

***ELECTROMATION: CABOT CARBON REVISITED,
OR A NEW ERA IN INTERPRETING
EMPLOYEE RIGHTS TO PARTICIPATE IN
EMPLOYER-SPONSORED ORGANIZATIONS***

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ABSTRACT

This article explores the legal question of whether the NLRB's recent *Electromation* decision changes the legal doctrine of the Supreme Court's *Cabot Carbon* decision. At issue is whether employer-initiated employee participation plans can be considered illegally dominated labor organizations in violation of 8a2. The article concludes that these plans probably continue to be potentially illegal under the broad definition of labor organizations set up in *Cabot Carbon*, although formal NLRB complaints about such plans continue to be rare. The article also examines ways in which employer initiated participation plans can be set up to avoid potential NLRB complaints in light of recent litigation in this area.

The legal question of whether individual workers can form or participate in representation plans other than formal unions has once again come up before the National Labor Relations Board (NLRB). The most recent case was the *DuPont* decision in June 1993, which dealt primarily with the employer's duty to bargain in a union setting. It was in the *Electromation* case decided on December 16, 1992 that the National Labor Relations Board rendered its long-awaited decision on applying section 8a2 to employer-sponsored employee organizations in a non-union setting (i.e., where workers participate as individuals not formally organized [1]). It was hoped this decision would put to rest the legal status of employer-sponsored employee organizations in nonunion settings. It represents the latest example of the conflict between the traditional arms-length collective bargaining process envisioned by the National Labor Relations Act and other forms of employee-employer relationships. This conflict is not new and dates

from the beginning of the enforcement of the Wagner Act; in fact, the NLRB's first decision dealt with this question [2].

This conflict has also been the subject of numerous articles in recent years that have reviewed the legal status of the many different types of employer-sponsored, employee-involvement plans (ESEIP) that were adopted in the 1970s, '80s, and '90s. Articles by Beaver [3], Fulmer and Coleman [4], and Lee [5], questioned the validity of the modern application of section 8a2 to ESEIPs. While these articles questioned the validity of applying section 8a2 to different types of management-sponsored programs such as worker participation, there is no question that in the original debate surrounding the NLRA during the mid-1930s Congress concluded that the negative factors associated with allowing any form of employer-sponsored, employee-representation plans outweighed any advantages to employees associated with allowing existing plans to continue. Congress clearly intended to accomplish this objective by broadly defining labor organizations through Section 2(5) of the NLRA and by making the formation of employer-dominated labor organizations an unfair labor practice [6]. Although Congress left it to the National Labor Relations Board and the federal judiciary to interpret and enforce this prohibition, it is safe to say that to the present day almost any form of ESEIP could be declared illegal under existing statutory and case law. The Supreme Court's interpretation of Sections 2(5) and 8a2 in *Cabot Carbon* [7], defined labor organizations in the broadest terms and found domination based on employer support during the formation of the labor organization. The NLRB in deciding *Electromation* referred explicitly to *Cabot Carbon*, declaring an employer-sponsored "Action Committee" to be an illegally dominated company union. The *Electromation* decision is also being examined by the Dunlop Commission to determine whether changes in the law may be necessary.

The conclusion that the majority of ESEIPs (and an individual's right to participate in such a plan) could be declared illegal seems unusual in view of the widespread experimentation and adoption of alternative forms of employee involvement plans [8]. The lack of legal problems encountered by the majority of these plans may be attributed to several factors that prevent the NLRB and the federal judiciary from ordering their dissolution.

The most important factor is the enforcement mechanism of the National Labor Relations Act. The NLRB can take action only in response to a complaint by an interested party. Absent a complaint, the NLRB has no jurisdiction over the matter. In a typical employer-sponsored employee involvement plan, such a complaint would come only from a disgruntled employee or a union trying to organize that particular place of business. Relying on this factor to avoid legal entanglements clearly involves some risk to the employer, since the legality of the plan could potentially be called into question at any time. This also begs the question of how many employers have refused to implement such plans on the advice of counsel or dropped existing plans because of fear that an unfair labor practice might be lodged against them.

Another mitigating factor protecting many existing plans is that they occur where certified unions already represent employees. In that case, such plans are legal so long as they do not compromise the independence of the union. These efforts are typically called labor-management cooperation plans even when they involve the exact same elements as a typical employer-sponsored, employee-involvement plan in a nonunion setting.

