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PROOF OF NON-INTEREST IN REPRESENTATION DISPUTES: A BURDEN WITHOUT REASON

*Calvin William Sharpe**

I. INTRODUCTION

The Ohio Public Employee Collective Bargaining Act (OPECBA)[1] contains unique provisions governing the establishment of a collective bargaining relationship between a public employer and a labor organization representing its employees.[2] A significant controversy which surfaced during the OPECBA's first year of operation concerns a petitioning employer's burden of demonstrating a question of representation in order to secure an election conducted by the State Employment Relations Board (SERB) pursuant to section 4117.07(A)(2) of the OPECBA.[3]

In Ohio, SERB may certify public sector unions through official elections or voluntary recognition.[4] The OPECBA permits a union to obtain voluntary recognition by filing a request with an employer[5] for recognition as exclusive representative of an appropriate unit of employees.[6] This request must allege that a "majority of the employees in the bargaining unit wish to be represented by the employee organization, and [be supported] with substantial evidence [demonstrating ma-

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1. Act of July 6, 1983, 1983 Ohio Legis. Serv. 5-237, 5-238 to -246 (Baldwin) (codified at OHIO REV. CODE ANN. §§ 4117.01–.23 (Page Supp. 1984)).

2. For example, no other comprehensive public sector statute has a provision that permits certification on the basis of union authorization cards if an employer does not file an election petition when confronted with a request for voluntary recognition. *See* OHIO REV. CODE ANN. § 4117.05(A)(2) (Page Supp. 1984); OHIO ADMIN. CODE § 4117-3-03 (1984).

3. OHIO REV. CODE ANN. § 4117.07(A)(2) (Page Supp. 1984).

4. *Id.* § 4117.05(A). Besides Ohio, only Minnesota and Pennsylvania permit certification of the collective bargaining representative by means other than an officially supervised secret ballot election. MINN. STAT. ANN. § 179.12(2) (West Supp. 1985) (certification by joint request of the employer and majority union); PA. STAT. ANN. tit. 34, § 95.11 (Purdon 1964) (certification by joint request of the employer and majority union).

Pursuant to the National Labor Relations Act (NLRA), private sector unions may be certified by the National Labor Relations Board only through officially-supervised elections. 29 U.S.C. § 159(c)(1) (1982).

5. OHIO REV. CODE ANN. § 4117.05(A)(2) (Page Supp. 1984).

6. *Id.*

jority support] . . . ."[7] Under section 4117.05(A)(2), when the employer receives the union's request, it must either request an election within twenty-one days,[8] or post notice of the union's recognition request in each facility as well as notify SERB of the union's request.[9] If the employer does not file a timely election petition and there are no other objections to voluntary recognition,[10] SERB will certify the union as the collective bargaining representative on the twenty-second day after the union's filing of the request for recognition.[11]

Procedures for handling election petitions are contained in section 4117.07 of the OPECBA.[12] SERB is required to investigate election petitions filed by an employee, a group of employees, an individual, or a union claiming that at least thirty percent of the employees in an appropriate unit want to be represented by a union.[13] SERB is also required to investigate election petitions filed by an employer claiming that one or more unions have presented a claim for recognition.[14] If SERB has reasonable cause to believe that a question of representation

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7. *Id. See also* OHIO ADMIN. CODE § 4117-3-01(A)(3) (1984).

8. OHIO REV. CODE ANN. § 4117.07(A)(2) (Page Supp. 1984).

9 *Id.* § 4117.05(A)(2). Section 4117.05 provides that the public employer, upon receipt of a request for voluntary recognition, may:

> (a) Post notice in each facility at which employees in the proposed unit are employed, setting forth the description of the bargaining unit, the name of the employee organization requesting recognition, and the date of the request for recognition, and advising employees that objections to certification must be filed with the state employment relations board not later than the twenty-first day following the date of the request for recognition;
>
> (b) Immediately notify the state employment relations board of the request for recognition.

Id. § 4117.05(A)(2)(a)–(b).

10. Possible objections to voluntary recognition which can be raised pursuant to § 4117.05(A)(2) are as follows:

> (ii) Substantial evidence based on, and in accordance with, rules prescribed by the board demonstrating that a majority of the employees in the described bargaining unit do not wish to be represented by the employee organization filing the request for recognition;
>
> (iii) Substantial evidence based on, and in accordance with, rules prescribed by the board from another employee organization demonstrating that at least ten percent of the employees in the described bargaining unit wish to be represented by such other employee organization; or
>
> (iv) Substantial evidence based on, and in accordance with, rules prescribed by the board indicating that the proposed unit is not an appropriate unit pursuant to section 4117.06 of the Revised Code.

Id. § 4117.05(A)(2)(b)(ii)–(iv). *See also* OHIO ADMIN. CODE § 4117-3-02 (1984).

11. OHIO REV. CODE ANN. § 4117.05(A)(2)(b) (Page Supp. 1984).

12. *Id.* § 4117.07.

13. *Id.* § 4117.07(A)(1). For comparison, it should be noted that exclusivity is awarded a majority "representative" within the meaning of § 9(a) of the NLRA. *See* 29 U.S.C. § 159(a) (1982). A "representative" is defined as any "individual" or "labor organization." *Id.* § 152(4). Since individuals may act as representatives under § 9(a) of the NLRA, such persons have petitioning rights under § 9(c)(1)(A). *Id.* § 159(a), (c)(1)(A).

14. OHIO REV. CODE ANN. § 4117.07(A)(2) (Page Supp. 1984).

exists, it will order a hearing upon notice to the parties.[15] Upon finding the existence of a question of representation at the hearing, SERB will direct an election and certify its results.[16] Implicitly, if SERB does not find a question of representation, it will not direct an election.[17]

In the case of a union seeking to test its majority status in an election, the union cannot secure an election that may lead to certification, when no question of representation exists.[18] The consequence to an employer who cannot show a question of representation when confronted with a request for voluntary recognition is union certification *without* an opportunity to test the union's asserted majority status through a SERB-conducted election.[19]

To secure a SERB direction of election, the employer must overcome two obstacles created by section 4117.07(A)(2). First, to secure a hearing, the employer must demonstrate that there is "reasonable cause to believe" that a question of representation exists.[20] Second, to secure an election, the employer must prove at the hearing that an actual question of representation exists.[21] The filing of an employer petition for election meets the "reasonable cause to believe" requirement that triggers a SERB hearing pursuant to section 4117.07(A)(2).[22] It does not, however, establish the *actual* question of representation.[23] Rather, when the employer does not object to the unit requested and wants only to test the union's majority status, SERB has interpreted sections 4117.05(A)(2) and 4117.07(A)(2) together as imposing a burden on the employer of proving at the hearing, by a preponderance of the evidence, that the union's majority claim is without foundation.[24]

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15. *Id.* § 4117.07(A)(2).

16. *Id.*

17. *See id.*; OHIO ADMIN. CODE § 4117-5-05(C) (1984).

