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NO HOLDS BARRED

The Intensification of Employer Opposition to Organizing

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Economic Policy Institute

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Executive summary

This study is a comprehensive analysis of employer behavior in representation elections supervised by the National Labor Relations Board (NLRB). The data for this study originate from a thorough review of primary NLRB documents for a random sample of 1,004 NLRB certification elections that took place between January 1, 1999 and December 31, 2003 and from an in-depth survey of 562 campaigns conducted with that same sample. Employer behavior data from prior studies conducted over the last 20 years are used for purposes of comparison. The representativeness of the sample combined with the high response rate for both the survey (56%) and NLRB unfair labor practice (ULP) charge documents (98%) ensure that the findings provide unique and highly credible information. In combination, the results provide a detailed and well-documented portrait of the legal and illegal tactics used by employers in NLRB representational elections and of the ineffectiveness of current labor law policy to protect and enforce workers rights in the election process.

Highlights of the study regarding employer tactics in representational elections include:

- In the NLRB election process in which it is standard practice for workers to be subjected to threats, interrogation, harassment, surveillance, and retaliation for union activity. According to our updated findings,

TABLE OF CONTENTS

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employers threatened to close the plant in 57% of elections, discharged workers in 34%, and threatened to cut wages and benefits in 47% of elections. Workers were forced to attend anti-union one-on-one sessions with a supervisor at least weekly in two-thirds of elections. In 63% of elections employers used supervisor one-on-one meetings to interrogate workers about who they or other workers supported, and in 54% used such sessions to threaten workers.

- In combination, our survey and ULP findings reveal that employer opposition has intensified: the incidence of elections in which employers used 10 or more tactics more than doubled compared to the three earlier periods we studied, and the nature of campaigns has changed so that the focus is on more coercive and punitive tactics designed to intensely monitor and punish union activity.
- Many of these same tactics have been key elements of employer anti-union campaigns that we have studied for the last 20 years.[1] Although the use of management consultants, captive audience meetings, and supervisor one-on-ones has remained fairly constant, there has been an increase in more coercive and retaliatory tactics ("sticks") such as plant closing threats and actual plant closings, discharges, harassment and other discipline, surveillance, and alteration of benefits and conditions. At the same time, employers are less likely to offer "carrots," as we see a gradual decrease in tactics such as granting of unscheduled raises, positive personnel changes, promises of improvement, bribes and special favors, social events, and employee involvement programs.
- Unions filed unfair labor practice charges in 39% of the survey sample and 40% of the NLRB election sample. The survey and NLRB documents both show that the most aggressive employer anti-union behavior—that is, the highest percentage of allegations—were threats, discharges, interrogation, surveillance, and wages and benefits altered for union activity.
- The character of the process in the private sector is illuminated by survey data from the public-sector campaigns, which describe an atmosphere where workers organize relatively free from the kind of coercion, intimidation, and retaliation that so dominates in the private sector. Most of the states in our public-sector sample have card check certification as the primary means through which workers are organizing, where the employer is required to recognize the union if the majority of workers sign cards authorizing the union to represent them.

Highlights of the study regarding NLRB ULP charges include:

- Twenty-three percent of all ULP charges and 24% or more of serious charges—such as discharges for union activity, interrogation, and surveillance—were filed before the petition for an election was filed, and 16% were filed more than 30 days before the election petition was filed. These data confirm that employer campaigning, including the employer free speech provision, does not depend on a petition to kick into effect.
- Forty-five percent of ULP charges resulted in a "win" for the union: either the employer settled the charges or the NLRB or the courts issued a favorable decision.
- Thirty-seven percent of ULP charges result in the issuance of a complaint by the NLRB. Twenty-six percent are withdrawn by the union prior to the complaint being issued, and 23% are found to have no merit. Just under a third of all charges are resolved in whole or in part at the settlement level with 14% settling before the complaint is issued, with 18% settling after the complaint but before the Administrative Law Judge (ALJ) hearing process is complete. The content of the settlements is very similar except that settlements prior to merit determination are less likely to include reinstatement than those settled after the complaint.

- Employers tend to appeal most ALJ decisions, particularly Gissel bargaining orders and orders for second elections. This means that in the most egregious cases the employer is able to ensure that the case is delayed by three to five years, and in all the cases in our sample the worst penalty an employer had to pay was back pay, averaging a few thousand dollars per employee.
- Our findings and previous research suggest that unions are filing ULPs in fewer than half the elections for three main reasons: filing charges where the election is likely to be won could delay the election for months if not years; workers fear retaliation for filing charges, especially where the election is likely to be lost; and the weak remedies, lengthy delays, and the numerous rulings where ALJ recommendations for reinstatement, second elections, and bargaining orders have then been overturned, delayed, or never enforced, have diminished trust that the system will produce a remedy.

In 2007 there were only 1,510 representation elections and only 58,376 workers gained representation through the NLRB. Even for those who do win the election, 52% are still without a contract a year later, and 37% are still without a contract two years after an election. Yet researchers such as Freeman (2007) are showing that workers want unions now more than at any other time in the last three decades. Our findings suggest that the aspirations for representation are being thwarted by a coercive and punitive climate for organizing that goes unrestrained due to a fundamentally flawed regulatory regime that neither protects their rights nor provides any disincentives for employers to continue disregarding the law. Moreover, many of the employer tactics that create a punitive and coercive atmosphere are, in fact, legal. Unless serious labor law reform with real penalties is enacted, only a fraction of the workers who seek representation under the National Labor Relations Act will be successful. If recent trends continue, then there will no longer be a functioning legal mechanism to effectively protect the right of private-sector workers to organize and collectively bargain.

In a nation where union density stands at 12.4%, it is easy to forget that the majority of U.S. workers want unions. In fact, more workers would choose to be unionized if given the opportunity than at any time in the last 30 years. According to Richard Freeman (2007) the percent of the non-managerial workforce who say they would vote for a union has been steadily increasing from 30% in the early 1980s, to almost 40% in the mid-1990s, reaching 53% in 2005. Based on his estimates, if all workers who wanted a union were actually given the opportunity they desired, then as of 2005 union density would have been as high as 58% (BLS 2007; Freeman 2007). Yet, in 2009, the overwhelming majority of workers who want unions do not have them. The majority also believes that, due to employer opposition, they would be taking a great risk if they were to organize (Hart 2007). For these workers, the right to organize and bargain collectively—free from coercion, intimidation, and retaliation—is at best a promise indefinitely deferred.

Since the rise of the union-avoidance industry in the 1970s (Smith 2003), we have witnessed a significant increase in the intensity and aggressiveness with which private-sector employers have opposed organizing efforts in their firms. As companies have globalized and restructured, corporate anti-union strategies have become more sophisticated, through resorting to implied or real threats of ownership change, outsourcing, or contracting out in response to nearly every organizing campaign (Bronfenbrenner 1994; 2000; Compa 2004; Logan 2006).

The combination of deregulation, investor-centered trade and investment policies, and an underfunded and disempowered National Labor Relations Board (NLRB) appears to have emboldened employers to act with increasing disregard for the National Labor Relations Act (NLRA). Long-time "union free" companies such as Wal-Mart, Coverall North America, and Cintas have been able to accelerate their anti-union efforts on multiple fronts because of the dysfunction and ineffectiveness of our labor law regime (Ruckelshaus 2007; Compa 2004). As labor historian Nelson Lichtenstein (2008, 1,492) explains, between 1998 and 2003 unions filed 288 unfair labor practices against Wal-Mart alone:

> These included forty-one charges claiming improper firings, forty-four instances in which Wal-Mart threatened employees if they joined a union, fifty-nine charges involving improper surveillance, and another fifty-nine asserting that Wal-Mart illegally interrogated its associates to determine their views on sensitive labor related issues. In all, ninety-four of these complaints were weighty enough to generate a formal NLRB complaint against the corporation.

What distinguishes the current organizing climate from previous decades of employer opposition to unions? The primary difference is that the most intense and aggressive anti-union campaign strategies, the kind previously found only at employers like Wal-Mart, are no longer reserved for a select coterie of extreme anti-union employers. In examining NLRB documents we discovered dozens of employers similar to Earthgrains—companies with a history of maintaining a stable collective bargaining relationship with the majority of their workforce—making a dramatic shift in how they respond to union organizing efforts. When faced with an organizing campaign in its London, Kentucky plant in the summer of 2000, Earthgrains unleashed a relentless campaign of threats, interrogations, surveillance, harassment, and intimidation against the union.[2] The charges against Earthgrains included videotaping workers as they spoke to union representatives; maintaining and showing to workers a list that supposedly revealed how other workers were going to vote; interrogating workers about whether they or their co-workers supported a union; threatening to fire workers for union activity; managers forcibly removing union literature from the hands of employees while they were on break; threatening to eliminate entire shifts, take away retirement plans, or gain-sharing benefits if the union won in the plant; telling the workers the union would go on strike as soon as the election was won; and promising improvements in benefits and a committee to resolve grievances if the union lost (Ahearn 2000).

The corporate anti-union strategy used in the Earthgrains campaign had an enormous emphasis on interrogation, surveillance, harassment, threats, and fear. Whereas these aggressive tactics have normally been associated with

only the most extremely anti-union firms, the examples of Earthgrains and similar employers demonstrate that trend is changing. These trends show us that in today's organizing climate, even employers with no prior history of waging war against unions are increasingly running extremely aggressive anti-union campaigns with great success.

The changing behavior by companies such as Earthgrains raises several key questions critical to the labor policy debate currently before Congress. Has the nature and intensity of employer opposition changed over the last decade? Has the NLRB or the court system changed their interpretation or enforcement of the law in ways that might account for these changes in employer behavior? How does labor law need to be reformed in order to restore the promise embodied in Section 7 of the NLRA that workers have the right to organize and bargain first agreements?

