Federal Court Cour fédérale

Date: 20100129

Docket: T-94-09

Citation: 2010 FC 103

Ottawa, Ontario, January 29, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

CUPE, AIR CANADA COMPONENT

Applicant

and

AIR CANADA

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

[1] This is an application for judicial review of a decision of a Health and Safety Officer (HSO) under Part II of the *Canada Labour Code*, R.S., 1985, c. L-2 (the *Code*), dated September 23, 2008, Transport Canada (Aviation) file number T5240-8-225. In the decision letter received by the Applicant, the HSO determined that Air Canada had complied with the *Code* by having the Workplace Health and Safety Committee (WPC) members participate in a joint hazardous occurrence investigation.

I. Background

[2] On November 19, 2006, an incident occurred onboard Air Canada flight 038 (Shanghai to Vancouver), approximately 45 minutes following its departure from Shanghai (the incident). Sudden moderate turbulence caused injuries to four flight attendants. The flight was diverted to Nariata airport in Japan to provide medical attention to the injured flight attendants. After receiving medical care, all four flight attendants returned home the following day.

[3] On November 20, 2006, immediately after the crew arrived in Canada, Air Canada management conducted a "debrief" or meeting with regard to the incident (the meeting). Attending this meeting were all cabin crew members from the flight, the flight's captain, an employer representative and employee representatives of the WPC, four representatives from the Employee Assistance Program (EAP), and a family member of one of the flight attendants. There is disagreement as to the purpose of the meeting. The meeting was optional.

[4] Following the meeting, the employer WPC representative Ms. Lucy Casmey, Manager, Safety Operations and Product Support – Western Canada, for Air Canada, sent Transport Canada a report entitled "Incident Report and Investigation". I note that in June 2007, Ms. Casmey was replaced by Ms. Laura Curran-Burden as the employer co-chair of the Committee.

[5] Following the incident, Ms. Casmey was appointed as the employer representative and Mr. Bernard Lecerf was appointed as the employee representative of the WPC for the investigation. Both the employer and employee representatives were informed of each others appointment.

[6] Between November 24, 2006, and December 4, 2006, a series of emails was exchanged between Ms. Casmey and a CUPE representative, Ms. Bernadette Jean, with regard to access to certain reports/documents related to the incident.

[7] On December 5, 2006, Mr. Lecerf filed a Complaint Registration Form against Air Canada with Transport Canada. The complaint alleged that Air Canada violated several provisions of the *Code* and its associated Regulations. Specifically, the complaint cited a violation of subsection 135(7)(e), in that the employer co-chair refused to undertake a joint investigation of the incident.

[8] Between the time of the incident and the date of the decision, numerous investigative activities were undertaken, such as interviews with Flight Safety and members of the crew on the flight and reviews of weather and turbulence reports. These activities were conducted or arranged primarily by Ms. Casmey or Ms. Curran-Burden, but also involved employee members of the WPC.

[9] On March 2, 2007, Transport Canada issued a direction to Air Canada. The direction stated that two provisions of the *Code* were contravened: subsection 125(1)(c), which relates to the employers obligation to investigate the incident and subsection 135.1(8)(b), which relates to the

designation of members of the WPC to perform the functions of the WPC. Air Canada was directed to terminate these contraventions.

[10] On February 26, 2008, the OHS inspector wrote to Air Canada to enquire about the actions taken since the March 2, 2007, direction. An Assurance of Voluntary Compliance (AVC) was issued on March 19, 2008, requiring that the joint work place health and safety committee forward its report to the HSO's attention on or before April 10, 2008. The WPC held a three day meeting to review the investigation and make recommendations. However, in an email dated April 10, 2008, from Ms. Jean to Ms. Curran-Burden, CUPE took the position that while there were changes, comments and additions that had to be included in the report before it could be signed by the them, they were reserving these changes until further instruction from Transport Canada based on the employer's response to the AVC.

[11] After an extension, Air Canada filed its response to the AVC on April 14, 2008, by way of a report.

