LABOR LAW—THE NATIONAL LABOR RELATIONS BOARD'S JURISDICTIONAL POWER OVER HANDICAPPED EMPLOYEES IN SHELTERED WORKSHOPS

Catherine A. Bean
LABOR LAW—THE NATIONAL LABOR RELATIONS BOARD’S JURIS­DICTIONAL POWER OVER HANDICAPPED EMPLOYEES IN SHELTERED WORKSHOPS

INTRODUCTION

The National Labor Relations Act (NLRA) facilitates the free flow of interstate commerce by regulating employer-employee relationships. Although the jurisdiction of the National Labor Relations Board (Board) must be broad in order to carry out the purpose of the NLRA, the Board’s jurisdiction is limited to “employers” and “employees.” Because the NLRA defines these terms very broadly, the

2. Congress found that employers who denied their employees the right to organize and to bargain collectively forced employees to strike, which led to industrial strife and burdened and obstructed commerce. 29 U.S.C. § 151 (1982). Congress determined that protecting employees’ rights to organize and bargain collectively safeguarded the consistency and flow of commerce. Id. Congress set out to eliminate and mitigate obstructions and causes of obstructions of commerce. Id.
3. Congress specifically decided to allow the Board to have broad jurisdiction in order to effectuate the policies of the Act. The House of Representatives stated that the power of the Board under the . . . act in the matter of unfair labor practices is exclusive . . . . The rule of exclusive jurisdiction was developed many years ago . . . to provide for uniformity in matters of national policy under the commerce clause.
H.R. REP. No. 245, 80th Cong., 1st Sess. 40, reprinted in LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 292, 331 (1974). Furthermore, the Senate indicated that “[the NLRA] has demonstrated that . . . [due to] lengthy hearings and litigation enforcing its orders, the Board has not been able . . . to correct unfair labor practices until after substantial injury has been done.” S. REP. No. 105, 80th Cong., 1st Sess. 27, reprinted in LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 407, 433 (1974). See infra note 41 and accompanying text for a discussion of the broad discretion exercised by the Board.
4. The term “employer” is defined as including any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder, or individual, or any person subject to the Railway Labor Act [45 U.S.C. §§ 151-163, 181-188], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.
29 U.S.C. § 152(2) (1982). See infra note 56 and accompanying text for a further discussion of the definition of “employer” under the NLRA.
5. The term “employee” is defined as including
Board and court interpretations have become important in determining whether the Board has jurisdiction in a particular instance. These interpretations, however, are somewhat limited to the ordinary meaning of the terms. One area of debate arises when courts consider whether handicapped workers employed in "sheltered workshops" any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. §§ 151-163, 181-188], as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. § 152(3) (1982). See infra note 55 and accompanying text for a further discussion of the definition of "employee" under the NLRA.

6. See supra notes 4-5 and accompanying text for the definitions of "employee" and "employer" under the NLRA. See also NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944) (the broad language of NLRA definitions indicate that applicability is to be broadly determined). See infra note 7 and accompanying text for a further discussion of the court's interpretation of the broad language of the NLRA.

7. See NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). The Supreme Court stated that the broad language of the Act's definitions, which . . . reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly . . . by underlying economic facts rather than technically and exclusively by previously established legal classifications.

. . . .

It is not necessary . . . to make a completely definitive limitation around the term "employee." That task has been assigned primarily to the [Board] . . . .

Id. at 129-30. See also NLRB v. Yeshiva University, 444 U.S. 672, 693 (1980); Allied Chemical & Alkali Workers of America, Local Union 1 v. Pittsburgh Plate Glass Co., Chemical Division, 404 U.S. 157, 166-67 (1971). See supra notes 4-5 and accompanying text for a further discussion of the definitions of "employee" and "employer" under the NLRA.

8. H.R. REP. NO. 245, 80th Cong., 1st Sess. 18 (1947). The House of Representatives stated that:

An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, . . . means someone who works for another for hire . . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished . . . . Congress intended . . . that the Board give to the words not far-fetched meanings but ordinary meanings.

Id. See also Allied Chemical & Alkali Workers of America, Local Union 1 v. Pittsburgh Plate Glass Co., Chemical Division, 404 U.S. 157, 167-68 (1971).