For the past 20 years the primary focus of my research agenda has been to answer just these kinds of questions through a series of empirical studies examining the role of employer behavior and NLRB practice and policy in determining NLRB election certification of election outcomes. Combined, this research makes up the only extant national data on legal and illegal employer behavior during union election campaigns over time, controlling for election environment, company characteristics, union tactics, and bargaining unit demographics.[3] This report is the product of my most recent study, which set out both to update my earlier work and expand on it by doing a full Freedom of Information Act request (FOIA) from the NLRB for all unfair labor practice documents relating to the election sample.

Methodology and data

This study examines employer behavior in NLRB elections in the private sector as well as the process for filing charges of unfair labor practices to protect workers' rights to organize free from coercion, intimidation, and retaliation from employers.[4] It is based on a random sample of 1,004 NLRB campaigns taken from the full population of all certification elections in units with 50 or more eligible voters between January 1, 1999 and December 31, 2003 (BNA Plus 2000; 2002; 2004).[5] (Hereafter, this paper will refer to this broad set of 1,004 elections as the "NLRB election sample.") Using in-depth surveys with the lead organizer conducted by mail, phone, or email, personal interviews, documentary evidence, and electronic databases, we compiled detailed data on election background, organizing environment, bargaining unit demographics, company and union characteristics and tactics, and election and first contract outcomes.

We believe that the methods we used have been proven to be the most effective means for collecting data on employer behavior in organizing campaigns (see Appendix). It would be preferable if scholars could interview workers in the aftermath of each organizing campaign and find out how the employer campaign had affected their vote. However, as indicated by the paucity of this kind of research on any scale, there are significant barriers to conducting such research. Most obvious is that the same climate of fear and intimidation that surrounds the certification election would influence how workers would respond to any survey. Workers would fear that the employer would figure out how they were answering the survey, just as they seemed able to determine which way workers intend to vote in elections. It would be extremely difficult to gain approval for such research from any university human subjects institutional review board because of the risks to the worker. The second problem is a matter of scale. Getting even modest funding for research on organizing is extremely difficult, but to conduct a study that would be representative of a broad enough cross-section of workers from different kinds of industries, unions, and employer campaigns would require an extremely large sample and a very labor intensive survey process, with the probability of a very small return rate. So instead, most research involves individual voter studies that poll unorganized workers about how they think employers would react to an organizing attempt.

Some critics have raised questions as to the reliability of union organizers as a data source. This question is answered by the consistency of our findings over time and by the fact that the organizer findings have been confirmed repeatedly by NLRB decisions and transcripts, primary campaign documents, first contracts, and newspaper reports. Also, it is simply not possible to use employers as an alternate source. As we have demonstrated in previous studies, the overwhelming majority of employers are engaging in

at least one or more illegal behaviors (at minimum 75% of the employers in the current sample are alleged to have committed at least one illegal action). Not only would it be next to impossible to get employers to complete surveys in which they honestly reported on illegal activity, but that kind of question would not be permitted by university institutional review boards since it might put the subjects at risk of legal action. Our past survey research has shown that surveying lead organizers, combined with collecting supporting documentary evidence (such as employer and company campaign literature, newspaper articles, campaign videos, unfair labor practice documents, and on-line information about company strategy, ownership, and financial conditions) is a reliable method for answering these questions. We decided, however, that we would impose an even higher standard on the research data. Instead of sending out a one-time FOIA request to the NLRB based on whatever surveys were returned and accepting whatever documents we received, we made it a priority to get all available unfair labor practice documents for every case in our sample whether or not a survey was returned. This then would be the first comprehensive database examining the current practice of the NLRB in processing ULP charges, all the way from charge sheets through court decisions. Equally important, for those cases where we had both survey data and unfair labor practice data, we would be able to analyze the relationships between employer behavior, election outcomes, and the processing of ULP charges, and the implication of these relationships for the labor law reform debate.

Surveys were completed for 562 of the 1,004 cases in the sample, for a response rate of 56% (**Table 1**). We refer to these data as our "survey data" and the full sample of 1,004 cases as the "NLRB election sample." Furthermore, we were able to collect corporate ownership structure information—such as parent company name and base country; non-profit or for-profit status; whether the company is publicly or privately held; countries or regions of sites, operations, suppliers and customers; whether other units or sites are unionized—for all of the cases, and at least partial financial information for 75% of those in our sample. We also ran summary statistics across several key variables, such as union and industry, to ensure that the sample was representative of the population of all NLRB certification elections in units of 50 or more voters that took place in 1999-2003 (BNA Plus 2003; 2004).

Unfair labor practice documents

We collected unfair labor practice documents from the NLRB for two purposes. First, we wanted to know whether the same trends we were finding in the most egregious behavior in the organizer surveys would reflect the most common allegations found in the ULP charges filed and upheld in whole or in part in settlements and NLRB dispositions. Second, we wanted to document NLRB practice and function in processing ULP charges in the current organizing climate, and the implications that their current methods and practices have for labor law reform.

Our goal in this process was to collect the full spectrum of ULP documents relating to each election in our sample. To do this, we first obtained data from the NLRB Case Activity Tracking System (CATS) to prepare a Freedom of Information Request for all legal documents relating to unfair labor practices tied to the elections in our sample. The request specifically included charge sheets, letters of withdrawal, no merit determinations, settlement agreements, complaints, Administrative Law Judge decisions, NLRB decisions, court decisions, and all other related documents for the elections in our sample. For those cases that had been closed because more than six years had passed, we requested and received the charge sheet and a letter from the NLRB outlining the disposition of the case.[7] Once surveys had been returned, we also sent an amended FOIA request that included all the cases in our survey sample where organizers reported a ULP charge had been filed but the ULP did not show up in the CATS database, either because of a change in the company name or a data-entry error in the database. We have gotten responses from every region of the NLRB, covering 99% of our original FOIA request sample and 98% of the amended request from the survey sample.[8]

Given the extent of the ULP documents received, it might seem that they, rather than organizer survey responses, should be used as the sole or preferred measure of illegal employer behavior. However, as previous research has shown (Bronfenbrenner 1997b; 2000; Compa 2004) while unfair labor practice prosecutions can help

TABLE 1

Summary data from NLRB election survey and unfair labor practice data collection

	All years	1999	2000	2001	2002	2003
Number of elections in total sample	1,004	248	218	198	174	165
Percent of total sample	100%	25%	22%	20%	17%	17%
Percent win rate in sample	45	41	45	43	47	48
Survey data						
Percent surveys returned	56%	50%	49%	64%	55%	67%
Percent by mail	39	48	39	43	33	32
Percent by phone	26	27	23	21	26	32
Percent by Web	33	22	38	34	38	33
Percent by fax	2	2	1	2	3	3
Percent win rate for returns	47	47	49	44	53	45
ULP data – full sample						
Percent of sample with ULP charges	40%	32%	44%	40%	43%	42%
Total response rate from FOIA (for all elections with ULP charges)	98	100	98	96	96	96
Percent full documents received	57	23	41	65	84	78
Percent partial documents received	21	34	33	13	11	13
Percent ULP charges confirmed but documents reported destroyed	14	39	12	7	0	0
Percent still awaiting NLRB response	5	5	10	9	4	4
Percent no records found	3	0	4	6	1	4
ULP data – sample with survey responses						
Percent of sample with ULP charges	39%	28%	41%	38%	47%	27%
Total response rate from FOIA (for all elections with ULP charges)	98	100	99	96	97	96
Percent full documents received	58	19	41	65	85	76
Percent partial documents received	21	38	33	17	7	15
Percent ULP charges confirmed but documents reported destroyed	11	36	12	6	0	0
Percent still awaiting NLRB response	7	6	10	6	7	4
Percent no records found	4	0	4	6	2	6

SOURCE: Bronfenbrenner's survey of NLRB elections 1999-2003; Bronfenbrenner's analysis of NLRB ULP documents, 1999-2003 NLRB election sample.

capture the nature and intensity of employer opposition to union activity, and while monitoring ULPs over time can help track changing patterns in employer behavior, ULPs are inadequate for measuring the totality of employer behavior.

First, unions are hesitant to file charges when there is a high probability that they are going to win the election because the employer can use the ULP charges to indefinitely delay or block the election. Even in the case of discharges for union activity (one of the most egregious

ULPs), unions often wait until after the election (as long as it is within the six-month filing period) to see if they are able to negotiate reinstatement before filing a charge. Given the long time that it takes to litigate a ULP case to conclusion, and the relatively weak relief available even for employees who ultimately win their cases, the statutory scheme does not provide strong incentives for workers to pursue such charges. As Lance Compa (2004, 68) explains:

> In practice, many discriminatory discharge cases are settled with a small back-pay payment and workers' agreement not to return to the workplace. At a modest cost and with whatever minor embarrassment comes with posting a notice, the employer is rid of the most active union supporters, and the organizing campaign is stymied.

Alternatively, in cases where the union lost the election badly, organizers reported to us that they had considerable difficulty getting workers to come forward and testify because they were afraid of retribution from the employer. Furthermore, workers are keenly aware that even in cases with egregious employer violations, the most likely penalty is a posting and a small amount of back pay, which could take more than two years from filing the charge to a final Board decision to collect (Organizer interviews 2008; Compa 2004). Therefore, the incentive to pursue such cases is limited.

And finally many union ULP victories are not captured in NLRB or court determinations but rather in informal settlements that occur after charges are filed but before the merit determination (the issuance of a formal complaint by the NLRB's general counsel) takes place, or after the election as part of the first contract process. Thus, with less than half of all illegal employer violations captured by ULPs, they are best used in combination with other measures to assess the totality of the changing nature of employer opposition.

