



Dropping the Ax: Illegal Firings During Union Election Campaigns, 1951-2007

John Schmitt and Ben Zipperer

March 2009

Center for Economic and Policy Research
1611 Connecticut Avenue, NW, Suite 400
Washington, D.C. 20009
202-293-5380
www.cepr.net

Contents

Summary.....	3
Introduction.....	3
The Data and Methodology	6
The Rise of “Majority Sign-Up” or “Card Check” Organizing Strategies.....	9
Trends in Illegal Firings	11
Conclusion	17
References.....	18

About the Authors

John Schmitt is a Senior Economist and Ben Zipperer is a Senior Research Associate at the Center for Economic and Policy Research, in Washington, D.C.

Acknowledgements

The Center for Economic and Policy Research gratefully acknowledges financial support for this project from the Arca Foundation, the Public Welfare Foundation, and the Ford Foundation.

We thank Kris Warner, Rivka Deutsch, Nichole Szembrot, Pranav Vaidya, and Robert Henline for research assistance, and Dean Baker, Heather Boushey, Kate Bronfenbrenner, and Liz Chimienti for many helpful comments.

Summary

This report uses published data from the National Labor Relations Board (NLRB) to update an index, first developed by Weiler (1983) in the *Harvard Law Review* and modified by LaLonde and Meltzer (1991) in the *University of Chicago Law Review*, of the probability that a pro-union worker will be fired in the course of a union election campaign. We use the more conservative LaLonde and Meltzer methodology and also make adjustments for the rise since the mid-1990s in "majority sign-up" or "card check" organizing campaigns.

Using the Weiler (1983) and LaLonde and Meltzer (1991) methodology, we find that in the 2000s workers were illegally fired in over 1-in-4 (26 percent) of union election campaigns, up sharply from about 16 percent in the late 1990s. In 2007, the most recent year for which data is available, 30 percent of union election campaigns had an illegal firing. Pro-union workers faced about a 2.3 percent chance of being illegally fired during the course of the campaign. Even after we adjust for the effect of the rise in majority sign-up organizing campaigns, pro-union workers in 2007 appeared to have a 1.8 percent chance of being illegally fired.

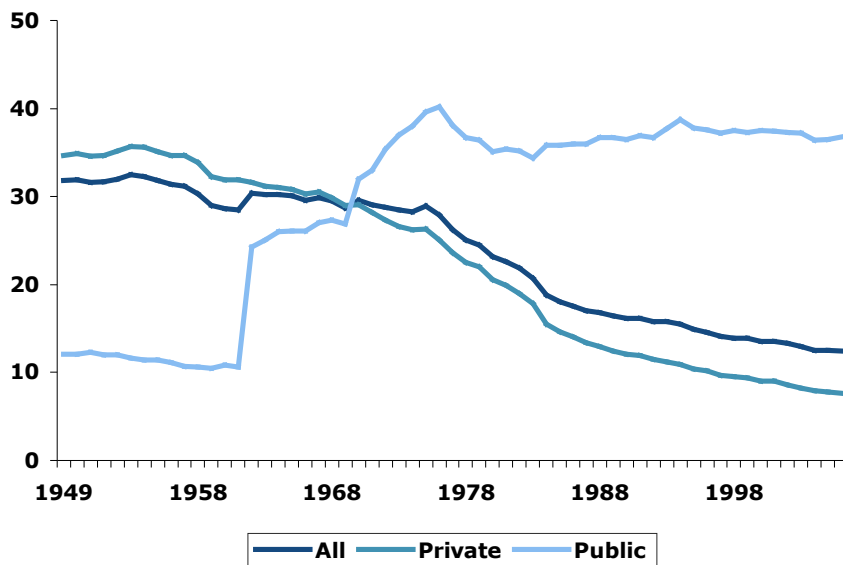
If we assume that employers target union organizers and activists, and that union organizers and activists make up about 10 percent of pro-union workers, our estimates suggest that about one-in-five union organizers or activists can expect to be fired as a result of their activities in a union election campaign. Even after we adjust for the increase in organizing campaigns not built around NLRB elections, our calculations suggest that more than one-in-seven union organizers and activists are illegally fired while trying to organize unions at their place of work.

Our findings provide significant support for the view that an important part of the decline in private-sector unionization rates (the unionization rate in the public sector has remained constant for three decades) is that aggressive—even illegal—employer behavior has undermined the ability of workers to create unions at their work places. The National Labor Relations Act (NLRA) penalties associated with illegal firings are small: back pay for illegally fired workers *minus* any earnings that workers had after they were fired. Current law has given employers a powerful anti-union strategy: fire one or more prominent pro-union employees—typically workers most involved in organizing the union—with the hope of disrupting the internal workings of the organizing campaign, while intimidating the rest of the potential bargaining unit in advance of the NLRB-supervised election.

Introduction

The share of U.S. workers in unions has been on the decline for the entire postwar period. In 1948, almost one-in-three workers (31.8 percent) was in a union; by 2008, the fraction had fallen to just one-in-eight (12.4 percent; see **Figure 1**). The drop-off in union membership has been particularly stark in the private sector, where, by 2008, only about one-in-thirteen workers (7.6 percent) was unionized, whereas more than one-in-three workers in the public sector was unionized.

FIGURE 1
Union Membership as Percent of Workforce, 1947 – 2008



Source: Labor Research Associates and Bureau of Labor Statistics

Academics, politicians, pundits, employers, union leaders, and rank-and-file union members have offered a host of explanations for the drop in unionization rates. Perhaps the most common is the decline in the importance of manufacturing employment—where unions traditionally had their strongest presence. Another frequent interpretation suggests that workers no longer see unions as useful or relevant in the new, high-tech, overwhelmingly service-sector economy.¹ One strand of this particular view argues that the leadership of the labor movement has hastened the irrelevancy of unions by failing to adapt to long-term structural changes in the economy. A final explanation argues that since about 1980, employers—with substantial legal support and cover—have engaged in a systematic attack on unions, especially on union efforts to organize new workers.²

This paper presents evidence that provides significant support for this last explanation of union decline—that aggressive, even illegal, employer behavior has undermined the ability of U.S. workers to create unions at their work places. While the NLRA makes it illegal for employers to fire workers involved in union-organizing campaigns,³ the penalties associated with "discriminatory discharges" are small: back pay for illegally fired workers *minus* any earnings that workers had after they were fired.⁴ Given these small penalties for illegal firings, the NLRA, in practice, has given employers a powerful anti-union strategy: fire one or more prominent pro-union employees—typically those most involved in organizing the union—with the hope of disrupting the internal workings of the

1 That the unionization rate has basically held constant in the public sector suggests that the decline in private-sector representation may have more to do with behavior of private-sector employers than preferences of American workers.

2 See, for example, Freeman and Medoff (1984). For an excellent history of the "union avoidance industry," see Logan (2006).

3 See Weiler (1983) for a discussion of the NLRA.

4 See Dunlop Commission (1994), Chapter 3, p. 71. In 1990, the Dunlop Commission notes, "...the average back pay award amounted to \$2,749 per discharge."

union's campaign, while intimidating the rest of the potential bargaining unit in advance of the NLRB-supervised election.