9. A "sheltered workshop" is defined by the Department of Labor as "a charitable organization or institution conducted not for profit, but for the purpose of carrying out a
constitute "employees," or whether the management of these workshops constitute "employers" within the meaning of the National Labor Relations Act. Such a determination is neither simple nor straightforward. The ultimate solution involves balancing many competing policies involving labor as a whole and handicapped individuals as a protected group. Decisions have been made on an ad hoc basis. Thus, decisions and determinations have not provided a stable and consistent basis for future determinations. At best, these decisions provide only a few vague tests to be used when considering this issue. As a result, sheltered workshop employers and their handicapped employees have no guidelines by which to gauge their conduct within the employer-employee relationship.

The NLRA's broad language, along with the extensive jurisdictional power vested in the Board, provide few guidelines for determining which individuals and/or corporations fall within the provisions of the Act. Thus, jurisdiction over appropriate groups is based on a

recognized program of rehabilitation for handicapped workers, and/or providing such individuals with remunerative employment or other occupational rehabilitative activity of an educational or therapeutic nature." Employment of Handicapped Clients in Sheltered Workshops, 29 C.F.R. § 525.2(b) (1988). See infra note 57 and accompanying text for a further discussion of the Department of Labor's definition of "sheltered workshop."

10. See Sheltered Workshops of San Diego, 126 N.L.R.B. 961 (1960). Sheltered Workshops of San Diego, Inc. is a nonprofit corporation providing work experience for physically, mentally, emotionally, and socially disabled persons. Id. The workers are paid an hourly wage regardless of their production, and many are only part-time employees. Id. Revenues are derived from sales to profit-making firms, fees for public services for the handicapped, and donations. Id. San Diego is a certified sheltered workshop, exempt from minimum wage requirements, and not subject to unemployment compensation laws. Id. The Board determined that regardless of similarities to an employment relationship, the emphasis on training, counseling, rehabilitation, and placement tend to establish therapeutic assistance rather than employment. Id. Therefore, the Board decided that it was not necessary to determine whether or not the workshop was an employer under the Act. Id. The Board viewed the commercial activities as simply a means to an end. Id. See also Chicago Lighthouse for the Blind, 225 N.L.R.B. 249 (1976) (it effectuated the policies of the Act for the Board to assert jurisdiction over this employer engaged in the non-retail performance of services). See infra notes 136-83 and accompanying text for a further discussion of the court's view of whether handicapped employees in sheltered workshops fall under the Board's jurisdiction.

11. "Ad hoc" is defined as "[f]or this; for this special purpose." BLACK'S LAW DICTIONARY 38 (5th ed. 1979). More broadly it is defined as "made, established, acting, or concerned with a particular end or purpose." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 26 (1971). In common legal usage, the term is used to distinguish those decisions which are, because of their very nature, decided on a case-by-case basis rather than establishing precise legal guidelines for application in future cases.

12. See infra notes 55-56 and accompanying text for a further discussion of the individuals who fall within the Board's jurisdiction.
case-by-case inquiry.\textsuperscript{13} This type of inquiry does not always include careful consideration of other legislation, policies, or problems which should be considered in dealing with certain individuals.\textsuperscript{14} The handicapped are a prime example of this situation. Although the language of the NLRA does not specifically exclude such individuals and their employers from the Board’s jurisdiction, other legislation, policies, and problems must be considered when the Board makes its determination on the appropriate measures to be taken. In order to effectuate the policies and purposes of the NLRA, while also furthering the policies and purposes of legislation directed toward handicapped employees, a modified approach must be taken.

Part I of this comment describes the history and development of the NLRA. Part II then discusses legislation enacted to protect and provide employment and educational assistance to handicapped individuals; it also examines the policies and purposes behind this legislation. Part III reviews and discusses cases arising under the jurisdiction of the Board, within the setting of a “sheltered workshop” that employs handicapped individuals. Part IV examines the most recent case in the area of handicapped employees in a sheltered workshop, \textit{Arkansas Lighthouse for the Blind v. NLRB}.\textsuperscript{15} Part V compares and contrasts the reasoning behind the court decisions based upon the legislation and policies in the area, pointing out the consistencies and inconsistencies in court reasoning and conclusions.