The decline of organizing under the NLRB

In 1970, 276,353 workers organized through NLRB elections. There were a total of 7,733 elections that year. The win rate was 55%, and 49% of the eligible voters eventually gained union representation. Outside of several thousand railway and airlines employees who would have organized that year under the Railway Labor Act, and construction and entertainment industry workers who have rarely organized through the traditional NLRB process due to the short-term nature of their employment markets, those 276,353 workers represented close to the totality of the private-sector workforce organizing that year (Pavy 1994). The 1970s also saw the beginning

TABLE 2

NLRB representation elections, 1999-2007

Year	Number of elections	Percent win rate	Number of eligible voters	Number in elections won	Percent of voters in elections won
1999	3,108	52%	243,720	106,699	44%
2000	2,826	53	212,680	93,346	44
2001	2,361	54	193,321	68,718	36
2002	2,724	59	189,863	72,908	40
2003	2,351	58	150,047	77,427	52
2004	2,363	59	166,525	84,838	51
2005	2,137	61	125,305	64,502	52
2006	1,657	61	112,598	59,841	53
2007	1,510	61	101,709	58,376	57

SOURCE: BNA Plus 2003; 2008.

of the first big wave of organizing in the public sector. Although there are no official records of the total number of public-sector workers organized in the 1970s, we can assume that at least 50,000 to 100,000 new public-sector workers were added each year. Still, the majority of workers who organized into unions did so through the NLRB (Bronfenbrenner and Juravich 1995).

By 1987, when I conducted my first study of employer behavior, unions won only 1,610 elections out of 3,314 (49%), and the number of workers organized under the NLRB had plummeted to 81,453 (Pavy 1994). The NLRB as a means to organize was already in grave danger.

Twenty years later in 2007, the number of workers newly obtaining union representation through all possible mechanisms averaged somewhere between 600,000-800,000 workers a year.[9] At least 400,000 are public sector, 7,000-25,000 are under the Railway Labor Act depending on the year, and the rest are in the private sector. But as explained in **Table 2**, a diminishing portion, now less than 20%, of new workers organized in the private sector are using the means established for them by law to organize—the National Labor Relations Act.

In 2007, out of 101,709 workers who voted in NLRB elections, only 58,376 workers wound up with union representation. For years fewer and fewer workers have tried to use the NLRA, and fewer have been successful.[10] That is not to say that hundreds of thousands of workers, if not millions, are not trying to organize under the NLRB. To the contrary, many begin the NLRB process but eventually give up along the way because the odds are so stacked against them. Based on these findings and those discussed above, we conclude that the certification election process, as established by the Taft-Hartley Act and as it has been enforced by the NLRB and the courts, has failed to function as the legislation was originally intended. As mentioned earlier, opinion polling has consistently shown that the majority of private-sector workers want unions, but they do not see a safe and viable means to get representation (Freeman 2007; Hart 2005). Without reform, the NLRA no longer serves as a viable mechanism for workers to obtain union representation. Our findings explain why this is so.

Threats, interrogation, promises, surveillance, and retaliation for union activity

Over the last two decades there has been a gradual evolution in employer tactics during NLRB certification election campaigns. In the 1970s and 1980s, employers took the initiative, hiring consultants and pulling together many of the basic elements of the anti-union "tool-kit" that still make up the core of most employers' strategies today. But these tactics have not remained constant. Over time they have changed in both sophistication and intensity as employers adapted to changing economic, trade, and investment climates as well as changes in the political and regulatory environment. Similarly, as unions made strategic responses to these same changes, employers responded in kind with new initiatives to counter them.

Table 3 provides summary statistics on the full range of employer behavior data we collected in the NLRB survey. These findings capture the breadth and extent of employer opposition to organizing while also suggesting how employers continuously capitalize on the changing environment and use it to their advantage. We have grouped these tactics into the following categories: threats, interrogation, and surveillance; fear, coercion, and violence; retaliation and harassment; promises, bribes, and improvements; election interference; and public campaigns.

In combination, these numbers reveal a chilling pattern. First, they show that the overwhelming majority of employers—either under the direction of an outside management consultant or their own in-house counsel—are running aggressive campaigns of threats, interrogation, surveillance, harassment, coercion, and retaliation. Second, these tactics, both individually and in tandem, are part of a highly sophisticated, carefully crafted strategy that has withstood the test of time.

Under the free speech provisions of the NLRA, employers have control of the communication process, and as shown in Table 3, in today's organizing climate they take full advantage of that opportunity to communicate with their employees through a steady stream of letters, leaflets, emails, digital electronic media, individual one-on-one meetings with supervisors, and mandatory captive-audience

TABLE 3

Employer tactics in NLRB elections, 1999-2003

	Percent or mean of elections	Election win rate when employer tactic: used	Election win rate when employer tactic: not used
Employer mounted a campaign against the union	96%	48%	72%
Hired management consultant	75%	43%	52%
Employer use of threats, interrogation, and surveillance			
Held captive audience meetings	89%	47%	73%
Number of meetings	10.4	-	-
More than 5 meetings	53%	47%	48%
Mailed anti-union letters	70%	46%	59%
Number of letters	6.5	-	-
More than 5 letters	28%	49%	45%
Distributed anti-union leaflets	74%	46%	59%
Number of leaflets	16.2	-	-
More than 5 leaflets	61%	46%	51%
Used E-mail communications	7%	49%	53%
Used anti-union DVDs/videos/Internet	41%	39%	57%
Held supervisor one-on-ones	77%	48%	56%
One-on-ones at least weekly	66%	48%	54%
Used them to interrogate workers	63%	49%	51%
Used them to threaten workers	54%	49%	50%
Used any type of surveillance	14%	58%	48%
Used electronic surveillance	11%	57%	49%
Attempted to infiltrate organizing committee	28%	44%	51%
Interrogated workers about union activity	64%	49%	52%
Threatened cuts in benefits or wages	47%	51%	48%
Threats of plant closing	57%	45%	53%
Actually closed plant after the election	15%	56%	44%
Threatened to file for bankruptcy	3%	63%	49%
Filed for bankruptcy	0%	50%	50%
Threatened to report workers to INS	7%	34%	51%
Actually referred workers to INS	1%	17%	50%
Made random document checks	3%	56%	49%
Fear, coercion, and violence			
Employer used events of 9/11 or national security	2%	57%	50%
Used guards, put up security fencing, or cameras	14%	50%	50%
Brought police into the workplace	21%	46%	51%
Police arrested workers on site	0%	0%	50%
Employer instigated violence and blamed union	7%	45%	50%
Retaliation and harassment			
Discharged union activists	34%	49%	50%
Number discharged	2.6	-	-
Workers not reinstated before election	29%	47%	72%

cont. on page 11

TABLE 3 (CONT.)

Employer tactics in NLRB elections, 1999-2003

	Percent or mean of elections	Election win rate when employer tactic: used	Election win rate when employer tactic: not used
Other harassment and discipline of union activists	41%	55%	49%
Transferred pro-union activists out of the unit	5%	64%	49%
Laid off bargaining unit members	5%	50%	50%
Number laid off	32.6	-	-
Contracted out bargaining unit work	3%	71%	49%
Number of jobs contracted out	34.0	-	-
Alteration in benefits or working conditions	22%	49%	53%
Promises, bribes, and improvements			
Granted unscheduled raises	18%	49%	50%
Made positive personnel changes	27%	47%	51%
Made promises of improvement	46%	44%	54%
Used bribes and special favors	22%	47%	51%
Held company social events	16%	50%	50%
Established employee involvement program	15%	39%	50%
Upgraded health & safety conditions	7%	43%	50%
Promoted pro-union activists	11%	57%	49%
Election interference			
Solicitation/distribution rules	10%	43%	50%
Employer used NLRB-like front group	11%	54%	49%
Assisted anti-union committee	30%	41%	53%
Public campaign			
Ran media campaign	12%	43%	51%
Use free mass media	8%	35%	51%
Purchased time on paid media	3%	41%	50%
Involved community leaders/politicians	6%	46%	50%
Other tactics			
Distributed pay stubs with dues deducted	23%	42%	52%
Distributed union promise coupon books	22%	44%	51%
Held raffles relating to union dues	3%	32%	50%
Filed ULP charges against the union	3%	80%	49%
Filed election objections	8%	91%	46%
Intensity of employer campaign			
Number of tactics used	10.9	-	-
No tactics used	6%	72%	48%
Weak campaign (1-4 tactics)	10%	65%	35%
Moderate campaign (5-9 tactics)	30%	40%	52%
Aggressive campaign (10 or more tactics)	54%	45%	55%

SOURCE: Bronfenbrenner's survey of NLRB elections, 1999-2003.

meetings with top management during work time. Nearly 90% of employers use captive audience meetings, holding on average 10.4 meetings a year. Seventy-seven percent hold supervisory one-on-ones, and two-thirds hold them at least weekly throughout the campaign.

But this is nothing new. For years these tactics have been the primary means through which companies make their case against unions (Bronfenbrenner 2000; 2004). What stands out about these data is what they tell us about how the tactics are being used. These data provide additional insight into the critical role played by supervisor one-on-ones as the primary means through which employers deliver threats and engage in interrogation. As shown in Table 3, employers use supervisor one-on-ones to threaten workers for union activity in at least 54% of campaigns and to interrogate workers about their union activity and that of coworkers in at least 63% of campaigns. In addition to interrogation, 14% of employers use surveillance, primarily electronic (11%), and 28% of employers attempt to infiltrate the organizing committee in order to learn more about union supporters and activity.

Table 3 shows that these threats take many forms. Fifty-seven percent of employers make plant closing threats, and 47% threaten wage or benefit cuts. In 7% of all campaigns—but 50% of campaigns with a majority of undocumented workers and 41% with a majority of recent immigrants—employers make threats of referral to Immigration Customs and Enforcement (ICE).

We also confirmed new tactics involving fear, coercion, and violence that organizing directors say are increasingly common. They include such actions as bringing in security guards, putting up fencing, and putting in security cameras (14%), bringing in police to walk through the plant (21%), or instigating violence and trying to put the blame on the union (7%). However, despite the substantial number of police walkthroughs, none of the cases in our survey sample included any arrests, which makes the use of the police appear to be merely one more coercive strategy rather than reflecting any legitimate security concern.