The final factor mitigating against potential legal problems is the NLRB's interpretation of section 8a(2), as evidenced by *Electromation* and other cases, in which they limit their findings to the facts of that particular case. The NLRB has consciously avoided making general statements about employer-sponsored, employee-involvement plans in nonunion settings. In a word, they have left this area deliberately grey.

The first section of this article is an in-depth examination of *Electromation*. In addition to a general analysis of the facts and decision, there is also a specific discussion of the NLRB's analysis of existing interpretations of sections 2(5) and 8a2. The next section of the article reviews *Electromation* to determine whether it provides new guidelines to finding exceptions to the legal problems ESEIPs experienced in the past. The last section examines options for solving the legal problems associated with ESEIPs in the future.

ELECTROMATION: FACTS AND DECISION

The Electromation Company produces electrical equipment. It experienced a downturn in business during 1988 that caused it to reduce employee benefits related to its bonus system for attendance and to forgo general wage increases for 1989. In early January 1989, sixty-eight employees sent a letter to the company president asking that the bonus system be restored. The company president held a meeting on January 11, 1989 with a group of selected employees to resolve the issue but that meeting in the mind of the company president failed to produce satisfactory results. The following week, after consultation with other managers, he decided to create "action committees" to address the employee concerns raised at the general meeting, since he believed further unilateral management action would not resolve these problems. These committees were composed of six employees, one or two managers, and the company personnel director (as coordinator of the committees). The action committees on absenteeism/infractions, no-smoking policy, communication network, pay progression, and attendance bonus programs were to meet, discuss the issues, and recommend solutions. There were sign-up sheets for membership on the committees for employees, who were expected to discuss their activities on the committees with fellow employees. The employees were paid for the time they spent at committee meetings, and all materials were provided by the company. During late January and early February (1989), when these committees were set up and began to meet, no formal union represented employees nor was any formal organization drive in progress. This

changed on February 13, 1989 when the company became aware of a formal organization drive due to a request for recognition by the Teamsters. On March 15, in response to the union organization drive, the company decided the committees should complete existing projects but suspend committee operations until after the representation election, which was scheduled for March 31, 1989.

After losing the election, the Teamsters filed an unfair labor practice, claiming the operation of the action committees constituted an illegal, company-dominated union in violation of section 8a2. The administrative law judge (ALJ) agreed with the union's claim and ordered the company to eliminate its action committees. The NLRB reviewed this decision and sustained the ALJ's findings and also ordered the dissolution of the action committees, but in its decision carefully pointed out that this finding was limited to the facts of this particular case and was not a general statement on the legality of employer-sponsored, employee-involvement programs in nonunion settings. Despite this limitation, a careful reading of the case and its concurring opinions leads one to the inescapable conclusion that any committee sponsored by an employer in a nonunion setting that discusses wages, hours, and other terms and conditions of employment is a violation of 8a2.

Support for this conclusion is based on the NLRB's analysis of the Supreme Court's earlier decision in *Cabot Carbon* and its review of the legislative history. In its review of statutory history, the NLRB pointed out that Congress in passing section 2(5) deliberately defined employee organizations in the most general terms to allow the NLRB to apply 8a2 charges to almost any type of employee representation (now read as employee involvement) plan. In particular, Senator Wagner, in describing the purpose of defining labor organizations broadly, made it clear that it was to outlaw any form of employee representation committee—even ones having no structure resembling a union or any process similar to collective bargaining. In reviewing case law on this point, the NLRB pointed out the Supreme Court in *Cabot Carbon* had noted during the Taft-Hartley revisions of the NLRA Congress had considered and rejected language (specifically a proposed section 8(d) (3)) that would have explicitly allowed employers to continue many of the employer-sponsored employee committees set up during World War II to enhance production. Congress also refused to reword section 8a2, making it clear in the eyes of the NLRB that Congress did *not* intend to change the NLRB policy, dating from the early years of the act, of disestablishing any employer-sponsored organization that dealt with wages, hours, and terms and conditions of employment.

