during the case-in-chief, Lang did not contradict Bennett's or Gould's testimony that he never requested bargaining. (Tr. at 190-93.)

The parties stipulated that MIT, Hynes, and Fenway received lists of employees from the locations appearing on the 2006 no-match lists, and that ARAMARK substantially complied with the Policy at MIT and Hynes. (Tr. at 165.) Some employees at these two locations resigned; some disappeared; some produced documentation allowing them to return to work (either before or after a suspension was imposed); and some were suspended and never returned to work. (Tr. at 165-66.) At Fenway, as noted above, the end of the 2006 baseball season preempted enforcement of the Policy, and the two affected employees were simply advised that they needed to rectify the mismatched SSN prior to the beginning of the next baseball season. (Tr. at 176-78.) One employee returned to work with a new name and new SSN in the Spring of

[5] ARAMARK excepts to the Administrative Law Judge's finding that Gould "took the position that it was perfectly legitimate for the Company to implement the new no match policy despite the Union's opposition." (Cross-Exception 3.) Even Lang's testimony does not make that assertion. Lang simply testified that they agreed to disagree about the merits of ARAMARK's company-wide policy. (Tr. at 39.)

2007, and following verification that the name and SSN matched, the employee missed no time. (Tr. at 178-79.) The other employee was never heard from again. (Tr. at 178.) Given this unexplained disappearance and the high level of turnover from one season to the next (acknowledged by Lang) (Tr. at 65), it is impossible to know whether this employee's decision not to return to work the next season was related to his no-match issue.

II. STATEMENT OF QUESTIONS

Did the Administrative Law Judge err in ruling that Local 26 did not clearly and unmistakably waive its right to further bargaining on ARAMARK's response to the receipt of no-match letters through its agreement to contractual language covering this response? Suggested Answer: YES. (Cross-Exceptions 8-10.)

Did the Administrative Law Judge err in ruling that Local 26 did not clearly and unmistakably waive its right to bargaining on ARAMARK's response to the receipt of no-match letters through its failure to request such bargaining? Suggested Answer: YES. (Cross-Exceptions 1-7.)

III. ARGUMENT

ARAMARK did not violate Section 8(a)(5) of the National Labor Relations Act ("the Act" or "the NLRA") by unilaterally implementing terms and conditions of employment without affording Local 26 the opportunity to bargain. It was the General Counsel's burden at trial to show not only that ARAMARK unilaterally implemented a material, substantial, and significant change in terms and conditions of employment, but also that ARAMARK implemented the change without giving Local 26 advance notice and an opportunity to bargain before implementation. Bohemian Club, 351 NLRB No. 59, slip op. at 2 (Nov. 19, 2007); American Geri-Care, Inc., 278 NLRB 676, 678 (1986). The General Counsel did not carry that burden.

At MIT and Hynes, ARAMARK did not just give Local 26 the opportunity to bargain over SSN no-match issues; the parties actually *did* bargain and reached agreement over those issues in collective bargaining agreements. Moreover, at all three locations, ARAMARK gave Local 26 advance notice prior to enforcing the Policy in 2006, and Local 26 chose not to request additional bargaining.

A. Local 26 Clearly and Unmistakably Waived its Right to Bargain Over ARAMARK's Response to No-Match Letters at MIT and Hynes Through Contractual Language.

In a recent case, the Board discussed the theory of contract waiver in the context of a unilateral implementation claim:

> [A] union has the statutory right to require an employer to bargain before making a unilateral change with respect to a term or condition of employment. Conversely, the employer's authority to act unilaterally is predicated on the union's waiver of its right to insist on bargaining. A leading treatise summarizes the Board's well-established principles this way:
>
> > [U]nless discharged or waived, the duty to bargain continues during the term of the collective bargaining agreement.
> >
> > ***
> >
> > A party may contractually waive its right to bargain about a subject. Where such a waiver is claimed, the test is whether the putative waiver is in "clear and unmistakable" language.

Provena Hospitals, 350 NLRB No. 64, slip op. at 4 (Aug. 16, 2007) (citations omitted) (quoting I American Bar Association, Section of Labor & Employment Law, The Developing Labor Law 1006-07 (5th Ed. 2006 John E. Higgins, Jr. ed.)). Provena rejected the "contract coverage" standard that certain courts of appeals, including the D.C. Circuit and the 1st Circuit, apply in contract waiver cases. Id. at 5-8; see also Bath Marine Draftsmen's Ass'n v. NLRB, 475 F.3d 14 (1st Cir. 2007); NLRB v. United States Postal Service, 8 F.3d 832 (D.C. Cir. 1993).

