BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL NO. 695

and

CITY OF STOUGHTON

Case 22
No. 55277
MA-9963

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Marianne Goldstein Robbins**, appearing on behalf of the Union.

Boardman, Suhr, Curry & Field LLP, by **Attorney Steven C. Zach**, appearing on behalf of the City.

ARBITRATION AWARD

Teamsters Union Local No. 695, hereinafter referred to as the Union, and the City of Stoughton, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a suspension and discharge. The undersigned was so designated. Hearing was held in Stoughton, Wisconsin, on February 23, 1998. The hearing was transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on May 22, 1998.

BACKGROUND

In 1973, the Grievant was in an automobile accident and suffered a severe closed head injury which resulted in memory problems and chronic seizure disorder which is controlled by medication. The Grievant also has problems with balance and motor skills and has a broad-based spastic gait. The Grievant was hired by the City in 1981 and worked in the City's wastewater treatment plant. The Grievant was discharged by the City in November, 1991, for failure to complete work orders. The discharge was appealed to arbitration and the Grievant's

discharge was reduced to a three-day suspension and he was reinstated in about July, 1992. In 1993, the Grievant was evaluated by a rehabilitation psychologist who reported that the Grievant would continue to experience difficulty completing forms absent reasonable accommodations. It was suggested that the Grievant be provided with a memory book containing step by step instructions and examples which the Grievant would need to carry with him at all times. Additionally, it was recommended that a job coach work one on one with the Grievant and that he be given extended time periods for task acquisition and completion. The City retained a job coach to assist the Grievant. The City thought that the Grievant was not too keen on the idea, and was aloof, so the job coach was let go after only one day. The City also provided the Grievant with a memory notebook several times but the Grievant lost them. The Grievant was off work from January, 1994 until April, 1995, due to a foot injury and subsequent surgery. On May 10, 1995, the Grievant was given a written warning letter related to inadequate job performance. The letter was grieved and as a result, a revised letter was issued to the Grievant. On February 16, 1996, the Grievant was given a one-day suspension for putting the handle of a sewer tape into a drain he was attempting to unplug on November 1, 1995, with the result that the tape became stuck requiring dismantling of equipment to remove it as well as related repairs.

On April 28, 1997, the Grievant was given a three-day suspension for his actions on April 17, 1997 when he was working with a fellow employe on a jet vac cleaning sewer lines in that he failed to warn the jet vac operator of approaching traffic, did not follow directions and operated his truck in such a manner to almost cause an accident. This was grieved and is part of the instant arbitration.

On May 15, 1997, the Grievant was discharged for leaving his radio on the street while working with the jet vac operator and then forgetting about the radio. The radio was found by a citizen and returned to the City. The radio costs about $800. The discharge was grieved and is part of the instant arbitration.

ISSUE

The parties stipulated to the following:

1. Did the City suspend the Grievant, Jon Onsrud, on April 28, 1997, without just cause? If so, what is the appropriate remedy?

2. Did the City discharge the Grievant, Jon Onsrud, on May 15, 1997, without just cause? If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 3 – MANAGEMENT RIGHTS

Section 1. Teamsters Union Local No. 695 recognizes the prerogatives of the City of Stoughton to operate and manage its affairs in all respects in accordance with its responsibility and powers of authority which the City has not officially abridged, delegated or modified by this Agreement and such powers or authority are retained by the City. These management rights include, but are not limited to the following: the rights to plan, direct and control the operation of the work force, determine the size and composition of the work force, to hire, to layoff (sic), to discipline or discharge for just cause, to subcontract after notifying the Union, to establish and enforce reasonable rules of conduct, to introduce new or improved methods of operation, to determine and uniformly enforce minimum standards of performance subject to the provisions of this Agreement.

. . .

ARTICLE 17 – MISCELLANEOUS

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Section 7. Warning letters shall not remain in effect more than eighteen (18) months from date of issue. Copies of all warning letters shall be sent to the Union and provided to the steward at the time of issuance to the affected employee.

CITY'S POSITION

The City contends that there was just cause to discipline and discharge the Grievant. It argues that the Grievant's actions warranted the discipline, he was afforded due process, he was given notice that of the type of conduct that would result in discipline, he was counseled as to his job performance and was given progressive discipline.