In addition to the view that Congress intended to outlaw most forms of ESEIPs, the NLRB also concluded that the Supreme Court's current interpretation of sections 2(5) and 8a2 mandates employee organizations to be broadly defined and section 8a2 is to apply in situations where collective bargaining is not utilized by the employer-sponsored organization. This view is based on the NLRB's interpretation of the Supreme Court's decision in *Cabot Carbon*, where the facts

clearly showed it was a production committee set up during World War II that did not involve collective bargaining or an intent to keep out unions, yet it was found to be illegal. In declaring that committee illegal, the Supreme Court affirmed the NLRB's view (expressed again in *Electromation*) that the Supreme Court expects the NLRB to define labor organizations in broad terms (section 2(5)) and that any employer role in setting up or supporting the committee automatically constitutes domination in violation of section 8a2. NLRB member Ruadabaugh, in his concurring opinion in *Electromation*, took great pains to point out the NLRB cannot make public policy in defiance of clear guidelines established by the Supreme Court in interpreting National Labor Relations Act. Absent a change in the statute by Congress or a new Supreme Court decision on this issue, he argued the NLRB must continue to find any ESEIP dealing with wages, hours, and other terms and conditions of employment to be a violation of section 8a2. (See also [1, footnote 24] as support for this position.)

Section 2(5) Distinctions in *Electromation*

The chief lessons from the *Electromation* decision remain its discussion of the facts that qualify the action committees as employee organizations. The NLRB took the unanimous view that such committees are labor organizations covered by section 2(5), because of the factual finding that the purpose of the committees was to address employees' dissatisfactions concerning their conditions of employment after employees had petitioned the employer to redress their grievances. Addressing employee-expressed dissatisfaction is the essence of the "dealing with" criteria set up by section 2(5) for determining what constitutes a labor organization. In an attempt to reconcile this decision with earlier NLRB decisions, the NLRB cited its own exceptions to this concept of addressing employee complaints, such as *Mercy-Memorial Hospital* [9], where the employer-sponsored committee deciding the validity of employee complaints did not discuss them with the employer, and *Ascuaga's Nuggett* [10], where an employee organization also resolved employee grievances without involving management. The NLRB noted in both cases it was the lack of direct management involvement that precluded a finding of "dealing with" as mandated by section 2(5).

When the issue is applying a subject matter test to a determination of what constitutes a labor organization with respect to section 2(5), i.e., discussions concerning wages, hours, and other terms and conditions of employment (mandatory bargaining subjects) such as occurred in *Electromation*, the NLRB again listed its prior exceptions when it cited *General Foods* [11] as an example where the subject precluded a finding that the employees were involved in a labor organization. In that case, the committee dealt with an employer but there was not an employee-initiated concern about job enrichment, which the NLRB found to be a management prerogative. In citing these cases, the NLRB made it clear it did not intend to overturn rulings made prior to *Electromation*.

The most fascinating exception cited by the NLRB to section 2(5) labor status findings came in the NLRB's finding in *Electromation* that an absence of anti-union animus is immaterial, based on its criterion that the purpose of an organization is found in actions—rather than in the motive behind its creation. While the NLRB made it clear that it found a lack of anti-union animus toward representation elections to be immaterial, it noted that the Sixth Circuit Court does not share that view. In *Scott v. Fetzer* [12], where operation of the committee was found to have had no impact on the union representation election, and in *Airstream* [13], where employer inactions concerning its created committees' recommendations also did not affect the representation election, the Sixth Circuit Court concluded it will not find domination if a complete lack of animus is shown or if no impact on the employees' free choice of representation can be found. Clearly, the NLRB must hope its decision in *Electromation* is not appealed to the Sixth Circuit, where it most likely would not be enforced, since that court clearly believes motivation and impact are key tests in finding an ESEIP to be a labor organization.

