

Rainbow International

COVERAGE AND EXCLUSIONS

Waiver of benefits (RCW 51.04.060)

RCW 51.04.060 invalidates a contractual agreement to the extent that it purports to exclude a worker from coverage who would otherwise be covered by the Industrial Insurance Act. It is inappropriate, however, to rely on RCW 51.04.060 to make the threshold determination whether the employment relationship is within the coverage of the Act. ...*In re Rainbow International, BIIA Dec., 88 2664 (1990)* [Editor's Note: The Board's decision was appealed to superior court under Thurston County Cause No. 90-2-00248-6.]

EMPLOYER-EMPLOYEE (RCW 51.08.070; RCW 51.08.180)

Route managers

Where every aspect of the route manager's job is controlled by the employer and the employer supplies the work as well as the equipment, the fact that the route managers hire helpers and do not believe they are employees does not make them independent contractors. A right to control the work performed and an absolute right to terminate the relationship without liability are inconsistent with the concept of an independent contract and establish an employer-employee relationship. ...*In re Rainbow International, BIIA Dec., 88 2664 (1990)* [Editor's Note: The Board's decision was appealed to superior court under Thurston County Cause No. 90-2-00248-6.]

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: RAINBOW INTERNATIONAL/) DOCKET NO. 88 2664**
2 **MICHAEL MORALES & WIFE)**
3 **)**
4 **FIRM NO. 457,192) DECISION AND ORDER**
5 _____)

6 **APPEARANCES:**

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8 Firm, Michael Morales & Wife,
9 dba Rainbow International, by
10 Seth (Kelly) Fulcher, Jr.

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12 Department of Labor and Industries, by
13 The Attorney General, per
14 Linda M. Gallagher, Assistant

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16 This is an appeal filed by the firm, Michael Morales & Wife, dba Rainbow International, on June
17 27, 1988 from an order of the Department of Labor and Industries dated May 24, 1988 which
18 assessed industrial insurance taxes for the period January 1, 1986 through December 31, 1987 in the
19 amount of \$12,239.49. **REVERSED AND REMANDED.**

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22 **DECISION**

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24 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
25 and decision on a timely Petition for Review filed by the firm to a Proposed Decision and Order issued
26 on May 23, 1989 in which the order of the Department dated May 24, 1988 was reversed and
27 remanded with instructions to recompute the taxes due and owing to the state fund under the
28 provisions of WAC 296-17-350(4) and with instructions that the total assessment was not to exceed
29 \$12,239.49.
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33 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
34 prejudicial error was committed and said rulings are hereby affirmed.

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36 The question presented by this appeal is whether certain individuals who clean and dye carpets
37 under a business agreement with Rainbow International are covered workers under our Industrial
38 Insurance Act. Michael Morales owns a franchise known as Rainbow Carpet Dyeing and Cleaning.
39 The actual carpet cleaning or dyeing services are provided by persons designated as route managers.
40 These route managers sign an agreement with Mr. Morales, indicating that they are "contractors".
41 This appeal focuses on the nature of the relationship between Mr. Morales and the route managers.
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1 Our Industrial Appeals Judge determined that the route managers were independent
2 contractors, found that the essence of the contract was their personal labor, and concluded that they
3 were covered workers under our Industrial Insurance Act. While we agree with the result reached by
4 the Proposed Decision and Order, we disagree with the analysis used by the Industrial Appeals
5 Judge. The level of control which Mr. Morales exercised over the route managers' day-to-day
6 performance is inconsistent with a determination that the route managers were independent
7 contractors. Furthermore, because the route managers frequently hired helpers, we cannot conclude
8 that they were independent contractors, the essence of whose contract was their personal labor. See,
9 White v. Dep't of Labor & Indus., 48 Wn.2d 470, 294 P.2d 650 (1956); Mass. Mutual Life v. Dep't of
10 Labor & Indus., 51 Wn. App. 159, 752 P.2d 381 (1988). However, under all the facts of this case, in
11 particular the level of control Mr. Morales exercised over the method and manner of the route
12 managers' performance of their duties on his behalf, we must conclude that the route managers were
13 employees of Mr. Morales.

