

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

Advice Memorandum

DATE: March 28, 1996

TO : Peter W. Hirsch, Regional Director
Region 4

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

SUBJECT: Textron Lycoming Reciprocating Engine Division
Case 4-CA-23285

530-6050-0825-3300
530-6067-4011-1100
530-6067-6067-2300
595-0420-5500
625-6650-1200

This case was submitted for advice as to whether the Employer 1) bargained in bad faith by failing to advise the Union during contract negotiations that it intended to subcontract unit work shortly after the parties signed the agreement; 2) unlawfully failed to bargain with the Union about its decision to subcontract unit work; and 3) [FOIA Exemptions 2 and 5 .]¹

FACTS

The Employer (or "Lycoming") manufactures and overhauls reciprocating engines for the general aviation market. United Auto Workers Local 817 ("Union") represents, among others, the Employer's production and maintenance employees at Lycoming's Williamsport, Pennsylvania manufacturing facility. Unit employees currently are working under a three-year collective-bargaining agreement which became effective on April 1, 1994.

The Employer is one of the last reciprocating engine manufacturers for the general aviation market. As a result of a general downturn in the industry, Lycoming's annual sales have plummeted from approximately 16,000 engines in 1978 to about 1200 engines today. However, the Employer has retained a successful engine overhaul, service and parts distribution business. Until recently the Employer machined its own engine component parts which it used in the assembly, overhaul and service processes.

¹ The Union's request for 10(j) relief will be addressed in a separate memorandum.

On October 28, 1993, in preparation for upcoming contract negotiations, the Union sent Lycoming a detailed, nine-page information request. Therein, the Union asked the Employer to provide, inter alia, "all written reports, memoranda, projections and feasibility studies concerning any contemplated movement of work from UAW represented locations during the period 1994-1997."

On December 16, 1993, the Employer submitted a partial response, providing that,

In the years ahead, in the interest of being competitive, every aspect of the manufacturing process will be examined to determine make or buy decisions. Currently, certain low value added operations are being investigated with the idea that some of this work will be placed with vendors who are better suited to provide these operations.

The Employer identified six of the "low value added operations" under investigation, including valve guides, valve seats and seal and gasket kits. The Employer further stated that, "Valve Guides is the closest to being placed with a subcontractor. No dates have been established at this time." Nonetheless, Lycoming specifically asserted that, "[t]here is no written report, memoranda, projections or feasibility studies pertaining to movement of work during 1994-1997."

At the parties' first negotiating session on January 6, 1994,² the Union again asked the Employer whether anything is "on paper" regarding future subcontracting plans. The Employer representative responded that he was not aware of anything, but that he'd check to see what was contemplated. The Employer did not respond further and, on February 2, the Union tentatively agreed to retain the previous contractual Memorandum of Agreement which arguably

² All dates hereafter are in 1994 unless specified otherwise.

permits nearly unlimited subcontracting after the Employer follows specified notification procedures.³

On or about February 25, during ongoing contract negotiations with the Union, the Employer circulated among management personnel a comprehensive, 32-page proposal to subcontract the machining of all engine parts to outside sources. Therein, the Employer set forth a comprehensive breakdown of costs and benefits from the proposed subcontracting, including substantial, detailed financial documentation. As a direct result of the proposed subcontracting, the document noted that about 300 unit employees would be laid off, amounting to approximately one-half of the bargaining unit.

Despite the Union's October 28, 1993 and January 6 information requests, the Employer failed to provide the Union with a copy of this document during bargaining or even to apprise the Union of its existence. Rather, the Union first learned of this "Restructure Review" in June 1995, well after the filing of the instant unfair labor practice charge.

In its proposal, the Employer estimated that by subcontracting unit work it would save approximately \$6.7 million annually beginning in 1998. It appears that savings from the layoff of bargaining unit employees would account for over 60 percent of the total cost benefits,⁴

³ The memorandum of agreement provides, *inter alia*, that, "[i]f for general business reasons or because of the nature of the work, the Company desires to contract out work normally and historically performed by the Production employees of the Production and Maintenance Unit, the Union will be advised of such potential contract seven (7) working days prior to contracting out of the work." The parties first agreed to this language in 1990 after labored collective bargaining negotiations. The Union maintains that the parties thereby intended only to codify the past practice of subcontracting small projects and that they did not intend the agreement to constitute a broad grant of authority.