18. OHIO REV. CODE ANN. § 4117.07(A)(2) (Page Supp. 1984).

19. *Id.* § 4117.05(A)(2)(b). *See also* OHIO ADMIN. CODE § 4117-5-05 (1984); Franklin School Dist. Bd. of Educ., 1 OHIO PUB. EMPLOYEE REP. (LRP) ¶ 1308 (1984). On April 1, 1985, a colloquium was held at the Case Western Reserve University Law School to commemorate the first anniversary of the OPECBA's effective date. Following formal presentations by Chairman Arvid Anderson of the New York City Office of Collective Bargaining, Professor Andria S. Knapp of the University of Pittsburgh Law School, James O'Reilly, author of *Ohio Public Employee Collective Bargaining*, and SERB Chairman Jack G. Day, discussions transpired between members of the audience and the panelists. The panelists addressed impasse resolution, unit determination, voluntary recognition, and other issues arising during SERB's first year. The entire colloquium proceedings have been published in the *Case Western Reserve Law Review*. *See* Day, *Report from SERBIA*, 35 CASE W. RES. L. REV. 353 (1986).

20. OHIO REV. CODE ANN. § 4117.07(A)(2) (Page Supp. 1984).

21. *Id.*

22. *Franklin School Dist.*, 1 OHIO PUB. EMPLOYEE REP. (LRP) ¶ 1308, at VII-235.

23. *Id.*

24. *Id.* It should be noted that such a showing would establish an objection to the question of representation request—a separate ground for postponing certification pursuant to § 4117.05. *See* OHIO REV. CODE ANN. § 4117.05(A)(2)(b)(ii) (Page Supp. 1984). *See also* OHIO ADMIN.

SERB Chairman Jack G. Day has indicated that this burden entails proving that "there is in fact a representation issue—that there is not [majority support for the union]."[25] SERB will certify the union as a collective bargaining representative without an election if the employer fails to meet this burden and raises no question concerning the appropriateness of the bargaining unit.[26]

If the employer does not object to the union's proposed unit and wishes only to test the union's majority status through a SERB-conducted election, the burden of proving the insubstantiality of the union's claim of majority status under SERB's interpretation is likely to be quite difficult. The employer is denied access to the union's documentary evidence of majority support under SERB's rules and regulations.[27] This benign rule regards the confidentiality of such evidence as essential to the preservation of employee free choice.[28] Thus, the best evidence of a suspect majority claim is insulated from discovery by the employer. Other means of testing majority support, such as polling employees, tend to expose the employer to the risk of unfair labor practice liability.[29]

To resolve this *Scylla* and *Charybdis* dilemma for the employer, SERB Chairman Day has suggested that section 4117.05(A)(2) be amended to eliminate all references to a section 4117.07(A)(2) election.[30] He argues that protecting the union authorization cards from disclosure and giving the employer a realistic opportunity to challenge the union's status, where there is doubt, are both worthy objectives.[31]

CODE § 4117-3-02 (1984). It is contended here that a showing of lack of union majority support goes considerably beyond what is required to establish a question of representation pursuant to the statute.

25. Knapp, O'Reilly & Sharpe, *Discussion: Unit Determination*, 35 CASE W. RES. L. REV. 471, 478 (1986) (response by SERB Chairman Jack G. Day).

26. *Franklin School Dist.*, 1 OHIO PUB. EMPLOYEE REP. (LRP) ¶ 1308, at VII-235.

27. OHIO ADMIN. CODE § 4117-3-03(A) (1984). Under § 4117-3-03(A), documentation of a union's majority support is to be filed with the Board only. *Id.*

28. Day, *supra* note 19, at 372; Knapp, O'Reilly & Sharpe, *supra* note 25, at 478–79. *See* NLRB v. J. I. Case Co., 201 F.2d 597 (9th Cir. 1953), which held that requiring a union to present formal proof of a claim of representation at a representation hearing "would violate the long-established policy of secrecy of the employees' choice in such matters." *Id.* at 600.

29. Section 4117.11(A)(1) proscribes employer interference or coercion of employees in the exercise of their self-organizational rights under Chapter 4117. *See* OHIO REV. CODE ANN. § 4117.11(A)(1) (Page Supp. 1984). Interrogation has long been recognized as a form of coercion in the private sector. *See* Struksnes Constr. Co., 165 N.L.R.B. 1062 (1967). A similar proscription is contained in the OPECBA. *See* OHIO REV. CODE ANN. § 4117.11 (Page Supp. 1984). The National Labor Relations Board has held, however, that certain polling practices are lawful, provided they meet certain criteria and take place prior to the filing of an election petition. *Struksnes*, 165 N.L.R.B. at 1063.

30. *See* Day, *supra* note 19, at 372–73. Knapp, O'Reilly & Sharpe, *supra* note 25, at 477–78.

31. Day, *supra* note 19, at 372–73.

Chairman Day points out that an amendment would accomplish both purposes by continuing the present practice of nondisclosure while allowing the employer to secure an election by simply filing a petition.[32] Where the employer has doubt, it has a legitimate interest in knowing whether its employees want to be represented by a union. Similarly, the union has an interest in determining whether it really enjoys majority support. An early election would serve both interests. Conversely, after a union claims majority support under section 4117.05(A)(2), it cannot legitimately oppose the testing of this claim in a SERB-conducted election.[33] Chairman Day concludes his argument with the observation that the objective of section 4117.05(A)(2) is to facilitate certifications without an election when there is no real contest.[34] This objective, however, is not served by permitting certification without an election where there is a real contest.[35]

Chairman Day's concern about the policies frustrated by SERB's current interpretation of the voluntary recognition provisions is warranted. The prospects for amendment of the statutory language, however, are at best uncertain.[36] But, this uncertainty need not thwart the achievement of important goals.

This article will challenge SERB's interpretation of the procedural requirements of sections 4117.05(A)(2) and 4117.07(A)(2) of the OPECBA. It will examine analogous private sector law as an aid to the proper interpretation of these provisions. Finally, this article will suggest an interpretation of the provisions that will achieve important policy objectives and obviate any revision of the statutory language.

II. REPRESENTATION QUESTIONS UNDER THE NLRA

A. Language Under the NLRA and the OPECBA

The National Labor Relations Act (NLRA)[37] has served as a model for much of the comprehensive public sector labor relations leg-

32. *Id.*

33. *Id.* at 372–73; Knapp, O'Reilly & Sharpe, *supra* note 25, at 478.

34. Day, *supra* note 19, at 373.

35. *Id.*

36. This writer's pessimistic view about the prospects for an amendment is shared by Chairman Day and James T. O'Reilly. *See* Knapp, O'Reilly & Sharpe, *supra* note 25, at 473 (response by SERB Chairman Jack G. Day). Besides Ohio, other states also have public sector statutes containing similar voluntary recognition language. *See* ALASKA STAT. § 23.40.100(a)(B) (1984); ILL. ANN. STAT. ch. 48, § 1606(c) (Smith-Hurd Supp. 1984); IOWA CODE ANN. § 20.14 (West 1978); KAN. STAT. ANN. § 75-4327 (1984); MASS. GEN. LAWS ANN. ch. 150E, § 4 (West 1982); MICH. COMP. LAWS ANN. § 423.9E (West 1978); MONT. CODE ANN. §§ 39-31-201 to -211 (1983); N.H. REV. STAT. ANN. § 273-A:10 (Supp. 1983); N.Y. LAB. LAW § 705 (McKinney 1977); OR. REV. STAT. § 243.666 (1983); PA. STAT. ANN. tit. 34, § 95.11 (Purdon 1964); S.D. CODIFIED LAWS ANN. §§ 60-9A-1 to -15 (1977).