In combination, these more aggressive coercive actions—threats of plant closure, referrals to ICE, benefit cuts, police walk-throughs, turning the workplace into an armed camp—send a clear message to workers: those who choose to move forward with the union do so at great personal risk. Employers send an even stronger message when they follow through on their threats with direct retaliation and harassment for union activity, such as when they actually refer workers to ICE (7% of all units with undocumented workers); discharge workers for union activity (34%); issue suspensions, written warnings, close supervision, and verbal abuse (41%); alter benefits or working conditions (22%); order layoffs (5%); contract out (3%); and transfer workers (5%). It is a message heard well beyond the workplaces where the organizing campaigns take place, discouraging not only the voters in that particular campaign, but holding back others from even attempting to get a campaign off the ground (Hart 2005).

In addition to punitive strategies, employers continue to use softer, less overtly coercive tactics such as promises of improvement (46%); bribes and special favors (22%); the use of social events (16%); or the use of employee involvement programs (15%). These tactics have commonly been the reward for supporting or cooperating with the employer campaign, and in the past they have been among the most effective employer strategies (Bronfenbrenner 1994; Rundle 1998). But it seems that in the current climate, such promises play a less central role because, as I have found in my research on global outsourcing, employers are willing and able to risk being more ruthless in their treatment of workers because they face fewer regulatory, economic, and social repercussions for doing so (Luce and Bronfenbrenner 2007; Bronfenbrenner 2000).

Employers also engage in tactics that directly interfere with the union campaign. The most common of these is assisting the establishment of an anti-union committee (30% of the campaigns). At least 10%[11] of employers illegally issue rules for union communications and distribution of union materials that are different from rules applied to other organizations and activities, while 11% have individuals who pose as agents of the NLRB spread misinformation among workers.

In this study's data, most of the more extreme employer tactics—supervisor one-on-ones at least weekly, police walk-throughs, plant closing threats, promises, bribes, or assisting the anti-union committee—are associated

TABLE 4

Changes in frequency and intensity of employer tactics over time

	Proportion of elections tactics employed in:			
	1986-87	*1993-95*	*1998-99*	*1999-2003*
Hired management consultant	72%	82%	76%	75%
Employer use of threats, interrogation, surveillance				
Held captive audience meetings	82%	93%	92%	89%
Average number of captive audience meetings	5.5	9.5	11.6	10.4
Mailed anti-union letters	80%	78%	70%	70%
Average number of letters	4.5	5.4	6.7	6.5
Used E-mail communications			6%	7%
Distributed anti-union leaflets	70%	81%	75%	74%
Average number of leaflets	6.0	10.8	13.3	16.2
Held supervisor one-on-ones	79%	82%	78%	77%
Used electronic surveillance		13%	6%	11%
Used anti-union DVDs/videos/Internet		63%	54%	41%
Threats of plant closing	29%	50%	52%	57%
Actually closed plant after the election	2%	4%	1%	15%
Threatened to report workers to INS/ICE		1%	7%	7%
Retaliation and harassment				
Discharged union activists	30%	32%	26%	34%
Workers not reinstated before election	18%	21%	23%	29%
Other harassment and discipline of union activists			9%	41%
Alteration in benefits or working conditions		27%	17%	22%
Promises, bribes, and improvements				
Granted unscheduled raises	30%	25%	20%	18%
Made positive personnel changes		38%	34%	27%
Made promises of improvement	56%	64%	48%	46%
Used bribes and special favors		42%	34%	22%
Held company social events	4%	28%	21%	16%
Established employee involvement program	7%	16%	17%	15%
Promoted pro-union activists	17%	16%	11%	11%
Other tactics				
Assisted anti-union committee	42%	45%	31%	30%
Ran media campaign	10%	9%	5%	12%
Intensity of employer campaign				
Number of tactics used by employer	5.0	8.2	7.2	10.9
No tactics	0%	3%	3%	6%
More than 5 tactics	38%	78%	63%	82%
More than 10 tactics	0%	26%	20%	49%

SOURCE: See Bronfenbrenner (1994) for the 1986-87 study, Bronfenbrenner (1997b) for the 1993-94 study, and Bronfenbrenner (2000) and Bronfenbrenner and Hickey (2004) for the 1998-99 study .

with union win rates several percentage points (between 5 to 7) lower than in campaigns where they are not used. Compared to my previous studies, this gap between the win rates when tactics are utilized and when they are not has been closing (except for the most extreme tactics). This difference is most likely explained by the fact that employers are now sophisticated enough in their opposition strategies that they can often discourage union formation even without having to use these most aggressive tactics, thus only resorting to them for campaigns in which they feel the union has a good chance of winning.

Changes in frequency and intensity of employer tactics over time

Table 4 presents data on the key tactics most commonly used by employers from our studies conducted over the last 20-plus years. These include data from this study as well as 1986-87 (Bronfenbrenner 1993), 1993-95 (Bronfenbrenner 1996), and 1998-99 (Bronfenbrenner 2000). Although on the whole we find the same list of tactics—a combination of threats, interrogation, promises, surveillance, and retaliation for union activity—that employers have used for the last two decades, we find in the last several years there has been certain shifting of focus, scale, and intensity in employer campaigns. Although the use of management consultants, captive-audience meetings, and supervisor one-on-ones has remained fairly constant, more recently we have seen an increase in more coercive and retaliatory tactics such as plant closing threats and actual plant closings, discharges, harassment and other discipline, surveillance, and alteration of benefits and conditions. At the same time employers are not bothering as much with promises of improvements, as we see a gradual decrease in tactics such as granting of unscheduled raises, positive personnel changes, bribes and special favors, social events, and employee involvement programs.

With the exception of plant closing threats (which nearly doubled by increasing from 29% in 1986-87 to 57% today) and discharged workers not being reinstated before the election (which gradually increased from 18% in 1986-87 to 29%), most of the increase in more coercive tactics occurred in the period since our last study. Discharges for union activity have increased from 26% to 34%, alterations in benefits or working conditions have increased from 17% to 22%, and other harassment and discipline of union activists from 9% to 41%.[12]

In contrast, the decline for the softer tactics began in the late 1980s or early 1990s, continuing through the present. Most of these tactics, including the granting of unscheduled raises, promises of improvement, and social events, dropped 10 to 2 percentage points, but some, including bribes and special favors, decreased as much as 20 percentage points. It seems that most employers feel less need to bother with the carrot and instead are going straight for the stick.

Yet the employer behavior data tell a story that is more complex than simply a shift toward more coercive tactics. Our new findings also show a consistent pattern across the data, namely that threats, interrogation, surveillance, harassment, and retaliation were the most common tactics across all the campaigns surveyed.

As Administrative Law Judge (ALJ) Paul Bogas describes in his decision regarding Rugby Manufacturing, these patterns are not random. Rugby's anti-union campaign began after management was alerted to union activity and in response, "called its managers and supervisors together for a special Saturday meeting at which the attendees were instructed on techniques for discerning who was a union supporter."[13] Managers and supervisors were encouraged to casually broach the subject of unionization with their employees "in hopes that the employees would reciprocate by divulging their own sentiments" (Rugby 2002, 3). The results of these "conversations" were recorded on a chart detailing the contacts Rugby supervisors made with employees regarding the union.

Rugby "also engaged in frequent anti-union lobbying of individual employees" sometimes two or more times a day (Rugby 2002, 4). The engineering manager of the facility "gave daily anti-union speeches at the facility and stated that he was afraid the Respondent would close down if the employees unionized" (Rugby 2002, 4). Other managers and supervisors "warned employees that there could be negative repercussions if they discussed the Union among themselves" (Rugby 2002, 4). The consolidated complaints issued against Rugby included serious labor law violations such as "terminating two employees, laying off 16 employees, and refusing to recall 15 of the laid-off employees" because of union activity and to

discourage further union activity, offering a promotion to the leading rank-and-file union activist (which he turned down), and "prohibiting employees from discussing union matters during company time, threatening employees regarding such discussions, maintaining a no-solicitation policy, and engaging in coercive interrogation" (Rugby 2002, 1). Given the intensity and aggressiveness of the employer campaign, it is not surprising that the Steelworkers lost the election 48 to 31 on November 30, 2000, just one month after they petitioned for the election.

The most important part of the Rugby story is not the most dramatic—the discharges and layoffs—but rather the full arc of the employer's plan, which in fact started not with the meeting with the supervisors, but as Bogas points out in his decision, with its aggressive union-free policy. This policy was clearly outlined in the employee handbook, and read out loud to all new employees upon hiring. It made it clear that unions would not be tolerated, laying the groundwork for the aggressive and intense effort that followed. But the model that Rugby and so many others of these campaigns adopt is one in which the priority task of frontline supervisors is to ascertain through whatever means possible the leanings of every worker and then use the more aggressive retaliatory tactics to sway those leaning toward unionization.

A case such as Rugby reminds us of the great deficiencies of the regulatory regime under which private-sector workers organize in this country. The United Steelworkers did file multiple unfair labor practices at Rugby for the discharges, interrogation, no solicitation policy, threats, layoffs, and denial of recall. It took a year to finally get a consolidated complaint, another year before the ALJ decision, and it was not until January 2003 (more than two years after the election) that the ALJ decision was finally enforced. The decision is what by NLRB standards would be considered "favorable" for the workers and the union. Rugby was found to have violated the NLRA on all charges except one of the discharges, and so was ordered to offer full reinstatement and a back pay award totaling more than $217,000 to be divided up among the 16 workers who lost their jobs (one discharged and the rest laid off and not recalled). In addition, Rugby had to post a notice in all its facilities stating it would cease and desist from all such violations from that point forward.[14] However, in a case like this, where two years had gone by before the final NLRB decision, most laid-off workers had had to leave town to find employment and weren't coming back. Ultimately, only one of the 16 union activists was reinstated, and the union was unable to win a second election. In July 2007, six years after the workers first tried to organize at Rugby, they did win representation with a different union (NLRB Reports 2007), but 15 out of 16 workers who had been wrongfully terminated for leading the first organizing effort at Rugby, and had to move out of town to even find another job, never obtained union representation at Rugby.