The NLRB publishes annual data on its determinations of "discriminatory discharges." In this report, we review those data and use a methodology first employed by Weiler (1983) and subsequently critiqued and modified by LaLonde and Meltzer (1991) to estimate the probability that a pro-union worker is fired in connection with a union election campaign. We also use the same data and related methods to calculate several additional indicators of employer behavior and union success in union election campaigns, including the share of union-representation elections that include an illegal firing.

According to the NLRB data, and following LaLonde and Meltzer's methodology, since about 2000, pro-union workers involved in union election campaigns have seen a substantial increase in their likelihood of being illegally fired. In the 1970s, a pro-union worker involved in a union election campaign faced about a 1-in-100 chance of being illegally fired. The probability of being fired reached its historical peak in the first half of the 1980s, with about 1-in-42 pro-union workers being illegally fired. From the second half of the 1980s through the second half of the 1990s, the likelihood of a being illegally fired declined steadily but remained high, reaching about 1-in-87 pro-union workers by the end of the period. From 2000 on, however, the likelihood that a pro-union worker would be fired in a union-election campaign has jumped sharply—to about 1 in every 52 pro-union workers.

Weiler (1983) and LaLonde and Meltzer (1991) have emphasized the probability that any pro-union worker will be fired in a union election campaign, but employers engaging in illegal firing activities will generally discharge key union activists, rather than random employees believed to be sympathetic to the union. If we assume that ten percent of pro-union workers are union activists, then we can estimate that in 2007 union activists faced more than a 20 percent chance of being fired during a union election campaign.

The same approach used by Weiler (1983), LaLonde and Meltzer (1991), and subsequently by the Dunlop Commission (1994) also allows us to estimate the share of NLRB-sponsored elections where an illegal firing took place. According to this same methodology, in 2007, workers were illegally fired in about 30 percent of NLRB-sponsored elections. The average for the period 2001-2007 was 26 percent, up sharply from about 16 percent over the period 1996-2000. Since 1951, only the period 1981-1985 had a higher rate of NLRB elections with an illegal firing (31 percent).

By the mid-1990s, unions appeared to have adapted their traditional organizing strategies to reduce the scope for an employer's ability to fire pro-union workers in an effort to derail union organizing campaigns. A key element of the new union strategy involves "majority sign-up" or "card-check" campaigns that seek union representation without a formal NLRB election. Even after we make what is probably an overly-conservative adjustment to the Weiler and LaLonde and Meltzer methodology so as to take this rise in majority sign-up campaigns into account, the NLRB data still show a substantial increase during the 2000s in illegal firings as an anti-union strategy.

The Data and Methodology

Each year, the NLRB publishes data on the progress and outcomes of a wide range of legal actions connected with the NLRA. The published data include detailed information on the outcomes of union election campaigns and investigations of "discriminatory discharges" under the NLRA.

In the early 1980s, Harvard Law School professor Paul Weiler (1983) used three decades of the NLRB's published data to estimate the probability that a pro-union worker involved in a union organizing campaign would be the victim of a discriminatory discharge. The NLRB annual reports provided data that allowed Weiler to estimate both the number of workers that were illegally fired and the number of pro-union workers involved in union election campaigns over roughly the same period of time as the discriminatory discharges. Weiler's review of the data and his particular methodology led him to conclude that, in 1980, the "...odds are about one in twenty that a union supporter will be fired for exercising rights supposedly guaranteed by federal law a half-century ago."⁵

Economist Robert LaLonde and law professor Bernard Meltzer, both of the University of Chicago, however, disputed aspects of Weiler's methodology and published an extensive critique and re-examination of the data in 1991 (LaLonde and Meltzer, 1991).⁶ The main thrust of their technical criticisms was that Weiler's methodology tended to overstate the number of workers that were discharged in connection with union-election campaigns (primarily because, in LaLonde and Meltzer's view, an important portion of fired workers were fired in contexts other than union-election campaigns). LaLonde and Meltzer suggested and implemented several changes to Weiler's methodology and concluded that the probability that a pro-union worker would be fired in connection with a union-election campaign was between 50 and 70 percent lower than originally calculated by Weiler.⁷ In 1980, for example, according to LaLonde and Meltzer, the odds were about 1-in-63 that a pro-union worker faced discriminatory discharge in connection with a union election, compared to the 1-in-20 odds calculated by Weiler from the same data.⁸

In this report, we follow the more conservative methodology proposed by LaLonde and Meltzer, and use the last 17 years of NLRB data to update their earlier work. The basic strategy involves using published data from the NLRB on "remedial actions taken in unfair labor practice cases closed," the "final outcome of representation elections in cases closed," and "valid votes cast in representation elections in cases closed" to produce annual estimates of both the number of workers illegally fired and the number of pro-union workers involved in union election campaigns. Together, these two figures allow us to calculate the probability that a pro-union worker is illegally fired in

5 Weiler, 1983, p. 1781. He continues: "Such a widespread pattern of employer intimidation has ramifications that reach far beyond the units in which discharges actually occur. It fosters an environment in which employees will take very seriously even subtle warnings about the consequences of joining a union."

6 For Weiler's response to LaLonde and Meltzer, see Weiler (1991).

7 Compare panels A and B in LaLonde and Meltzer (1991), Table 7.

8 LaLonde and Meltzer note: "Even the 1 in 63 ratio manifestly represents a serious denial of statutory rights to individual employees and a potentially serious impediment to effective union organization" (p. 992).

connection with a union election campaign.⁹ The same approach also provides an estimate of the share of NLRB-sponsored elections that had an illegal firing.

The NLRB does not report the number of workers fired illegally in connection with union election campaigns. The NLRB, however, does give the total number of cases closed each year in which a fired worker was offered reinstatement.¹⁰ Following LaLonde and Meltzer (1991, pp. 990-98), we assume that 51 percent of these cases each year corresponded to dismissals during union election campaigns.¹¹ Also following LaLonde and Meltzer, we assume that each case involved, on average, 2.2 workers.¹² In order to estimate the number of workers illegally fired during union election campaigns in 2000,¹³ for example, we first take the number of “employees offered reinstatement” in that year (1,224 cases) and multiply that number by 0.51, to find the total number of reinstatement offers that were connected to a union election campaign (624 cases). We then multiply our estimate of the total number of cases with illegal firings by 2.2 employees per case to arrive at the total number of workers illegally fired in connection with a union election campaign: 1,373.

Once we have an estimate of the total number of illegal firings connected to union election campaigns, we can easily calculate the likelihood that a pro-union worker will be illegally fired during a union election campaign. The NLRB annual reports provide detailed breakdowns of voting in union election campaigns.¹⁴ Following Weiler (1983) and LaLonde and Meltzer (1991), we take the total number of pro-union voters (in all elections, regardless of the outcome of the election) from the NLRB and use this to calculate a crude probability that a pro-union worker will be fired. Continuing with the example of the year 2000, the NLRB data show 100,815 workers voted in favor of union representation in NLRB elections.¹⁵ The ratio of 1,373 illegally fired employees to 100,815 pro-union workers in union election campaigns yields the probability that a pro-union worker is illegally fired during a union election campaign: 1.4 percent, which represents about one in every 73 pro-union workers.