Section 8a2 Distinctions in *Electromation*

Although section 8a2 is not specific as to what constitutes domination, the traditional definition of an employer-dominated organization was established in the NLRB's first decision, *Pennsylvania Greyhound Lines* [2], as, among other factors, an organization whose continued existence depends on the fiat of management or direct employer involvement in creating or determining the structure of the employee organization. In the facts associated with *Electromation*, both tests were met. The structure and organization of action committees were set in place by management fiat and their continued operation was entirely dependent on management support. Citing the Supreme Court's decision in *Newport News* [14], the NLRB stated in *Electromation* that determining domination does not require finding the employer attempted to control the outcomes of the committees (i.e., dominate the process) or that the employees wanted to continue the employer-sponsored plan. In addition, again citing *Newport News* [14], the NLRB held that employer motivation is completely immaterial, since the Supreme Court found no evidence in that case that the employer even opposed unions who were organizing while the committees were in operation. Instead, it held that the employer's role in founding the committees constituted sufficient evidence alone of domination to warrant a section 8a2 violation.

It is difficult to envision any form of employee involvement scheme that does not meet the existing standards for domination with respect to section 8a2, once a determination is made that the employees involved in the effort constitute a labor organization. The NLRB, in its own discussion of redefining the standards for domination in *Electromation*, seemed to close the door on this method of determining employer-sponsored, employee-involvement programs as legal with its

comment that the federal judiciary is wholly supportive of its existing policy as to what constitutes domination in violation of section 8a2.

The only opposing view comes in NLRB member Raudabaugh's concurring opinion, in which he questioned the traditional interpretation of *Newport News* used by the majority in *Electromation*, as dictating the tests described above with respect to motivation and role in the organization. His test would completely rewrite the existing interpretation of what constitutes section 8a2. He would examine four factors: 1) the extent of employer involvement in the structure and operation of the committee; 2) whether the employees see the process as a substitute for full collective bargaining through a traditional union; 3) whether employees have been assured of their section seven right to choose to be represented by a traditional union; and 4) the employer's motives in establishing the plan. Raudabaugh concluded the employer in *Electromation* failed three of the four tests. He felt the structure of the action committees dictated and controlled the operations to the extent that they were dominated, failing criterion one. With respect to the second factor, he concluded that these action committees were meant as substitute for collective bargaining. He also concluded that the employer failed the third test, in that the employer never reassured employees of their right to choose. Finally, while he found no evidence concerning employer motivation, he felt consideration of the other three factors, especially criterion three, were sufficient for a finding of domination in violation of section 8a2.

His justification for this new idea of section 8a2 is based on the supposition that some employee-involvement plans are vehicles for accomplishing the employer's entrepreneurial interests, which can be divorced from the employee's representational self-interests (envisioned in the NLRA) that are sometimes accomplished through the collective bargaining process. This goes along with the philosophy that employee involvement plans make all employees part of the management of the firm, where they act not to protect their own self-interests but solely to promote the interests of the organization as a whole. This Three Musketeer approach of "one for all and all for one" begs the question of how employees protect their self-interest by assuming employee interests can best be protected by each employee acting for the good of the whole firm. This entrepreneurial view of employee interests is a radical departure from the traditional view of the adversarial process of collective bargaining as the best means of protecting employees' self-interests. To date, there seems little support for this view in either the federal judiciary or in Congress.

NEW GUIDELINES FROM *ELECTROMATION* FOR DETERMINING THE LEGAL STATUS OF ESEIP's IN NONUNION SETTINGS

As seen from the previous discussion of *Electromation*, there is still sufficient cause to believe that most employer-sponsored, employee-involvement efforts could potentially be found to be illegal under current statutes. In general, what

constitutes a labor organization has been broadly defined by Congress, the federal judiciary, and the NLRB to include any scheme in which employees represent other employees or deal with the employer on behalf of other employees. Given the ease with which labor organization status can be determined, almost de facto findings of employer domination in violation of section 8a2 can be found, since domination has been defined in terms of employer sponsorship alone, even absent other information concerning the employer's role in the specific process.

The exceptions to the general doctrine of what constitutes a labor organization cited in *Electromation* seem to be the most promising way of avoiding legal complications. One method is to make sure that the ESEIP does not have employees representing other employees. This can be done in two ways.