⁴ The Employer estimated its net savings from the layoff of all employees, unit and non-unit, to comprise approximately 66 percent of the total cost benefits. However, it appears

while reduced overhead costs would account for another 20 percent of the total savings.

In the Review, Lycoming identified several problems which drove the subcontracting proposal:

- Mature/Declining Markets
- Increased Competition
- Reduced Margins & NOP
- Need to Maximize Cash
- **Increasing Employee Costs**
- Fixed vs Variable Cost Increases
- Aged Machinery
- Ease of Exit

The Employer further identified goals which motivated the drafters to consider subcontracting:

- Avoiding capital expenditures
- Cutting costs (**head count reduction**, reducing fixed costs)
- Increasing flexibility
- Focusing on core business
- **Improving customer service**
- **Increasing productivity, efficiency**
- **Avoiding labor problems**
- Simplifying the logistics process
- **Avoiding costs of regulation** (environmental, **employment**, use taxes)⁵

The Employer also estimated various expenses associated with the subcontracting proposal, including a \$1,000,000 investment to tool up vendors and \$1,000,000 to rearrange and consolidate the Employer's facility after the subcontracting. The Employer also estimated that it would gain book write-offs of approximately \$3,500,000 from the disposal of unnecessary machinery and equipment, \$2,100,000

that about 22 of the 322 affected employees will be non-unit personnel. Thus, assuming that these non-unit employees are remunerated at a level proportionate to unit employees, net savings from a layoff only of unit employees would comprise approximately 61.3 percent of total savings.

⁵ Emphases supplied.

from the disposal of a building at the Williamsport facility, and \$600,000 associated with tooling used in the machining of parts.⁶

On March 28, the parties agreed to a successor, three-year contract effective April 1. The agreement includes the Employer's right to subcontract as set forth in the above-referenced memorandum of agreement. On April 15, the Employer gave the Union seven days notice of its intention to subcontract the manufacture of valve guides, valve seats and seal and gasket kits. On April 27, Lycoming's Board of Directors approved the proposed subcontracting of all engine parts.

On June 2, the Employer advised the Union that it intended to subcontract the manufacturing of all engine parts, resulting in the loss of about 300 unit jobs over the subsequent two years. Lycoming president Philip R. Boob told UAW international representative Robert McHugh that overhead costs were driving the Employer's decision to subcontract and refused to engage in any discussion about possible contractual concessions from the Union.⁷ On June 13, the Employer notified the Union of its intention to subcontract all unit work in nine named departments. On June 28, the Union filed a grievance concerning the Employer's decision to subcontract unit work. The Employer's plans appear to be considerably behind schedule; by the summer of 1995, mass layoffs and transfers of assets had not yet occurred.

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Employer bargained in bad

⁶ It is not known to what extent the Employer has actually disposed of its assets in the manner described in its February 25 proposal or whether these estimates were accurate.

⁷ The Employer provided employees with a handout in which it stated that, "Concessions [from employees] are not the solution and we are not requesting concessions. Most of the cost of in-house production is in overhead, not wages."

faith by failing to apprise the Union during contract negotiations of its plans to subcontract unit work, and that it unlawfully failed to bargain about its decision to subcontract unit work, a mandatory subject of bargaining.

1. The Employer's Decision to Subcontract Unit Work was a Mandatory Subject of Bargaining

In Fibreboard Paper Products v. NLRB,⁸ the Court held that an employer's subcontracting of its maintenance work in such a way that it merely replaced existing employees with those of an independent contractor who did the same work under similar conditions of employment constituted a mandatory subject of bargaining. The Court stated that since the decision to subcontract involved no capital investment and had not altered the company's basic operation, requiring the company to bargain about the decision "would not significantly abridge the company's freedom to manage the business."⁹ Moreover, since the decision turned on labor costs, it was "peculiarly suitable for resolution within the collective-bargaining framework"¹⁰ In Torrington Industries,¹¹ the Board applied the Court's analysis in Fibreboard to hold that a subcontracting decision was a mandatory subject of bargaining. In so concluding, the Board declined to apply the burden-shifting test first enunciated in Dubuque Packing Co.¹² for use in determining whether a

⁸ 379 U.S. 203 (1964).