Several features of the data and methodology could act to raise or lower our estimates relative to the true level of illegal firings connected to union election campaigns. The first issue is that we cannot distinguish between campaigns that culminated in an election and campaigns that were abandoned

9 Following an October 20, 2006, telephone conversation with Patricia Gilbert, Associate Director of the NLRB’s Division of Information, we have excluded as almost certainly inaccurate the extremely high illegal firings and related data from 1994.

10 We follow Weiler (1983), LaLonde and Meltzer (1991), the Dunlop Commission (1994), and others in treating cases where the union filed an 8(a)(3) violation with the NLRB and the worker or workers involved were subsequently reinstated, by third-party order or agreement of the parties, as an illegal firing.

11 LaLonde and Meltzer (1991) found that: “... 50 percent of the [NLRB’s] reinstatement orders were based on employer violations during organizational drives” (p. 990). In a subsequent footnote (134, p. 991), they indicate that the 50 percent figure was rounded from 0.51.

12 LaLonde and Meltzer base their estimate of 2.2 workers per case on a GAO review of a sample of NLRB cases. According to LaLonde and Meltzer, the GAO derived the figure “...by dividing the number of employees allegedly discharged during organizational drives (394) by the number of complaints alleging such firings (176)” (p. 991, footnote 136).

13 All NLRB data reported here refer to fiscal years of the federal government.

14 We take the rest of the data we report, including the number of pro-union voters in union election campaigns, directly from the NLRB’s Tables 13 and 14.

15 See NLRB Annual Report 2000, Table 14; of these 100,815 votes in favor of union representation, 61,466 were cast in “RC” elections where the union won; 38,539 were cast in “RC” elections where the union lost; 614 in “RM” elections where the union won; and 373 in “RM” elections where the union lost.

before an election was held.¹⁶ This feature of the data will have the effect of increasing the number of illegally-discharged workers per union election campaign since some portion of the workers were illegally fired during campaigns that did not result in an election.¹⁷ As LaLonde and Meltzer (1991) explain: “...the numerator includes discharges during all phases of an organizational campaign, whereas the denominator measures the number of organizational campaigns by the number of elections. Because not all organizing drives lead to a petition, let alone an election, the number of organizational campaigns is greater than the number of NLRB elections. Hence, the ... figure derived ... may well overstate the frequency of discriminatory discharges aimed at averting unionization” (p. 991).

Second, following LaLonde and Meltzer, we base the illegal firings calculation on all cases closed by the NLRB that involved reinstatement offers, whether those offers resulted from a third-party order or a settlement between the parties. As Weiler, LaLonde and Meltzer, and the Dunlop Commission recognized, using only cases where the NLRB ordered reinstatement would severely underestimate the true number of illegal firings since the NLRB strongly encourages parties to settle before a formal third-party decision is made. Weiler, LaLonde and Meltzer, and the Dunlop Commission may, therefore, overestimate the true number of illegal firings because some of the settlements involving reinstatement might not have been classified as illegal firings if the NLRB or other third-party made a formal ruling. At the same time, we may also understate the number of illegal firings because some illegally fired workers may choose not to file a formal complaint with the NLRB because the potential gains—eventual reinstatement and back pay (less any interim earnings)—may be small relative to the cost and inconvenience involved in pressing their case. LaLonde and Meltzer (1991) note that because of these and other “offsetting factors, estimates of the frequency of discharges in the organizational context are subject to error in both directions” (p. 990).¹⁸

A third data issue is that the NLRB procedures to handle discriminatory discharge complaints take time, often more than a year, which means that some of the cases of illegal firings that were closed in a particular year may actually reflect cases concerning employer actions taken in an earlier year. This mismatch will likely lead our estimates of illegal firings to overstate the true number in some years and understate the true number in other years. To diminish the effects of these procedural lags, we use three-year trailing averages to summarize illegal firing activity where appropriate.

Finally, our analysis applies only to workers covered by the NLRA. The NLRA does not cover public-sector workers and some workers in the private sector, most notably agricultural laborers and workers covered by the Railway Labor Act. As a result, our estimates exclude workers fired for union activity in these uncovered sectors, but also exclude pro-union workers in these sectors.

16 A related issue is the potential impact on our numbers of a decision by unions to plan organizing campaigns around “majority sign-up” or “card-check” recognition rather than an NLRB election. If unions decided to increase systematically the use of this organizing route, and employers resisted majority sign-up campaigns by engaging in illegal firings in the same way that they would have in more standard NLRB election, then our estimate of illegal firings per pro-union worker in an NLRB election would rise, even though the true probability of being fired was unchanged. Below we describe an adjustment procedure to account for majority sign-up recognition.

17 See LaLonde and Meltzer, p. 991.

18 “Settlements of charges of such firings sometimes call for the employer to reinstate one or more employees. On the one hand, such settlements presumably involve a greater likelihood of an actual violation of [NLRA section] 8(a)(3) than do cases dismissed or withdrawn. On the other hand, some charges of unlawful discrimination are presumably settled by employers even though no such discrimination occurred. Such settlements might be prompted by a desire to avoid legal expenses, reputational damage, or industrial unrest” (LaLonde and Meltzer, 1990, p. 990).

The Rise of “Majority Sign-Up” or “Card Check” Organizing Strategies

An increasing reliance on “majority sign-up” or “card-check” organizing strategies complicates both the calculation and interpretation of our findings. Beginning in the mid-1990s, unions began to adapt more aggressively and more successfully to employer “union avoidance” strategies. An important component of these strategic changes by unions was a shift away from the traditional NLRB election process toward organizing campaigns centered around “majority sign-up” recognition. In a traditional organizing campaign, unions collect signed cards from a majority of the eligible workers at an establishment asking for union representation. The union then presents these cards to management, which generally requests that the NLRB supervise an election with a secret ballot in order to verify the outcome of the union card collection. The period between the time when unions present management with the signed cards and the actual NLRB-supervised election is typically the most active period that employers engage in aggressive and illegal anti-union behavior, including illegal firings.

Employers, however, also have the option to recognize the union based only on the results of union card collection, without having to verify the results by a secret ballot. While the decision to recognize the union after majority sign-up and before a formal election resides solely with employers, unions have developed organizing strategies around bringing pressure in some cases against employers to recognize the union at the time of majority sign-up, which is often the first time that the employer learns of the workers’ efforts to organize a union. The advantages for the workers are clear, including avoiding private employer meetings, threats of plant closings, and illegal firings. The advantages for employers, even strongly anti-union employers, can also be significant, including....? This is especially true if the organizing campaign has succeeded in building a solid internal organizing structure and has managed to marshal significant outside support for the organizing campaign (for example, from community groups, religious organizations, local politicians, and others).¹⁹

The increased use of majority sign-up campaigns affects our calculations, and especially the interpretation of our calculations, in complex ways. One interpretation of the exercise here is that we are attempting to create an index of underlying employer aggressiveness with respect to unions. Our main indicator of that unobserved condition is employers’ willingness to illegally fire workers for union-organizing activity. Prior to the mid-1990s, when unions pursued NLRB-election strategies more exclusively, the incidence of illegal firings was a reasonable and consistent proxy for underlying employer aggressiveness. In the mid-1990s, however, directly in response to sustained employer aggressiveness, unions changed strategies, in part, to explicitly reduce the likelihood that employers would fire pro-union activists involved in union election campaigns.

