The Board and the Pendulum: Four Reversals of Obama Board Precedent Begin the Re-balancing of the NLRA

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DEFINING SUCCESS TOGETHER

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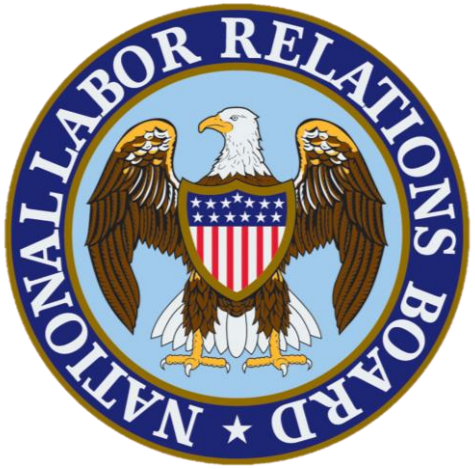
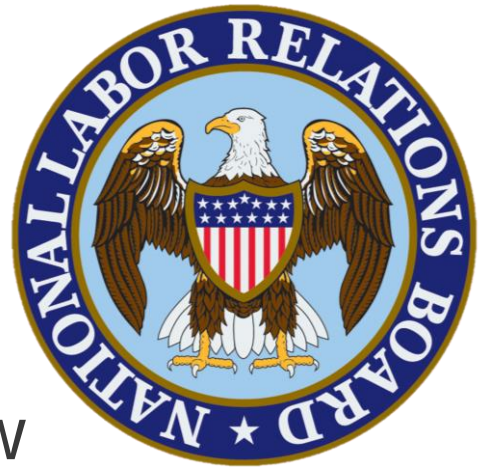
“24”: NLRB Edition



- Board reached full strength on September 27, 2017, less than three months before expiration of Chairman Miscimarra’s Term on December 16.
- On December 12, the NLRB announced a request for information concerning the “quickie election rules.”
- During the week of December 15, the NLRB reversed five controversial Obama Board decisions.
- While one of these decisions directly affects only unionized employers, the others impact all employers.

"24": NLRB Edition



As the clock ticked toward zero on Chairman Miscimarra's term (and a full Board), the NLRB:

- Created a more refined balancing test for review of employer rules;
- Abandoned the "micro-unit" bargaining unit standard adopted in *Specialty Healthcare*;
- Rejected the indirect or reserved control joint employer standard set forth in *Browning-Ferris*; and
- Restored prior precedent allowing unilateral changes in certain situations based on established past practice.

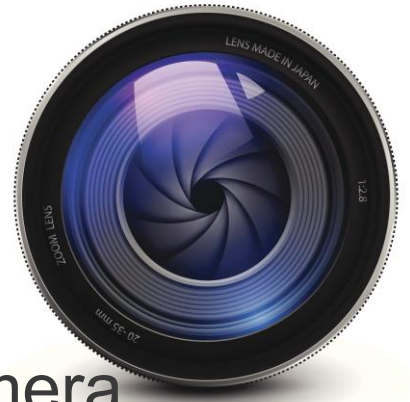
A New Balance: Board Establishes New Framework for Workplace Rule Review

- Employers have faced increased scrutiny concerning workplace rules, often with conflicting results.
- These rules have been evaluated under the framework set forth in *Lutheran Heritage*, 343 NLRB 646 (2004).
- Under *Lutheran Heritage,* the mere maintenance of a facially-neutral rule has been found to violate the Act if employees would reasonably construe the rule as prohibiting protected activity.

A New Balance: Board Establishes New Framework for Workplace Rule Review

- Applying the *Lutheran Heritage* standard, rules restricting use of cameras or recording equipment, and civility in the workplace, were rejected as overbroad or ambiguous.
- For example, in *William Beaumont Hospital*, a split Board found that a hospital violated the Act by stating that nurses and doctors should foster "harmonious interactions and relationships."

The New Framework: Boeing Co.



- In *Boeing Co*., the employer maintained a “no camera rule” prohibiting unauthorized photo or video recording.
- The employer established the rule to protect proprietary information and trade secrets and comply with regulatory requirements as a defense contractor.
- Applying *Lutheran Heritage*, an ALJ found the rule was overbroad and violated the Act.
- Reversing the ALJ, a split Board held that the *Lutheran Heritage* framework did not adequately consider an employer’s legitimate interests in promulgating a work rule, or the complexities of a specific workplace.