⁹ Id. at 213.

¹⁰ Id. at 214.

¹¹ 307 NLRB 809 (1992).

¹² 303 NLRB 386 (1991), enf'd in rel. part sub nom. Food & Commercial Workers Local 150-A v. NLRB, 1 F.3d 24 (D.C. Cir. 1993), cert. denied 114 S.Ct 2157 (1994). Therein, the Board held that in order to determine whether a plant relocation is a mandatory subject of bargaining, the General Counsel carries the initial burden of establishing that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. The employer may then either rebut

subcontracting, rather than a plant relocation, decision was a mandatory subject. Thus, the Board concluded that in cases factually analogous to Fibreboard, the "Supreme Court has already determined" that subcontracting decisions involving merely the substitution of one group of employees for another "do not involve 'a change in the scope and direction of the enterprise' and thus are not core entrepreneurial decisions which are beyond the scope of the bargaining obligation defined in the Act."¹³

In Bob's Big Boy Family Restaurants,¹⁴ the Board held that the employer's decision to subcontract the processing of shrimp by unionized employees for use in its restaurants was a mandatory subject of bargaining. After subcontracting the work out to non-unit employees, the employer completely phased out its shrimp processing operations, sold its shrimp-processing equipment, and returned leased equipment used in its operations. The Board concluded that the decision should be considered a subcontracting, rather than a partial closing, because the employer remained in the business of providing prepared foodstuffs to its individual restaurants. Furthermore, the Board held that the subcontracting decision did not invoke the very core of the employer's entrepreneurial control. The Board reasoned that "the nature and direction of Respondent's business was not substantially altered by the subcontract" because "[t]he only difference is that the processing work is now performed by [the subcontractor's] employees pursuant to the subcontract rather than by Respondent's employees."¹⁵ The Board further reasoned that the subcontracting decision had not required the employer

that showing or, in the alternative, may raise affirmative defenses by demonstrating that labor costs were not a factor in the decision or that, even if labor costs were a factor, the union could not have offered concessions that could have changed the employer's decision to relocate. Id. at 391.

¹³ 307 NLRB at 810-11, quoting Fibreboard, 379 U.S. at 223 (Stewart, J., concurring).

¹⁴ 264 NLRB 1369 (1982).

¹⁵ Id. at 1371.

to engage in "any substantial capital restructuring or investment;" nor, in light of the employer's leisurely disposal of equipment, had there been any "immediate restructuring of capital."¹⁶ In these circumstances, the Board concluded that the capital transactions were not "substantial enough to remove the decision from the scope of Respondent's mandatory bargaining obligation."¹⁷ Finally, the Board observed that the employer's concerns regarding efficiency and quality control were of a type traditionally amenable to collective bargaining.¹⁸

We conclude that the Employer's decision to subcontract the machining of all engine parts constitutes a mandatory subject of bargaining. The Employer's decision essentially resulted in the replacement of its own employees with those of the subcontractors. As in Bob's Big Boy, the subcontracting did not change the nature or direction of the Employer's business. Rather, the Employer continues to sell assembled aircraft engines to the general aviation market as before. Lycoming also continues to overhaul and service those engines, and to warehouse and distribute spare parts. Therefore, this is not a case in which an employer terminated a product or service; Lycoming will remain in the same business as before it subcontracted away the unit employees' work. Thus, we conclude that the intended result of the subcontracting lies not in changing the nature or direction of the Employer's business but, rather, solely in reducing costs.¹⁹

¹⁶ Ibid.

¹⁷ Ibid. The Board further noted "that in First National Maintenance, the Court had indicated that the extent of investment or withdrawal of capital was not crucial." Id. at 1371, n.14, citing First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

¹⁸ Id. at 1371.