This change in union strategy will affect both the numerator and the denominator of the ratio of illegally fired workers to pro-union workers. To the extent that the union strategy was successful, the increased use of majority sign-up campaigns after the mid-1990s will have reduced the incidence of

19 For a discussion of “union avoidance” strategies, see Levitt (1993), Smith (2003), and Logan (2006); for a discussion of threats of plant closings, see Bronfenbrenner (2000, 2001); for a discussion of the strategic response of organized labor from the 1990s on, see Bronfenbrenner, Friedman, Hurd, Oswald, and Seeber (1998) and Brudney (2005).

illegal firings. This lowers the numerator in the ratio, reducing the apparent probability that a pro-union worker will be fired illegally. The resulting decline in illegal firings under these circumstances is not the result of a decline in anti-union behavior by employers, but rather the result of an adaptive strategy used by unions. Without any modifications or reinterpretations, our simple indicator of employer aggressiveness may give misleading results after the mid-1990s swing to majority sign-up campaigns, by suggesting that anti-union behavior by employers is on the decline, when what is really happening is that unions have simply been more effective in avoiding a particular set of employer behaviors.

The new union organizing strategy will also affect the denominator of the ratio. The majority sign-up strategy has explicitly sought to avoid NLRB-supervised elections, which will have the effect of lowering the number of elections and therefore the number of votes cast in favor of unions. Since the number of votes cast in favor of unions is our proxy for the number of pro-union workers involved in organizing campaigns, the decline in the number of elections (relative to the total number of newly organized workers), all else constant, will act to increase the probability that a worker faces illegal firing conditional on supporting a union election campaign.

The net impact of these two contradictory effects is not clear. The decline in the numerator (the observed illegal firings for any given level of union-organizing effort) would bias the index toward showing diminished employer opposition; the decline in the denominator (as the share of workers casting ballots also falls for any given level of union organizing activity) would bias the index toward showing greater employer opposition to union-organizing activities.

We have several possible ways to address the issues raised by the change in the mid-1990s in union-organizing strategies. One option is to do nothing other than to clarify the meaning of our principal statistics. The procedures initially proposed by Weiler (1983) and LaLonde and Meltzer (1991), and later adopted by the Dunlop Commission (1994), continue to capture accurately the number of illegally fired workers per pro-union worker *involved in an election-based union-organizing campaign*. Unions are now less likely to take an organizing effort to an NLRB election, but when unions do pursue a more traditional election-based strategy, our statistic captures employer opposition reasonably well, and arguably as well as it always has.

A second approach involves attempting to “correct” for the decline in union elections. Below we report adjusted numbers that effectively add the estimated pro-union portion of workers involved in majority sign-up campaigns back into the total pool of pro-union workers that voted in NLRB elections. This is not entirely satisfactory, however, because while we can fairly easily add workers involved in majority sign-up campaigns back into our calculations, we don't know how also to add back in the workers who *would have been illegally fired* if the union had decided to conduct an NLRB election rather than a majority sign-up campaign.²⁰ We note that probably the best easily available estimate of these counterfactual illegal firings would be to assume that the likelihood of being fired in the absence of card check would be identical to the probability of being fired in the actual election-based campaigns that did take place. If we took this approach, however, we would end up effectively with the first option above—doing nothing—since proportional additions to the numerator and the denominator would leave the “adjusted” estimates identical to the unadjusted

20 Eaton and Kriesky (2001) "...find strong evidence that card-check agreements reduced management campaigning, as well as the use of illegal tactics such as discharges and promises of benefits, and also substantially increased the union recognition rate."

ones. In what we report below, however, we take the most conservative approach and only adjust the denominator in the main ratio of interest. We add a portion of workers involved in majority sign-up campaigns back into our estimate of pro-union workers, but make no adjustment to the number of workers who were illegally fired.²¹ This has the unambiguous effect of lowering our estimate of the probability of a pro-union worker to be illegally fired relative to not making the adjustment.

Trends in Illegal Firings

In this section, we review the historical trends in illegal firings from the early 1950s through 2007 (the most recent year for which data is available) using the NLRB data and research methodology described in the preceding sections. To cover the period before 1974, we rely on the published results from LaLonde and Meltzer (1991) and the Dunlop Commission (1994); to cover the period since, we rely primarily on our own analysis of the NLRB using a consistent methodology.²²

Table 1 and **Figure 2** show the trends in the NLRB data over approximately five-year periods from 1951 to the present.²³

21 See Appendix Table 2 and related discussion for a description of how we adjust the number of pro-union workers.

22 For the legal and institutional backdrop, see Bronfenbrenner (2000, 2001), Compa (2004), Dunlop Commission (1994), Freeman (2005), and Pope (2004).

23 Our attempt to match LaLonde and Meltzer's approach appears to have succeeded. A comparison of the first two panels of the table show a close match between LaLonde and Meltzer's original published results and our own replication of their results using the NLRB data across comparable time periods from 1974. The only differences between our numbers and those of LaLonde and Meltzer (1991) stem from rounding errors, which are exaggerated by taking the inversion of probabilities—Weiler's (1983) and LaLonde and Meltzer's (1991) preferred method of reporting their results. For example, $1/0.0125$ is 80; while $1/0.013$ rounds to 77.