With respect to the Grievant's conduct, the City points out that shortly after the Grievant returned to work in April, 1995, he was given a written warning for failure to properly perform the tasks assigned to him. It observes that throughout the summer of 1995, the Grievant's performance was not satisfactory. It notes that in February, 1996, the Grievant was suspended one day because he improperly tried to clean a drain with the sewer tape handle

getting stuck in the drain, necessitating substantial repairs. It asserts that the three-day suspension at issue also involves the improper performance of the job duties assigned in assisting a co-worker on the jet vac. It claims that the Grievant was not paying attention and did not have his radio with him, so he did not warn his co-worker about traffic. It states that the Grievant drove his truck so as to almost collide with another vehicle and these incidents were reported by the co-worker which resulted in the Grievant's three-day suspension. It submits that within two weeks of this incident, the Grievant lost an $800 radio. It argues that no evidence was presented that these events did not occur. The City claims that unsatisfactory job performance provides just cause for discipline.

The City insists that the Grievant was aware of job expectations and warned of the consequences for failure to meet them. It alleges that because of his memory problems, the City discussed with the Grievant what its expectations were for the job tasks assigned to the Grievant. It maintains that the City met with the Union and agreed to work with the Grievant and because of his memory problem, to make sure he knew how to perform the tasks assigned to him. It points out that he was given a log to help him and was made aware of the maintenance manuals. It claims that his supervisor discussed with the Grievant how to perform each task for which he received discipline.

It contends that the three-day suspension and the discharge were appropriate. It observes that the last two incidents followed a long series of incidents involving damage or potential damage to property or person which resulted in progressive discipline. It asserts that progressive discipline was followed and additionally, meetings were held with the Grievant and Union to attempt to solve the work deficiency problems. It claims that returning the Grievant to work will not result in his performing tasks properly and safely. It argues that the arbitrator should defer to the City's decision to discipline as it was rational, followed a logical progression and was not arbitrary and capricious.

The City takes the position that the Union has not established grounds for setting aside the discipline. It anticipates the Union will argue that the Grievant was not trained for the tasks, others were not disciplined for similar offenses and the discipline is too severe for the offense.

As to the training issue, the City submits that for each relevant task, the Grievant was instructed how to perform it or knew how to perform it. It notes that the last two disciplines involve cleaning sewers with the jet vac and the Grievant had been performing it starting the week of April 3, 1997, and the first incident occurred on Thursday, April 17, 1997. The argument that he did not know how to do the work ignores the fact and the Grievant's admission that he knew what he was expected to do.

With respect to disparate treatment, the City reviews three incidents, the first, an accident involving the jet vac truck and a car when another employe was assisting the jet vac operator; the second, in 1984 an employe lost a pager; and the third involves three accidents where no one was disciplined. As to the first example, the City claims that the accident occurred before the assisting employe was set up and the accident was caused by a reckless driver running into the jet vac truck. It submits that no discipline was warranted and the City thereafter established a procedure to avoid future accidents. The City points out that the record of the two employes involved in this accident was not put in evidence so there can be no comparison with the Grievant from a progressive discipline standpoint. As to the pager lost in 1984, the City alleges that the cost difference between the pager and the radio is $25 for the pager versus $800 for the radio. Also, the employe who lost the pager had no outstanding warnings at the time he lost the pager. It concludes that the 1984 incident is not relevant to the instant case. As to the three accidents, the City concludes that the Safety Committee reviewed these and the Union Steward testified there had been no discipline but admitted that discipline is not a function of the Safety Committee but is up to the supervisors to determine, and supervisor John Lynch testified discipline resulted from one of these accidents. The City observes that the record is not sufficient to establish any difference in treatment as the circumstances were not established nor the disciplinary record of those involved and the claim of disparate treatment is not supported in the record.