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21 Initially we note that the Industrial Appeals Judge relied on the provisions of RCW 51.04.060.
22 RCW 51.04.060 states:

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24 No employer or worker shall exempt himself or herself from the burden or
25 waive the benefits of this title by any contract, agreement, rule or
26 regulation, and any such contract, agreement, rule or regulation shall be
27 pro tanto void.

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29 The Industrial Appeals Judge concluded that because of the provisions of RCW 51.04.060, the
30 contract between the route managers and Mr. Morales did not control the nature of the relationship
31 between them. We disagree. The contract between the parties obviously controls their relationship.
32 However, it does not necessarily determine whether a route manager is a covered worker within the
33 meaning of the Industrial Insurance Act. RCW 51.04.060 applies to invalidate a contractual
34 agreement, to the extent that agreement purports to exclude from coverage a worker who would
35 otherwise be covered by the Industrial Insurance Act. It is inappropriate, however, to rely on RCW
36 51.04.060 to make the threshold determination of whether a relationship is within the coverage of the
37 Industrial Insurance Act. For that initial determination we must refer to the provisions of RCW
38 51.08.180, 51.08.185, 51.08.070, 51.08.013, and Ch. 51.12 RCW.

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44 Our Industrial Appeals Judge determined that because the route managers were substantially
45 autonomous in performing their work, they were independent contractors, rather than employees. She
46 then determined that although the route managers were independent contractors, the essence of their
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1 contract was personal service, and therefore they were covered workers under our Industrial
2 Insurance Act. RCW 51.08.180.

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4 While we agree that the route managers are mandatorily covered workers, we do not believe
5 that they are independent contractors. Because of the level of control exercised by Mr. Morales over
6 the performance of the route managers' duties, and because of other factors detailed below, we find
7 that an employer-employee relationship exists between Mr. Morales and the route managers. The fact
8 that the route managers hired helpers does not mean they were not themselves Mr. Morales'
9 employees. The route managers had the authority to hire helpers to assist them in their duties of
10 cleaning and dyeing carpets for Mr. Morales. Mr. Morales was aware of the practice and did nothing
11 to discourage it. The helpers were paid out of the route managers' commissions. Thus Mr. Morales,
12 like many employers, essentially delegated to his route managers the task of hiring subordinates to
13 assist them. That fact alone does not preclude a finding that the route managers themselves were Mr.
14 Morales' employees.¹

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16 The test for determining whether an employer-employee relationship or a principal-independent
17 contractor relationship exists has developed through case law. In Clausen v. Dep't of Labor & Indus.,
18 15 Wn.2d 62, 129 P.2d 777 (1942), the court stated that:

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20 . . . an independent contractor is one who, in exercising an independent
21 employment, contracts to do certain work according to his own methods,
22 and without being subject to the control of the employer, except as to the
23 product or result of his work.

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25 Clausen, at 71.

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27 The court in Clausen went on to state that:

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29 No one of the factors hereinbefore mentioned is conclusive in determining
30 the nature of the relationship. However, in Burchett v. Department of
31 Labor & Industries, 146 Wash. 85, 261 Pac. 802, 263 Pac. 746, we quoted
32 with approval from 14 R.C.L. 72, a statement to the effect that no single
33 fact is so conclusive in showing that the relationship is not that of an
34 independent contractor as that the employer has the unrestricted right to
35 terminate the particular service whenever he chooses, without regard to
36 the final result of the work itself. As we stated in Hubbard v. Department
37 of Labor & Industries, supra, [198 Wash. 354 (1939)] the power of the

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1 The issue of whether Mr. Morales is responsible for premiums on the worker hours of the helpers is not addressed by the Notice and Order of Assessment on appeal and was not litigated by the parties. Therefore, that issue is beyond the scope of our review.