TABLE 1
Illegal Firings During Union Election Campaigns, 1951-2007

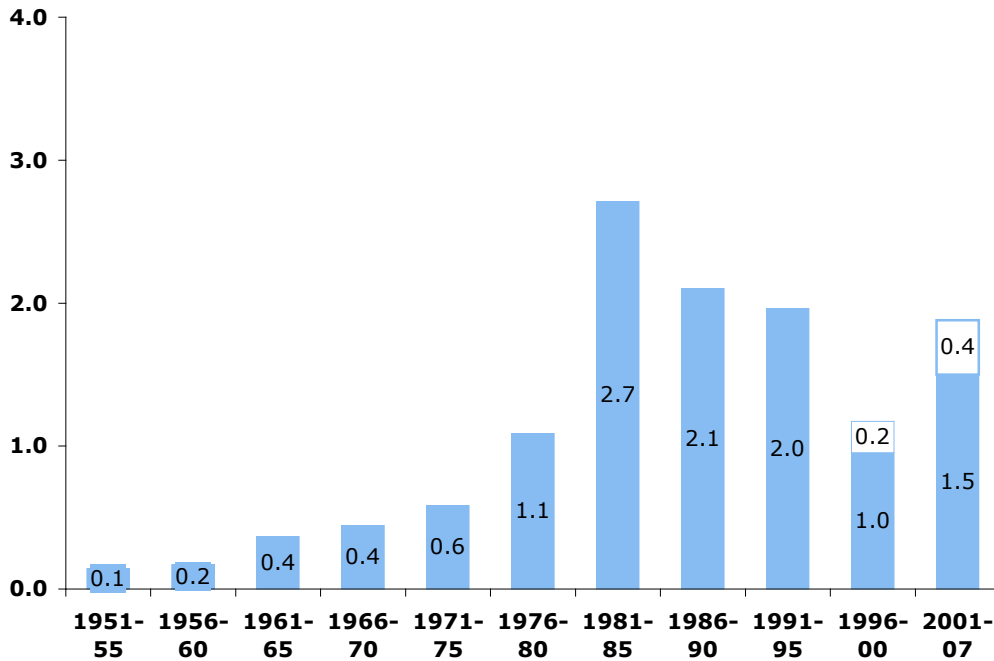
	Discriminatory Firings	Total Pro-Union Voters	Pro-Union Voters per Fired Union Supporter	Probability Pro-Union Worker Fired in Campaign (percent)	Elections with Illegal Firing (percent)	Elections Won by Unions (percent)	Elections Held by NLRB
<i>(a) LaLonde & Meltzer (1991) results</i>							
1964-69	1,371	n.a.	209	0.5	8	59	7,698
1970-74	1,342	n.a.	196	0.5	7	54	8,298
1975-79	1,942	n.a.	110	0.9	11	49	7,884
1980-84	2,812	n.a.	57	1.8	20	46	5,049
1985-88	2,483	n.a.	36	2.8	32	48	3,559
<i>(b) LaLonde & Meltzer (1991) time periods, our data</i>							
1975-79	1,942	212,708	114	0.9	11	49	7,884
1980-84	2,812	129,082	51	2.3	27	46	5,049
1985-88	2,483	90,023	40	2.8	32	48	3,559
<i>(c) Dunlop Commission (1994)</i>							
1951-55	608	n.a.	689	0.1	5	75	n.a.
1956-60	429	n.a.	584	0.2	4	59	n.a.
1961-65	1,019	n.a.	272	0.4	8	56	n.a.
1966-70	1,346	n.a.	225	0.4	8	54	n.a.
1971-75	1,473	n.a.	171	0.6	8	43	n.a.
1976-80	2,238	n.a.	92	1.1	14	37	n.a.
1981-85	2,855	n.a.	38	2.6	32	38	n.a.
1986-90	1,967	n.a.	48	2.1	25	38	n.a.
<i>(d) Our time periods, our data</i>							
1974-80	2,099	212,478	108	1.0	12	49	7,869
1981-85	2,756	107,041	42	2.7	31	46	4,339
1986-90	1,967	94,552	54	2.1	25	49	3,580
1991-95	1,606	81,751	60	2.0	24	49	3,035
1996-00	1,092	93,365	87	1.2	16	51	3,071
2001-07	1,291	67,339	52	1.9	26	58	2,251
<i>(e) Our time periods, our data, adjusted for rise in card-check</i>							
1996-00	1,092	116,356	108	1.0	16	51	3,071
2001-07	1,291	87,541	68	1.5	26	58	2,251

Notes: Authors' analysis of NLRB data, following LaLonde and Meltzer (1991), Table 7; LaLonde and Meltzer (1991), Table 7; Dunlop (1994), Exhibit III-1, following LaLonde and Meltzer (1991), Table 7. See notes to Appendix Table 1. For adjustments in (e), see Appendix Table 2 and text.

From the first period in the Dunlop Commission's analysis, 1951-1955, through the mid-1980s, (1981-1985 in the Dunlop Commission; 1985-88 in LaLonde and Meltzer), the probability that a pro-union worker would be fired during an organizing election increased by more than a factor of 25—from about a 0.1 percent chance of being fired in 1951-1955 to between 2.6 and 2.8 percent in the mid-1980s. LaLonde and Meltzer, the Dunlop Commission, and our extension of that analysis through 2007 suggest that the probability of being illegally fired peaked in the 1980s, and then fell

steadily through the last half of the 1990s, to about 1.2 percent. Our analysis, however, shows that the current decade saw a substantial resurgence in the rate of illegal firings, averaging 1.9 percent over the period 2001-2007,²⁴ or about 1-in-52 pro-union workers involved in a union election campaign. (Figure 2 combines consistent estimates from the Dunlop Commission, LaLonde and Meltzer, and our own analysis to display the average probability that a pro-union worker is fired over roughly five-year periods between 1951 and 2007. **Figure 3** presents results from our own analysis of annual data—smoothed using a three-year trailing moving average—for the period 1976-2007.)²⁵

FIGURE 2
Probability that a Pro-Union Worker is Fired During a Union Election Campaign, 1951-2007



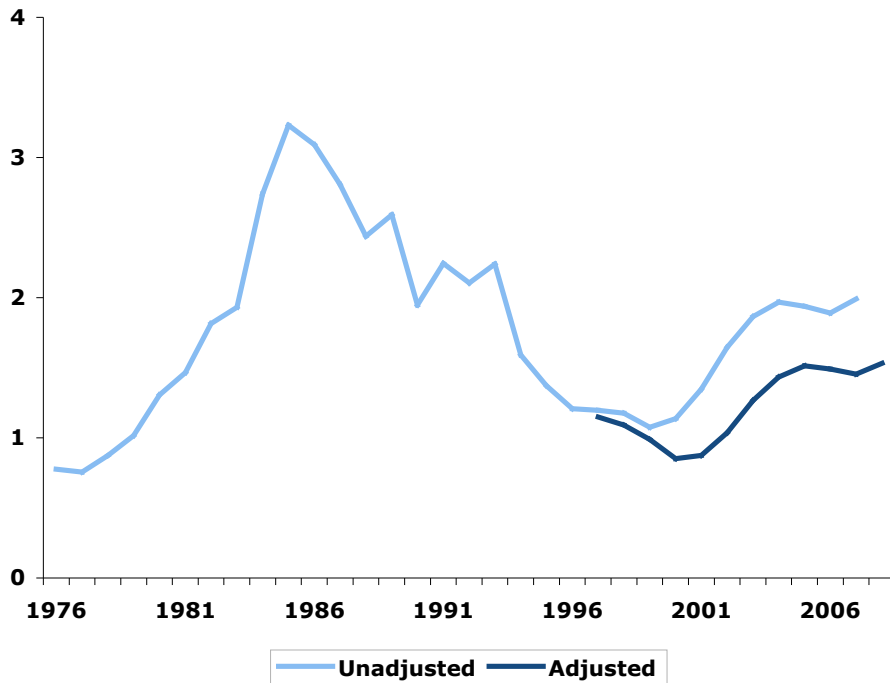
Source: Dunlop Commission (1994), LaLonde and Meltzer (1991), and authors' analysis of National Labor Relations Board data. See Table 1.

Note: The probabilities for the periods 1996-00 and 2001-07 reflect downward adjustment as indicated to account for the rise in non-NLRB election campaigns.

24 For annual data, see Appendix Table 1. The rate for 2007 jumped to 2.3 percent.

25 See Appendix Table 1 for the annual data used to produce both Table 1 and Figure 3.

FIGURE 3
Probability that a Pro-Union Worker is Fired During a Union Election Campaign, 1976-2007



Source: Authors' analysis of National Labor Relations Board data. See Appendix Table 1.

