

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CP ANCHORAGE HOTEL 2, LLC,
D/B/A HILTON ANCHORAGE

and

Cases 19-CA-193656
19-CA-193659
19-CA-203675
19-CA-212923
19-CA-212950
19-CA-218647
19-CA-228578

UNITE HERE! LOCAL 878, AFL-CIO

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION

This case involves Respondent's anti-union animus and its multi-year dispute with UNITE HERE! Local 878, AFL-CIO (the "Union").

Following the issuance of a Consolidated Complaint, this case was heard by the Honorable Andrew S. Gollin (the "Judge") on October 28-30, 2019, in Anchorage, Alaska, and on November 12, 2019, in Seattle, Washington. On March 4, 2020, the Judge correctly found that Respondent violated §§ 8(a)(1) and (5) of the Act by: unilaterally restricting Union access to its facility by barring interns and by calling the Anchorage Police Department to report that Union officials were trespassing; failing and refusing to bargain in good faith with the Union; failing to timely provide the Union with information it requested; and dealing directly with employees. (ALJD 37:29-38:2).¹

On April 1, 2020, both the Union and Respondent filed exceptions and supporting briefs with the Board.² While Respondent seeks reversal of many of the Judge's well-reasoned findings, its supporting brief addresses only the Judge's findings on bad faith bargaining and its summoning of the police.³ Moreover, as discussed below, Respondent, in support of its sought-after reversal, relies on mischaracterization and misrepresentation of record evidence and citation to inapplicable Board precedent; it asserts neither facts nor law that would warrant such action. Accordingly, the Board should sustain the Judge's well-supported findings of fact, conclusions of law, and recommended order challenged by Respondent.

¹ References to the Judge's decision will be referred to as "ALJD" followed by the appropriate page number(s) and, where applicable, followed by a colon and the particular line numbers. References to the official transcript in this proceeding will be designated as (Tr.__:__). The first number refers to the pages; the second to the lines. References to General Counsel Exhibits appear as (GCX __); references to Joint Exhibits appear as (JTX__); and references to Respondent Exhibits appear as (RX __).

² The Union excepted to the Judge's failure to find that Respondent engaged in unlawful surveillance of Unit employees and unilaterally changed employees' terms and conditions of employment by increasing their presence in the cafeteria, in violation of §§ 8(a)(1) and (5). Counsel for the General Counsel joins generally in the Union's exceptions and files her own Limited Exceptions and Supporting Brief simultaneously with this Answering Brief.

³ Respondent's Exceptions 12 and 29 do not meet the minimum requirements of § 102.46(b) of the Board's Rules and Regulations, as Respondent has failed in its exceptions and supporting brief, to state the grounds for why the purportedly erroneous findings should be overturned. Thus, it is respectfully requested that these exceptions be disregarded. See *Holsum De Puerto Rico, Inc.*, 344 NLRB 694, n.1 (2005), citing *Oak Tree Mazda*, 334 NLRB 110, n.1 (2001).

II. RESPONDENT'S EXCEPTIONS ARE WITHOUT MERIT AND THE JUDGE'S FINDINGS SHOULD BE ADOPTED

A. The Judge Correctly Found that Respondent Prematurely Declared Impasse, and that the Implementation of Changes to Article IV in January 2018 Was Unlawful (Exceptions 3-4, 10, 17, 20-25 and 30)

Respondent does not except to the Judge's finding that the parties' prior impasse was broken, but rather argues in the collective of its 11 exceptions that the Judge erred in failing to find that impasse was reached again, and that Respondent was, therefore justified in implementing changes to the contractual access provision in the Implemented Agreement in effect since 2009 ("Article IV"). (Resp. Br., pp.24-38). Respondent also argues that even if the parties hadn't reached impasse, the Judge erred in failing to find that Respondent was justified in implementing changes to Article IV based on the Union's conduct. Respondent's arguments are meritless and should be rejected.