The Rugby story comprises the key elements of our new survey findings. Employer campaigns have become more coercive, with an early emphasis on interrogation and surveillance to identify supporters, followed by threats and harassment to try to dissuade workers from supporting the unions, moving then to retaliation against employees who continue to move forward with the union campaign. Employers may still use promises, wage increases, social events, and other softer tactics, but with much less frequency and not as the focus of their campaigns.

Unfair labor practice findings

Unions filed unfair labor practice charges in 39% of the survey sample and 40% of the NLRB election sample (that was constructed by combining the CATS data and our FOIA request to the NLRB). For the surveys a total of 926 total allegations were filed in all ULP charges combined, while for the full NLRB sample the total number of allegations totaled 1,387.[15] The 39% ULP rate is higher than the 33% rate we found in our 2000 study, but that is not surprising given the increase in more egregious employer anti-union behavior (e.g., discharges and wage/benefit cuts), which can result in actual financial settlements rather than simply notice postings. Still, if we focus on the most common and serious employer anti-union tactics—threats, interrogation, surveillance, harassment, alteration of wages, benefits and/or working conditions, assistance or domination of the anti-union committee, and discharges or layoffs for union activity—the survey results suggest that unions file ULP charges in fewer than half the elections where serious labor law violations occur.

TABLE 5

Total number and percent of allegations filed in returned surveys and full election sample

Allegations	Total allegations in returned surveys	Percent in allegations in returned surveys	Total allegations in sample	Percent allegations in sample
Assistance or domination	12	1%	13	1%
Coercive statements and threats	173	19	248	18
Denial of access	8	1	12	1
Destroying authorization cards	1	0	1	0
Discipline for union activity	66	7	95	7
Discharge for union activity	161	17	265	19
Disparagement	8	1	13	1
Weingarten rights	2	0	2	0
Harassment	41	4	57	4
Imposing onerous assignments	40	4	50	4
Interrogation	79	9	123	9
Lawsuits for union activity	0	0	1	0
Layoff for union activity	11	1	23	2
Misrepresentation	1	0	1	0
Other rules	20	2	31	2
Polling employees	11	1	16	1
Promise of benefits	35	4	58	4
Refusal to hire	3	0	4	0
Retaliation for board participation	21	2	30	2
Solicitation/distribution rules	44	5	66	5
Statements of futility	23	2	34	2
Surveillance	57	6	90	6
Suspension for union activity	46	5	63	5
Violence	1	0	2	0
Wages or benefits altered for union activity	54	6	79	6
Withholding promotions	2	0	2	0
Bribery	1	0	2	0
Impressions of surveillance	3	0	3	0
Refusal to furnish information	1	0	1	0
Refusal to recognize (Not Gissel)	1	0	1	0
Subcontracting unit work	0	0	1	0
Total allegations	926	100	1,387	100

SOURCE: Bronfenbrenner's analysis of NLRB ULP documents, 1999-2003 NLRB election sample.

The reasons workers and unions do not use the NLRB process to file charges every time a serious violation occurs are inherent in the process itself. As the Rugby case demonstrated, it is a process fraught with delays and risks to the worker, with extremely limited penalties for the employer, even in the most extreme cases. In a case where

there are just one or two serious allegations, especially if those allegations involve serious 8(a)1 violations (such as threats, surveillance, interrogation) but have no financial penalties, then the risks and benefits of such filings must be weighed each time against the impact they could have on the election. For example, ULPs were not filed in 32% of the elections with serious anti-union tactics in units where the election was won. That is most likely because filing charges can hold up the election for many months if not a year or more. Thus, except in the case of the most egregious violations (e.g., serious harassment, threats of referral to ICE, multiple discharges, or violence), unions typically wait until after the election to file charges. And if the election is won, unions often file charges only on 8(a)3 violations that cannot be negotiated or settled with the employer as part of the first contract process.

Table 5 describes the nature and extent of the total allegations filed in both the returned surveys and the full sample of 1,004 elections.[16] It presents a wide spectrum of employer behaviors, but one that is extremely consistent between the full sample and the survey data, thus reinforcing the representativeness of the survey sample.

The most common allegations are coercive statements and threats (19% of the allegations filed in the survey sample, 18% of allegations filed in the NLRB sample) and discharges for union activity (17% of allegations in the survey sample, 19% of allegations in the NLRB sample). The threats include threats of job loss, wage and benefit cuts, transfers, referrals to ICE, violence, contracting out, sexual harassment or any other kind of coercive statement or action. Other common allegations include interrogation (9%), other disciplinary actions (7%), surveillance (6%), wages or benefits altered for union activity (6%), solicitation distribution rules (5%), suspension for union activity (5%), harassment (4%), imposing onerous assignments (4%), and the promise of benefits (4%).

Table 6 presents the final disposition of the ULPs for the full NLRB election sample.[17] Twenty-six percent of ULPs were withdrawn before merit determination, and 23% were found to have no merit. Fourteen percent were settled in whole or in part before merit determination in either formal or informal settlements. These pre-complaint settlement agreements normally include some kind of posting, listing 8(a)1 violations and one or more 8(a)3 violations, and a back-pay award (though typically without reinstatement). But that does not mean they are for minor violations. In most of these agreements the postings include a recitation of the same combination of

TABLE 6

Disposition of unfair labor practice charges for full NLRB election sample

Disposition	Percent of allegations in NLRB election sample
Withdrew before merit determination	**26%**
No merit	**23**
Settlement in whole or in part prior to merit determination	**14**
Complaint issued	**37**
Withdrew prior to hearing	*2*
Settlement in whole or in part prior to hearing decision	*18*
ALJ decision (loss)	*1*
ALJ decision (Upheld in whole or in part)	*1*
Board Order (Upheld in whole or in part)	*9*
Board (loss)	*3*
Federal Court (loss)	*0*
Federal Court Order (Upheld at in whole or in part)	*3*

SOURCE: Bronfenbrenner's analysis of NLRB ULP documents, 1999-2003 NLRB election sample.

threats, interrogation, discharges, surveillance, and solicitation rules that make up most of the complaints. The difference is that these employers decided to settle with the union rather than have the NLRB general counsel issue a complaint, and these workers and their union representatives decided to take the settlement rather than risk either not getting a complaint or waiting a year or more for an ALJ decision.

Forty-five percent of unfair labor practice charges filed in the full sample resulted in either a settlement by the employer or a favorable decision by the NLRB or the courts.[18] In 14% of the cases, the employer settled before a compliant was issued and in 37%, the NLRB issued a complaint. Additionally, another 18% of complaints were settled before the ALJ decision. Once a complaint has been issued, a higher percentage of employers settle and a higher percentage of those settlements involve full back pay and offers of reinstatement as well as postings because, as our data show, once a case makes it past a complaint, only a very small percent lose. As a result, there is a great incentive for the employer to settle at this stage. However, there is equal pressure on the worker to settle because, as Table 6 shows, even though only 1% of ALJ decisions are lost, only 1% are enforced at the ALJ level. The remainder of filings are appealed to the NLRB or the courts, often taking as much as two to three years to be resolved. In most prehearing settlements, some but not all workers are offered reinstatement, or workers are offered some but not all of their back-pay. The workers' alternative is to wait the full year or more for the ALJ decision, and as these data show, in most cases to wait for the appeal to the full NLRB.

We found several cases in our sample where the ALJ recommended a Gissel bargaining order, but in each case, the NLRB reversed the decision. The most dramatic of these was Abramson LLC, where the violations committed by the employer were so severe that they led Administrative Law Judge Lawrence W. Cullen to decide that a Gissel bargaining order should be issued retroactive to when the union first obtained majority status through signed authorization cards. He found there were "hallmark violations committed by [Abramson] including threats of plant closure and job loss, and threats of loss of substantial benefits by the elimination of transportation benefits, hotels, expense money, and per diems on out of town assignments." Furthermore, these threats and actions emanated "from the highest level of management and resulted in a substantial reduction in Union support as evidenced by the overwhelming loss of support for the Union on election day from the peak of 54 cards signed in support of the Union" (345 NLRB No.8, 23-24 (2005)).

If the company had not appealed the ALJ decision to issue the Gissel order, bargaining would have commenced within 10 days of Cullen's decision. Instead the workers waited three more years only to have the NLRB overturn the bargaining order and instead order a second election. Part of the basis for the NLRB's decision was that in three cases with "more serious and more pervasive unfair labor practices," a bargaining order was not issued and traditional remedies were used instead. The NLRB reasoned that Abramson's conduct was not bad enough to warrant a bargaining order if previous cases with worse behavior relied on traditional remedies and the running of a second election (345 NLRB No.8, 7 (2005)). The second election was lost.

The decision on which ULPs to settle and which to take to a higher level is partially determined by the type of allegation because, as shown in **Table 7**, certain types of allegations are much more likely to be found to have merit either singly or in combination with other allegations.