Notes: Percent, three-year trailing moving average; "Adjusted line" has been adjusted for rise in non-NLRB election campaigns.

Both Table 1 and Figures 2 and 3 also report our crude adjustment for the rise since the mid-1990s in majority sign-up organizing campaigns. Our adjustment lowers the probability that a pro-union worker will be fired in connection with a union-organizing campaign in the two relevant periods 1996-2000 (from 1.2 percent to 1.0 percent) and 2001-2007 (from 1.9 percent to 1.5 percent). The adjustment, however, does not affect the trend over time: both the adjusted and unadjusted data show a sharp climb in illegal firings in the 2000s.

Weiler (1983) and LaLonde and Meltzer (1991) have emphasized the probability that a pro-union worker will be fired in a union election campaign. Employers, however, are unlikely to fire workers randomly, or simply for expressing pro-union views. Employers maximize the return to illegal firing by focusing on union activists. If we assume that ten percent of pro-union workers are union activists, and that employers target union activists, then we estimate that over the period 2001-2007, union activists faced about a 19 percent chance of being illegally fired during a union election campaign. If union activists represent 20 percent of all pro-union workers, then the probability that an activist is illegally fired in a union election campaign would be about 9-10 percent. If union activists represent only 5 percent of pro-union workers, then the probability that an activist is illegally fired would rise to about 38 percent.

The LaLonde and Meltzer methodology also allows us to estimate the share of NLRB-sponsored elections where a worker was illegally fired for union activity. Table 1 and **Figure 4** show the estimated share of elections with illegal firings from 1951 through 2007 from the Dunlop Commission, LaLonde and Meltzer, and our own analysis of the NLRB data. In the 1950s, 5 percent

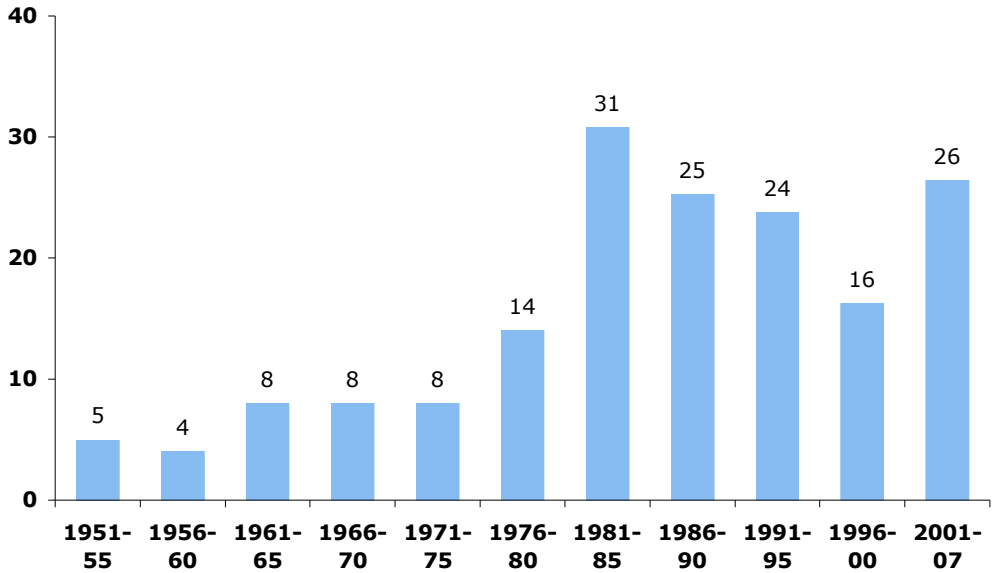
or fewer of NLRB elections had an illegal firing (Dunlop Commission). In the 1960s through the mid-1970s, the share rose to about eight percent (Dunlop Commission and LaLonde and Meltzer). In the second half of the 1970s, the share of elections with an illegal firing broke 10 percent before rising rapidly to about 30 percent in the first half of the 1980s (Dunlop Commission, LaLonde and Meltzer, and our own analysis). From the second half of the 1980s through the second half of the 1990s, the share of elections with an illegal firing fell continuously to about 16 percent. Our analysis of the most recent NLRB data, however, show a steep rise from 2001 forward, with 26 percent of NLRB-sponsored elections including an illegal firing over the period 2001-2007. As Appendix Table 1 shows, the average for 2007 was 30.4 percent, at the high end of the range seen over the 2001-2007 period. (Figure 5 displays the annual results of our own analysis based on only the most recent NLRB data.²⁶)

Our estimates are broadly in line with survey-based evidence that does not rely on the analysis of NLRB data. Bronfenbrenner (1996), for example, found firings in about one-third of a national sample of union elections that took place between 1993 and 1995. Bronfenbrenner (2000) found firings in about 25 percent of a separate national sample of union election campaigns conducted in 1998 and 1999.²⁷ Mehta and Theodore (2005) in a survey of Chicago-area organizing campaigns found employers fired pro-union workers in about 30 percent of cases.

26 Each annual observation is a trailing-three-year average to smooth year-to-year differences related to the NLRB's reporting procedures mentioned in the methodology section.

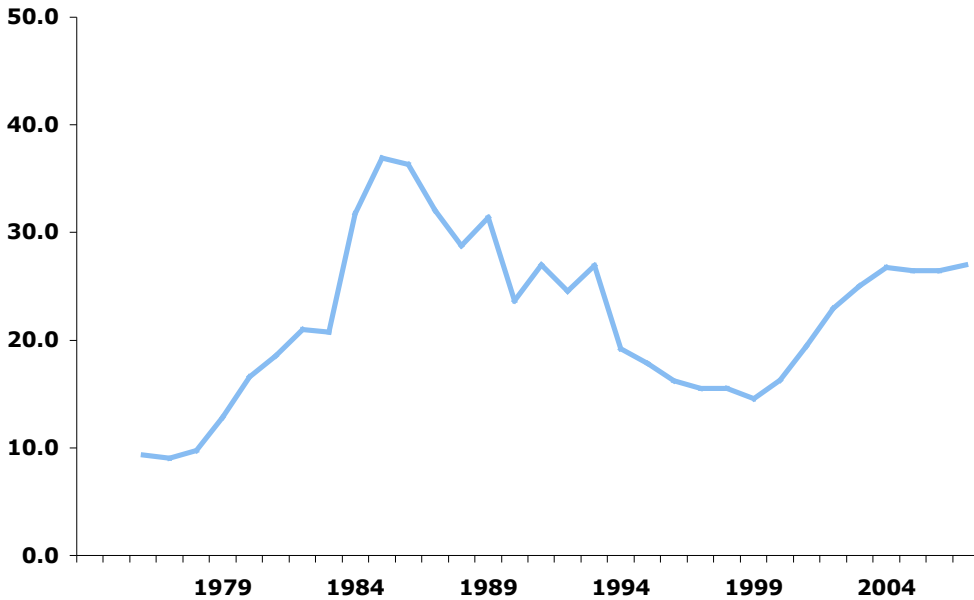
27 Bronfenbrenner (2000): "In addition to plant closing threats, one in every four employers in our sample discharged workers for union activity, while 48 percent made promises of improvement, 20 percent gave unscheduled wage increases, and 17 percent made unilateral changes in benefits and working conditions. Sixty-seven percent of the employers held supervisor one-on-ones with employees at least weekly, 11 percent promoted union activists out of the unit, 34 percent gave bribes or special favors to those who opposed the union, 31 percent assisted the anti-union committee, and 10 percent used electronic surveillance of union activists during the organizing campaign. Employers threatened to refer undocumented workers to the Immigration and Naturalization Service (INS) in 7 percent of all campaigns and 52 percent of cases where undocumented workers were present in the unit." (p. 43)

FIGURE 4
Percent of Union Election Campaigns with an Illegal Firing, 1951-2007



Source: Dunlop Commission (1994), LaLonde and Meltzer (1991), and authors' analysis of National Labor Relations Board data. See Table 1.