¹⁹ See, infra, at pp. 9-11. The Board's decision in Kingwood Mining Co., 210 NLRB 844 (1974), aff'd 90 LRRM 2844 (D.C. Cir. 1975), does not affect our conclusion. The Board held there that the employer was not obligated to bargain about its decision to close its coal mining operations, subcontract mining work and sell its mining

We further conclude that the evidence is insufficient to establish that the subcontracting decision has resulted in any "substantial capital restructuring or investment."²⁰ Thus, there is no evidence that the Employer has fully implemented the planned disposal of real estate, machinery and tooling as outlined in the 1994 subcontracting proposal. As the Board in Bob's Big Boy noted, the Employer's leisurely pace of the restructuring of its capital -- although not insignificant, should the Employer actually implement its proposal -- belies any suggestion that the subcontracting decision was substantial enough to invoke the very core of entrepreneurial control.²¹

However, the Third Circuit (in which the instant matter arises) has criticized the Board's application of Torrington in cases, like Fibreboard, where an employer simply replaces unit employees with non-unit personnel. Instead, the court requires the Board to inquire into the employer's motivations behind the subcontracting decision by, e.g., using the Dubugue burden-shifting test. Thus, in Furniture Rentors of America v. NLRB,²² the court rejected the Board's "simplistic" and "potentially ham-handed"

equipment, while concurrently expanding its coal processing business, because the decision to get out of the coal mining business was a "basic management decision." The employer was already buying, rather than mining, about 70 percent of the coal it processed. As opposed to the instant matter, Kingwood's decision had the effect of substantially enlarging one discreet aspect of its business, coal processing, at the expense of another smaller aspect, coal mining. In the instant matter, Lycoming's services and product line will remain unchanged after the subcontracting; rather, the only effects of its decision are to change the identity of the employees who machine engine parts and to reduce costs.

²⁰ Bob's Big Boy, 264 NLRB at 1371.

²¹ Ibid.

²² 36 F.3d 1240 (3d Cir. 1994), denying enforcement in rel. part to 311 NLRB 749 (1993).

refusal to review the employer's motivation behind its subcontracting decision where, as in Fibreboard, the employer merely replaced unionized employees with non-unionized employees. Consequently, the court remanded the case to the Board for a determination as to whether the employer's decision "was prompted by factors that are within the union's control and therefore 'suitable for resolution within the collective bargaining framework.'"²³ Therefore, the Third Circuit apparently would reject the Board's continuing limitation of Dubuque to plant relocation cases involving "a substantial commitment of capital or change in the scope of the business," as set forth in Torrington and Geiger Ready-Mix Co. of Kansas City.²⁴

We note that the Third Circuit's decision in Furniture Rentors is distinguishable from the instant case insofar as Lycoming's subcontracting decision was motivated by labor costs, rather than issues facing the court such as employee honesty which may not be as readily amenable to the collective bargaining process. However, in light of the Third Circuit's reluctance to endorse the Fibreboard approach as applied in Torrington and Geiger Ready-Mix, we would further argue that, even assuming the Dubuque test applies, the Employer's decision to subcontract unit work constituted a mandatory subject of bargaining. Thus, as set forth above, the Employer's decision to subcontract did not constitute a basic change in the nature of its

²³ Id. at 1248, quoting Fibreboard, 379 U.S. at 214. In Furniture Rentors, 318 NLRB No. 67 (August 25, 1995), the Board accepted the court's remand, adopted the court's findings and analysis, and held that the employer's subcontracting decision based on employee dishonesty and customer dissatisfaction did not encompass a mandatory subject of bargaining.

²⁴ 315 NLRB 1021 (1994) (under Torrington, the employer's reassignment of bargaining unit work to its non-union facilities was a mandatory subject of bargaining because, as in Fibreboard, the employer merely substituted non-unit employees for highly paid unit employees). See also Power, Inc., 311 NLRB 599 (1993), enf'd 40 F.3d 409 (D.C. Cir. 1994) (Dubuque not applicable in Fibreboard subcontracting situations).