37. 29 U.S.C. §§ 151–169 (1982).

islation,[38] including the Ohio Public Employee Collective Bargaining Act.[39] Like many other public sector statutes, the OPECBA tracks many of the representation provisions of the NLRA,[40] and specifically incorporates the National Labor Relations Board's (NLRB) administratively promulgated "showing of interest" rule.[41]

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38. H. EDWARDS, R. CLARK & C. CRAVER, LABOR RELATIONS LAW IN THE PUBLIC SECTOR 112–16, 160–61 (3d ed. 1985) [hereinafter cited as H. EDWARDS].

39. J. O'REILLY, OHIO PUBLIC EMPLOYEE COLLECTIVE BARGAINING 11–12 (1984).

40. H. EDWARDS, *supra* note 38, at 160.

41. Early in its existence the NLRB ruled that a union, an individual, an employee, or a group of employees must demonstrate that 30% of the employees in an appropriate unit desire representation by the union before the NLRB would authorize an election. Statement of Procedures, Ser. 8, 29 C.F.R. § 101.18(a) (1984). This rule is not expressly embodied in the NLRA, but implements the statutory provision calling for a showing of substantial employee interest as a precondition to the NLRB's further investigation of any question concerning representation. *See* 29 U.S.C. § 159(c)(1) (1982). The OPECBA specifically incorporates this NLRB administrative rule. *See* OHIO REV. CODE ANN. § 4117.07(A)(1) (Page Supp. 1984). Beyond this administrative variation, the NLRA and the OPECBA are virtually identical in relevant parts. Section 9(c)(1) of the NLRA states:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by the their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(1) (1982).

Section 4117.07(A) of the OPECBA provides:

> When a petition is filed, in accordance with rules prescribed by the state employment relations board:
>
> (1) By any employee or group of employees, or any individual or employee organization acting in their behalf, alleging that at least thirty percent of the employees in an appropriate unit wish to be represented for collective bargaining by an exclusive representative, or asserting that the designated exclusive representative is no longer the representative of the majority of employees in the unit, the board shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, provide for an appropriate hearing upon due notice to the parties;
>
> (2) By the employer alleging that one or more employee organizations has presented to it a claim to be recognized as the exclusive representative in an appropriate unit, the board shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, provide for an appropriate hearing upon due notice to the parties. If the board finds upon the record of a hearing that a question of representation exists,

While there are provisions of the OPECBA which address the peculiar problems of public sector collective bargaining and have no analogue in the NLRA,[42] the OPECBA representation provisions are equally applicable in both the public and private sector. Because the language of these common provisions[43] expresses well-settled rules governing the filing of election petitions and the securing of officially-supervised elections, SERB and the Ohio judiciary can profitably examine NLRB and federal judicial interpretation of NLRA rules for guidance in interpreting analogous OPECBA provisions.

B. Procedures and Employer Petitions

Pursuant to section 9(c) of the NLRA, a number of factors may foreclose the finding of a question of representation.[44] Employee interest in union representation may not be substantial enough to warrant the use of NLRB election machinery, or to justify the workplace disruption produced by an election campaign.[45] The employee unit named in the petition may be inappropriate for purposes of collective bargaining.[46] The petition may be untimely because it is barred by an election that occurred within the preceding twelve months,[47] the employer is party to an effective contract with another union,[48] or another certi-

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it shall direct an election and certify the results thereof.
OHIO REV. CODE ANN. § 4117.07(A) (Page Supp. 1984).

Other jurisdictions with statutes specifically incorporating the 30% showing of interest requirement are as follows: ALASKA STAT. § 23.40.100 (1984); DEL. CODE ANN. tit. 19, § 1305 (1979); D.C. CODE ANN. § 1-618.10 (1981); FLA. STAT. ANN. § 447.307(2) (West 1981); HAWAII REV. STAT. § 89-7 (1976); ILL. ANN. STAT. ch. 48, § 1609(1) (Smith-Hurd Supp. 1985); IOWA CODE ANN. § 20.14(2)(b) (West 1978); KAN. STAT. ANN. § 75-4327(d) (1984); MICH. COMP. LAWS § 423.212(a) (1978); MINN. STAT. ANN. § 179A.10(3) (West Supp. 1985); MONT. CODE ANN. § 39-31-207(1)(a) (1983); NEB. REV. STAT. § 48-838(3) (1984); N.H. REV. STAT. ANN. § 273-A:10(I)(a) (Supp. 1983); PA. STAT. ANN. tit. 43, § 1101.603(a) (Purdon Supp. 1985); VT. STAT. ANN. tit. 21, § 1584(a) (1978); WIS. STAT. ANN. § 111.83(5) (West 1974). Rhode Island only requires a 20% showing of interest. R.I. GEN. LAWS § 28-9.4-6 (1979).

42. *See, e.g.*, OHIO REV. CODE ANN. § 4117.06 (Page Supp. 1984) (unit determination); *id.* § 4117.08 (scope of bargaining); *id.* § 4117.09(B)(2) (deduction of dues); *id.* § 4117.10 (scope of agreement); *id.* § 4117.14 (resolution of disputes); *id.* § 4117.15 (strikes). *See also* Sharpe, *The Ohio Public Sector Collective Bargaining Law: First Anniversary Colloquium*, 35 CASE W. RES. L. REV. 345 (1986).

43. *See supra* note 41.

44. *See generally* A. COX, D. BOK & R. GORMAN, LABOR LAW: CASES AND MATERIALS 320–27, 370–74 (9th ed. 1981). [hereinafter cited as A. COX].

45. In order for there to be a question of representation, thus requiring the use of election machinery, the petitioning unit must have been designated by at least 30% of the employees. Statements of Procedure, Ser. 8, 29 C.F.R. § 101.18(a) (1985). *See also* 29 U.S.C. § 159(c)(1)(A) (1982) (petitioning unit must allege the support of a substantial number of employees).

46. 29 U.S.C. § 159(b) (1982); Statements of Procedure, Ser. 8, 29 C.F.R. § 101.18(a) (1985).

47. 29 U.S.C. § 159(c)(3) (1982).

48. See Statements of Procedure, Ser. 8, 29 C.F.R. § 101.18(b) (1985); *See also* Reed

fied[49] or recognized majority representative exists.[50] The NLRB also may decline to proceed to an election due to a pending unfair labor practice charge,[51] the size of the employer, or the nature of the employees, employer, or union.[52] On the other hand, absent all of these procedural bars, a question of representation may exist for NLRB resolution. The foregoing factors for determining a question of representation combine to conserve administrative resources, promote stable collective bargaining relationships, and permit election campaign-induced disruption in the workplace only for *significant* representational disputes.[53]

1. Showing of Interest

Unions whose petitions are not untimely, obstructed by pending unfair labor practice charges or jurisdictional problems, or frustrated by inappropriate unit descriptions may still fail to establish a question of representation under the NLRA. Early in its institutional life, the NLRB promulgated a "showing of interest" rule to further the statutory objective of resolving only significant representational disputes.[54] As a condition to further investigation of the question of representation, the showing of interest rule requires a union to produce evidence—usually authorization cards[55]—indicating that thirty percent of the employees in an appropriate unit have designated the union as their collective bargaining representative.[56]

Roller Bit Co., 72 N.L.R.B. 927 (1947).