FIGURE 5
Percent of Union Election Campaigns with an Illegal Firing, 1976-2007



Source: Authors' analysis of National Labor Relations Board data.
 Note: Percent is a three-year trailing moving average.

Conclusion

Starting at the end of the 1970s, American employers began to engage in the systematic and widespread use of illegal firings and other aggressive legal and illegal tactics in an attempt to undermine the success of campaigns for union representation. At the peak in the early 1980s, almost three percent of pro-union workers involved in union election campaigns were illegally fired in connection with those campaigns. From that peak in the early 1980s, the rate of illegal firings fell smoothly through the end of the 1990s, though remained high by historical standards. From about 2000 on, however, the rate of illegal firings jumped sharply again. This observed increase in illegal firings holds even after we control for the rise in majority sign-up union organizing campaigns, which were often adopted in direct response to more aggressive anti-union tactics carried out by employers.

Using the conservative methodology proposed by LaLonde and Meltzer (1991), we estimate that for the period 2001-2007, pro-union workers involved in a union election campaign faced almost a 2 percent chance of being fired. After applying an inherently conservative adjustment for the effects of majority sign-up campaigns, we estimate that pro-union workers involved in union-organizing campaigns that year faced a 1.5 percent chance of being fired. Since employers have a strong incentive to fire union organizers and activists, these figures translate to very high probabilities that organizers and activists will be fired in any given unionization campaign. If one-in-ten union supporters is an activist or an organizer, for example, our calculations suggest that in the 2000s, union organizers and activists face a 15 to 20 percent chance of being illegally fired.

The same data and methodology also suggest that, over the current decade, illegal firings have marred over one-in-four NLRB-sponsored union elections, reaching 30 percent of elections in 2007 (the most recent year for which data are available).

References

- American Rights at Work. 2008. "Half a Million and Counting," <http://www.americanrightsatwork.org/publications/general/half-a-million-and-counting-20080917-654-116-116.html>, accessed February 22, 2009.
- Bronfenbrenner, Kate. 1996. "The Effect of Plant Closings and the Threat of Plant Closings on Worker Rights to Organize," Supplement to Plant Closings and Workers Rights: A Report to the Council of Ministers by the Secretariat of the North American Commission for Labor Cooperation, Dallas Texas.
- Bronfenbrenner, Kate. 2000. *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing*. Report prepared for the U.S. Trade Deficit Review Commission.
- Bronfenbrenner, Kate. 2001. *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing Part II: First Contract Supplement*. Report prepared for the U.S. Trade Deficit Review Commission.
- Bronfenbrenner, Kate, Sheldon Friedman, Richard W. Hurd, Rudolph A. Oswald, and Ronald Seeber. 1998. *Organizing to Win: New Research on Union Strategies*. Ithaca, New York: Cornell University Press.
- Compa, Lance. 2004. *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards*. Ithaca, New York: Cornell University Press.
- Dunlop, John T. 1994. *Fact Finding Report: Commission on the Future of Worker-Management Relations*. Washington, DC: U.S. Department of Labor and U.S. Department of Commerce.
- Eaton, Adrienne E. and Jill Kriesky. 2001. "Union Organizing under Neutrality and Card Check Agreements," *Industrial and Labor Relations Review*, Vol. 55, No. 1 (Oct. 2001), pp. 42-59.
- Freeman, Richard B. 2005. "What Do Unions Do? The 2004 M-brane Stringtwister Edition," National Bureau of Economic Research Working Paper 11,410.
- Freeman, Richard B. and James Medoff. 1984. *What Do Unions Do?* New York: Basic Books.
- LaLonde, Robert J. and Bernard D. Meltzer. 1991. "Hard Times for Unions: Another Look at the Significance of Employer Illegality," *University of Chicago Law Review*, vol. 58, pp. 953-1014.
- Levitt, Marty. 1993. *Confessions of a Union Buster*. New York: Random House.
- Logan, John. 2006. "The Union Avoidance Industry in the United States," *British Journal of Industrial Relations*, vol. 44, no. 4, pp. 651-75.
- Mehta, Chirag and Nik Theodore. 2005. "Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns, Center for Urban Economic Development," University of Illinois at Chicago.

- Pope, James Gray. 2004. "How American Workers Lost the Right to Strike, and Other Tales," Rutgers Law School Faculty Papers No. 3. <http://law.bepress.com/rutgersnewarkwps/fp/art3>
- Smith, Robert Michael. 2003. *From Blackjacks to Briefcases: A History of Commercialized Strikebreaking and Unionbusting in the United States*. Athens, Ohio: Ohio University Press.
- Weiler, Paul. 1983. "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA," *Harvard Law Review*, vol. 96., no. 8 (June), pp. 1769-1827.
- Weiler, Paul. 1991. "Hard Times for Unions: Challenging Times for Scholars," *University of Chicago Law Review*, vol. 58, pp. 1015-1032.

Data Appendix

Appendix Table 1 shows the annual data used to prepare Figures 3 and 5.

Appendix Table 2 summarizes the procedure used to adjust the data on pro-union workers from 1996 through 2007, a period that saw a substantial increase in non-NLRB-election organizing campaigns, in order to attempt to make the more recent data more directly comparable with the earlier data.

In Table 2, the first step is to get an estimate of the total number of newly organized private-sector workers each year, not just those organized through NLRB elections. We found three sources for this figure. One is unpublished information supplied by the AFL-CIO to Brudney (2005, footnote 45) (column one); the second are estimates for 1999 through 2003 compiled by and published in “Work In Progress,” an AFL-CIO newsletter (column two); and, third, results of a review by the American Rights at Work (2008) of organizing activities by 13 national unions (not shown in table since the data are not available broken down by year). All three sets of estimates include workers in the public sector and a few other sectors not covered by NLRB elections. In the absence of better estimates, we assume that the share of the total newly organized workers who were in the private sector, and therefore probably covered by the NLRB, was proportional to the share of private-sector workers in total union membership in the same year (column three). The resulting estimates of newly organized workers in the private sector appear in columns four (based on Brudney) and five (based on “Work In Progress”). We then take the total number of newly organized workers who were organized through NLRB elections (column six) and present this number as a share of the total estimated number of private-sector workers in each year. This gives us two sets of estimates (columns seven and eight) of the share of newly organized private-sector workers who were organized through NLRB elections. Since the data appear to be noisy and show no obvious trend, we take the average over all years of both sets of estimates and conclude that NLRB elections covered about 60 percent of potentially eligible private-sector workers over the period, leaving about 40 percent organized outside of the traditional NLRB-election procedures. We assumed that about 10 percent of workers had been organized outside these procedures in earlier years, and ended up with a scaling factor of 30 percent.