The City maintains that the discipline was based on written warnings within the contractual time lines. It states that the contract provides that written warnings cannot remain in effect for more than 18 months from the date of their issue and the City has complied with this provision. It recounts that the Grievant was given a written warning on March 30, 1995, a one-day suspension on February 16, 1996, the three-day suspension was issued on April 28, 1997, and the discharge within a month of the suspension; thus it complied with the 18-month time frame. The City insists that none of the Union's arguments have merit or establish that the disciplinary action was arbitrary and capricious so as to justify modification of the discipline.

UNION'S POSITION

The Union contends that the City has failed to meet its burden of proof on the Grievant's suspension and discharge. It argues that Article 3 requires the City to prove just cause for the suspension and discharge and it has failed in its burden of proof. It submits that the City did not establish just cause for the suspension on April 28, 1997. It points out that the suspension was based on the complaints of a co-worker with whom the Grievant was performing jet vac duties on sewers. It claims that jet vac work is seasonal in nature and the Grievant had not performed this work since the prior fall and had not been retrained, which in light of his impaired memory, is imperative. It states that the City claimed the Grievant made a U-turn on April 3, 1997, which was dangerous because of oncoming traffic, but there was

no accident, and because of the Grievant's memory problems, the only proof is the testimony of his co-worker but the co-worker did not signal or radio the Grievant and even though it was reported that same afternoon, no discipline was given until almost four weeks later. The three-day suspension was based on the Grievant's failure to warn of oncoming traffic but again, there was no accident, although there was an accident which occurred on March 28, 1997, yet neither of the employes involved in that accident were disciplined. It points out that it was reported that the Grievant went to the wrong manhole cover. It submits that this does not indicate any intentional wrongdoing on the Grievant's part and the manhole covers were off center in this location. It alleges that this evidence does not indicate that the Grievant could not perform these duties with the proper training. It maintains that the miscommunication of this type does not warrant a three-day suspension. It argues that the mere fact the Grievant has disabilities does not automatically mean he is considered a safety risk. It also contends that the Grievant's co-worker has negative feelings toward the Grievant as a result of the Grievant's failure to inform him of his wife's call in the fall of 1995 that their baby was ill and this negative bias demonstrates that his testimony cannot be fully credited and should be given little weight.

The Union asserts that the Grievant's suspension amounted to disparate treatment because the City has treated similar and even more serious safety violations with less severity. It points out that there was no accident on April 17, 1997, yet there was one a week or two earlier and no one was disciplined. There were two other accidents, according to the Union (forks on a forklift too high and failure to wear safety goggles) where no one was disciplined. It maintains that there is no reasonable basis for the disparate treatment of the Grievant and no just cause for the suspension.

The Union believes that the City failed to take mitigating circumstances into consideration when it suspended the Grievant. It points out the City knew when it hired the Grievant that he had memory problems and needed training and instruction for duties he had not performed in a while. The Union recalls that it met with the City and made suggestions after the May 10, 1995 written warning but the City took the attitude that these would not help the situation. The Union argues that the City was on notice and did not accommodate the Grievant but waited for him to fail and then disciplined him. According to the Union, because of the City's failure to attempt to accommodate the Grievant's memory problems, it lacked just cause to suspend him.

The Union submits that there was no just cause for the Grievant's discharge. It maintains that the Grievant's leaving the radio at the work site and failing to report it missing at the end of the day is not a safety violation but a simple mistake. It claims that the punishment of discharge is too severe and not reasonably related to the offense. It observes that the Grievant was not used to carrying the radio and his memory problems required retraining which he was not given and this extenuating circumstance mitigates against a discharge. The Union suggests that simply strapping the radio to the Grievant's belt would

avoid a repetition of the problem. The Union observes that another employe lost a pager in 1984 and despite the fact the pager was never found, no discipline was meted out. It dismisses the City's assertion that the pager was less expensive than the radio because the difference in cost was exaggerated and there was absolutely no loss in this case because the radio was recovered. It claims that discharge under the circumstances was disparate treatment.

The Union argues that the prior discipline raised by the City may not be considered under Article 17. The Union insists that the May 10, 1995 letter falls outside the 18-month period and cannot be used to support the Grievant's suspension and discharge. The Union also contends that the City's reference to Lynch's notes from June, 1995, were not the subject of discipline and cannot be used to justify the discharge now. The Union concludes that the suspension and discharge were without just cause and it asks for an order reinstating the Grievant to his former position and that he be made whole.