49. *See* Brooks v. NLRB, 348 U.S. 96 (1954).

50. *See* Keller Plastics E., Inc., 157 N.L.R.B. 583 (1966).

51. A. COX, *supra* note 44, at 262; K. MCGUINESS, HOW TO TAKE A CASE BEFORE THE NATIONAL LABOR RELATIONS BOARD § 7-3, at 107 (4th ed. 1976).

52. A. COX, *supra* note 44, at 89–90 (listing of NLRB-promulgated jurisdictional standards); 29 U.S.C. § 152(2)–(3), (5) (1982) (definitions of employees, employer, and union). *See also* 29 U.S.C. § 152(6)–(7) (1982) (definitions of commerce and affecting commerce); *id.* § 159(c)(1) (authorizing the NLRB to investigate petitions in order to determine the existence of a question of representation); *id.* § 160(a) (general power of the NLRB to prevent a person from engaging in unfair labor practices affecting commerce); Rules and Regulations, Ser. 8. 29 C.F.R. § 101.18 (1985) (investigation of petition).

53. *See* R. GORMAN, *supra* note 45, at 52–59. It should be noted that public sector statutes typically make the question of representation a function of the same factors. *See generally* H. EDWARDS, *supra* note 38, at 160–82.

54. 29 U.S.C. § 159(c)(1) (1982); Statements of Procedure, Ser. 8, 29 C.F.R. § 101.18(a) (1985). *See* 10 NLRB ANN. REP. 15, 16 n.7 (1945).

55. *See* K. MCGUINESS, *supra* note 51, § 5-20, at 66–67.

56. NLRB Statements of Procedure make it clear that the showing of interest rule is imposed on the employer and not the union when the employer files a petition. Statements of Procedure, Ser. 8, 29 C.F.R. § 101.18 (1985).

The NLRB investigates the showing of interest administratively in order to protect employees from disclosure of their choices concerning representation. NLRB v. J. I. Case Co., 201 F.2d 597, 600 (9th Cir. 1953). In upholding this administrative practice against employer challenge, the Court of Appeals for Ninth Circuit said that it saw nothing in § 9(c)(1) of the NLRA that purported to make proof of substantial union interest an element in determining whether a ques-

Employers may also initiate representation proceedings by filing petitions pursuant to section 9(c)(1)(B) when unions demand recognition.[57] An employer is not required to make a showing of interest, nor need the union demonstrate a showing of interest, when the employer files a petition under this section.[58] But how is the NLRB to determine whether an election would serve a statutory purpose when the employer, rather than the union, files the petition and unlike the union, the employer, as petition initiator, need not show substantial employee interest justifying an election? The prima facie inequality of this procedure seems all the more suspect when one considers that section 9(c)(1) requires that the NLRB find a question of representation before directing an election,[59] and that section 9(c)(2) requires the equal treatment of all petitioners.[60]

The question of whether an employer must show substantial employee interest was the subject of an early NLRB debate in *Felton Oil*

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tion of representation exists. *Id.* at 600. The employer had argued that the wording of § 9(c)(1) precluded an NLRB determination on the existence of a question of representation unless the record at the hearing contained evidence demonstrating that the union represented a substantial number of employees. *Id.* at 598.

Before a change of policy in O. D. Jennings & Co., 68 N.L.R.B. 516 (1946), the showing of interest was subject to being proven at the hearing. *See* Brad Foote Gear Works, Inc., 60 N.L.R.B. 97 (1945). Furthermore, the administrative and party protection policies advanced by the question of representation requirement clearly encompass the showing of interest rule. It is not surprising, then, that the NLRB's administrative pronouncements make it clear that the showing of interest is necessary to establishing a question of representation. Statements of Procedure, Ser. 8, 29 C.F.R. § 101.18(a) (1985). Specifically, the NLRB regulations provide that a petition may be withdrawn on the initiative of the petitioner if the investigation discloses no question of representation, because:

> [A]mong other possible reasons, the unit is not appropriate, or a written contract precludes further investigation at that time, or where the petitioner is a labor organization or a person seeking decertification and the showing of representation among the employees is insufficient to warrant an election under the 30-percent principle stated in paragraph (a) of this section.

Id. § 101.18(b).

The special treatment given the showing of interest element of the question of representation is justified by the important policy of preserving employee free choice, and not by the notion that the substantiality of employee interest in representation is not a factor in determining whether a question of representation exists.

Other methods of proving the showing of interest are dues checkoff lists, employee petitions, and membership rolls. A. Cox, *supra* note 44, at 261.

57. 29 U.S.C. § 159(c)(1)(B) (1982). Before the Taft-Hartley amendments to the Wagner Act, an employer was permitted to file a petition only when confronted by recognition claims from two or more unions. *See* R. Gorman, *supra* note 44, at 41–42.

58. Statements of Procedure, Ser. 8, 29 C.F.R. § 101.18(a) (1985).

59. 29 U.S.C. § 159(c)(1) (1982). *See supra* note 41.

60. 29 U.S.C. § 159(c)(2) (1982). This section states in relevant part: "In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of labor

Co.[61] The *Felton Oil* majority noted the absence of any substantial interest requirement in the language of section 9(c)(1)(B) as well as the practical difficulties that an employer would have in meeting such a requirement.[62] The NLRB concluded that section 9(c)(1)(B) manifested Congress' intent to provide employers who were confronted with recognition demands with an unfettered NLRB election procedure to ascertain the representative status of unions.[63] The majority was not dissuaded by the "equal treatment" language of section 9(c)(2), because explicit legislative history indicated that the purpose of that provision was to prevent more favorable treatment to affiliated unions than to independent unions.[64]

The dissent argued that Congress' concern about frivolous petitions filed by employees, labor organizations, or employers was embodied in the section 9(c) pre-election requirements that the existence of questions of representation be investigated and heard before an election was directed.[65] Thus, in determining the existence of questions of representation, the NLRB's use of a double standard—one for unions and a different one for employers—disregarded an important congressionally-recognized interest in avoiding the expenditure of government funds for unwarranted elections.[66] The dissent further argued that the majority rule invited unscrupulous employers to thwart collective bargaining by colluding with unprincipled unions to make recognition demands that would invariably lead to employer-won elections.[67] The election bar rule would then preclude employees from voting for a true representative for one year.[68] The dissent dismissed the practical difficulty of an employer showing of interest requirement, arguing that it would be easily solvable by requiring the demanding union to meet this burden or face an adverse finding on the issue of majority status.[69]

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61. 78 N.L.R.B. 1033 (1948).

62. *Id.* at 1035. Prominent among such difficulties would be a union's noncooperation in showing evidence of its representational status, its failure to petition for an election, and the risk of exposure to unfair labor practice liability when an employer must ascertain employee sentiments. *Id.* at 1035 n.5.