A. *The Decision*

[12] On December 23, 2008, the HSO issued a decision in the form of a short two page letter to Ms. Jean. The HSO stated that the decision was with regard to the Complaint Registration Form dated December 5, 2006. In the letter, the HSO stated:

> We have reviewed and investigated your complaint and have determined that it appears the employer has complied with the

> *Canada Labour Code*, Part II ("the Code") by having the work place health and safety committee members participate in a joint hazardous occurrence investigation of Air Canada flight 038 incident, occurring on 19 November 2006, as provided in an email dated 14 April, 2008 from Laura Curran-Burden…We consider this file closed.

II. The Legislative Scheme

[13] Part II of the *Code* addresses issues of occupational health and safety in federally regulated workplaces. Under the *Code*, employers are obligated to investigate all accidents and other hazardous occurrences, to cooperate with the WPC, and to provide information as requested by the WPC (see section 125 of the *Code*).

[14] The *Code* mandates and sets out procedural requirements for joint employer/employee workplace health and safety committees (such as the WPC) and these committees are to deal with health and safety matters (see section 135). Subsection 135(7) identifies the duties of the WPC, which include the issue in this matter, as set out in subsection 135(7)(e):

135(7) A workplace committee, in respect of the work place for which it is established,	135(7) Le comité local, pour ce qui concerne le lieu de travail pour lequel il a été constitué :
[…]	[…]
(e) shall participate in all of the inquiries, investigations, studies and inspections pertaining to the health and safety of employees, including any consultations that may be	e) participe à toutes les enquêtes, études et inspections en matière de santé et de sécurité des employés, et fait appel, en cas de besoin, au concours de personnes

necessary with persons who are professionally or technically qualified to advise the committee on those matters;	professionnellement ou techniquement qualifiées pour le conseiller;
[…]	[…]

[15] Health and Safety Officers are designed by the Minister of Labour under subsection 140(1) of the *Code*. Under subsection 127.1, 129, 141, 141.1 and 142 of Part II of the *Code*, HSO’s have been granted broad powers for the purpose of carrying out investigations. They also have broad discretion to determine if a provision of Part II of the *Code* has been violated. If a violation is found, the HSO has the discretion to issue a direction or undertake other action. This is set out in subsection 127.1(10) and subsection 145(1) of the *Code*:

<u>Duty and power of health and safety officer</u>	<u>Pouvoirs de l’agent de santé et de sécurité</u>
127.1 (10) On completion of the investigation, the health and safety officer	127.1 (10) Au terme de l’enquête, l’agent de santé et de sécurité :
(a) may issue directions to an employer or employee under subsection 145(1);	a) peut donner à l’employeur ou à l’employé toute instruction prévue au paragraphe 145(1);
(b) may, if in the officer’s opinion it is appropriate, recommend that the employee and employer resolve the matter between themselves; or	b) peut, s’il l’estime opportun, recommander que l’employeur et l’employé règlent à l’amiable la situation faisant l’objet de la plainte;

(c) shall, if the officer concludes that a danger exists as described in subsection 128(1), issue directions under subsection 145(2).	c) s'il conclut à l'existence de l'une ou l'autre des situations mentionnées au paragraphe 128(1), donne des instructions en conformité avec le paragraphe 145(2).
[…]	[…]
<u>Direction to terminate contravention</u>	<u>Cessation d'une contravention</u>
145. (1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the employer or employee concerned, or both, to	145. (1) S'il est d'avis qu'une contravention à la présente partie vient d'être commise ou est en train de l'être, l'agent de santé et de sécurité peut donner à l'employeur ou à l'employé en cause l'instruction :
(a) terminate the contravention within the time that the officer may specify; and	a) d'y mettre fin dans le délai qu'il précise;
(b) take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or re-occur.	b) de prendre, dans les délais précisés, les mesures qu'il précise pour empêcher la continuation de la contravention ou sa répétition.