The New Framework: Boeing Co.

When evaluating a facially-neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things:

(i) the nature and extent of the potential impact on NLRA rights, *and*

(ii) legitimate justifications associated with the rule.

Applying the New Standard

"We emphasize that the Board will conduct this evaluation, consistent with the Board's 'duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,' focusing on the perspective of employees, which is consistent with Section 8(a)(1)."

Looking Forward: Three New Categories of Rules

Category 1	Category 2	Category 3
Rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.	Rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.	Rules that the Board designates as unlawful because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

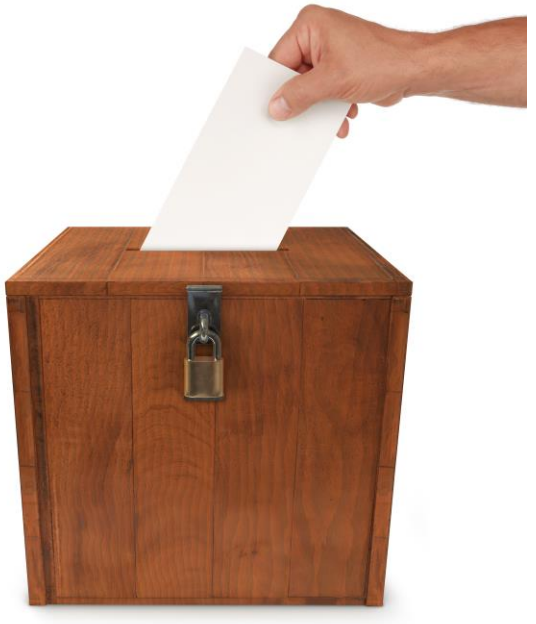
What's Next?

Q. A return to civility (at least in terms of handbook rules)?

A. Maybe. The answer depends on:

- Resolution of any potential appeal;
- Future decisions that directly address rules concerning respect and civility in the workplace; and
- Potential additional guidance from EEOC and NLRB.

The Demise of the Micro-Units



- Issue: how to determine bargaining units in representation elections, when employer believes proposed unit is too small.
- *Specialty Healthcare* (2011): Petitioned-for unit is appropriate if:
  - Readily identifiable as a group
  - Employees within group share community of interest
  - Burden shifts to employer to show that additional employees have "overwhelming community of interest" and the community of interest factors overlap completely.

Appropriate Bargaining Units

- *PCC Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017)
  - Return to prior community of interest approach
  - Test: do the employees in the petitioned-for unit share a community of interest *sufficiently distinct* from excluded employees to warrant a separate unit.
    - Also consider industry specific standards
    - No burden shifting

Community of Interests Factors

- Are employees organized into a separate department?
- Do employees have distinct skills and training?
- Do employees have distinct job functions and distinct work (*i.e.*, is there job overlap)?
- Are the employees functionally integrated with other employees?
- Do the employees have contact with other employees?
- Do the employees have interchange with other employees?
- Do the employees have distinct terms and conditions of employment?
- Are the employees separately supervised?

Practical Effect of *PCC Structurals*

- Avoid small units that draw barriers between employees that impede operations
- Voting units not determined by a union's organizing success
- Avoid domino organizing
- More time between petitions and elections

Employers No Longer (Automatically) Joined at the Hip

Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co., 365 NLRB No. 156, slip op. (December 14, 2017)

- A Board majority (3-2) overruled *Browning-Ferris Industries*, 362 NLRB No. 186 (2015) ("*Browning-Ferris*")

- Returning to the pre–*Browning Ferris* standard to determine
  - Whether a joint-employer relationship exists and, if so,
  - Whether there is shared responsibility for bargaining, and shared liability for unfair labor practices.

BFI Is Now on the Ash Heap of History

The *Browning-Ferris* Board majority held that

- *Even when* two entities have never exercised joint control over essential terms and conditions of employment, and
- *Even when* any joint control is not “direct and immediate,”
- The two entities *would still be* joint employers based on
  - The mere existence of “reserved” joint control, or
  - Based on indirect control or control that is “limited and routine.”