63. *Id.* at 1036.

64. *Id.* at 1035 n.5.

65. *Id.* at 1038 (Murdock, M., dissenting).

66. *See id.* at 1038–40.

67. *Id.* at 1041.

68. *Id.* The election bar rule is contained in § 9(c)(3) of the NLRA which reads in relevant part: "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held." 29 U.S.C. § 159(c)(3) (1982).

69. *Felton Oil Co.*, 78 N.L.R.B. at 1041 (Murdock, M., dissenting).

2. The Majority Claim

The NLRB has continued to follow the *Felton Oil* majority interpretation of an employer-petitioner's burden under sections 9(c)(1) and (2) of the NLRA.[70] Pivotal to the employer's demonstrating a question of representation under section 9(c)(1)(B) is the showing that the employer has been presented with a *claim* for recognition as majority representative by one or more individuals or labor organizations.[71]

The NLRA's requirement that an employer's petition be based on a union's majority claim partially addresses the *Felton Oil* dissent's concern about an unscrupulous employer's illegitimate precipitation of the statute's election bar in order to thwart legitimate employee representational interest.[72] The legislative history of section 9(c)(1)(B) reveals that the majority claim requirement seeks to prevent an employer from causing a premature election, and the subsequent bar, by filing a petition before the union has had an opportunity to organize.[73] It does not, however, prevent an employer from colluding with the unprincipled union to precipitate a premature election with the same election bar consequences.[74] While such employer-union conspiracies may have been a major concern in 1935,[75] when the NLRA was enacted, they did not move the *Felton Oil* majority in 1948. There is no evidence that such improbable conspiracies should preoccupy current interpreters of statutory procedural provisions.[76]

If the majority claim requirement only partially answers the dis-

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70. *See* Hooker Electrochemical Co., 116 N.L.R.B. 1393, 1394 n.3 (1956); Statements of Procedure, Ser. 8, 29 C.F.R. § 101.18(a) (1985).

71. *See* Albuquerque Insulation Contractor, Inc., 256 N.L.R.B. 61 (1981). In that case, the union requested that the employer sign a pre-hire agreement under § 8(f) of the NLRA. *Id.* As a concession to the peculiarities of the construction industry, § 8(f) permits construction industry employers to enter into agreements with non-majority unions as a limited exception to the statutory principle of majority rule. The NLRB found that the union's request did *not* constitute a request for recognition as *majority* representative. *Id.* at 63. *But cf.* Robert Tires, 212 N.L.R.B. 405 (1974) (union's picketing of a successor employer to sign a predecessor contract was deemed a demand for recognition). *See also* Ogden Enterprises, Ltd., 248 N.L.R.B. 290 (1980) (NLRB held that the union's picketing was recognitional in spite of a disclaimer that the picketing was directed only to the public); McClintock Market, Inc., 244 N.L.R.B. 555 (1979) (NLRB held the union's picketing to be recognitional, thus raising a question of representation). In Malcom X Center for Mental Health, Inc., 222 N.L.R.B. 944, 947 (1976), the employer showed a question of representation even though the union had won an election where the election certified the union in an inappropriate unit.

72. *See supra* notes 67–68 and accompanying text.

73. *See* S. REP. NO. 105, 80th Cong., 1st Sess. 1, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407, 417.

74. *See supra* note 67 and accompanying text.

75. Section 8(a)(2) of the NLRA was spawned by this kind of concern. *See* 29 U.S.C. § 158(a)(2) (1982). *See also* Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510, 511–16 (1973).

76. *See* Note, *supra* note 75, at 511–16.

sent's concern that the election bar may be triggered improperly, it fully satisfies the dissent's administrative resources conservation argument.[77] The demand for recognition contemplated by section 9(c)(1)(B) is that made by a union asserting *majority* status.[78] Such a demand is normally made as a prelude to petitioning the NLRB to conduct an election on the assumption that the employer will refuse the demand.[79] Pursuant to section 9(c)(1)(A), the petitioning union, as a threshold matter, must make a showing of interest demonstrating the existence of a question of representation.[80] It has been well documented that unions typically do not settle for the thirty percent minimum showing of interest required by the NLRB when filing petitions; rather, unions solicit the signatures of fifty to one hundred percent of the targeted employees before filing an election petition.[81] These factors erase any question that where an employer can show a union's demand for recognition as "majority" representative, the interest is present to justify the NLRB's expenditure of resources and the election-related disruption of the workplace.

III. IMPLICATIONS FOR OHIO'S VOLUNTARY RECOGNITION PROCEDURES

Theoretically, even when an employer files a timely and unencumbered election petition to test the union's majority status following a union's request for voluntary recognition, alternative circumstances might lead to a finding that there is no question of representation. First, the showing of interest may be insufficient to raise a significant question of representation. Second, the evidence of majority support may be so convincing that it leaves no reasonable question of representation. Empirical evidence and well-settled experience in the private sector indicate that neither circumstance exists when the Ohio Public Employee Collective Bargaining Act's voluntary recognition procedures lead to an employer petition.[82]

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77. *See supra* note 66 and accompanying text.

78. A "representative," as defined in § 9(a), is an entity that has been designated by a *majority* of the employees as their bargaining representative. 29 U.S.C. § 159(a) (1982). It should be noted that an employer may not lawfully recognize a union which represents only a minority of employees as an exclusive representative. *See, e.g.*, ILGWU v. NLRB, 366 U.S. 731 (1961) (§ 8(a)(2) violation).

79. A. COX, *supra* note 44, at 112, 260.

80. *See supra* notes 54–56 and accompanying text.

81. *See* Weiler, *Promises To Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1776 n.22 (1983). *See also* K. MCGUINESS, *supra* note 51, § 5-18, at 63–66.

82. As indicated previously, most unions will solicit the signatures of 50% to 100% of the targeted employees, thus raising a significant question of representation. *See supra* note 81 and accompanying text. However, solicitation through the use of authorization cards tends to leave

A. The Ohio Statute's Peculiar Twist in Voluntary Recognition Cases

The debate by members of the NLRB in *Felton Oil Co.*[83] is statutorily resolved by voluntary recognition procedures that give rise to employer election petitions pursuant to the OPECBA. A labor organization seeking voluntary recognition in the Ohio public sector must file a request with the public employer and provide a copy of the request to the State Employment Relations Board.[84] The union must allege majority support and produce substantial evidence to support the allegation.[85] Substantial evidence usually consists of union authorization cards which are filed only with SERB.[86] When a request for voluntary recognition is filed, the employer must either post a prescribed notice at each relevant facility and notify SERB of the request for recognition, or it must petition for an election.[87] These rules contemplate employer petitions that will be precipitated by demonstrated majority employee interest sufficient to warrant the campaign-induced expenditure of SERB resources and disruption of the workplace.

The OPECBA's voluntary recognition procedures, which permit *certification* upon non-election evidence of majority support,[88] are not

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open the question of representation. *See infra* notes 94–104 and accompanying text.

83. 78 N.L.R.B. 1033 (1948). For a discussion of this debate, see *supra* notes 61–69 and accompanying text.