[16] Subsection 157(1) permits the Governor in Council to make regulations under the *Code*. One such regulation relevant to this matter is subsection 9.3 of the *Aviation Occupational Safety and Health Regulations*, SOR/87-182 (*AOSHR*). Subsection 9.3 is set out thus:

Investigation	Enquête
9.3 Where an employer is aware of an accident, occupational disease or other hazardous occurrence affecting any of the employees in the course of employment on an aircraft, the employer shall, as soon as possible,	9.3 L’employeur qui prend connaissance d’une situation comportant des risques, notamment un accident ou une maladie professionnelle, qui touche un employé pendant qu’il travaille à bord d’un aéronef doit dès que possible :
(a) take necessary measures to prevent a recurrence of the hazardous occurrence;	a) prendre les mesures nécessaires pour empêcher que la situation comportant des risques ne se reproduise;
(b) appoint a qualified person to carry out an investigation of the hazardous occurrence; and	b) nommer une personne qualifiée pour mener une enquête sur la situation comportant des risques;
(c) notify the safety and health committee or the safety and health representative, if either exists, of the hazardous occurrence and of the name of the qualified person appointed to investigate it.	c) aviser le comité de sécurité et de santé ou le représentant en matière de sécurité et de santé, si l’un ou l’autre existe, de la situation comportant des risques et du nom de la personne qualifiée nommée pour faire enquête.

III. The Issues

[17] The Applicant submits that the issues to be resolved in this matter are:

(a) What is the applicable standard of review?

(b) Did the HSO err in law and fact by concluding that Air Canada's actions constituted compliance with the *Code*'s subsection 135(7)(e) requirement that the WPC "participate" in all investigations pertaining to health and safety of employees?

(c) Did the HSO err in law and fact by concluding that a "joint hazardous occurrence investigation" had taken place?

(d) Did the HSO fail to observe a principle of natural justice and procedural fairness by failing to have regard to the statements of employee WPC members that there was no joint investigation and no joint report?

(e) Did the HSO's decision that Air Canada complied with the *Code* constitute an invalid reversal of discretion and an unreasonable refusal to enforce the *Code* and the March 2, 2007, decision?

A. *What is the Applicable Standard of Review?*

[18] As the existing jurisprudence does not provide a determination with regard to the appropriate standard of review applicable to this case, it is necessary to undertake a standard of review analysis (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraphs 62-63).

[19] In determining the applicable standard of review, I am guided by the statements made by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12; [2009] 1 S.C.R. 339, and especially paragraphs 25-26. In these paragraphs, the majority discussed the deference to be accorded tribunals and reinforced a general policy of deference.

(1) Privative Clause

[20] Decisions of an HSO are not protected by a privative clause. However, the lack of a privative clause is not determinative of the issue (see *Khosa*, above, at paragraph 25).

(2) Purpose of the Tribunal As Determined by the Legislation

[21] The purpose of Part II of the *Code* is to “prevent accidents and injury to health arising out of, linked with, or occurring, in the course of employment (see subsection 122.1). As set out above, the *Code* empowers HSO’s with extensive investigative powers, broad discretion with regard to

determining the action, if any, to be taken, and provides them with wide remedial powers to address *Code* violations.

(3) The Nature of the Question

[22] Where a question is one of fact, it has been recognized that deference will usually apply (*Khosa*, above, paragraph 46).

[23] I have addressed the nature of each question below.

(4) Expertise of the Tribunal

[24] HSO's are specialized decision makers. Under section 140 of the *Code*, their appointment is specifically based on the candidate's qualifications to perform the required duties. In *Canadian Pacific Railway Company v. Woollard*, 2006 FC 1332; [2006] F.C.J. No. 1673 (aff'd 2008 FCA 43; [2008] F.C.J. No. 199)) Justice Michel Beaudry reviewed a decision by a Health and Safety Appeals Officer. Justice Beaudry held that HSO's are recognized in the *Code* as specialized decision makers and based his determination that Appeals Officer decisions should be given deference on the fact that they enjoy all the powers of HSO's.

[25] I also note that Justice James Russell held in *P&O Ports Inc. v. International Longshoremen's and Warehousemen's Union, Local 500*, 2008 FC 846; 331 F.T.R. 104, that the

decision of an Appeals Officer should be given deference (see paragraph 16). While I understand that the issues in this case involve a decision of a HSO, *P&O Ports*, above, is instructive.