1. The Judge's Finding that the Parties Were Not at Impasse Is Well-Supported by the Record Evidence

The Board has long defined impasse as a situation where "good-faith negotiations have exhausted the prospects of concluding an agreement." *Dish Network Corp.*, 366 NLRB No. 119 (2018), *citing Taft Broadcasting Co.*, 163 NLRB 475 (1967). Both parties must believe they are at the end of their rope and that further bargaining would be futile. *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993). As found by the Judge, given the severity of the changes Respondent was proposing to Article IV, limiting the Union's long-standing practice of interacting daily with Unit employees at the Hotel during their lunch breaks to just two hours a week, in a room that was not the cafeteria, it wanted to reopen negotiations and discuss Article IV as part of an overall agreement. (ALJD 32:5-8; JTX 1, ¶ 6, JTX 4; JTX 9; RX 13). At the time Respondent's proposal was made, the Union's representatives had been visiting with employees in the cafeteria Monday through Friday, between 10 a.m. and 11 a.m., and the credited evidence established that this was the Union's primary method of communicating with Unit employees as most employees took their lunch break in the cafeteria from 10 to 10:30 a.m. (ALJD 6:19-24; JTX 1 ¶ 12; Tr. 68:12-69:1, 382:6-19, 383:5-12, 726:11-728:5).

The Union then submitted proposals on the “key issues” previously identified by Respondent as preventing the parties from reaching a successor agreement.⁴ The Union’s proposals reflected substantial movement that the Judge correctly found created the possibility of further fruitful discussions. (ALJD 31:26-27;Tr. 298:25-306:3, 364:20-366:7, 376:12-378:24, 561:11-2; JTX 5, JTX 50).

Rather than make any counterproposals of its own, Respondent flat out rejected the Union’s proposals, communicating that it was difficult to see granting any benefits to the Unit employees in light of the Union’s boycott efforts,⁵ and that it would be implementing changes to Article IV.⁶ (ALJD 30:32-25, 32:37-42, 34:38-40; JTX 47, JTX 52). Thus, far from concluding the parties reached an impasse, the Judge correctly concluded found that Respondent wanted the Union to relinquish its primary method of communicating with unit members in exchange for little or nothing, and that Respondent did not approach the negotiations with the attitude of settlement through give and take which the Act requires. (ALJD 32:44-33-2).

a. The Judge Properly Rejected Respondent’s Single Issue Impasse Argument

A party asserting a single-issue impasse has the burden to prove: (1) that a good-faith impasse existed as to a particular issue; (2) that the issue was critical in the sense that it was of “overriding importance” in the bargaining; and (3) that the impasse as to the single issue “led to a breakdown in overall negotiations.” *Atlantic Queens Bus Corp.*, 362 NLRB No. 65 (2015) (*citing CalMat Co.*, 331 NLRB 1084, 1097 (2000)). As correctly found by the Judge, although the evidence established that restricting the Union’s access to cafeteria was one of Respondent’s objectives, limitations on cafeteria access was never identified as an

⁴ Respondent’s claim that it offered to bargain with the Union over dues checkoff, an issue that was never in dispute between the parties, after the Union communicated that it wanted to bargain over the key issues, does not, as suggested by Respondent (Resp. Exception 19) establish that Respondent, in any way, engaged in the ‘give-and-take’ that characterizes good-faith bargaining. (JTX 12, JTX 16, JTX 19, JTX 20). *Bridon Cordage, Inc.*, 329 NLRB 258, 265 (1999).

⁵ The Union had been urging a consumer boycott of the Hotel to pressure Respondent to return to the bargaining table to negotiate a successor collective-bargaining agreement. (ALJD 4: 1-5).

⁶ The e-mail message communicating when the changes to Article IV contained a typo, mistakenly stating that the changes would go into effect on Monday, January 12, 2018. (JTX 53). Respondent implemented its changes to Article IV on Monday, January 15, 2018. (JTX 1 ¶ 22).

overriding objective. (ALJD 34:12-18). Thus, it could not serve as the basis for a finding of single issue impasse. Further, as the Judge also correctly found, the parties simply had not reached a good faith impasse on Article IV. (ALJD 33:18-34:2).