The job loss and wage and benefit change allegations have the highest bar to overcome in the merit determination process, most likely because they both require individual workers to come forward and testify and also because those workers have to prove two things. First, that the employer is aware of their union activity, and second, that their union activity is the reason for the discipline, layoff, benefit cut, or changed working conditions. But even if they make it past that phase, these cases tend to be pushed toward non-precedent making settlements rather than ALJ or NLRB decisions, in part because workers cannot afford to wait that long for reinstatement, and the back-pay quickly loses its value once money earned on other jobs is deducted. But the decisions also suggest that the bar to achieving a full NLRB win keeps being raised higher and higher each year, and that the NLRB is increasingly likely to dismiss the serious allegations relating

TABLE 7

Allegations by disposition for full NLRB election sample

	Pre-merit loss		Pre-merit settlement	MERIT DETERMINED—Complaint issued								
Allegations	*% Withdrew before*	*% No merit*	*% Settled before, in whole, or in part*	*% Withdrew after*	*% Settled after in whole or in part*	*% ALJ Loss*	*% ALJ upheld in whole or in part*	*% Board loss*	*% Board upheld in whole or in part*	*% Court loss*	*% Court order upheld in whole or in part*	*Total loss*	*Total with charges settled or upheld in whole or in part*
Coercive statements & threats	30%	17%	13%	1%	21%	1%	1%	2%	11%	0%	4%	**50%**	50%
Interrogation	26	11	14	3	29	1	0	3	7	0	5	**45**	55
Polling employees	56	13	13	6	13	0	0	0	0	0	0	**75**	25
Promise of benefits	25	18	18	4	27	0	2	2	4	0	0	**49**	51
Surveillance	25	20	16	2	17	0	0	3	8	1	7	**52**	48
Impressions of surveillance	33	0	67	0	0	0	0	0	0	0	0	**33**	67
Other rules	13	13	20	3	10	0	0	13	13	0	13	**43**	57
Solicitation/ distribution rules	13	14	14	2	27	2	2	0	14	0	14	**30**	70
Statements of futility	21	6	21	3	36	0	0	0	9	0	3	**30**	70
Bribery	50	0	50	0	0	0	0	0	0	0	0	**50**	50
Disparagement	17	8	17	0	0	17	0	8	33	0	0	**50**	50
Harassment	23	30	23	2	11	0	0	2	9	0	0	**57**	43
Assistance or domination	23	31	8	0	15	0	0	0	15	0	8	**54**	46
Discharge for union activity	27	36	10	2	14	0	1	3	7	0	0	**68**	32
Discipline for union activity	16	30	15	3	17	1	0	5	8	0	4	**56**	44
Suspension for union activity	24	33	13	3	17	0	0	2	8	0	0	**62**	38
Layoff for union activity	30	26	9	0	13	0	0	9	13	0	0	**65**	35
Wages or benefits altered	31	23	17	0	15	0	1	0	13	0	0	**54**	46
Imposing onerous assignments	33	25	17	2	13	0	0	2	4	0	4	**63**	38
Retaliation for board participation	23	30	13	7	10	0	0	10	7	0	0	**70**	30

SOURCE: Bronfenbrenner's analysis of NLRB ULP documents, 1999-2003 NLRB election sample.

to threats of job and benefit cuts or serious interrogation, harassment, and coercion, while sustaining the accusations around more minor solicitation and distribution rules, promises, and less coercive threats.

The timing of employer anti-union activity

Another indication of the increased intensity of employer opposition is the timing of when ULP charges are filed. As described in **Table 8**, 22% of all ULPs were filed before the election petition was filed, and 16% were filed more than 30 days before the petition was filed. Thus, we find that nearly a quarter of the discharge ULPs (24%) were filed before the petition, and 16% were filed more than 30 days before the petition. Similarly, 19% of ULPs relating to threats were filed before the petition, including 14% filed more than 30 days before, while 24% of interrogation ULPs, 31% of the assistance and domination ULPs, 16% of the surveillance ULPs, 25% of the solicitation/distribution rules ULPs and 17% of the alteration of wages and benefit ULPs were filed more than 30 days before the petition was filed for the election.

Recognizing that the behaviors listed in the ULP charge had to have occurred days if not weeks before the

TABLE 8

Percent of allegations filed prior to the petition being filed

Allegations	Percent of allegations filed prior to petition	Percent of allegations filed before 30 days prior to petition	Percent of allegations filed within 30 days prior to petition
Assistance or domination	31%	31%	0%
Coercive statements and threats	19	14	5
Denial of access	25	25	0
Discharge for union activity	24	16	8
Discipline for union activity	25	18	7
Disparagement	17	17	0
Harassment	26	16	10
Imposing onerous assignments	18	13	5
Interrogation	29	24	5
Layoff for union activity	14	5	9
Misrepresentation	50	0	50
Other rules	45	41	4
Polling employees	13	13	0
Promise of benefits	14	10	4
Refusal to hire	25	0	25
Retaliation for board participation	3	0	3
Solicitation/distribution rules	30	25	5
Statements of futility	9	6	3
Surveillance	26	16	10
Suspension for union activity	24	17	7
Violence	50	50	0
Wages or benefits altered for union activity	20	17	3
All allegations	23	16	6

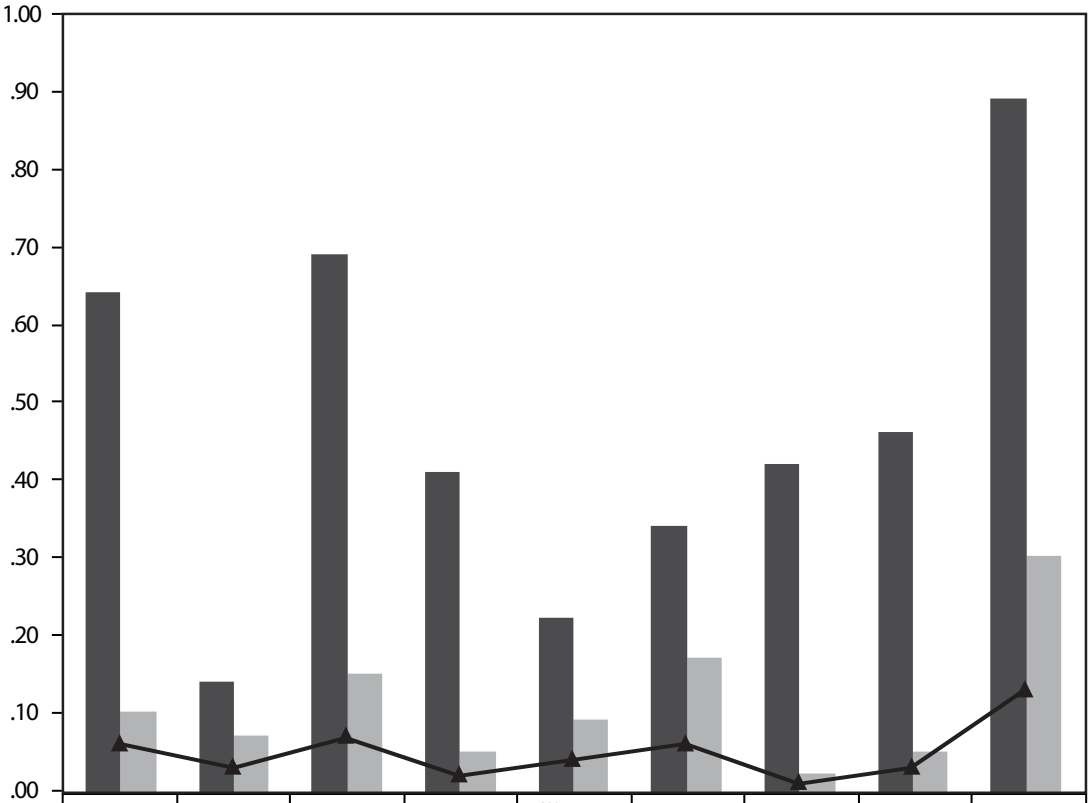
SOURCE: Bronfenbrenner's analysis of NLRB ULP documents, 1999-2003 NLRB election sample.

actual charge was filed, these data confirm not only that a significant amount of employer opposition is in place very early in many union campaigns, but that employer campaigning does not depend on an election petition to kick into effect.

Ultimately, this brings us back from the ULP data to the employer behavior data. For it is important to remember the difference between the extent of employer opposition documented by union organizers, and those violations they chose to file charges on with the NLRB, and then again, what, if anything, they gained from filing those charges even when they prevailed. **Figure A** compares the most serious illegal employer behavior reported on the survey: interrogation, threats, harassment and other discipline, alterations in wages, benefits, or conditions for union activity, discharges for union activity, assistance or domination of union, promises of benefits, and all serious allegations.[19] Although as shown in Figure A,

FIGURE A

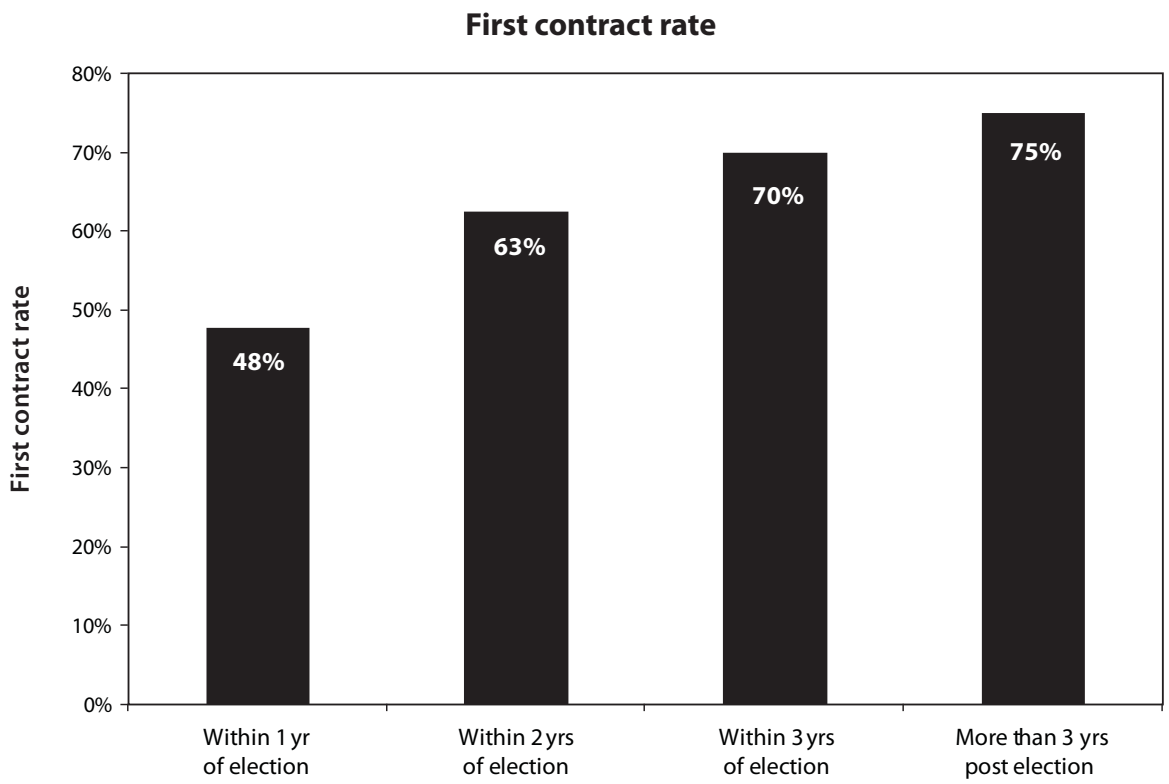
Survey responses, ULP allegations, and ULPs settled or upheld by elections in survey sample



	Interrogation	Surveillance	Threats	Harassment	Wages or benefits altered	Discharge	Assistance or domination	Promise of benefits	All Allegations
Percent reported on survey	.64	.14	.69	.41	.22	.34	.42	.46	.89
Mean elections where at least one allegation filed	.10	.07	.15	.05	.09	.17	.02	.05	.30
Mean elections where at least one allegation upheld or settled	.06	.03	.07	.02	.04	.06	.01	.03	.13

SOURCE: Bronfenbrenner's survey of NLRB elections, 1999-2003; Bronfenbrenner's analysis of NLRB ULP documents, 1999-2003 NLRB election sample.