[26] Based on these facts, the Court's expertise on these matters is not superior to those of the HSO.

[27] Issues related to jurisdiction are commonly subject to the standard of correctness (see *Dunsmuir*, above, paragraph 59). I note that in *CUPE, Air Canada Components v. Air Canada*, 2009 FC 12; [2009] F.C.J. No. 15, at paragraph 10, the Court applied the correctness standard to the review of a HSO's refusal to exercise jurisdiction.

[28] Based on the standard of review analysis above, questions b) and c) are questions that should be reviewed under a standard of reasonableness. They are questions addressing the application of the facts to the law and involve the HSO interpreting their own statute.

[29] Question d) addresses issues of procedural fairness and will be addressed on a correctness standard. Question e) is a question of jurisdiction and will be addressed on a standard of correctness. Should I find that there is no issue as to jurisdiction, then a reasonableness standard will be used.

B. *Did the HSO Err in Law and Fact By Concluding That Air Canada's Actions Constituted Compliance With the Code's Subsection 135(7)(e) Requirement That the WPC "Participate" in All Investigations Pertaining to Health and Safety of Employees?*

[30] It is clear that the employer has an obligation to investigate all hazardous occurrences (see section 125 of the *Code* and subsection 9.3 of the *AOSHR*) and that the WPC must participate in investigations pertaining to the health and safety of employees (see subsection 135(7)(e) of the *Code*).

(1) Role of Workplace Committees

[31] The Respondent argues that the employer is obligated under section 125 and subsection 9.3 of the *Code* and *AOSHR* to investigate hazardous occurrences and that there is no legislative or jurisprudential support for the Applicant's position that the investigation must be a joint investigation by the Committee. It is the Applicant's position that there must be a joint investigation.

[32] The role of the WPC in investigations was recently considered in *Air Canada and CUPE*, Decision No. OHSTC-09-23, June 18, 2009. In that matter, the Appeals Officer discussed the role of workplace committees with respect to hazardous occurrence investigations. He wrote at paragraphs 208-209:

> The main duty of the workplace committee is to offer advice and make recommendations to the employer on occupational health and safety issues. As far as investigations are concerned, the workplace committee may participate actively in the employer investigation.

> However, in a situation where the employer does not conduct an investigation, I opine that the workplace committee should not take over the lead investigative role.
>
> The respondent made several references to the fact that the YUL workplace committee was investigating the hazardous occurrence of E. Niles, which is not provided for in the Code and the Aviation Regulations. It is the sole responsibility of the employer to carry out a complete hazardous occurrence investigation, with the active participation of the workplace committee.

[33] The Applicant argued that if the *AOSHR* derogated from the statutory rights of employees to participate in investigations through the WPC, the regulations would be *ultra vires*. I do not need to consider the issue of the regulations being *ultra vires* as the *AOSHR*'s do not derogate from the *Code*.

(2) Definition of the Term "Participation"

[34] The Applicant argues that the term participation under the *Code* means taking an active part in the investigation. The Respondent agreed that the committee's participation in the investigation must be active, but argues that the level of participation is determined by the committee itself, which will determine how the committee's participation will be achieved in the particular circumstances of each case.

[35] The meaning of the term "participate" was discussed in *Halterm Ltd.*, above, and *Halifax International Longshoring Assn.*, [1992] C.L.C.R.S.O.D. No.1. In *Halterm Ltd.*, above, the Regional Safety Officer determined that it was not Parliament's intention that the whole committee

be present during investigations, but that a member of the committee, whether employer or employee, should be designated by the committee and authorized to act on its behalf during these investigations. The Regional Safety Officer continued, stating that a member of the safety and health committee must be physically present during a hazardous occurrence investigation in order to take part in all the actions described above and that reviewing reports and making recommendations cannot be substituted for the more active role of participating in inquiries and investigations.