84. OHIO REV. CODE ANN. § 4117.05(A)(2) (Page Supp. 1984).

85. *Id.* The union must also describe the bargaining unit. *Id.*

86. *See* OHIO ADMIN. CODE § 4117-3-03 (1984). Section 4117-3-03 states:

> (A) For the purposes of division (A)(2), (A)(2)(b)(ii), and (A)(2)(b)(iii) of section 4117.05 of the Revised Code, and rules 4117-3-01 and 4117-3-02 of the Administrative Code, "substantial evidence" shall consist of the following documentation that shall be filed only with the board:
>
> (1) Original signed and dated statements, including but not limited to cards and petitions, that clearly set forth the intent of the employee with respect to representation by the employee organization; or
>
> (2) Dues deduction authorizations or dues deduction lists in effect as of the payroll period immediately preceding the filing of the request for recognition with the employer.
>
> (B) For the purpose of division (A)(2)(b)(iv) of section 4117.05 of the Revised Code, "substantial evidence" shall consist of a clear and concise statement of the reason the unit is not appropriate, such statement to be supported by documentation relating to the factors set forth in section 4117.06 of the Revised Code.

Id.

87. OHIO REV. CODE ANN. § 4117.05(A)(2)(a)–(b)(1) (Page Supp. 1984). The notice must describe the bargaining unit, provide the name of the union requesting recognition, and give the date of the request. *Id.* § 4117.05(A)(2)(a). Furthermore, the notice must advise employees that objections to certification must be filed with SERB no later than 21 days after the request for recognition. *Id.* The posting of a notice does not preclude the employer from also petitioning for election within 21 days following the union's voluntary recognition request. OHIO ADMIN. CODE § 4117-3-01(D) (1984).

88. OHIO REV. CODE ANN. § 4117.07(A)(2) (Page Supp. 1984). *See supra* notes 4–11 and accompanying text.

found in the NLRA and are unique among public sector statutes.[89] The more important question to be asked here is *not* whether there is sufficient interest to raise a question of representation;[90] rather, one should ask whether the question of representation has been settled by the union's evidence of majority support. Moreover, if a union demonstrates its majority status to SERB by substantial evidence as required under section 4117.05, and there is no reason to doubt the authenticity and validity of this evidence, is there a "question of representation" that warrants the expenditure of SERB resources and disruption of the workplace?[91] In *Franklin School District Board of Education*,[92] SERB said no,[93] effectively finding union authorization cards to be determinative of majority status. That decision ignores well-settled experience under the NLRA and important policy concerns.

B. The Reliability of Card-Based Majorities Under the NLRA

It has been said that the presentation of union authorization cards, as reliable evidence of the union's representational status among employees, is merely a cut above an employer's request for a "show of hands."[94] While this assessment may be a somewhat humorous overstatement, it possesses more than a kernel of truth.[95] The primary de-

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89. *See supra* notes 1–4 and accompanying text; *see also infra* note 105.

90. *See* North Canton City Schools, 2 OHIO PUB. EMPLOYEE REP. (LRP) ¶ 2638 (1985); Cleveland School Dist. Bd. of Ed., 2 OHIO PUB. EMPLOYEE REP. (LRP) ¶ 2083 (1985). These cases hold that a petition filed by a rival union supports a good faith doubt, justifying an employer's withdrawal of recognition from an incumbent union. *North Canton*, 2 OHIO PUB. EMPLOYEE REP. (LRP) ¶ 2638, at VII-45; *Cleveland School Dist.*, 2 OHIO PUB. EMPLOYEE REP. (LRP) ¶ 2083, at VII-63. If cards establishing the 30% showing of interest are sufficient to disrupt an established collective bargaining relationship, certainly the same kind of evidence showing majority support raises a question concerning representation.

91. Note that this question focuses on the "substantial interest" factor and not other factors, such as unit propriety, which could also raise a question of representation.

92. 1 OHIO PUB. EMPLOYEE REP. ¶ 1308 (1984).

93. *Id.* ¶ 1308, at VII-233.

94. NLRB v. S. S. Logan Packing Co., 386 F.2d 562, 565 (4th Cir. 1967).

95. For the past two decades the question of authorization card reliability has been extensively debated in federal cases and scholarly literature. For a review of commentary urging regulation of union authorization card solicitation, see Browne, *Obligation to Bargain on Basis of Card Majority*, 3 GA. L. REV. 334 (1969); Gruender & Prince, *Union Authorization Cards: Why Not Laboratory Conditions?*, 32 LAB. L.J. 13 (1981); Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 MICH. L. REV. 851 (1967); Note, *Union Authorization Cards*, 75 YALE L.J. 805 (1966). For a review of commentary acknowledging elections as preferred, but pointing out the superior reliability of authorization cards in some situations, see Browne, *supra* at 348; Lesnick, *supra*, at 863–68; Scheinkman, *Recognition of Unions Through Authorization Cards*, 3 GA. L. REV. 319, 327–33 (1969). *See also* Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301 (1974); NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); Aaron Bros., 158 N.L.R.B. 1077 (1966); Gordon, *Union Authorization Cards and the Duty to Bargain*, 19 LAB. L.J. 201 (1968). There is statistical support for the unreliability of authorization cards relative to NLRB-conducted elections. In a 1961 address to the American Bar Association, former NLRB

fect in card authorizations is that they are solicited in a short period of time, often unbeknownst to the employer, thereby precluding the employer from presenting its views and denying employees full exposure to counter arguments on the union question.[96] Employee sentiments, as reflected in authorizations cards, therefore, are likely to be made without the amount of information necessary to make a fully-informed choice. Moreover, the process by which the authorization cards are solicited is much less likely to come under NLRB scrutiny than election campaign behavior where the NLRB insists on the preservation of "laboratory conditions."[97]

A second major problem with authorization cards is that employees often sign the cards for reasons unrelated to a desire for union representation, yet their signatures suffice to demonstrate their support for the union and may actually be counted as a vote for the union.[98] Under

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Chairman McCulloch stated:

> In 58 elections, the unions presented authorization cards from 30 to 50 [%] of the employees; and they won 11 or 19% of them. In 87 elections, the unions presented authorization cards from 50 to 70 [%] of the employees—and they won 42 or 52% of them. In 57 elections, the unions presented authorization cards from over 70% of the employees, and they won 42 or 74% of them.

McCulloch, *A Tale of Two Cities: Or Law in Action*, 1962 A.B.A. SEC. LAB. REL. LAW 14, 17.

Furthermore, in rival union situations it is not uncommon to find competing unions with authorization card majorities in the same unit. *See* Abraham Grossman, 262 N.L.R.B. 955 (1982).

96. Note, *supra* note 95, at 823–28. Section 8(c) of the NLRA guarantees private sector employers the right to present non-coercive views, arguments, and opinions with respect to employee organization. 29 U.S.C. § 158(c) (1982). Similarly, public employers do not commit an unfair labor practice under the OPECBA by expressing non-coercive views, arguments, and opinions on employee organization, as such actions are not prohibited. *See* OHIO REV. CODE ANN. § 4117.11(A)(1) (Page Supp. 1984).