We note that both the AFL-CIO data in Brudney and the “Work in Progress” data we use have several limitations. First, the data are compiled exclusively from successful organizing campaigns, and the data do not allow us to distinguish between pro- and anti-union workers participating in successful campaigns. The NLRB data allow us to include pro-union workers from failed elections as well as to exclude anti-union workers from successful elections. Since these limitations have contradictory effects on our calculations—the exclusion of pro-union workers in unsuccessful campaigns reduces our estimate of pro-union workers, while the inclusion of anti-union workers in successful campaigns increases our estimate of pro-union workers—the net effect of this limitation on our estimates is not clear. Second, the Brudney and the “Work in Progress” data do not include information on illegal firings, including illegal firings related to card-check campaigns (for example, as is common in the building trades where high worker mobility means that unions and workers frequently choose not to pursue violations of this type). So, our proposed adjustment to the ratio of illegally fired workers to union supporters adds workers to the denominator of the ratio without making any adjustment to the numerator. The result of this limitation is to make our correction a conservative estimate of the likelihood of being fired.

We used the resulting scaling factor to produce our estimates of the probability of illegal firing by multiplying the actual number of pro-union workers in the years 1998 through 2007 by 1.3; to “phase in” the scaling factor, we multiplied the NLRB-reported pro-union workers by 1.1 in 1996 and 1.2 in 1997.

Appendix TABLE 1
Illegal Firings During Union Election Campaigns, 1974-2005

	Discriminatory Firings	Total Pro-Union Voters	Pro-Union Voters per Fired Union Supporter		Probability Pro-Union Worker Fired in Campaign (percent)		Elections with Illegal Firing (percent)	Elections Won by Unions (percent)	Elections Held by NLRB
			Un-adjusted	Adjusted	Un-adjusted	Adjusted			
1974	1,785	223,906	125	125	0.8	0.8	9.7	51.1	8,368
1975	1,719	238,774	139	139	0.7	0.7	9.7	49.6	8,061
1976	1,520	186,706	123	123	0.8	0.8	8.6	49.7	8,027
1977	1,666	226,447	136	136	0.7	0.7	8.8	48.2	8,635
1978	1,950	181,342	93	93	1.1	1.1	11.9	48.1	7,433
1979	2,853	230,270	81	81	1.2	1.2	17.8	47.2	7,266
1980	3,199	199,900	62	62	1.6	1.6	19.9	47.9	7,296
1981	2,605	166,965	64	64	1.6	1.6	17.8	45.4	6,656
1982	2,360	103,282	44	44	2.3	2.3	25.3	43.7	4,247
1983	1,472	75,610	51	51	1.9	1.9	19.2	47.7	3,483
1984	3,971	99,651	25	25	4.0	4.0	50.7	46.5	3,561
1985	3,373	89,699	27	27	3.8	3.8	40.9	46.5	3,749
1986	1,406	92,135	66	66	1.5	1.5	17.4	47.5	3,663
1987	2,755	87,696	32	32	3.1	3.1	37.8	48.5	3,314
1988	2,398	90,561	38	38	2.6	2.6	31.1	49.5	3,509
1989	2,118	106,515	50	50	2.0	2.0	25.4	49.5	3,791
1990	1,158	95,853	83	83	1.2	1.2	14.5	49.5	3,623
1991	2,870	81,214	28	28	3.5	3.5	41.0	46.9	3,179
1992	1,197	75,959	63	63	1.6	1.6	18.2	49.8	2,993
1993	1,451	90,331	62	62	1.6	1.6	21.6	50.4	3,055
1994	--	--	--	--	--	--	--	--	--
1995	905	79,500	88	88	1.1	1.1	14.1	50.4	2,911
1996	1,020	79,935	78	86	1.3	1.2	16.6	47.3	2,792
1997	1,067	91,044	85	102	1.2	1.0	15.8	50.4	3,075
1998	1,039	96,046	92	120	1.1	0.8	14.1	51.2	3,339
1999	960	98,986	103	134	1.0	0.7	13.8	53.0	3,162
2000	1,373	100,815	73	95	1.4	1.0	20.9	51.8	2,988
2001	1,409	82,403	58	76	1.7	1.3	23.6	54.2	2,714
2002	1,410	75,455	54	70	1.9	1.4	24.4	56.2	2,627
2003	1,497	74,295	50	65	2.0	1.5	27.0	56.8	2,516
2004	1,457	72,181	50	64	2.0	1.6	28.8	56.6	2,299
2005	1,169	65,551	56	73	1.8	1.4	23.4	60.5	2,267
2006	1,065	56,985	54	70	1.9	1.4	27.1	60.3	1,787
2007	1,032	44,503	43	56	2.3	1.8	30.4	59.5	1,545

Notes: Authors’ analysis of NLRB data, following LaLonde and Meltzer (1991), Table 7. The number of discriminatory discharge cases for 1982 are “not available this year due to technical problems” (NLRB, 1982 Annual Report, p. 268). The estimate here is the number of victims of discrimination offered reinstatement that year (6,332) over the average number of victims of discrimination per case over the period 1978-86 (approximately 3). The NLRB believes that the published data for 1994 contain an error (telephone conversation, October 20, 2006), and we have therefore excluded 1994. For adjustment procedure from 1996 on, see Appendix Table 2 and text.

Appendix TABLE 2**Adjustment factor for post-1995 data for decline in relative importance of NLRB elections**

	Newly organized workers		Estimated share in private sector	Estimated newly organized workers in private sector		Newly organized NLRB elections		
						Share of private sector		
	ILR	WIP		ILR	WIP	Total	ILR	WIP
1998	500,000	--	0.574	287,027	--	100,535	0.350	--
1999	600,000	474,140	0.572	342,987	271,040	112,291	0.327	0.414
2000	400,000	160,793	0.563	225,071	90,474	120,525	0.535	1.332
2001	400,000	446,039	0.560	223,975	249,754	95,408	0.426	0.382
2002	523,000	230,231	0.545	285,049	125,482	88,481	0.310	0.705
2003	400,000	140,991	0.536	214,300	75,536	87,499	0.408	1.158
Average							0.393	0.798

Addendum:

Average all	0.596
Scaling factor assuming no card check prior to 1996:	0.404
Scaling factor assuming 10 percent card check prior to 1996:	0.304

Notes: Authors' analysis. ILR refers to data from AFL-CIO cited in Brudney (2005, footnote 45) in the Iowa Law Review. WIP refers to data from the AFL-CIO's weekly publication "Work in Progress," various issues. The estimated share of newly organized workers in the private sector assumes that the share among newly organized workers is proportional to the share in the existing stock of unionized workers; data from Labor Research Association online (www.laborresearch.org) and BLS, Union Members Summary, various years.