[36] While I agree with the thrust of the *Halterm Ltd.,* above, decision with regard to the definition of participation, I am cognizant of the fact that it is over 15 years old. Therefore, as methods of communication have changed, I do not put significant weight on the committee's requirement to be physically present at any investigation.

[37] The Applicant argues that "participation" requires "joint participation" and provided three decisions to support this position: *Canadian Pacific Railway Co. and Canadian Auto Workers*, [2006] C.L.C.A.O.D. No. 46; *Munn and Canada (Department of National Defence)*, [2005] C.L.C.A.O.D. No. 30, and *Canadian National Railway Co. and Tetley*, [2001] C.L.C.A.O.D. No. 21. However, while these decisions do support the point that the WPC investigations are often reference as "joint investigations", there is nothing in the decisions or the *Code* that requires this. I note that in *Munn*, above, the Fire Chief conducted a joint investigation of the refusal to work made by fire fighters with the "participation" of the union committee member. I also note that in *Halterm Ltd.*, above, the Regional Safety Officer stated at paragraph 38 that "a" member of the safety and health committee must be present during a hazardous occurrence investigation.

[38] Several names have been ascribed to investigations under subsection 135(7)(e), such as "joint investigations" or "employer's joint investigations". The names or titles used are not important. What is important is the participation of the WPC, as set out in *Halterm Ltd*, above.

(3) Application to the Facts

[39] In this case, there is no evidence in the record of any formal internal mechanism to designate a WPC member to act on its behalf during investigations. However, it is clear that the employer and employees each appointed a member of the WPC to act on their behalf. This seemed to be the norm.

[40] Based on the role of the workplace committee as set out in *Air Canada and CUPE*, above, and the definition of participation as set out in *Halterm Ltd.*, above, the HSO had evidence before her to support a determination that the WPC had participated in the investigation and that the obligations under the *Code* had been satisfied.

[41] The HSO's decision is supported by the WPC's participation in the following activities related to the Respondent's investigation:

- Meeting or debrief on the day following the incident. While this was conducted with EAP, information was collected and no one was precluded from taking notes;
- Review of reports from cabin crew members;
- Review of levels of turbulence matrix;

- Preparation of a list of question to ask Flight Safety;
- Conference call with a Flight Safety Officer to discuss the Flight Safety Investigation and findings contained in their draft report;
- Verification of weather patterns for their particular flight;
- Meetings with Flight Operations to discuss weather patterns;
- Interviews with flight attendants conducted by employee representatives of the Committee;
- Creation of an appendix tracking of turbulence;
- Joint inspection of aircraft by WPC members;
- Review of photographic evidence;
- Discussion of the employer's investigation report and of recommendations; and
- Review of all pertinent information and reports at joint meetings held during three days from April 1-3, 2008.

[42] The HSO's decision was reasonable.

C. *Did the HSO Err in Law and Fact by Concluding That a "Joint Hazardous Occurrence Investigation" Had Taken Place?*

[43] The Applicant argues that there was no factual basis for the HSO to determine that Air Canada had complied with the *Code* by having the Workplace Health and Safety Committee members participate in a joint hazardous occurrences investigation. The Applicant argues that this was a violation of the obligations set out in the *Code* (subsection 135(7)(e)), and is also a

contravention of Air Canada's obligation to comply with every oral or written direction from an HSO.

[44] There is no requirement in the *Code* for a joint investigation. The obligation is the participation of the WPC. As I discussed above, words such as "joint" appear to have been adopted by people who work in this area. However, the adoption of such terms cannot oust the clear language of the statute nor give rise to substantive rights.

[45] The HSO's decision was reasonable.

D. *Did the HSO Fail to Observe a Principle of Natural Justice and Procedural Fairness by Failing to Have Regard to the Statements of Employee WPC Members That There was No Joint Investigation and No Joint Report?*

[46] The Applicant argues that the HSO ignored statements made by the employee representatives. They argue that the employee submissions included in the April 14, 2008, report and a later submission on May 12, 2008, provided "uncontroverted evidence" that there was no joint investigation and no joint report. I agree that these submissions were not directly addressed in the HSO's brief reasons.