97. General Shoe Corp., 77 N.L.R.B. 124 (1948). Under some NLRB majorities, the "laboratory conditions" rule has involved regulating some misrepresentations made during the campaign. *See* General Knit of Cal., Inc., 239 N.L.R.B. 619 (1978). *But see* Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127 (1982). The prohibition on captive audience speeches within 24 hours of the election is also an effort to preserve laboratory conditions by preventing last minute claims that cannot be refuted during an election campaign. *See* Peerless Plywood, 107 N.L.R.B. 427 (1953). *But see* Lesnick, *supra* note 95, at 859–68 (urging the policing of union authorization card solicitation while demythologizing the sacrosanctity of NLRB-conducted elections). *See also* Weiler, *supra* note 81, at 1781–86 (description of the debate on the impact of campaign tactics on voter behavior).

98. Most union authorization cards specifically authorize a particular union to act as the signers' bargaining agent. *See, e.g.*, Levi-Strauss & Co., 172 N.L.R.B. 732 (1968). Some authorization cards contain language about using the card to secure an NLRB-conducted election. *See, e.g.*, Lenz Co., 153 N.L.R.B. 1399 (1965). There is evidence that employees often do not read such cards carefully and may not fully understand their significance. *See* Gruender & Prince, *supra* note 95, at 19.

Even where the language indicates only the authorization purpose, it may be effectively canceled by contemporaneous statements made by the union solicitor to the prospective card signer. *See* Holding Co., 231 N.L.R.B. 383, 399–400 (1977) (employees were told that the card would be used to get an election). NLRB decisions prevent the most egregious form of misrepresentation where employees are told that the card will be used *only* to secure an election. *See, e.g.*, Levi-

the OPECBA's voluntary recognition provisions, authorization cards *will* count as evidence of union majority support unless the employer petitions for an election.[99] By contrast, voters in an NLRB- or a SERB-conducted election can have no question about the effect of their ballots.

In the Taft-Hartley amendments to the Wagner Act, Congress expressed a clear preference for NLRB-conducted elections as a means of resolving representation questions while preserving the legality of card-based recognition.[100] Congress made the NLRB-conducted election the sole basis for union certification and gave certified unions special privileges under the NLRA.[101] Recognizing the relative unreliability of authorization cards as a measure of majority sentiment, the NLRB, in 1966, relieved employers of having to establish a good faith doubt of an authorization card-based majority claim before insisting on an election.[102] Rather than recognize a union making a card-based demand for recognition, a private sector employer may do nothing and force a union to petition the NLRB for an election under the NLRA.[103] The employer may insist on an election to determine the status of the union, even though it has no doubt about the validity of cards supporting the demand.[104] These procedures reflect congressional, judicial, and administrative deference to the superior attributes of officially-supervised elections.

C. *Card Reliability and the Ohio Voluntary Recognition Procedure*

While more subtle, the Ohio General Assembly's judgment about

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Strauss & Co., 172 N.L.R.B. 732 (1968); Cumberland Shoe, 144 N.L.R.B. 1268 (1963). But representations short of this extreme, including misrepresentations about the number of signatories among the prospective signer's fellow employees, will not invalidate the card. *See, e.g.,* Roney Plaza Apartments, 232 N.L.R.B. 409 (1977). For these reasons many employees actually sign cards because "everyone else has signed," *id.* at 416; to "scare" the employer into granting a wage increase, NLRB v. Koehler, 328 F.2d 770, 773 (7th Cir. 1964); to get an election, Holding Co., 231 N.L.R.B. at 400; and to get the union to come in and explain its program, Kolpin Bros., 149 N.L.R.B. 1378 (1964). *See generally* Browne, *supra* note 95.

99. *See* OHIO REV. CODE ANN. § 4117.05(A)(2)(b)(i) (Page Supp. 1984).

100. S. REP. NO. 105, 80th Cong., 1st Sess. 1, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407, 428–29, 431.

101. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 598–99 (1969). Certified unions enjoy special protection against recognitional picketing by rival unions, special protection in jurisdictional disputes, and recognitional as well as organizational picketing. *See id.* at 599 n.14. Certified unions, for example, also generally enjoy a longer period of insulation from challenges to their majority status by employers and rival employee groups. *See* Brooks v. NLRB, 348 U.S. 96 (1954).

102. Aaron Bros., 158 N.L.R.B. 1077 (1966). *See Gissel Packing Co.*, 395 U.S. at 590–95 (review of the history of the "good faith doubt" doctrine).

103. Aaron Bros., 158 N.L.R.B. at 1078.

104. Linden Lumber Div. v. NLRB, 419 U.S. 301, 305–06 (1974).

the superiority of officially-conducted elections is similar to Congress' and is discernable by careful analysis. The OPECBA permits certification of a union on the basis of an election or other evidence of majority support, such as authorization cards.[105] At the same time, the OPECBA gives an employer the right to petition for an election in language identical to the analogous section of the NLRA.[106] This right must be exercised in order to avoid certification when the union cards are valid and there is no majority showing *contra* representation, no rival union, and no unit problems.[107] This procedure acknowledges the potential existence of a representation question, even when an employer is presented with a card-based request for recognition.

The concurrence of sections 4117.05(A)(2) and 4117.07(A)(2) in the OPECBA must be reconciled. The inference seems evident that the Ohio General Assembly deemed authorization cards to be reliable enough to warrant an employer's petitioning for an election, if the employer is to simultaneously refuse recognition and avoid unfair labor practice liability, but *not* as reliable as an election should the employer deem one necessary.[108] That this is the appropriate reading of the statute is apparent when the private sector experience is factored into the analysis.

The legislative judgment that authorization cards are sufficiently

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105. OHIO REV. CODE ANN. § 4117.05(A)(2)(b) (Page Supp. 1984). Of the 26 comprehensive statutes that regulate public employee collective bargaining in 25 states and the District of Columbia, many permit voluntary recognition. *See supra* note 36. However, besides Ohio, only Minnesota and Pennsylvania permit certification on the basis of authorization cards. *See* MINN. STAT. ANN. § 179.12(2) (West Supp. 1985); PA. STAT. ANN. tit. 34, § 95.11 (Purdon 1964). Furthermore, Minnesota and Pennsylvania allow such certification only upon a joint request for certification to the government entity, while the Ohio statute forces the employer to file a petition to avoid certification. *See* MINN. STAT. ANN. § 179A.12(2) (West Supp. 1985); OHIO REV. CODE ANN. § 4117.07(A)(2)(b)(1) (Page Supp. 1984); PA. STAT. ANN. tit. 34, § 95.11 (Purdon 1964).

106. *See supra* note 41.

107. *See* OHIO REV. CODE ANN. § 4117.05(A)(2)(b)(ii)–(iv) (Page Supp. 1984).