operation. We further conclude that the Employer likely will not be able to establish an affirmative defense that either labor costs were not a factor in the decision or even if labor costs were a factor, the Union could not have offered concessions that could have changed Lycoming's decision to subcontract. Thus, the Employer's own proposal provides that over 60 percent of the savings achieved from the subcontracting will come from lowered unit labor expenses. The Employer's proposal repeatedly identified labor-related cost factors either as problems with the status quo, such as increasing employee costs, or as goals which motivated the subcontracting decision, such as head count reduction, improving customer service, increasing productivity and efficiency, and avoiding labor problems. Many of the remaining factors which drove the Employer's decision revolved around the cost associated with manufacturing engine parts, such as the need to maximize cash, reduce fixed costs and avoid costs of regulation. As the Court noted in Fibreboard, production and employment costs are "particularly suitable for resolution within the collective bargaining framework" ²⁵ Nonetheless, the Employer asserts -- without supporting evidence -- that bargaining would have been futile because overhead costs are so high as to render insignificant any possible concession from the Union. We reject the Employer's bare assertion of futility as negating the existence of a bargaining obligation. The Board has held that, "to conclude in advance of bargaining that no agreement is possible is the antithesis of the Act's objective of channeling differences, however profound, into a process that promises at least the hope of mutual agreement." ²⁶

²⁵ Fibreboard, 379 U.S. at 213-14.

²⁶ Pertec Computer, 284 NLRB 810, 810-11 n.3 (1987) (employer's decision to relocate was a mandatory subject of bargaining despite argument that "union would never agree to wage cuts substantial enough to make reversal of the [relocation] decision economically sound"). See also Holmes & Narver, 309 NLRB 146, 147 (1992), in which the Board held that even if the employer was already providing wages and benefits at the lowest possible level under the law, the employer could have bargained about many other alternatives to downsizing, including modified work rules, nonpaid vacations, restricted overtime, job sharing,

The Employer told the Union at all times after its subcontracting announcements that it would not bargain with the Union. Thus, we conclude that the Employer unlawfully failed to bargain in good faith about a mandatory subject of bargaining. Further, as discussed below, the subcontracting contract clause does not privilege the Employer's actions.

2. The Employer Bargained in Bad Faith by Concealing its Subcontracting Proposal from the Union during Collective Bargaining Negotiations

It is well established that, as part of its duty to bargain in good faith, an employer must comply with a union's request for information that will assist the union in fulfilling its responsibilities as the employees' statutory representative.²⁷ The Board utilizes a broad, discovery-type standard in determining whether the requested information is relevant to those functions.²⁸ In contract negotiations, information that pertains to a subject affecting the bargaining unit is deemed relevant,²⁹ for "[u]nless each side has access to information enabling it to discuss intelligently and deal meaningfully with bargainable issues, effective negotiation cannot occur."³⁰

shortened workweek, reassignment of work and job reclassifications.

²⁷ NLRB v. Acme Industrial Co., 385 U.S. 432 (1967); Detroit Edison Co. v. NLRB, 440 U.S. 301, 303 (1979).

²⁸ NLRB v. Acme Industrial Co., supra; NLRB v. Truitt Manufacturing Co., 351 U.S. 149 (1956).

²⁹ See, e.g., Pertec Computer, 284 NLRB at 811; CRST, Inc., 269 NLRB 400, 404-405 (1984), enf'd per curiam 758 F.2d 645 (4th Cir. 1985).

³⁰ Local 13, Detroit Newspaper Printing & Graphic Communications Union v. NLRB, 598 F.2d 267, 271 (D.C. Cir. 1979). Thus, there need only be a "probability that the desired information [is] relevant and that it would be of use to the union in carrying out its statutory duties and

The employer must provide such information in a timely fashion;³¹ an employer's subsequent compliance with a valid information request will not cure its prior unlawful delay.³²

Here, the Employer failed to comply with its statutory obligations. In preparation for upcoming contract negotiations, the Union submitted a comprehensive information request, in which it demanded that the Employer turn over, inter alia, "all written reports, memoranda, projections and feasibility studies" concerning any "contemplated" subcontracting during the term of the upcoming agreement. On December 16, 1993, the Employer remitted a vague response in which it notified the Union that "in the years ahead" it will examine its entire manufacturing process, but that currently only six enumerated engine parts were being considered for possible outsourcing. As it turns out, the Employer's response was, at best, premature and incomplete. The Employer failed to advise the Union that, in fact, it was currently devising detailed plans to subcontract the manufacture of all of its engine parts in the months, rather than years, ahead, and at a cost of one-half of the bargaining unit's jobs.³³

responsibilities." NLRB v. Acme Industrial Co., 385 U.S. at 437.