FIGURE B



SOURCE: Bronfenbrenner's survey of NLRB elections, 1999-2003.

the employer tactics and the charges filed followed the same pattern, unions failed to file charges in more than half of the elections where they reported that employers committed serious labor law violations. The allegations were upheld or settled in whole or in part in fewer than half the ULPs that they filed.

As these data have shown, the choice not to use the NLRB process is a rational one. Already discouraged by threats, harassment, and retaliation in the organizing campaign itself, workers have good reason to believe they are at risk, yet they can expect little gain even if they do prevail.

Even if the union succeeds in making it through the hoops of fire that it takes to win the election, **Figure B** shows that it will be many years before a union ever obtains a collective bargaining agreement. Within one year after the election, only 48% of organized units have collective bargaining agreements. By two years it increases to 63% and by three years to 70%. Only after more than three years will 75% have obtained a first agreement. Given that many workers had to wait many months—if not years—to schedule an election, they should not have to wait years to get a first contract.

For all the effort they go through, we know that fewer than 60,000 workers end up in a unit where an election is won, and fewer than 40,000 in a unit with a first contract. Worse yet, for many it is a process that can take as long as three to five years of threats, harassment, interrogation, surveillance, and, in some cases, job loss.

But it does not have to be this way. We know from the last two decades of United States public-sector organizing experience that there are alternative models in place to help us develop a framework that can make it possible for private-sector workers in the U.S. to organize without going through the trial by fire that they now endure. **Table 9** displays the stark contrast between employer behavior under the NLRB and employer behavior in state and local elections and card check certifications in the public sector (in this case New York, Minnesota, Florida,

TABLE 9

Comparison of employer opposition in public and private-sector campaigns

	Percent of elections	
	NLRB 1999-2003	***Public 1999-2003***
Election campaigns	100%	83%
Election win rate	45%	84%
Card check campaigns	0%	17%
Card check win rate	-	100%
No employer campaign	4.0%	48%
Hired management consultant	75%	23%
Employer use of threats, interrogation, and surveillance		
Held captive audience meetings	89%	22%
Number of meetings	10.4	9.47
Mailed anti-union letters	70%	21%
Number of letters	6.54	2.64
Distributed anti-union leaflets	74%	22%
Number of leaflets	16.2	4.1
Held supervisor one-on-ones	77%	26%
One-on-ones at least weekly	66%	2%
Used them to interrogate workers	63%	20%
Used them to threaten workers	54%	15%
Used E-mail communications	7%	14%
Attempted to infiltrate organizing committee	28%	6%
Threatened cuts in benefits or wages	47%	14%
Used electronic surveillance	11%	2%
Used anti-union DVDs/videos/Internet	41%	1%
Made plant closing threats	57%	3%
Actually closed plant after the election	15%	0%
Fear, coercion, and violence		
Used guards, put up security fencing, or cameras	14%	5%
Brought police into the workplace	21%	6%
Retaliation and harassment		
Alteration in benefits and working conditions	22%	3%
Discharged union activists	34%	3%
Other harassment and discipline of union activists	41%	13%
Laid off bargaining unit members	5%	1%
Number laid off	32.6	5
Contracted out bargaining unit work	3%	5%
Number of jobs contracted out	34	1

cont. on page 24

TABLE 9 (CONT.)

Comparison of employer opposition in public and private-sector campaigns

	Percent of elections	
	NLRB 1999-2003	***Public 1999-2003***
Promises, bribes, and improvements		
Established employee involvement program	15%	9%
Made positive personnel changes	27%	9%
Made promises of improvement	48%	12%
Granted unscheduled raises	18%	7%
Promoted pro-union activists	11%	2%
Used bribes and special favors	23%	2%
Held company social events	16%	1%
Other tactics		
Assisted anti-union committee	30%	8%
Used media campaign	12%	7%
Involved community leaders/politicians	6%	8%
Intensity of employer campaign		
Number of tactics used by employer	10.9	2.7
Employer used no tactics	6%	53%
Employer ran a weak campaign (1-4 tactics)	10%	25%
Employer ran a moderate campaign (5-9 tactics)	30%	14%
Employer ran an aggressive campaign (10 or more tactics)	54%	7%

SOURCE: Bronfenbrenner's analysis of Public Sector Survey data 1999-2003.

New Jersey, California, Illinois, and Washington). Five of the states in our sample—New York, New Jersey, California, Illinois, and Washington—have both card check and election certification of ballots.

In 48% of the public-sector campaigns, the employer did not campaign at all—no letters, no leaflets, no meetings. The entire decision was left up to the workers and the union. The remaining 52% of public employers did use some of the same tactics as private employers, but on an entirely different scale. Three percent discharged workers for union activity or made unilateral changes in wages and benefits, 22% held captive audience meetings, and 2% held supervisory one-on-ones at least weekly. Not surprisingly, both win rates and first contract rates continue to remain much higher in the public sector, averaging 84% overall. But in the few cases where unions are faced with moderate or aggressive employer opposition, the win rate plummets, suggesting that they are ill-prepared for the kind of opposition that has become routine under the NLRB.

Conclusion

When examined in combination, the survey data and the ULP data confirm what many U.S. workers already know: Our labor law system is broken. Polling consistently shows that a majority of workers believe they would be better off if they had a union in their workplace (Teixeira 2007), but they also feel that they would be taking a great risk if they were to try to organize (Hart 2005). They know intuitively what our data show—that the overwhelming majority of U.S. employers are willing to use a broad arsenal of legal and illegal tactics to interfere with the rights of workers

to organize, and that they do so with near impunity. The data show that:

- 57% of employers threaten to shut down all or part of their facilities;
- One-third of employers fire workers for union activity during NLRB certification campaigns;
- 47% threaten to cut wages or benefits;
- 28% attempt to infiltrate the organizing committee;
- 14% use surveillance;
- 22% offer bribes and special favors;
- 89% of employers require their workers to attend captive-audience meetings during work hours;
- 77% had supervisors regularly talk to workers one-on-one about the union campaign, with a focus on threats of plant closings, wage and benefit cuts, and job loss; and
- More than 60% use one-on-one meetings to interrogate and harass workers about their support for the union.

This combination of threats, interrogation, surveillance, and harassment has ensured that there is no such thing as a democratic "secret ballot" in the NLRB certification election process. The progression of actions the employer has taken can ensure that the employer knows exactly which way every worker plans to vote long before the election takes place. In fact, as our data show, many of the employer campaigns were in full swing more than a month before the petition was even filed. Although most of these actions are illegal, the penalties are minimal, usually a posting of a notice, at worst back-pay (maybe with interest and reinstatement for a fired worker), and a re-run election. Even the most serious penalties—reinstatement for fired workers, or Gissel bargaining orders—are all too often recommended by the ALJ and the General Counsel only to be reversed by the full NLRB. There are no punitive damages or criminal charges, and no extra penalties for repeat offenders. The most serious penalty—a bargaining order—simply gets the union to the first contract process, in which the anti-union campaign often continues unabated or even escalates.

Social scientists study patterns. As a researcher who has closely examined the NLRB organizing process for more than 20 years, I find the patterns of employer behavior appear deeply carved into our legal framework and employment practices. They have become so deeply engrained that we as a society have begun to accept illegal behavior as the norm, and for a long time now many workers have become resigned to the fact that no branch of government was going to listen to their pleas that the system was not just broken, but that it was operating in direct violation of the law.

In recent years, however, there seems to be a growing awareness of the failings of the law. In the three years we spent doing the work to collect and analyze data, Congress has begun considering far-reaching legislative reforms. We believe that our findings can help inform that debate and support policies that could make the NLRA once again a labor law regime private-sector workers can rely on to exercise their right to organize.

The first reform is the passage of the Employee Free Choice Act (EFCA). EFCA would provide a means to streamline the burdensome and terrifying obstacle course that the organizing and first contract process has become, while also offering more substantive penalties for the most egregious employer violations. Under EFCA, the NLRB would be required to automatically certify the union if the majority of the employees in a unit signed authorization cards designating the union as their bargaining representative. It would also establish a process for at least 30 days of mediation and then arbitration if one of the parties feels that continued bargaining is futile after at least 90 days of trying to reach an agreement.

EFCA would also create stronger penalties for labor law violations during organizing and first contract campaigns. These include making it a priority for the NLRB to seek federal court injunctions for discharges, discrimination, threats, and other interference with workers rights during organizing and first contract campaigns. It also triples back-pay awards and provides for civil fines of up to $20,000 per violation for willful or repeat violations.

But EFCA is just a first step in putting in place a labor policy that reestablishes workers' rights to organize. We had a labor law on our books for the last 20 years that U.S. employers have violated with impunity. And the same employers who are violating the NLRA are often in violation of health and safety, wage and hour, civil rights, and other employment and labor law standards. EFCA is a start to giving workers back their rights and protections under our labor and employment laws, but it will be up to Congress, policy groups, scholars, unions, concerned citizens, workers, and, yes, employers, to make sure that our regulatory agencies and the laws they enforce are once again living up to their legislative and historical mission to protect the rights of U.S. workers. Our country cannot afford a system where the only unionized workplaces are where workers are tough, brave, and lucky enough to make it through the campaign.