The most obvious way is to have all employees participate in the effort, i.e., a direct representation plan. In this type of program each employee could to be said to represent his/her own interests directly (a process sanctioned under Taft-Hartley) since everyone participated in the process. This type of procedure is usually not practical in situations where the problems are complex or where employment groups are large. Along these lines, the Sixth Circuit Court in *Scott v. Fetzer* was willing to accept another variant of that system of direct representation, i.e., a rotation in which all employees eventually served on the employer-sponsored committees but not simultaneously, as indicative of a direct representation plan where employees represented themselves and not other employees. The Sixth Circuit also found a total lack of anti-union animus and no interference with employees' free choice in representation elections, so that it is not entirely clear whether the system of direct representation alone would disqualify an employer-sponsored committee from being considered a labor organization in the absence of other findings. The stronger the argument that can be made that employees represent only themselves, the more likely, however, that the effort would not qualify as a labor organization under existing section 2(5) guidelines.

Another approach is the method used in *General Foods* [11], where the employer used direct employee participation as a way of enriching individual jobs but also avoided mandatory bargaining subjects. In this case, the most critical finding was not direct participation alone but that the content of this program was not related to what were considered traditional mandatory bargaining subjects. The subject matter in *General Foods* involved issues like production goals and self-supervision, not wages and fringe benefits, although it is easy to find potential connections between supervision and employee discipline (which is a mandatory subject). The combination of direct representation coupled with limitations on subjects seems to hold promise as continuing exceptions to current doctrines on finding section 8a2 violations.

Problems arise if addressing employee grievances that contain mandatory subjects is critical to the success of the ESEIP. In that case, the only exceptions are *Mercy Hospital* [9] and *Ascuaga's Nugget* [10], where the employer does not

allow the employer-sponsored committee to deal with management. This type of limitation may also limit the usefulness of the effort in the eyes of the employees, if they feel the grievances are directed toward management actions.

In summary, when it comes to ESEIPs, subject matter restrictions, direct representation plans, and systems where the employee groups do not deal with management have all managed to avoid meeting the section 2(5) statutory definition of being a labor organization, with subsequent findings of illegal domination. There is a caveat to these distinctions: in all of these cases, there was a presupposition that the employer-sponsored employee organizations were not part of an overall plan by the employer to thwart an organizational drive by the union. Where this might be the case, such as in *Electromation* [1], it is unlikely that the distinctions cited earlier would prevent the NLRB from declaring the employer-sponsored committee a labor organization. Board member Devaney, in his concurring opinion in *Electromation*, specifically wrote that this case was not an example of a genuine "employee participation plan," obviously referring to the fact that he believed its implementation by the employer was at least partially motivated by a desire to avoid unionization.

It is NLRB member Raudabaugh's proposed new test in *Electromation*, cited earlier for defining what constitutes employer domination, which holds great promise for making most ESEIPs legal in nonunion settings, provided a lack of anti-union animus could be shown. Unfortunately, such a test is not in accordance with existing case law, which defines domination in terms of sponsorship and direct support. I disagree with Raudabaugh's opinion that his alternative test is consistent with binding Supreme Court precedents such as *Newport News* or *Cabot Carbon*. While it may be time for a new test, there is little in existing case law, with the notable exceptions of the Sixth Circuit Court decisions in *Scott vs. Fetzer* [12] and *Airstream* [13], that might cause anyone to believe a new standard for determining domination exists. Even those cases are not a clear endorsement for a new section 8a2 test of domination because in both cases the court concluded the employer-sponsored organization had no impact on union organization drives from the employee perspective, as would have been necessary to avoid a finding that those employers violated section 8a2.

Conclusions and Proposal for Changing Existing Standards

The most obvious conclusion from the analysis of *Electromation* is that new standards for evaluating the legality of employer-sponsored employee participation plans have not been created by this decision. In addition, after reviewing related cases, under existing legal guidelines it is true that most, if not all, employer-sponsored employee participation plans would be declared illegal. As to the reasons why the NLRB cannot change the standards even if it thought a change was warranted, NLRB member Raudabaugh cited the Supreme Court's decision in *Lechmere* [15], regarding the limits of the NLRB's powers:

Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.

Raudabaugh added that the Supreme Court has broadly defined both section 2(5) and section 8a2 through *Cabot Carbon* [7] and *Newport News* [14], which in effect bar the NLRB from reinterpreting the NLRA to accommodate employer-sponsored, employee-participation plans even in the light of changed circumstances. In effect, the NLRB is locked into its present position until either the Supreme Court changes its precedents or Congress acts to change the statute. Until that time, the NLRB will go on evaluating each plan on a case-by-case basis under existing guidelines.