Respondent takes the position (Resp. Brf. at pp.27, 30-31) that the Union's counterproposal to Respondent's proposed Article IV changes was of little consequence, did not actually offer concessions, and constituted a mere agreement to behave better. However, as correctly found by the Judge, the language in the Union's counterproposal addressed the majority of reasons cited by Respondent in support its Article IV changes. (ALJD 33:27-34, 34:14-20; JTX 50, p.6). Further, within the Union's counterproposal was an agreement by the Union to sign in and out, something never required previously. (ALJD 33:25-33; JTX 2, JTX 4, JTX 50, p.6).

Moreover, contrary to Respondent's assertion, but as correctly found by the Judge, although the Union's concessions did not give Respondent all that it desired, that does not justify declaring impasse. See *Powell Elec. Mfg. Co.*, 287 NLRB 969, 973, 74 (1987), *enfd. as modified* 906 F.2d 1007 (5th Cir. 1990) (futility, not some lesser level of frustration, discouragement, or apparent gamesmanship is necessary to establish impasse). This is especially true where, as here, "there is no indication the Union was at the end of its rope, or would not yield on cafeteria access." (ALJD 33:21-22). Thus, unlike in *National Gypsum, Inc.*, 359 NLRB 1058 (2013), a case relied upon by Respondent, where both parties made clear they were unwilling to modify their proposals or positions, the record evidence does not support a finding of impasse. (ALJD 34:24-36).

Further, the alleged impasse over Article IV did not lead to an overall breakdown in negotiations. Rather, as the Judge concluded, at the time Respondent declared impasse, the Union had submitted proposals reflecting substantial movement on the key issues and created the possibility of further fruitful discussions. (ALJD 31:12-27). Respondent summarily rejected the Union's counterproposals. (ALJD 34:40-41).

Additionally, as also correctly concluded by the Judge, because Respondent had not provided the Union with the identities of the employees whose purported complaints about the Union were among the reasons cited by Respondent for proposing changes to Article IV, Respondent was precluded from declaring a good faith impasse on Article IV. (ALJD 34:4-10). Respondent appears to argue (Resp. Br. at p.27) that the Judge misapplied the law by failing to recognize that Respondent's conduct away from the table was not shown to have been aimed at preventing a contract, and by finding that a party engaged in a collateral unfair labor practice does not automatically equate with bad faith bargaining. Respondent's argument appears to rely on a finding never made - that it was engaged in bad faith bargaining by failing to turn over information. Respondent's citation to cases with different facts⁷ does not change this or require a different result.

The record evidence properly relied upon by the Judge established that, given that Respondent cited to alleged employee complaints as a reason for its proposed changes to Article IV, the Union sought the identities of those complaining employees in order to conduct its own investigation and address Respondent's expressed concerns. (ALJD 14:31-37; GCX 6; JTX 42). Further, Respondent's argument (Resp. Br. at p.28) that the Union already had the information in its possession based on knowing who it approached for a voice-recorded statement was properly rejected by the Judge, as the Union's request was for the names of employees who had "complained" to management that the Union "was forcing them" to agree to voice recording. (ALJD 27:10-16). Thus, as found by the Judge, there could be no valid impasse with respect to Respondent's proposed changes to Article IV – a core issue – because Respondent had not provided the Union with the information sought. *Caldwell Mfg. Co.*, 346 NLRB 1159, 1159-60, 1170 (2006).

⁷ Specifically, in *Litton Systems, Inc.*, 300 NLRB 324, 330 (1990), the Board overturned the ALJ's finding that respondent had engaged in bad faith bargaining based on bargaining positions and unilateral changes, and instead found the respondent was engaged in hard bargaining. *St. George Warehouse, Inc.*, 341 NLRB 904, 908 (2004) involved the Board reversing an ALJ's finding that the employer engaged in surface bargaining, by among other actions, making unilateral changes, and delaying and refusing to provide relevant information. The Board in that case found that Respondent had been engaged in hard bargaining, and did not address the issue of impasse. Finally, in the Board's decision in *PSAV Presentation Services*, 367 NLRB No. 103 (2019), the Board reversed the ALJ's finding of bad faith bargaining.

b. The Judge Properly Found that Respondent Was Not Privileged to Implement Changes to Article IV (Exceptions 5, 6-9 and 18)

In *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), the Board recognized two limited exceptions excusing an employer's obligation to bargain before implementing a change to bargaining unit employees' term and conditions of employment: when a union engages in tactics designed to delay bargaining and when economic exigencies compel prompt action. As properly found by the Judge, the evidence did not support the finding of either circumstance being present in this case. (ALJD 32:4-40, n.32).