The *Hy-Brand* Majority was Not Amused

The Board majority said that the *Browning-Ferris* standard was

- "*a distortion of common law as interpreted by the Board and the courts*,"
- "*contrary to the Act*,"
- "*ill-advised as a matter of policy*," and
- its application had prevented the Board from discharging one of its primary responsibilities under the Act: "*foster[ing] stability in labor-management relations*."

"Third Verse, Same as the First"

So, the Board's new (old) joint employer standard

- Requires proof that the alleged joint-employer entities have ***actually*** exercised joint control over essential employment terms (rather than merely having "reserved" the right to exercise control),
- Requires that the control must be "direct and immediate" (rather than indirect), and
- "Limited and routine" control alone will not be enough to establish a joint-employer relationship.

Consistency is Key

- The *Hy-Brand* Board also declared that its decision to overrule *Browning-Ferris* and return to the previous standard would
  - Eliminate uncertainty for employers, and
  - Bring the Board's treatment of joint-employer matters in line with the holdings of numerous Federal and state courts.

Pa-TAY-toe, Pa-TAH-toe?

Hy-Brand and Brandt were accused of unlawfully terminating the employment of seven employees who engaged in work stoppages based on concerns involving wages, benefits, and workplace safety, which the Board found was protected concerted activity. The NLRB argued they should be held jointly and severally liable.

- The *Hy-Brand* Board decided to apply its new (old) standard retroactively because it would not impose a “manifest injustice.”
- The Board even pointed out that the new (old) standard could actually benefit the alleged joint employers because that test imposes a heavier burden of proof on the General Counsel to establish joint employer status.

New, Old, or "New" – They're Joint Employers

- The Board found there was "substantial evidence" that the two entities exercised joint control over essential employment terms, establishing a joint employer relationship
  - The joint control was *actually* exercised, not *merely reserved*, and
  - It had a direct and immediate impact on Brandt and Hy-Brand employees.

KYP*

- Both companies had the same Corporate Secretary, who
  - Was directly involved in the decisions at both companies to discharge all seven of the discriminatees.
  - Identified himself as an official of Brandt when he signed letters effectively informing two of the Hy-Brand strikers that their employment had been terminated.
  - Was the primary individual making hiring decisions at Brandt, and he also hired Hy-Brand's General Manager.

Same - Same

- Employees of both companies participated in the same 401(k) and health benefit plans, and they are covered by the same workers compensation policy.
- Hy-Brand employees and Brandt employees attended common mandatory training sessions and an annual corporate meeting where common employment policies were reviewed.
  - Those policies were drafted by the Corporate Secretary and Brandt's Human Resources Director
    - Equal employment opportunity policy,
    - workplace harassment policy,
    - FMLA policy, and a drug-free workplace policy.

Much Ado About Nothing?

- The dissenting minority (who helped make up the majority in *BFI*) argued that there was no need to revert to the pre-*BFI* standard
  - Under either test they were joint employers.
  - No party argued that a return to the pre-*BFI* days was warranted.
  - There was a lack of public notice.
  - There was no input from interested parties (*i.e.*, amicus briefs).
- They also argued that the decision was out of line with the APA and that it could not be described as “reasoned decision-making.”

If Not Now, When? If Not Us, Who?

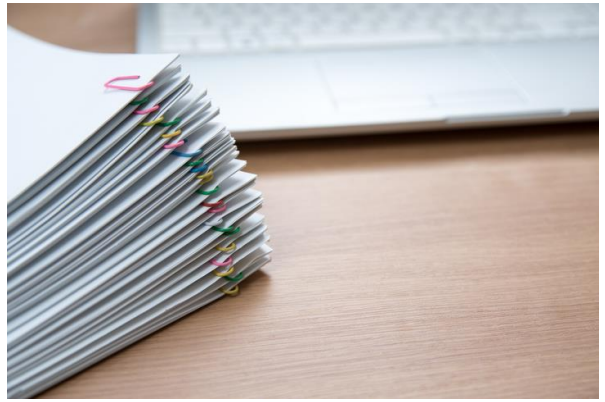
The Hy-Brand majority saw the BFI standard as deeply flawed and took the first opportunity to overrule it rather than perpetuate (and tacitly validate) a policy it strongly disagreed with.