Appendix: source and methodology overview

The prior research that informs and shapes this report includes four in-depth national studies of NLRB certification elections in 1986-87, 1994, 1993-95, 1998-99, and research on elections, card checks, and voluntary recognitions in state and local units in the public sector in a national sample covering all states in 1991-92 (see below). Combined, this research makes up the only extant national data on legal and illegal employer behavior during union election campaigns over time, controlling for election environment, company characteristics, union tactics, and bargaining unit demographics. By examining the effectiveness of the NLRB in enabling workers to exercise their rights to organize and in restraining illegal employer and union behavior during the organizing process, my research found that employer opposition has reduced the ability of workers to organize under the NLRB. For comparative purposes I also conducted similar research looking at state and local elections in the public sector.

This report is the product of my most recent study, which set out both to update my earlier work and expand on it by doing a full Freedom of Information Act Request (FOIA) from the NLRB for all unfair labor practice documents relating to the elections in our sample. In combination these data allow us to provide an in-depth examination of the nature and extent of employer opposition to worker efforts to organize under the NLRB, and the functioning of the unfair labor practice charge process in dealing with that behavior. I conclude that both the intensity and changing character of employer behavior, as well as the fundamental flaws in the NLRB process, have left us with a system where workers who want to organize cannot exercise that right without fear, threats, harassment, and/or retribution.

For the 1986-87 data and analysis, see Bronfenbrenner (1994; 1997a). For 1993-95, see Bronfenbrenner (1997b), and for 1994, see Bronfenbrenner and Juravich (1998). For data and analysis of 1998-99, see Bronfenbrenner (2000) and Bronfenbrenner and Hickey (2004). For the public-sector study of 1991-92 data, see Juravich and Bronfenbrenner (1998) and Bronfenbrenner and Juravich 1995. For the purposes of this paper I will be focusing on data from the 1993-95 study rather than the 1994 study because they overlap, and the 1993-95 study was more comprehensive.

Endnotes

1. See Bronfenbrenner (1994) for the 1986-87 study, Bronfenbrenner (1997b) for the 1993-94 study, and Bronfenbrenner (2000) and Bronfenbrenner and Hickey (2004) for the 1998-99 study.
2. Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing. The Earthgrains Company and BCTWGM, 9-CA-3872; 9-CA-33901, October 27, 2007.
3. See this paper's Appendix for details.
4. The other parts of the study look at organizing under the Railway Labor Act (RLA), private-sector elections, voluntary recognitions, and card check campaigns that occur outside the NLRB process, and state and local elections and card check certifications in the public sector for seven states: Minnesota, Illinois, Florida, Washington, California, New Jersey, and New York. The RLA and non-board data analysis will be completed later this year, while the data analysis for the public sector has been completed and we will include some of those findings in this paper for comparative purposes.
5. See Bronfenbrenner (2005) at http://works.bepress.com/kate_bronfenbrenner/14 for summary statistics on the population and a complete discussion on how the data for the population were compiled. We chose 1999-2003 to include some years before the economic downturn and to allow at least three years for the parties involved in all elections in the sample to process election objections and attempt to bargain a first contract. We limit the sample to units with 50 or more eligible voters so there would be enough data to analyze the full spectrum of variables we are examining. A question might be raised as to whether that would impact on the representativeness of the ULP data for the overall population. We did examine the relationship between unit size and number of ULPs, and did not find any consistent pattern between the size of the unit and the number or nature of the ULPs filed.
6. The only unions underrepresented in the returned surveys were independent unions, in particular local independent unions (23% return rate for local independents, 33% for national and state independents). This was because, for quite a few of the local independents, the only listing we had from the NLRB was simply "LIND," so we had no contact information. Even for those with contact information, many of the small independents went out of existence after losing the election, and there was no listing or person to contact. We do believe, however, that for the national independents that we did get a representative sample, since such a high percentage all come out of the same occupations and cluster of unions, and we were able to get returned surveys from a representative cross section of the major national independent unions operating during that period, including the nurse unions, United Electrical Workers (UE), and the various security guard unions, several of which affiliated with each other during the period of our study.
7. Although we did not receive all the documents for every case, we did get complete documents for 69% of the cases with ULPs in our full sample and 74% of the returned surveys. For the remaining 29% of the total sample and 24% of the survey cases with ULPs, where the full official records would normally have been destroyed by the NLRB because more than six years had gone by, we received at least a charge sheet and a letter describing the disposition of the case, or a letter describing the charges and disposition of the case, except for eight cases in the survey sample and two additional cases in the full sample where the NLRB was unable to find any record of the case. For the 21% of those cases where the NLRB was only able to send us a charge sheet because the other records were destroyed, we then used the CA number to conduct an "Unfair Labor Practice (Complaint Case) Advanced Search" on the http://mynlrb.nlrb.gov Web site hosted by the NLRB to find out the disposition for the case. This left us only with at most 22% of the survey cases and 22% in the total ULP sample that we were missing ULP data, and of those 11% of the survey cases and 14% of the full ULP sample cases had been confirmed by the NLRB as ULPs, but they reported to us all records had been destroyed.
8. In addition to reporting out the findings from these data in this report, summary data from these documents have been entered into a searchable database that will be made available to other scholars and researchers, making this the first ever dataset of ULPs occurring during NLRB campaigns that is based on a national random sample.
9. My estimates for the number of workers organizing in the public-sector and non-board campaigns came from the data we collected to create our population for the public-sector and non-board survey sample. For the public-sector survey we collected complete data from a cross section of five states (later adding data from two other states). I used the data from the five states that are representative of the types of public-sector elections from across the country and the range of election activity to estimate that the number of new workers organized averages 400,000 a year. Similarly, I used the numbers coming in to us from the non-board survey in our sample to come up with an estimate of 250,000-300,000. NMB election numbers average between 10,000 and 25,000 per year. Thus the total number of workers organized should range between 600,000-800,000 depending on the year. My numbers are consistent with those reported by the federations.
10. Just as this report went to press, the BNA released its 2008 election update. It showed that the total number of NLRB elections increased from 1,510 to 1,579, and the win rate increased from 61% to 67%. However, the total number organized under the NLRB remained quite small at 70,511. This represents less than 20% of the estimated 400,000 workers who organize each year in the private sector.
11. The actual percentage of employers who issued solicitation/distribution rules is likely much higher than 10% because we did not include a question about solicitation/distribution under the employer behavior section of the survey, but 10% of the respondents reported on their surveys that they had filed unfair labor practice charges regarding solicitation/distribution rules that were settled or upheld by the NLRB.
12. Although the data don't show up in the table, we also found an increase in interrogation, threats of benefit cuts, harassment, and more onerous assignments, overtime, etc. We did not include specific questions in the surveys, but we did have a column for other and for comments on why the union lost the election in each of the four surveys. In addition, we had copies of primary employer campaign documents, unfair labor practice documents, and the detailed case summaries for the NAALC Trade Secretariat for the 1993-95 study (Bronfenbrenner 1996) and the U.S. Trade Deficit Review Commission for the 1998-99 study (Bronfenbrenner 2000). In combination, these data suggest a dramatic increase in interrogation, threats, discipline, harassment, and alteration of benefits and working conditions.

13. Rugby Manufacturing and USW, ALJ Decision, Paul Bogus, August 30, 2002, 18-CA-15-802; 18-CA-16154; 18-CA16475; 18-CA16008: 3.

14. Settlement Correspondence Letters dated January 22, 2003, Rugby Manufacturing, 18-CA-15802 et al.

15. The number of allegations filed per election for the survey sample ranged from 1 to 27 with a mean of 3.97 and a median of three, while the number of allegations per election for the full NLRB election sample ranged from 1 to 52 with a mean of 4.49 and a median of three. Thirty percent of all elections in both the survey sample and the full NLRB election sample had only one allegation filed, and 9% of the elections in the survey sample and 7% of the full NLRB election sample had 10 or more ULP allegations. However, two serious discharge allegations can lead to an election being overturned, while 10 vague threats would easily be dismissed. Thus, it is content rather than number of allegations that matters the most.

16. These percentages are not percent of elections but percent of the 1,387 allegations filed that we have documented records for in the 1,004 elections in our total sample and the 926 allegations filed that we have documented records for in our survey sample. The handful of allegations that appear to be relating to a contract rather than election campaign are tied to organizing campaigns that occurred in units where employers had withdrawn recognition in previously organized units, and unions were litigating those cases while simultaneously running new organizing campaigns in the same units. This table does not include cases where we know ULPs were filed but do not know the specific nature of the allegations because the records were destroyed.

17. We also ran the same data for the survey sample and compared it against the disposition numbers for the NLRB election sample and found them to be consistent across every category.

18. MIT researcher John-Paul Ferguson collected ULP data for a similar time period for his study on ULP charges from 1999-2004. Using the CATS data he made FOIA requests to the NLRB and received data confirming ULPs for 20% out of more than 22,000 ULPs (2008). The difference is not surprising given that we had a random sample of 1,004 elections rather than his much larger study, and we had full information to include with our FOIA requests on employer name, address, certification date, election date, number of eligible voters, and election outcome. In addition, we allowed enough time to send two FOIA requests to the region and then a follow up FOIA request to both the Region and NLRB Headquarters. Most important, our response rate from the NLRB was 98% from our sample, thus suggesting that our numbers more accurately capture current ULP rates. Still, despite the difference in percentages, our overall findings about the adverse impact that ULPs have on the election process serve to complement rather than contradict each other's work.

19. The term "Threats" includes all elections in which the employer made threats of plant closing, benefit cuts, and threats to report workers to INS/ICE. It also includes employer threats of filings for bankruptcy and threats made in supervisor one-on-ones. "Assistance" or "Domination" included cases in which employers assisted with the anti-union committee or used an NLRB-like front group.

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