ARAMARK requests that the Board reconsider that decision and adopt the contract coverage standard, but ARAMARK should prevail on the basis of Local 26's contract waiver regardless of the standard applied. Under Provena, the contract language upon which the employer relies must either (a) constitute an explicit waiver or (b) demonstrate that the issue was fully discussed and consciously explored and that the union intentionally relinquished its right to further bargaining in this area. Id. at 4-5, 8; Georgia Power Co., 325 NLRB 420, 420-21 (1998). The language in the MIT and Hynes contracts meets that standard.[6]

The waiver in this case is clear and unmistakable. As Lang testified, Article 36 of the MIT contract (Exhibit GC-3) and Article 19 of the Hynes contract (Exhibit GC-12) clearly cover how ARAMARK was to respond to the receipt of a no-match letter. The first paragraph of those Articles covers three scenarios: (1) an employee's having a problem with his/her right to work in the United States, (2) notification by the INS that an immigration audit or an investigation is being initiated, and (3) ARAMARK's receipt of a no-match letter from SSA. The last sentence of that paragraph reads: "Whenever possible, this meeting shall take place before any action by the Employer is taken." Clearly, then, in collective bargaining, the parties acknowledged that ARAMARK would have to take action in response to receipt of a no-match letter.

What action did the parties contemplate? The second paragraph refers to ARAMARK's duty to furnish certain information to employees who are *terminated* for one of the reasons enumerated in the previous paragraph. The fifth and sixth paragraphs refer to the necessary preconditions for reinstatement / rehire following termination for one of these reasons. The MIT and Hynes contracts do not specifically address the steps between receipt of a no-match letter and termination, but such detailed description of those steps is unnecessary. The management

[6] It is even more clear that the language in the MIT and Hynes contracts "covers" ARAMARK's response to no-match letters, as Lang acknowledged in his hearing testimony. (Tr. at 59.)

rights clauses in each contract permit ARAMARK the discretion to establish reasonable working rules and to discipline or discharge employees for just cause, to the extent such actions do not conflict with other provisions of the agreement. With the Immigration language so clearly permitting termination of employees appearing on no-match letters, no such conflict existed. ARAMARK clearly had the contractual right to establish and follow the procedures in the Policy. Cf. Tyson Foods, Inc., 123 Lab. Arb. (BNA) 484 (2006) (Bankston, arb.) (holding that a management rights clause alone authorized a response to no-match letters that mirrored ARAMARK's efforts in 2006).

To the extent Local 26 wanted to argue that ARAMARK committed some technical violation of the contractual language at MIT or Hynes, it could have pursued these cases in grievance arbitration. Indeed, its initial focus on grieving the suspensions demonstrates this point, and Lang's focus on the contract in his first conversation with Bennett further emphasizes the contractual nature of the dispute. Nonetheless, this case is not about ARAMARK's compliance with the contracts, and the Board does not argue that ARAMARK modified contractual language in violation of Section 8(d) of the Act. The case is about unilateral implementation and whether Local 26 waived its right to further bargaining once it agreed to the immigration and management rights language in the MIT and Hynes contracts. Clearly and unmistakably, it did so.

B. Local 26 Clearly and Unmistakably Waived its Right to Bargain Over ARAMARK's Response to No-Match Letters at All Three Locations Through its Conduct Following Notice of the Policy.

Following ARAMARK's advance notice to Local 26 of its intention to enforce the Policy in 2006, Local 26 waived its right to bargain over the Policy or no-match issues in general at any of the three locations. "It is settled Board law that '[W]hen an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act

with due diligence in requesting bargaining.'" Haddon Craftsmen, Inc., 300 NLRB 789, 790 (1989) (quoting Jim Walter Resources, 289 NLRB 1441 (1988) (quoting Clarkwood Corp., 233 NLRB 1172 (1977))). The Board has held that as little as two days' notice may fulfill an employer's obligation to provide advance notice. Shell Oil Co., 149 NLRB 305 (1964). "A Union has an obligation to seize the bargaining opportunity afforded by advance notice of a proposed employment condition change or risk waiver of its statutory right. A union does not preserve its statutory bargaining right by declining to meet and negotiate while seeking to assert a bargaining right by protesting an employer's conduct or by filing an unfair labor practice charge…." Boeing Co., 337 NLRB 758, 763 (2002) (internal citations omitted). As noted above, it is the General Counsel's obligation to show that Local 26 fulfilled its obligation to affirmatively seek bargaining on a change in terms and conditions about which it had advance notice. Bohemian Club, 351 NLRB No. 59, slip op. at 2 (Nov. 19, 2007); American Geri-Care, Inc., 278 NLRB 676, 678 (1986).