1 employer to terminate the employment at any time is incompatible with the
2 free control of the work usually enjoyed by an independent contractor.
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4 Clausen, at 73.
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6 In Hubbard v. Dep't of Labor & Indus., 198 Wash. 354, 88 P.2d 423 (1939), the court stated:
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8 The ultimate test by which it is determined whether the relation is that of
9 employer and employee or that of principal and independent contractor is
10 to inquire whether or not the employer retained the right, or had the right
11 under the contract, to control the manner of doing the work and the means
12 by which the result was to be accomplished. [citations omitted] These
13 cases all hold that the chief, and most decisive, factor in determining
14 whether the relationship is that of employer and employee or that of
15 principal and independent contractor is the right of control over the work or
16 thing to be done.
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18 Hubbard, at 358-359.
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20 While it appears that the primary test to be used in determining the existence of the
21 employer-employee relationship, as opposed to a principal-independent contractor relationship, is the
22 right to control the method and manner of the work under the contract, the courts have recognized a
23 second step to the analysis under our Industrial Insurance Act. In Novenson v. Spokane Culvert, 91
24 Wn.2d 550, 588 P.2d 1174 (1979), the worker had entered into an agreement with a temporary job
25 service for placement with other employers. The job service sent the worker to Spokane Culvert for
26 temporary duty. The worker was injured while working at Spokane Culvert. Spokane Culvert sought
27 immunity from civil liability for the worker's injuries, asserting an employer-employee relationship with
28 the worker. The trial court granted summary judgment in favor of Spokane Culvert, finding as a matter
29 of law that the worker was an employee of Spokane Culvert.
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32 The Supreme Court held that the facts were unclear as to whether the worker, Mr. Novenson,
33 had agreed to the employer-employee relationship with Spokane Culvert. The court held that absent a
34 mutual agreement between the parties, the relationship could not exist. The case was remanded to
35 determine the issue regarding consent to the relationship.
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38 In Novenson, the court stated that: "The right of control is not the single determinative factor in
39 Washington. A mutual agreement must exist between the employee and employer to establish an
40 employee- employer relationship." Novenson, at 553. Thus the analysis under our Industrial
41 Insurance Act requires a determination of whether "(1) the employer has the right to control the
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1 servant's physical conduct in the performance of his duties, and (2) there is consent by the employee
2 to this relationship." Novenson, at 553.
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4 With these established criteria, we now turn to the facts of the present case. Michael Morales
5 holds an exclusive franchise known as Rainbow Carpet Dyeing and Cleaning Co. of east King County.
6 Mr. Morales entered into a number of subcontractor agreements with individuals to perform services
7 as route managers. The route managers would clean and dye carpets. Several of the route
8 managers would employ "helpers" to assist in the work. The agreements have been admitted as
9 Exhibit No. 6. The contract lacks any specific information regarding the right of control by Mr. Morales
10 over the acts of the route managers. It also is silent regarding the termination of the contract.
11 However, it does include a non-competition clause which prohibits competition for three years and
12 which requires the route manager during the term of the agreement to pay Mr. Morales 40% of the
13 gross receipts earned by the route manager from any similar business.
14

15 Each route manager is interviewed by Mr. Morales, and then, if hired, engages in a two to three
16 week training program. Either Mr. Morales or another experienced route manager supervises and
17 trains the new route manager in the use of the equipment and technique of Rainbow Carpet Cleaning.
18 Mr. Morales supplies the carpet cleaning and dyeing equipment on a lease basis to the route
19 managers. He also supplies the various cleaning products. The route managers pay \$20.00 per week
20 for the lease of the equipment and purchase the supplies directly from Mr. Morales. Mr. Morales
21 maintains an advertisement in the yellow pages. He schedules and books the various jobs for the
22 route managers. Portions of the scheduling books for the route managers have been admitted as
23 Exhibit No. 7. These indicate that each route manager was scheduled for only one job for a particular
24 block of time. Thus, Exhibit No. 7 indicates that each route manager was assigned work in a manner
25 which was consistent with the requirement that the route manager perform the labor involved.
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27 Mr. Morales billed and collected the monies on commercial accounts, while on residential
28 accounts the managers collected the money and turned the invoices and the collections over to Mr.
29 Morales each day. The route manager's work was subject to review by Mr. Morales. He received the
30 calls from dissatisfied customers who called on him to correct unsatisfactory work. When this
31 occurred he would deal directly with the customer and the route manager in an attempt to resolve the
32 problem.
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34 We believe that the facts of this case indicate that the route managers are not independent
35 contractors. Every aspect of their work is controlled by Mr. Morales. He controls where they go, when
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1 they go, what they do, and how they do it. He supplies the work as well as the equipment to do the
2 work. He employs these route managers in the furtherance of his own business.