CITY'S REPLY

The City contends that the safety issues involving the discipline are real and substantial. It states that not surprisingly the Grievant's defense focuses on his disability as an excusing or mitigating factor and the City should accommodate him by excusing his failures. The fallacy of this, according to the City, is his fellow employe's testimony which speaks clearly to this that he no longer feels safe working with the Grievant. The City maintains that the record is replete with circumstances involving routine, simple tasks misperformed by the Grievant creating the risk of damage to property or person. It states that the only "accommodation" is having someone else do the tasks for the Grievant. The City points out it operates a complex, sophisticated wastewater treatment plant and employes have to be assured that other employes are not posing a risk to them. It observes that the Grievant presented no testimony to refute the facts giving rise to the discipline. It alleges that the record is filled with near misses which were addressed by progressive discipline and it fears that something major will happen but the ability to impose discipline does not depend on injury to person or damage to property.

The City insists that it took steps to assist the Grievant. The City asserts that the Grievant's doctor testified that the Grievant's condition is stable and has not changed from the 1980's and the Grievant needed to be informed what he was required to do to complete a task and the City has done this. The City argues that the May 10, 1995 letter and the summer 1995 documentation is relevant because it demonstrates that the City worked with the Union to address and improve the Grievant's performance. The City points out that it got notebooks for the Grievant, made available its maintenance manuals, instructed the Grievant how to do tasks, attempted to get him a job coach and gave him extended time to perform tasks. The City claims that short of having someone constantly at the Grievant's side or doing his job for him, the City did all it could to assist the Grievant.

The City insists that the Grievant knew how to do the jobs which gave rise to the discipline. With respect to the sewer tape, the City asserts that he had used it before and was instructed for 15-20 minutes how to accomplish the task at hand with it. It also notes that on the jet vac, the Grievant had performed the work the week of March 31 and again, the week of April 14, 1997, and the incident occurred on April 17, 1997, so he had been doing the job for some time and knew how to do it. The City observes that during this time and later the Grievant was carrying the radio until he lost it.

The City argues that the Grievant was not subject to disparate treatment. The City repeats that the earlier accident with the jet vac involved different circumstances and was caused by a reckless driver and the two employes were not shown to have had any prior discipline. It notes that the facts differ plus the Grievant made an unsafe U-turn and failed to go to the correct manhole which all evidence unsafe behavior on his part. It states that nothing in the record suggests anyone else with the Grievant's disciplinary history and series of events was not disciplined by the City. The City claims that the discipline cannot be viewed as arising from memory problems but rather specific job malfeasance. The City alleges that the discipline was meted out within 18 months of the prior step in the process in accord with the contract and the Grievant cannot argue that the time between incidents warrants a lesser discipline. It concludes that the grievance should be denied.

UNION'S REPLY

The Union contends that the City improperly relied on alleged misconduct which occurred more than 18 months prior to the Grievant's discharge. It states that the only prior discipline within the time frame was the February 16, 1996 suspension which was based on events four months earlier which was outside the 18-month period. The Union points out that earlier incidents were all outside the 18-month period. It observes that the Grievant was gone on a medical leave for more than a year as of April, 1995, and given his memory problems, it is not surprising that he had forgotten facets of the job in the initial months of his return. It notes that the City acknowledged the Grievant's memory problems but took the position that nothing would help.

It alleges that in the absence of retraining, the Grievant had to relearn the job on his own. It submits that as there was no further incident of poor work from November 1, 1995 for the next year and one-half, the Grievant did relearn most aspects of the job. It asserts that the incident in 1997 were duties that the Grievant had not performed for a long time for which he had received no retraining. It claims that the deficiencies at issue were from performing sporadic field work without the City accommodating his memory problem with adequate training.

The Union contends that the City has failed to accommodate the Grievant's disability. It submits that the City has known of his disability for a long time and received a report that he requires constant repetition to acquire new skills. It argues that when he resumes seasonal tasks, he should be retrained and by failing to accommodate the Grievant's known disability, the City violated the just cause standard for discipline.