The decision (like the decision in *BFI*) is intentionally long to ensure every problem the majority had with *BFI* got full airing.

The multiple bases to overrule show the majority's deliberation, and fully explained the rationale for returning to the old standard.

And another thing!

The majority's dismantling of *BFI* runs to 35 pages (the summary of the underlying facts, analysis, and conclusion regarding Brandt and Hy-Brand's joint employer status makes up roughly ¾ of one page).



The majority provides more than fifteen (15) arguments to support its decision to overrule *BFI*.

The arguments address political, economic, and practical problems.

Check Yourself Before You Wreck Yourself

By implementing its test in *Browning-Ferris* the Board exceeded its statutory authority.

It expanded the definition of employer and employee, and thus stepped beyond the common law boundaries established by Congress and the Supreme Court.

A Solution in Search of a Problem?

- The Browning-Ferris majority claimed its decision was to ensure all the responsible parties were at the bargaining table.
- By doing so, the Board was resetting its policy to reflect economic changes from “simpler times when labor negotiations were unaffected by the direct employer’s commercial dealings with other entities.”
- The majority disagreed, noting all of the purported “changes” (contracting, subcontracting, temporary and contingent worker arrangements, etc.) all existed before 1935, were in play every time Congress amended the Act.

“The Board is not Congress”

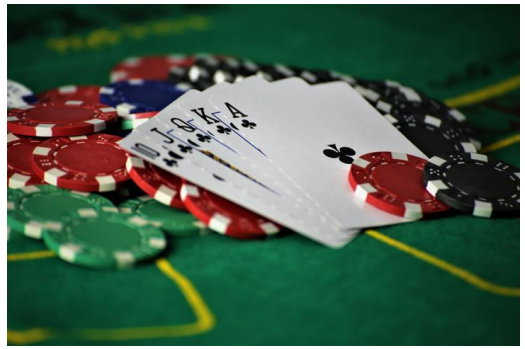
- The Board has no authority to rewrite the common law standard (which requires direct control over employees’ terms and conditions of employment) - that is Congress’s job.
- BFI put the cart before the horse:
  - Instead of using evidence of indirect or potential control to reinforce or supplement evidence of direct control,
  - the test treated that evidence as dispositive – creating joint employer relationships that no one ever expected or wanted.

Labor Relations Is Not a Guessing Game

- The *BFI* test was “vague and ill-defined” which made it all but impossible to identify the “employer.”
- The new (old) standard restores that certainty and predictability, and avoids

> [T]he imposition of unprecedented bargaining obligations on multiple entities in a wide variety of business relationships, based solely on a never-exercised right to exercise “indirect” control over what the Board later decides is an “essential” employment term, to be determined in litigation on a case-by-case basis.

The Board "Showed its Hand"



The *Hy-Brand* majority reminded the dissent (and all of us) that

> The Board is not vested with "general authority to define national labor policy by balancing the competing interests of labor and management."

The *BFI* test improperly sought to correct what the majority in that case perceived as unequal leverage at the bargaining table.

But interfering in those relationships (by bringing too many interests to the table) invites, rather than prevents, labor instability.

Where Do We Go from Here?

The Board will likely find fewer joint employer relationships, but it has by no means abandoned the concept – *Hy-Brand* tells us as much.

Hy-Brand looks like a relatively durable case – Congress has already taken action to legislatively overrule *BFI*, so if the case were struck down, Congress would likely step in.

Employers that contract, subcontract, or use temporary or contingency workers can structure those relationships with confidence, using the *Hy-Brand* standard as a roadmap.

When is a Change not a Change?

- Issue: If an employer has a practice of making changes to terms of employment during a CBA, can it continue making those changes after the agreement expires?
- *Katz* (U. S. Supreme Court, 1962): An employer cannot make unilateral changes in working conditions without providing notice to the union and an opportunity to bargain.
- *DuPont* (2016): An employer cannot make unilateral changes to working conditions after a CBA expires, even if permitted during the term of the CBA.

The Dynamic Status Quo

- *Raytheon Network Centric Systems*, 365 NLRB No. 161 (Dec. 15, 2017)
  - Question is “what is a change?”
  - If employer has a practice of making changes to working conditions, and continues making those changes, it is not a legally recognizable “change.”
  - Employer’s past practice of making changes itself constitutes a term of employment that allows further changes that “do not materially vary in kind or degree.”
  - If changes were allowed by management rights clause, and management rights clause expires with CBA, the past practice can still continue.