One possibility for changing the existing situation is Congressional action changing the present statutory guidelines. The issue of labor law reform, which was once politically impossible, may now resurface with a Democratic administration. Along these lines, the most logical way of avoiding legal problems for ESEIPs is changing section 2(5) to specifically not include employee participation in these efforts as membership in a labor organization. As seen from the oral briefs filed by the AFL-CIO in *Electromation*, labor is likely to oppose such a change unless it is coupled with other changes in the law that protect union organizational drives, such as requirements for speedy elections or new limits on employer opposition to unions during formal organizational campaigns. Any change concerning the latter is likely to bring fierce employer opposition, making the possibility of any simple compromise solution rather remote on changing the language of sections 2(5) or 8a2. In other words, speedy congressional action is not likely nor is a specific outcome certain.

The other possibility is for the Supreme Court to alter precedents concerning its previous interpretations of sections 8a2 and 2(5). Along these lines, another approach would be a new test for determining section 8a2 violations. Examples of four types of new criteria can be found in NLRB member Raudabaugh's concurring opinion in *Electromation* [1], which can briefly be restated as: 1) extent of employer involvement in structure and operation of committees; 2) whether employees perceive the ESEIP as a substitute for collective bargaining through a traditional union; 3) whether employees have been assured of their section 7 rights to choose to be represented by a traditional union under a system of full collective bargaining, and finally, 4) the employer motives in establishing the committee. He would consider all four factors but no single factor would be dispositive. The use of this test would make more plans legal than under existing guidelines but this approach still leaves a large grey area for nonunion employers. The main advantage of this plan is that it gives the NLRB far more discretion than under current legal guidelines, but falls short of establishing the legality of all existing ESEIPs.

The more radical approach would be for the Supreme Court to reinterpret what constitutes a labor organization in light of *Cabot Carbon* [7]. The long-awaited *Electromation* decision is *Cabot Carbon* revisited with respect section 2(5). The Supreme Court must either change the "dealing with" interpretation to a process resembling or approximating collective bargaining or change interpretations on whether ESEIPs are not labor organizations on the basis of their purpose being something other than employee representation, a distinction that is now immaterial. A change in either of these approaches to defining labor organizations would resolve the ambiguity associated with existing employer-sponsored, employee-participation plans and allow unfettered individual employee participation.

As of this writing, Supreme Court review of *Electromation* is in doubt. Perhaps another case of a "more genuine employer participation plan" as cited in *Electromation* needs to appear before the NLRB and that effort needs to be sanctioned by the NLRB before the Supreme Court will be forced to reexamine its *Cabot Carbon* doctrine. Until that time it looks like existing employer-sponsored, employee-participation plans in nonunion settings and the individual employee's right to participate in such plans will remain in legal limbo, relying on the enforcement mechanism of the NLPA rather than statute or legal precedent as the primary means of avoiding legal problems.

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ENDNOTES

1. *Electromation*, 309 NLRB 163, 1992.
2. *Pennsylvania Greyhound Lines*, 1 NLRB 1, 1935.
3. Beaver, "Are Worker Participation Plans 'Labor Organizations' Within the Meaning of Section 2(5)? A Proposed Framework of Analysis," 36 *Labor Law Journal*, 226 (1985).
4. Fulmer and Coleman, "Do Quality of Work Life Programs Violate Section 8a2?" 35 *Labor Law Journal*, 675 (1984).
5. Lee, "Collective Bargaining and Employee Participation: An Anomalous Interpretation of the NLRA," 38 *Labor Law Journal*, 206 (1987).
6. National Labor Relations Act, Section 8(2) [now 8(2)(2)], 1935.
7. *Cabot Carbon*, 360 U.S. 203, 1959.

8. *Business Week*, May 4, 1992.
9. *Mercy-Memorial Hospital*, 231 NLRB 1108 (1977).
10. *Ascuaga's Nuggett*, 231 NLRB 276 (1977).
11. *General Foods*, 231 NLRB 1232 (1977).
12. *Scott v. Fetzer*, 691 F 2nd 288, 1982.
13. *Airstream*, 877 F 2nd 1291, 1989.
14. *Newport News*, 308 U.S. 241, 1939.
15. *Lechmere*, 110 S.C. 2759, 1992.

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