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4 The contract requires that if the route manager performs any similar work for other individuals,
5 the route manager must compensate Mr. Morales for that work. This is not indicative of an
6 independent contractor relationship. Additionally, there is no definition of the scope of the work to be
7 performed under the contract. Mr. Morales stated that the ending of the arrangement was usually
8 mutual, a recognition that the agreement did not bind either party to any specific performance under
9 the contract. Thus the route manager worked at the discretion of Mr. Morales. As the court stated in
10 Clausen, an absolute right to terminate the relationship without liability is not consistent with the
11 concept of an independent contract. We believe the agreement is simply an employment agreement,
12 terminable at will by either party. Because Mr. Morales controlled the method and manner of the work
13 performed by the route managers, the "right of control" test has been met.

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15 The "consent" test set forth in Novenson has also been met. Although various route managers
16 testified that they did not view themselves as employees, but rather as independent contractors under
17 the agreement, we will not elevate form over substance. There is no question that the route managers
18 have consented to a business relationship with Mr. Morales. There is clearly a mutual agreement.
19 The question is whether this consensual agreement amounts to an employer-employee relationship or
20 some other relationship. The conduct of the parties and all of the surrounding facts of the relationship
21 are important in determining the existence of a contract of employment. Wilkie v. Dep't of Labor &
22 Indus., 53 Wn.2d 371, 334 P.2d 181 (1959).

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24 On the facts of this case, the route managers' testimony that they did not believe they were
25 employees is insufficient to change the nature of the business arrangement. In actuality the route
26 managers have consented to Mr. Morales' detailed control over the method and manner in which they
27 perform their work on his behalf. They cannot remove themselves from the mandatory provisions of
28 the Industrial Insurance Act by merely denying the existence of the employer-employee relationship.
29 Because the route managers are mandatorily covered workers under the Industrial Insurance Act, the
30 provisions of the agreement between them and Mr. Morales which purport to exclude them from
31 coverage are void pursuant to RCW 51.04.060.

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33 We also agree with the Industrial Appeals Judge's determination that the Department's reliance
34 on WAC 296-17-350(6) in assessing the industrial insurance taxes was misplaced. We agree that the
35 industrial insurance taxes must be recomputed pursuant to WAC 296-17-350(4). Our review of the
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1 provisions of WAC 296-17-350(4) and (6) convinces us that the Department's basis for choosing
2 subsection (6), which pertains to piece workers, is incorrect. The Department should have calculated
3 the premiums due by reference to WAC 296-17-350(4), which pertains to commissioned personnel.
4 Elizabeth Wells, the Department auditor, apparently chose the provisions of WAC 296-17-350(6), the
5 piece worker provision, because the workers were performing manual labor. However, subsection (4),
6 the provision pertaining to commissioned personnel, reads: "Commission personnel are persons
7 whose compensation is based upon a percentage of the amount charged for the commodity or service
8 rendered." (Emphasis added) The determining factor in applying subsection (4) is the basis of the
9 particular worker's compensation, not the type of labor performed. Subsection (4), on its face, applies
10 to individuals performing personal service. The Industrial Appeals Judge was correct in reversing the
11 order and requiring the Department to use the correct provisions of WAC 296-17-350(4) in determining
12 the taxes due.
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15 After consideration of the Proposed Decision and Order and the Petition for Review filed
16 thereto, and a careful review of the entire record before us, we are persuaded that the Proposed
17 Decision and Order's conclusion that the route managers are workers subject to the mandatory
18 coverage of the Industrial Insurance Act is correct. We also agree with the Proposed Decision and
19 Order's determination that the proper assessment of the route managers must be made pursuant to
20 WAC 296-17-350(4) on the basis that they are commission workers.
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22 FINDINGS OF FACT