One would search the record in vain for any indication that Lang ever sought – or even wanted – to bargain over no-match issues in 2006. In fact, as outlined in Part I.B, the following facts are undisputed on the record:

- Ellis instructed Bennett and Gould to give advance notice of Policy enforcement and to meet with any union officials who requested a meeting.
- Bennett and Gould provided advance notice and met with Lang by telephone as often as he wished.
- ARAMARK operators and Labor Relations Directors provided Local 26 with notice of its intent to enforce the Policy before any employee was contacted about appearing on a no-match letter, and certainly well before any employee was suspended.
- *Despite this advance notice, Local 26 never requested any bargaining in response to ARAMARK's notice.*

- Proving ARAMARK's good faith and willingness to bargain, Ellis bargained with the International Union over enforcement of the Policy.

Lang had no trouble picking up the phone and calling Bennett and Gould to complain about the Policy, ask why ARAMARK was enforcing it, or threaten multiple arbitrations. He had no trouble sending ARAMARK letter after letter, stating his position on the law and asking for documents and information about the Policy. The one thing he never did was request bargaining. He never testified that he did, even in the General Counsel's rebuttal case, when he was permitted by evidentiary ruling to clarify his earlier testimony. Bennett and Gould testified unequivocally that Lang never requested bargaining. On this record, it is clear that Local 26 never satisfied its obligation to request bargaining on no-match or policy enforcement issues.

The Administrative Law Judge reached a contrary conclusion only by trying to convert a number of complaints by Local 26 about no-match issues into requests for bargaining. Local 26 certainly did a fair amount of complaining. It stated its position regarding ARAMARK's legal obligations. It requested "meetings" with ARAMARK officials that were granted and in fact occurred.[7] The most the Administrative Law Judge could make of all that was that Local 26 "impliedly" requested bargaining." (ALJD, p. 15, line 11.) The decision does not state that Local 26 *actually* or *explicitly* requested bargaining, for the simple reason that Local 26 did not do so. As the case law set forth above makes clear, Local 26 did not do enough. The Act places significant obligations on employers to bargain in good faith, but *only if* the union first requests bargaining. Complaints or statements of opposition are simply not enough.

The most likely reason Lang chose not to request bargaining is that he saw the matter as a contract dispute, particularly since the two locations where employees were actually suspended –

[7] It would be practically impossible and simply absurd for ARAMARK to consider every union request for a "meeting" at each of its locations to be a request for formal bargaining.

MIT and Hynes – had contract language specifically covering the no-match issue. Indeed, Lang's conversations with Bennett and the fact that he filed grievances on the suspensions at all three locations support this notion. Ultimately, Lang's motivation is unimportant. The record is clear that Local 26 never satisfied its obligation to request bargaining.[8]

[8] Even if, despite the weight of the foregoing and the arguments in support of ARAMARK's Cross-Exceptions, the Board were to find an unlawful failure to bargain in this case, there would be no cause to order reinstatement or back pay for any ARAMARK employee at Fenway. As noted in Part I.B, the record is uncontroverted on the fact that neither of the two active employees at Fenway was suspended in 2006 or missed any time as a result of ARAMARK's policy enforcement at the end of the 2006 baseball season. Clearly, ARAMARK's national bargaining with Local 26 pre-dated any enforcement with respect to those two employees. Indeed, even after the failure of those negotiations to reach an agreement, it is impossible to say that ARAMARK's policy had any effect at all on the two employees. One employee appeared with a new name and number at the beginning of the 2007 baseball season and missed no time at all. The other employee never sought employment with ARAMARK in 2007, and given the undisputedly high turnover at Fenway from one season to another, that failure cannot be attributed to ARAMARK's policy enforcement. In sum, (1) ARAMARK's national bargaining was particularly effective with respect to Fenway given that it came before the start of the 2007 season, and (2) whatever remedy might be contemplated with respect to Fenway, reinstatement and back pay cannot be part of it.

IV. CONCLUSION

ARAMARK respectfully requests, first and foremost, that the Board deny the Exceptions of the General Counsel and the Charging Party and adopt the Recommended Order of the Administrative Law Judge. Alternatively, ARAMARK respectfully requests that the Administrative Law Judge grant ARAMARK's Cross-Exceptions and adopt the Recommended Order on those alternative grounds.

Respectfully Submitted,

/s/ Michael D. Keffer
Michael D. Keffer
ARAMARK
ARAMARK Tower
1101 Market Street
Philadelphia, PA 19107
(215) 238-6107 (telephone)
(215) 238-3344 (facsimile)

Dated: July 25, 2008

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused a copy of the foregoing Brief in Support of Cross-Exceptions to be served by U.S. Mail upon the following persons:

Robert J. DeBonis
National Labor Relations Board
Region 1
10 Causeway Street, 6h Floor
Boston, MA 02222-1072

Michael T. Anderson
Davis, Cowell & Bowe, LLP
8 Beacon Street, 4th Floor
Boston, MA 02108

/s/ Michael D. Keffer
Michael D. Keffer

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