Respondent argues that the Union engaged in delay tactics and, thus, the Judge erred in failing to find that Respondent was not permitted to implement changes to Article IV. In support of its these arguments, Respondent relies primarily on the delay between the parties' first and second bargaining sessions, and argues (Resp. Br. at pp.31-36) that the Union made "multiple layers of demands for information" that bore no relationship at all to the access issue and made its representatives unavailable for months on end. Respondent is mistaken.

As correctly found by the Judge, the requested information related to bargaining topics, including those related to Article IV, which the Union needed to help formulate its bargaining proposals and counter proposals. (ALJD 32:17-19). While some of that information was provided to the Union as early as June 5, 2017, it was not all provided to the Union until August 3, 2017. (JTX 16, 19, 21, 22, 24-26, 28-36). Respondent's claims that the Union's early communications said nothing about scheduling of bargaining sessions being complicated by busy schedules, does not establish that those complications did not exist or that they were purposely created.

As the information requested by the Union to formulate its bargaining proposals was not provided until August 2017, Respondent's argument (Resp. Br. at p.31) that the Union appeared at the first few sessions unprepared with proposals borders on the ridiculous and should be rejected. First, while the Union did not attend the first bargaining session with a proposal to share, as correctly found by the Judge, the Union

made a proposal on Article IV at the parties' second bargaining session, and indicated its willingness to move on the key issues. (ALJD 32:21-26; GCX 5). Next, while the parties did discuss the key issues during this session, the evidence also established that it was at this bargaining session where it was revealed that Respondent had unilaterally implemented terms and conditions of employment that were different from the terms in the Implemented Agreement. (ALJD 12, n.19; JTX 4, JTX 6; JTX 39).

Respondent's claim that the Union cancelled the October bargaining session as a delay tactic, after a member of the Union's bargaining committee had been fired, was also properly rejected by the Judge. (ALJD 32:32-36). In the letter sent to Respondent by the Union cancelling the bargaining session, the Union explained that, although employee Bill Rosario's termination had upset the bargaining committee and Unit employees, it was offering to continue bargaining with Respondent by correspondence, starting with its wage proposal. (ALJD 15:1-5, JTX 44). The Union did not feign ignorance as to the reasons why Mr. Rosario was terminated (Resp. Br. at p.37), but rather, asserted its belief that the termination was unlawful. (JTX 44, p. 2).

Thus, as concluded by the Judge, the cancellation of the October bargaining session was not dilatory, but instead was the Union's response to a perceived attack on its bargaining committee members and supporters. (ALJD 32:34-36). Moreover, there is no merit to Respondent's Exception 18 claiming that the Union conditioned further bargaining on Respondent rescinding Rosario's discharge or providing an explanation about why he was terminated.⁸ While, the Union's letter stated that it "hoped" that such actions with a counterproposal to the Union's proposal would "jump-start" the parties' negotiation process and quickly return to the bargaining table with a bargaining team, it did not condition negotiations on either.

⁸ The letter states, "I hope that receipt from you of such a [counteroffer], accompanied by either an acceptable explanation of the hotel's conduct towards Mr. Rosario or actions promptly remedying that conduct, will jump-start our negotiating process and allow us to quickly return to the bargaining table with a bargaining team, and supportive members who will not be fearful and intimidated (as they now are) by what they reasonably believe is a management team still motivated by anti-union animus, a team willing to seize on any excuse, lawful or otherwise, to punish, retaliate against, and potentially fire any employee perceived as providing strong support for [the Union] and his/her fellow workers in this bargaining process." (JTX 44, p.4).