The Union reiterates that others have engaged in the same conduct or omission as the Grievant and have not been disciplined. It observes that although the City argues that other employes do not have the Grievant's disciplinary record, the other employes did not even receive a lesser discipline but received no discipline at all. It concludes that the Grievant was given disparate treatment. It asks that the grievance be sustained and the Grievant be reinstated with full back pay.

DISCUSSION

The facts underlying the suspension and discharge are essentially undisputed. I credit Brian Erickson's testimony with respect to the events in April, 1997. Although the Union argued that he was biased because the Grievant failed to notify him of an emergency phone call, I conclude that this incident does not discredit his version of what occurred in April, 1997. Unfortunately, the Grievant could not recall what happened in April, 1997, and thus the facts related to the three-day suspension have been established by Erickson.

As to the lost radio, the facts speak for themselves. The radio was lost, probably when the Grievant placed it near a manhole, was found by a citizen and turned in to a fellow employe. The Grievant was responsible for the radio and forgot it or where he had left it and luckily it was returned. Thus, the facts giving rise to the discharge have been established.

Given these facts, the next issue is whether just cause for the suspension and discharge have been established. Just cause includes the concept of progressive discipline. Progressive discipline is based on the premise that behavior will be corrected if sufficient punishment is given to prevent a repeat of misconduct. This generally proves effective where the misconduct is intentional and the consequences of a willful repetition of such misconduct will result in greater discipline and ultimately discharge. This is based on the assumption that behavior will be changed by punishment. In the instant case, the Grievant suffers memory problems, a seizure disorder and physical problems. The progressive discipline scheme seems inappropriate because no matter how much discipline is given, it will not restore the Grievant's memory or change his physical limitations. Arbitrator Honeyman addressed this in his decision between the parties. CITY OF STOUGHTON, 7/92. While not relying on the Americans With Disabilities Act of 1990 (ADA), Arbitrator Honeyman stated the following:

> Yet it is impossible to determine whether there is "just cause" for the Grievant's suspension and then discharge, without entering some way into an analysis of the facts using some of the same principles that have led to the establishment of handicap discrimination statutes. Other arbitrators before me have found that it is not "just cause" to discharge or discipline an employe for what amounts to a handicap, where the employer concerned could have reasonably accommodated the employe.1/ Thus the question of whether or not the Grievant's inabilities constituted something which the Employer could reasonably accommodate are, whether separately addressed by statute or not, unavoidable in this "just cause" claim. (Footnote omitted).

Just cause in this case requires a determination of whether or not the City reasonably accommodated the Grievant's handicap. On November 10, 1993, Rehabilitation Psychologist Ross K. Lynch sent a report to the Grievant's supervisor, John Lynch, indicating the means of reasonably accommodating the Grievant's residual memory deficits. (Ex. 5). As to reasonable accommodation, the report states the following:

> The first of such would be a memory book with step-by-step instructions on completion of the forms which Mr. Onsrud would need to carry with him at all times and refer to as needed. The second means of accommodating Mr. Onsrud, in conjunction with the memory book, would be for him to work one-on-one with a job coach in a supportive employment setting to ensure acquisition of skills, thus improving his overall performance on-the-job.
>
> A supported employment/job coaching situation involves an individual working directly one-on-one with Mr. Onsrud so as to provide support to him, as is necessary, such as cueing him to look at his memory book, reminding him of completion of paperwork, keeping Mr. Onsrud on task, breaking down job tasks into smaller steps for further comprehension and retention, etc. Services of this nature are available via many vocational rehabilitation agencies.
>
> The second question posed relates to Mr. Onsrud's ability to understand and execute verbal or written directives. It would appear that his ability to follow simple directions is sufficient. However, when confronted with instructions on new tasks or with complex directions, Mr. Onsrud may have difficulty with comprehension and retention. Once again, the use of a job coach and memory compensation techniques should accommodate him in this situation. It is possible that verbal repetition of directives will be needed, as well as written copies of such directions.