³¹ Dependable Building Maintenance Co., 274 NLRB 216, 218-19 (1985).

³² Interstate Food Processing, 283 NLRB 303, 304 (1987); EPE, Inc., 284 NLRB 191, 200 (1987), enf'd in rel. part 845 F.2d 483 (4th Cir. 1988).

³³ The Employer maintains that it had no statutory obligation to turn over the Restructure Review or to advise the Union that it was contemplating subcontracting prior to any final decision on the matter. See, e.g., Willamette Tug & Barge Co., 300 NLRB 282 (1990), and The Liberal Market, Inc., 264 NLRB 807 (1982). However, in Willamette Tug, the Board limited its analysis to consideration of decisions to sell a facility, which inherently involve secrecy considerations not present in subcontracting. Secondly, in The Liberal Market, the Board did not even reach the issue of whether the Employer's decision to close

Nevertheless, the Union renewed its request for subcontracting information at the parties' initial January 6 bargaining session. Again, the Employer failed to notify the Union that it was drawing up a comprehensive outsourcing proposal. Thus, lulled into complacency, the Union agreed to retain the Employer's arguably broad right of subcontracting as set forth in the prior collective-bargaining agreement. Accordingly, we conclude that Lycoming bargained in bad faith regarding the retention of the subcontracting language given the Employer's unlawful failure to supply the Union with its plans on subcontracting away approximately 300 bargaining unit positions, and that the Employer can not rely on the subcontracting clause to privilege its actions.³⁴ Furthermore, although the Employer finally provided the Union with a copy of its plans in June 1995, well after the parties entered into the successor agreement, the Employer's unconscionable delay in notifying the Union of its subcontracting plans does not satisfy its statutory obligations.³⁵

We further conclude that Section 10(b) does not bar the amended allegation that the Employer bargained with the Union in bad faith by failing to turn over its subcontracting plans. The Section 10(b) period does not begin to run until a party knows or has reason to know of

a facility constituted a mandatory subject of bargaining under First National Maintenance. Moreover, those cases are distinguishable from the instant matter in that here, the Employer failed to comply with an outstanding information request for relevant subcontracting information.

³⁴ [FOIA Exemptions 2 and 5

.] Accordingly, the Employer was obligated to provide the Union with a copy of the document by at least February 25, the date which appears on the Restructure Review.

³⁵ See, supra, at nn.31-32.

the facts surrounding an alleged unfair labor practice.³⁶ Here, the Union first obtained a copy of the Employer's concealed plans in June 1995. It filed the amended charge on October 3, 1995, well within six months of the date on which it acquired knowledge of the alleged unfair labor practice. Accordingly, we conclude that the second amended charge was timely filed.

3. [FOIA Exemptions 2 and 5]

[FOIA Exemptions 2 and 5

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[FOIA Exemptions 2 and 5

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³⁶ See, e.g., AMCAR Div., ACF Industries, 231 NLRB 83 n.1 (1977), enf'd 592 F.2d 422 (8th Cir. 1979) (Section 10(b) period tolled until union learned of employer's fraudulently concealed plans to subcontract bargaining unit work).

³⁷ [FOIA Exemptions 2 and 5 .]

³⁸ [FOIA Exemptions 2 and 5 .]

³⁹ [FOIA Exemptions 2 and 5

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⁴² [*FOIA Exemptions 2 and 5* .]

⁴³ [*FOIA Exemptions 2 and 5* .]

⁴⁴ [*FOIA Exemptions 2 and 5* .]

⁴⁵ [*FOIA Exemptions 2 and 5*

In sum, we conclude that complaint should issue, absent settlement, alleging that the Employer unlawfully failed to bargain about its decision to subcontract unit work, a mandatory subject of bargaining, and that it bargained in bad faith by failing to apprise the Union during contract negotiations of its plans to subcontract unit work. [FOIA Exemptions 2 and 5

[FOIA Exemptions 2 and 5, continued

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B.J.K.

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