108. In a voluntary recognition situation the statute contemplates that SERB will be guided by the employer's initiative in testing doubts about the union's majority status. SERB is not otherwise likely to have doubts and apparently does not have the authority to initiate an election *sua sponte*. The employer, on the other hand, can test such doubts by petitioning for an officially-conducted election. Section 4117.05(A)(2), which permits certification upon a request for voluntary recognition, was also in an earlier form of the statute vetoed by Gov. James Rhodes. Telephone interview with Richard Masek, Chief of the Commerce, Labor, and General Development Division of the Ohio Legislative Service Commission, formerly Staff Member to the House Commerce & Labor Commission, Columbus, Ohio (Aug. 1, 1985). Generally, the voluntary recognition provision removes the election route to certification where the employer does not question the union's status and wants to start the collective bargaining relationship with the union on the "right foot." *Id.* Specifically, Ohio's unique "certification" in the voluntary recognition procedure works to standardize the recognition process. *Id.* Through this provision unions that are recognized voluntarily are specifically intended to enjoy no lesser prestige than one that is recognized after an election. *Id.* Such standardization is intended to produce uniformly effective collective bargaining. *Id.*

reliable to support a bargaining obligation without an election is also apparent under the NLRA.[109] The United States Supreme Court has held that bargaining orders are an appropriate remedy for pervasive unfair labor practices committed by the employer during private sector election campaigns.[110] In that situation, authorization cards, rather than a tainted election, are considered a more reliable indicator of employee free choice.[111] Otherwise, elections are a preferred means of determining employee sentiment.

While authorization cards may be reliable enough to force an employer to invoke SERB's superior processes, and even more reliable than an officially-supervised election in special circumstances,[112] the cards are not sufficiently decisive to remove a reasonable question of representation. Needless to say, "some evidence" of majority status supplied by valid authorization cards and "conclusive proof" provided by a SERB-conducted election meet substantially different standards of certainty in addressing questions of representation. The former leaves considerable doubt on the question of representation; the latter usually leaves none. Authorization cards necessarily leave the question of representation unresolved and should entitle the petitioning employer to an election under the OPECBA.

The foregoing observations are not intended to impugn the certification of Ohio public sector unions based on the statute's voluntary recognition procedures. On the contrary, while unique, the Ohio voluntary recognition procedures have led to the expeditious settling of rep-

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109. *See* Abraham Grossman, 262 N.L.R.B. 955 (1982). In that case, the NLRB held authorization cards to be reliable enough to create a foundation for recognizing and bargaining with a union unless a valid petition for an election is filed by a rival union. *Id.* at 958.

110. *Gissel Packing Co.*, 395 U.S. at 602.

111. *Id.* at 601–10, 614–15. Indeed, without benefit of the similar but clearer language of the OPECBA, § 9(c)(1)(B) of the NLRA had been interpreted as imposing an obligation upon the employer to petition for an election when presented a valid card-based majority demand for recognition. In Truck Drivers Local No. 413 v. NLRB., 487 F.2d 1099 (D.C. Cir. 1973), *rev'd sub nom.* Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301 (1974), the Court of Appeals for the District of Columbia Circuit stated:

> While we have indicated that cards alone, or recognitional strikes and ambiguous utterances of the employer, do not necessarily provide such "convincing evidence of majority support" so as to require a bargaining order, they certainly create a sufficient probability of majority support as to require an employer asserting a doubt of majority status to resolve the possibility through a petition for an election, if he is to avoid [a] duty to bargain . . . .

Id. at 1111. Disagreeing with the United States Supreme Court majority in the *Linden Lumber* reversal, Justice Stewart, writing for four dissenting Justices, adopted the D.C. Circuit's view of an employer's obligation to petition for an election when faced with a card-based demand for recognition. 419 U.S. 301, 316–17 (1974) (Stewart, J., dissenting). This view was, of course, rejected by the *Linden Lumber* majority. *See supra* notes 102–04 and accompanying text.

112. *See* OHIO REV. CODE ANN. § 4117.07(A)(2) (Page Supp. 1984) (provides for the *Gissel*-type remedy, where SERB determines that a free and untrammeled election cannot be held because of the employer's unfair labor practices).

resentation disputes and have facilitated the onset of constructive relationships between public sector unions and employers. Indeed, a survey of the voluntary recognition cases decided by SERB since its effective date of operation shows that, in the overwhelming majority of cases, recognition is granted upon request without objection or employer petition.[113] The Ohio voluntary recognition procedures are obviously working well in the vast majority of cases where the employer has no reason to doubt the union's claim of majority status.[114] However, where there is doubt, the testing of the union's majority by an officially-supervised election serves the interests of the union and the employer, while also advancing the statutory goal of encouraging stable and effective collective bargaining relationships.[115] In the absence of a reliable determination of representation questions, employers who suspect union weakness will be less willing to commit serious effort to collective bargaining, while insecure unions will bargain with little confidence or effectiveness. Furthermore, neither the union's nor the employer's interests are served by the protracted litigation that could result from a SERB investigation of an employer's petition under the current interpretation of section 4117.07(A)(2). The union must forego a possible early election victory that could prevent the dissipation of union bargaining strength. The employer, on the other hand, must shoulder the difficult and expensive burden of persuading SERB that the union's majority claim is without foundation.[116]

IV. CONCLUSION

Questions of representation exist whenever there is substantial employee interest in organizing that is ripe for testing by some accurate measure of employee sentiment. There is virtually unanimous agreement that the most accurate testing device is the officially-supervised election.[117] Evidence of majority support generated in one-sided campaigns without a full airing of countervailing views is likely to be less

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113. *See generally* 2 OHIO PUB. EMPLOYEE REP. (LRP) VI-1, VI-34 to -41 (Cumulative Digest of Cases—Headnotes 32.9–.92); 1 OHIO PUB. EMPLOYEE REP. (LRP) VI-1, VI-74 to -83 (Cumulative Digest of Cases—Headnotes 32.91–.92).

114. Compare the observations of Ronald Janetske that often the parties engage in protracted negotiations before a voluntary recognition is concluded. Telephone interview with Ronald Janetzke, General Counsel, AFSCME Ohio Council 8, Columbus, Ohio (July 23, 1985) [hereinafter cited as Janetske interview].

115. *See* OHIO REV. CODE ANN. §§ 4117.01(G), 4117.07(C)(6), 4117.11(A)(5), 4117.11(B)(3) (Page Supp. 1984). These sections advance the values of effective and stable collective bargaining relationships.

116. Recognizing their mutual interests in these circumstances, the parties sometimes agree to a consent election on the heels of an employer petition pursuant to § 4117.05(A)(2)(b)(i) of the Ohio Revised Code. Janetzke interview, *supra* note 114.

117. *See supra* notes 100–04 and accompanying text.

reliable.[118] Where employee sentiment has been registered by non-election means, questions concerning true employee sentiment on the issue of representation are necessarily unresolved. Thus, majority support is not conclusively demonstrated and a question of representation remains when a union requesting voluntary recognition submits valid evidence of majority support to SERB.

On the other hand, such evidence does *create* a question of representation which justifies a SERB-directed election. Thus, the employer should meet its burden of proving the existence of a question of representation under section 4117.07(A)(2) when it shows that the union has made a claim for voluntary recognition pursuant to section 4117.05(A)(2). Such an interpretation reconciles statutory provisions defining Ohio voluntary recognition procedures and conforms to national labor policy articulated in federal administrative and judicial decisions. It advances the benign policies of protecting union authorization cards from disclosure while giving employers an opportunity to challenge the union's status where there is doubt. And it obviates an amendment to the existing language of the Ohio Public Employee Collective Bargaining Act.

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118. See supra notes 94-99 and accompanying text.