Finally, the cases cited by Respondent, *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir. 1993), *Golden Eagle Spotting Co.*, 319 NLRB 64 (1995) and *Matanuska Electric Ass'n*, 337 NLRB 680 (2002), are distinguishable and do not support Respondent's arguments. In *Radisson Plaza*, the employer was found to have engaged in bad faith bargaining after it failed to provide information, maintained unlawful rules, cancelled multiple bargaining sessions, terminated bargaining sessions early, and refused requests for more sessions without explanation. Similarly, in the *Golden Eagle* case, the employer was found to have engaged in bad faith bargaining where it, *inter alia*, repeatedly cancelled or did not appear for bargaining sessions, repeatedly showed up late for bargaining sessions and ended them early, and engaged in regressive bargaining. Finally, in *Matanuska Electric*, the Board found that the employer was justified in declaring impasse as a result of the Union's delaying tactics, which included the Union asking "innumerable" questions about each proposal after representing earlier that it understood them. This also included the union taking the position that all words are ambiguous. *Id.* at 683. None of these facts are present here. As such, the Judge's findings should be affirmed.

B. The Judge Properly Found that Respondent Violated the Act by Summoning the Police to Assist It with Enforcing Changes to Article IV (Exceptions 26, 27 and 31)

As the Judge correctly found (ALJD 35:1-15) that Respondent's implementation of changes to Article IV was unlawful, he also properly concluded that Respondent's summoning the police to assist with enforcing those changes against the Union was also unlawful. Respondent asserts (Resp. Br. at pp.38-39) that the Judge's erred in his determination that Respondent's implementation was unlawful and that, even if the changes it implemented were not lawful, the Judge erred by failing to find Respondent had the right to "seek enforcement of its property interests." Respondent's arguments are without merit and should be rejected.

Notably, contrary to Respondent's assertions (Resp. Brf. at p.38), Respondent went beyond just conferring with the police to ascertain its rights. Instead, on January 31, 2018, Respondent followed through on its earlier threat to call the police to report a trespass if the Union refused to abide by Respondent's

unlawfully implemented changes, and actually sought a trespass notice. (ALJD 18:21-24, 33-34; JTX 54; GCX 7, GCX 8). As the Union had been engaging in the conduct consistent with the language of Article IV prior to Respondent's unlawful changes, the Judge's rejection of the cases cited by Respondent,⁹ neither of which involved union representatives exercising a contractual right to access an employer's property, was proper. (ALJD 35:19-22).

That Respondent may have backed away from attempting to enforce its unlawful changes after being advised that the police would not assist, does not in any way render the Judge's findings erroneous. Moreover, contrary to Respondent's assertions, Union representatives' efforts to meet with employees pursuant to a contractual access provision constitutes the exercise of § 7 rights. *C.E. Wylie Construction Co.*, 295 NLRB 1050 (1989). Thus, Respondent's claim that there is no plausible argument (Resp. Brf. at p.39) that Respondent was trying to undermine the Union or sought to interfere with employees' § 7 rights, should be rejected. Finally, that no employees witnessed Respondent's unlawful actions is of no significance because the conduct itself violates the Act; it interferes with the exercise of those rights. *See Roger D. Hughes Drywall*, 344 NLRB 413 (2005).

C. Respondent Violated §§ 8(a)(5) and (1) by Failing and Refusing to Bargain, and Prematurely Declaring Impasse (Exceptions 19 and 21)

As correctly found by the Judge and discussed above, the Union submitted proposals to Respondent on the key issues; this reflected substantial movement that created the possibility of further fruitful discussions. (ALJD 31:26-27; Tr. 298:25-306:3, 364:20-366:7, 376:12-378:24, 561:11-2; JTX 5, 50). Rather than make any counterproposals of its own, Respondent rejected the Union's proposals outright, communicating that it was difficult to see granting any benefits to the Unit employees in light of the Union's boycott efforts, and announcing that it would be implementing changes to Article IV. (ALJD 30:32-25, 32:37-42, 34:38-40; JTX 47, JTX 52). Further, it specifically stated in its January 5, 2018, letter to the Union that

⁹ *UPMC Presbyterian Hospital*, 368 NLRB No. 2 (2019); *Kroger Limited Partnership*, 368 NLRB No. 64 (2019).

that, while it was willing to meet and negotiate in good faith the terms and conditions of its employees, it would not change its “considered positions in the absence of a respectful and good faith partner.” (JTX 52).