- 23 1. On May 24, 1988 the Department of Labor and Industries issued Notice
24 and Order of Assessment of Industrial Insurance Taxes No. 61666 to
25 Michael Morales and Wife dba Rainbow International (Rainbow),
26 assessing taxes due and owing to the state fund for the period January 1,
27 1986 through December 31, 1987 in the amount of \$12,239.49 and
28 demanded payment in that amount. On June 27, 1988 the firm filed a
29 notice of appeal with the Board of Industrial Insurance Appeals by letter
30 placed in the U.S. mail on June 23, 1988. On July 27, 1988 the Board
31 issued an order granting the appeal subject to proof of timeliness,
32 assigned Docket No. 88 2664 to the appeal and directed that hearings be
33 held on the issues raised by the appeal.
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- 35 2. For the period January 1, 1986 through December 31, 1987 Rainbow
36 correctly paid state industrial insurance premiums on its office personnel,
37 including its telephone solicitors, a secretary and a bookkeeper.
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- 39 3. In the period from January 1, 1986 through December 31, 1987 Rainbow
40 entered into a mutual agreement with several individuals to perform carpet
41 cleaning and carpet dyeing. These individuals held the title of route
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1 managers. Rainbow trained the managers, paying a trainee \$25.00 per
2 day for a period from one to three weeks. Managers were required to
3 attend weekly training meetings.

4 Each route manager provided a van. Through advertising, Rainbow
5 provided customers for the managers. Rainbow scheduled jobs for the
6 managers to serve particular customers.

7
8 Rainbow (1) leased cleaning and dyeing equipment to the managers; (2)
9 sold managers their supplies; and (3) provided a warehouse for storage of
10 materials and for occasional cleaning and dyeing of carpets outside
11 customers' homes. The managers were encouraged to put the Rainbow
12 name on their vans and to wear shirts bearing Rainbow identification.

13 Rainbow had a maximum of eight route managers during a quarter. About
14 50% of the managers had one helper; no manager paid industrial
15 insurance premiums for his helper or for himself.

16 Rainbow negotiated most of the prices for work done by the managers.
17 Each route manager was paid by commission which ranged from 40 to
18 60% of the amount charged for their service. Managers carried a pager
19 by which they could be reached by the company during their work day and
20 on two evenings during the week.

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22 4. Rainbow controlled the method and manner of the route managers'
23 performance of their carpet cleaning and dyeing duties in furtherance of
24 Rainbow's business. The route managers consented to this control and to
25 the business relationship with Rainbow.
26

27 **CONCLUSIONS OF LAW**

- 28 1. The notice of appeal filed by Rainbow on June 27, 1988 was timely in
29 regard to the order of the Department of Labor and Industries dated May
30 24, 1988. RCW 51.48.131.
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32 2. The Board of Industrial Insurance Appeals has jurisdiction over the parties
33 and the subject matter of this appeal.
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35 3. During the period January 1, 1986 through December 31, 1987 Rainbow
36 entered into employment contracts with route managers in the course of
37 its business. Rainbow was an employer within the meaning of RCW
38 51.08.070 and the route managers were mandatorily covered workers
39 within the meaning of RCW 51.08.180.
40
41 4. Premiums for worker hours for route managers for the period January 1,
42 1986 through December 31, 1987 should be computed according to WAC
43 296-17-350(4), since the route managers are commission personnel.
44
45 5. The Notice and Order of Assessment of Industrial Insurance Taxes No.
46 61666 issued by the Department on May 24, 1988 which assessed taxes
47 due and owing to the state fund which accrued between January 1, 1986
through December 31, 1987 in the amount of \$12,239.49 is incorrect and
should be reversed and the matter remanded to the Department with

1 instructions to recompute the taxes due and owing to the state fund for the
2 worker hours of Rainbow's route managers under the provisions of WAC
3 296-17- 350(4) rather than WAC 296-17-350(6).
4

5 It is so ORDERED.

6 Dated this 3rd day of January, 1990.
7

8 BOARD OF INDUSTRIAL INSURANCE APPEALS
9

10 /s/
11 _____
12 SARA T. HARMON Chairperson
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14 /s/
15 _____
16 FRANK E. FENNERTY, JR. Member
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18 /s/
19 _____
20 PHILLIP T. BORK Member
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