[47] As set out by the Court of Appeal in *Ozdemir v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331; 282 N.R. 394, decision-makers are not bound to explain why they did not accept every item of evidence before them. Nor will a reviewing court infer from the failure of reasons to specifically address a particular item of evidence that the decision-maker must have

overlooked it. In *Ozdemir*, above, the Court of Appeal noted that it is inappropriate to require administrative officers to give as detailed reasons for their decision as may be expected of an administrative tribunal that renders a decision after an adjudicative hearing.

[48] In this case, there is no requirement for a joint report or investigation, and therefore there was no error or breach in the HSO not specifically addressing these points. I find that the reasons given by the HSO, an administrative officer, were adequate to explain the basis of the decision and do not support an inference that the HSO failed to consider all the material before her. There was no error.

E. *Did the HSO's Decision That Air Canada Complied with the Code Constitute An Invalid Reversal of Discretion and An Unreasonable Refusal to Enforce the Code and the March 2, 2007 Decision?*

[49] The Applicant argues that between the end of March 2007 and December 2008, the HSO essentially reversed her position on whether Air Canada's approach to the hazardous occurrence investigation complied with the *Code*. It is their position that the statutory power to prosecute and Transport Canada's "compliance policy" give rise to a public legal duty to enforce the *Code*, based on *Burstyn v. Canada (Revenue Agency)*, 2007 FC 822; 2007 F.C.J. No. 1074. However, the "compliance policy" is not set out nor part of the record before this Court. Therefore, I cannot assess whether it would give rise to a public duty.

[50] The Respondent takes the position that the HSO did not commit any reviewable error by issuing the decision after having sought and obtained additional information from the Respondent

regarding the steps taken in relation to the investigation of the incident following the March 2007 direction.

[51] It is clear that between the issuing of the direction on March 2, 2007, and the issuing of the decision, the investigation into the incident continued. These further steps were reported to the HSO in response to her AVC of March 19, 2008.

[52] In this case, the HSO did not reverse her position. The March 2007, direction stated that Air Canada had contravened two sections of the *Code* and was directed to terminate the contraventions by a specific date. While the deadline to terminate the contraventions was extended, the HSO determined that Air Canada had complied with the *Code*, as per the direction.

[53] Having found that there was no reversal, it is not necessary to determine if the HSO has that jurisdiction. The HSO's decision was reasonable based on the facts submitted to the HSO on April 14, 2008.

(1) <u>Mandamus</u>

[54] The Applicant also incorporated a mandamus argument into the jurisdictional section of their Memorandum of Fact and Law. They rely on *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41; [2001] 2 S.C.R. 281, for the position that a

Minister’s reversal of position without grounds is not a valid reversal of discretion and satisfies the requirements for mandamus.

[55] In *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742; 162 N.R. 177; affd [1994] 3 S.C.R. 110; 176 N.R. 11994, the Federal Court of Appeal set out a general framework of the principle requirements that must be satisfied before mandamus will issue (see paragraph 45). In brief, these requirements can be set out as:

(a) There must be a public legal duty to act;

(b) The duty must be owed to the applicant;

(c) There is a clear right to performance of that duty;

(d) Where the duty sought to be enforced is discretionary, the following rules apply:

(i) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";

(ii) mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

(iii) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;

(iv) mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

(v) mandamus is only available when the decision-maker's discretion is "spent";

(e) No other adequate remedy is available to the applicant;

(f) The order sought will be of some practical value or effect;

(g) The Court in the exercise of its discretion finds no equitable bar to the relief sought; and

(h) On a "balance of convenience" an order in the nature of mandamus should (or should not) issue.

[56] I have already found that there was no reversal by the HSO. However, had I found a reversal, it would have been done with grounds – the HSO had received further information on the investigation.

[57] I also note that the HSO’s discretion was not spent as there was a date to which Air Canada was to comply with the direction. The deadline for compliance was extended several times and there is no evidence in the record that the HSO did not ultimately determine that Air Canada was not in compliance based on non-response.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application is dismissed with costs to the Respondent.

"D. G. Near"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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