> It is expected that Mr. Onsrud may require additional time to complete certain job tasks that are not of his normal routine or something that is of a complex nature containing numerous steps to complete. It is nearly impossible to "factor" how much additional time would be needed for him to complete tasks as it will vary from event to event. He will definitely work most efficiently in a job situation which was routine, standardized, non-complex, and which requires little in the way of independent judgment.
>
> With employee training, Mr. Onsrud will definitely require additional time to receive and assimilate information being provided. He will need to compensate for his learning deficits by using a memory book, sample tasks, continued retraining, job coaching, etc.
>
> Based upon information reviewed in regard to this particular job situation, it is our feeling that Mr. Onsrud is able to complete the functions of a Wastewater Treatment Facility Operator 4 with reasonable accommodations such as a job coach, memory books, extended time periods for task acquisition and completion, etc.

The City argues that it has reasonably accommodated the Grievant by giving him log books, making maintenance manuals available and giving him instructions. It also claims that it gave him extended time to do tasks and attempted to get a job coach. The undersigned is not convinced by the record that the City made a good faith effort to accommodate the Grievant's disability. The City had a job coach for one day but determined that the Grievant didn't feel he needed one, was aloof and didn't like what was going on. The job coach never testified in this matter and there was no evidence that the Grievant was told that he had to work with a job coach to improve his performance. The evidence is insufficient to establish that the Grievant refused this accommodation. The City is obligated to accommodate the Grievant and if the Grievant refuses or rejects the accommodation, then termination would be appropriate because without the accommodation, he will not overcome his memory problems. Although the City gave the Grievant notebooks to carry around, they were lost. Again, the evidence failed to establish that these were the type of "memory book" suggested by Dr. Lynch's November 10, 1993 report. The evidence failed to show what, if any, written directives were given by the City to the Grievant. The City's attempts to accommodate the Grievant were not wholehearted and were less than reasonable. In short, the City did not reasonably accommodate the Grievant's "disability" or "handicap" so it must be concluded that the City did not have just cause to suspend or discharge the Grievant.

Having concluded that the City lacked just cause to suspend or discharge the Grievant, the next issue is to determine the appropriate remedy. This is an unusual case which calls for an unusual remedy. Arbitrators are allowed great latitude in fashioning a remedy. LODGE

NO. 12, MACHINISTS V. CAMERON IRON WORKS, 292 F.2D 112, 48 LRRM 2516 (5TH CIR., 1961). The undersigned is concerned that merely reinstating the Grievant will only result in his discharge some time in the future and in the meantime, there is a possibility that without retraining and job coaching, the Grievant may harm himself or someone else or do property damage including environmental harm as he works in a wastewater plant. The undersigned is also concerned that the Grievant won't accept a job coach and acquire the skills necessary to resolve his memory problems. Also, even if the Grievant is reasonably accommodated by the City, his performance may be unacceptable because even following all of Dr. Lynch's suggestions, the Grievant may not be able to perform in a safe and satisfactory manner. Therefore, the remedy shall be that the City conditionally reinstate the Grievant to his position as an Operator 4 and make him whole by paying him back pay and benefits less any interim wages, unemployment compensation and other monetary benefits he has received due to his termination. The City is ordered to reasonably accommodate him by providing the assistance suggested by Dr. Lynch. Dr. Lynch suggests a three to six month period for the Grievant to achieve success with all tasks to a reasonable degree of proficiency. Thereafter, the undersigned will retain jurisdiction for at least 90 days but not more than 180 days for the sole purpose of resolving any disputes with respect to the remedy herein. If the Grievant refuses to accept the job coaching and/or other accommodations suggested by Dr. Lynch, his conditional reinstatement will be revoked and his termination will be upheld. If the City fails or refuses to reasonably accommodate the Grievant, he will be reinstated without condition.

Based on the above and foregoing, the record as a whole and the arguments of counsel, the undersigned issues the following

AWARD

The City did not suspend and discharge the Grievant for just cause. The City is directed to conditionally reinstate the Grievant and make him whole for lost wages and benefits, less any interim earnings, unemployment compensation or other monetary benefits received but for his termination. The City shall reasonably accommodate his memory problems. The undersigned will retain jurisdiction for a period of at least 90 but not more than 180 days for the purpose of resolving any disputes with respect to the remedy discussed above.

Dated at Madison, Wisconsin, this 14th day of August, 1998.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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