Practical Effect of *Raytheon*

Me-too benefits clauses can continue after CBA expiration

- Don’t need overall impasse

Operations less compromised by expiration of CBA

Reduce union leverage to force contract by negotiating over usual changes

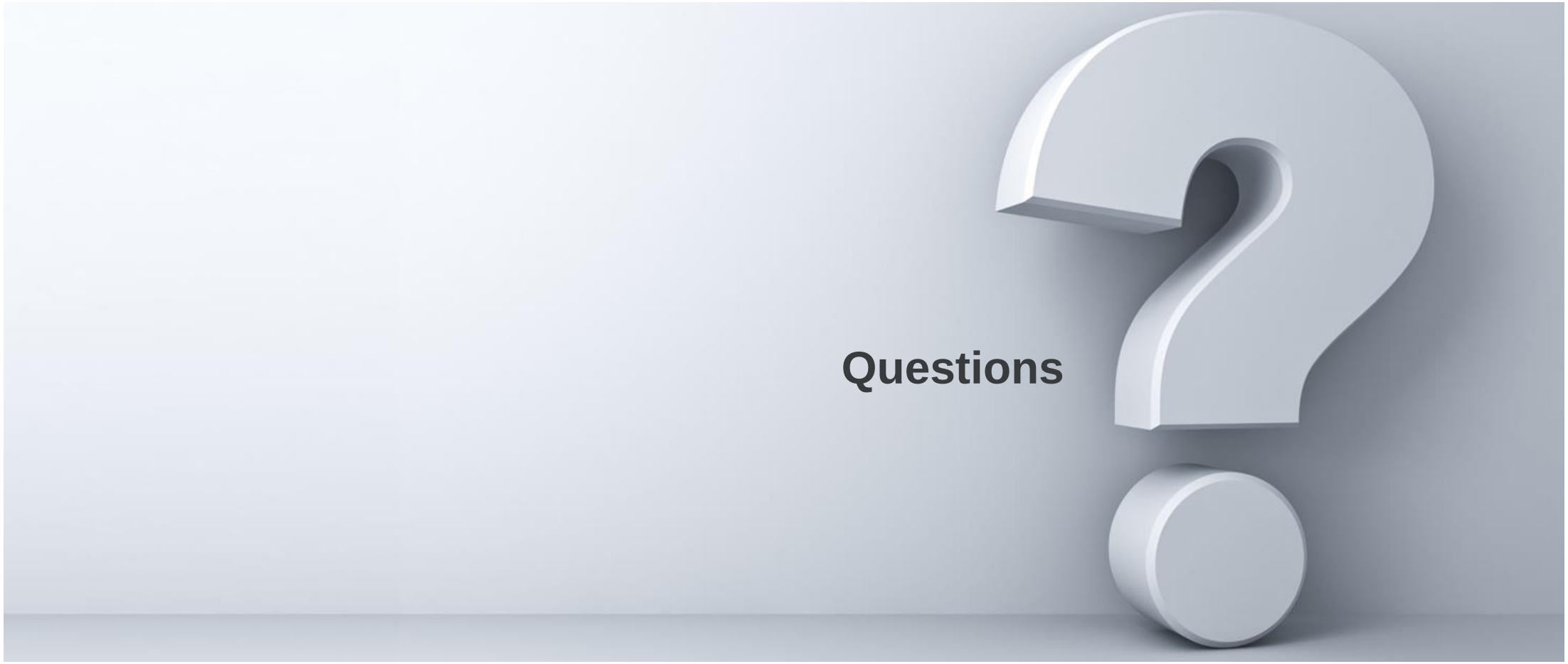
What's Next?

- Marvin Kaplan nominated to succeed Miscimarra, fifth seat awaiting nominee.
- Employers await Supreme Court Decision concerning class action waivers in arbitration agreements.

What's Next?

These decisions, and recent General Counsel guidance suggest other controversial decisions may be revisited, including:

- *Purple Communications* (use of employer's email for section 7 activity)
- Discipline during bargaining over first contract
- Rules concerning off-duty access to premises.


Questions

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