Based on these communications, Union negotiator David Glaser interpreted Respondent’s letter as stating it would not bargain with the Union. (ALJD 18:15-17). More salient, however, was the Judge’s proper conclusion that Respondent had prematurely declared impasse over Article IV when it had an obligation to reach impasse on an agreement as a whole, and violated the Act by failing and refusing to bargain. (ALJD 18:15-17, 35:1-2, n.37).

Respondent now argues (Resp. Br. at p.41) that there is no evidence that it refused to bargain at any time on anything other than its own access proposal after January 5, 2018; it urges the Board to ignore the clear meaning of its January 5 letter and, instead, interpret the letter as stating that Respondent was tired of the Union’s unidentified “antics,” but was still willing to bargain. It further argues that the obligation fell on the Union to seek clarification of the meaning of its letter, and claims, as was the case in *PSAV Presentation Services*, 367 NLRB No. 103 (2019), that the Union had not “sufficiently tested the Respondent’s willingness to bargain at the time it filed its bad-faith bargaining charge and ended bargaining.” Respondent’s reliance on *PSAV* is misplaced, and its arguments should be rejected.

In *PSAV*, the Board found no evidence suggesting that the respondent “engaged in any conduct or made any statements [at the bargaining session preceding the union’s charge] that indicated that further bargaining would be futile.” *Id.* at slip op. at 8. Rather, the Board found that the parties had actually discussed the union’s proposal and reached tentative agreements; thereafter, the union cancelled the parties’ next scheduled bargaining session and did not respond to respondent’s attempts to reschedule it. *Id.* It was on that basis that the Board stated it could not find that the union “had sufficiently tested the Respondent’s willingness to bargain at the time that it filed its bad-faith bargaining charge and ended bargaining.” *Id.*

By contrast, in the instant case, not only was there language communicating that Respondent would no longer bargain with the Union, but Respondent presented absolutely no evidence that it made any efforts to “clarify” the Union’s alleged confusion as to the meaning of its letter.¹⁰ Instead, it implemented changes to Article IV, summoned the police, and later, in June 2018, posted a notice to employees by the timeclock communicating that employees didn’t need the Union. (ALJD 18:19-20:30; JTX 1, ¶ 23; JTX 57).

D. The Judge Did Not Overlook Respondent’s Claimed Open Door Policy (Exceptions 11, 28 and 32)

Respondent doesn’t dispute that it posted notices by its timeclock in June 2018, soliciting employees’ grievances, or denigrating the Union or that such conduct was unlawful. (JTX 1 ¶ 23, JTX 57). Rather, it claims that the Judge overlooked that Respondent had previously posted its Open Door policy without Union objection. (RX 42). Respondent, yet again, is mistaken.

The Judge did not overlook Respondent’s claimed policy; rather, he distinguished it from the notice posted June 2018. (ALJD 36, n.41). Specifically, the Judge found that, while the Open Door Policy invited employees to report situations or problems to their supervisor or another member of management and to give him/her an opportunity “to work it out” with the employee, it did not, like Respondent’s June 2018 notice, promise a solution that was satisfactory to the employee. (ALJD 36, n.41; JTX 57; RX 42). The Judge further found that inviting employees to come directly to management for satisfactory solutions to their concerns undercuts the Union’s role as employees’ bargaining representative, and that Respondent had failed to rebut the inference of an implied promise by establishing that it had a past practice of soliciting grievances in a like manner prior to the critical period, or by establishing that the statements at issue were not promises. (ALJD 36, n.41).

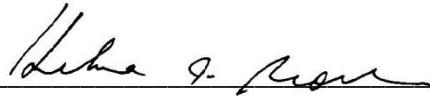
¹⁰ While Respondent filed multiple exceptions (Resp. Exceptions 1-2, 13-16) insinuating that it was not at fault for the parties’ hiatus in bargaining, the Judge properly found that Respondent’s signing of Settlement Agreements, which were not entered into by the Union or the Region, without taking any other actions to remedy the conduct found unlawful, did not shift the burden of requesting bargain onto the Union. (ALJD 30 n.32; GCX 1(aa); RX 31, RX 41).

III. CONCLUSION

For the reasons set forth herein, Respondent's Exceptions should be denied and all portions of the Judge's Decision challenged by Respondent, rejected.

DATED at Seattle, Washington, this 14th day of April, 2020.

Respectfully submitted:



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