Before examining the consistencies and inconsistencies in legislation and case law, this comment first turns to an examination of the NLRA. An overview of this statute is instrumental in understanding the role that the Board can and should play in the regulation of sheltered workshops employing handicapped individuals.

I. The Origin and Development of the National Labor Relations Act\textsuperscript{16}

Congress enacted the National Labor Relations Act\textsuperscript{17} in 1935. The National Labor Board, now the National Labor Relations Board,

---

\textsuperscript{13} See \textit{infra} notes 25-32 and accompanying text for a further discussion of case-by-case determinations made by the Board.

\textsuperscript{14} See \textit{infra} notes 58-136 and accompanying text for further discussion of legislation enacted pertaining to handicapped individuals.

\textsuperscript{15} 851 F.2d 180 (8th Cir. 1988).


\textsuperscript{17} Id.
was organized under the National Industrial Relief Act by Public Resolution 44. Although the Board had the power and machinery to conduct union elections, it could only report unfair labor violations to the National Relief Administrator or the Department of Justice for prosecution. Thus, in dealing with recalcitrant employers, the Board came up against a legal stone wall created by a lack of legal compulsion to comply with the Board’s decision. The Board’s findings were


19. H.R. REP. NO. 969, 74th Cong., 1st Sess. 2-3 (1935). Public Resolution 44 was a temporary measure taken by Congress in response to the failure of the proposed National Labor Relations Act to reach the floor of Congress for a vote. Id. Under the Resolution, Congress authorized the President to establish one or more boards to investigate labor disputes. National Industrial Recovery Board Establishment, ch. 677, 48 Stat. 1183 (1934). The board(s) were empowered to order and conduct union elections to ensure employees’ rights to organize and select representatives for collective bargaining. Id. In union elections, the United States Circuit Court of Appeals had the right to review the orders of the board(s). Id. The resolution was to be in effect until June 16, 1935. Id.

20. On August 5, 1933, the President created the National Labor Board in accordance with his powers under NIRA. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933). The Board, consisting of 20 regional boards, had jurisdiction only over cases involving violations of section 7(a) of the National Industrial Recovery Act. R. Smith, L. Merrifield, & T. St. Antoine, Labor Relations Law 34 (5th ed. 1974).

In response to employers questioning the Board’s authority, the President issued a series of executive orders giving the Board the right to adjust certain industrial disputes, conduct elections, and publish names of representatives; in addition, he ratified the previous actions of the Board. Id. This Board ceased to exist on July 9, 1934. Id.

21. H.R. REP. NO. 969, 74th Cong., 1st Sess. 2-3 (1935). In describing the problems encountered by the Board prior to the enactment of the NLRA, the House of Representatives stated:

All that the National Labor Board could do, if it found a violation . . . was to report the case to the National Recovery Administration, which might take away the employer’s “blue eagle”, or to the Department of Justice, which was authorized to institute, de novo, proceedings in equity or criminal prosecution, under subsections (e) and (f) of section 3.

Id. at 2.

22. Id. at 3-4. The House of Representatives described the situation as follows:

When a complaint is made to the board of violation . . . evidence is heard and transcribed by the proper regional board established by the National Labor Relations Board. The board has no power to subpoena witnesses or administer oaths. If the employer chooses to ignore the hearing, he can do so with impunity . . . If
given no prima facie weight by the courts in subsequent proceedings, thereby forcing the Department of Justice to start all investigations and proceedings anew.23 Serious conflicts between employees and employers continued to burden, or threaten to burden, the free flow of commerce and also produced enormous losses in wages, trade, and commerce.24

In 1935, Congress enacted the NLRA which gave the Board the power to investigate violations, make orders in response to any violations, and apply to the court of appeals to enforce such orders.25 The extent of the Board's power was to be equal to that of congressional powers under the commerce clause.26 Thus, Congress enacted the

the regional board finds a violation ... and the employer fails to comply with its recommendation for appropriate restitution, the case is referred to the National Labor Relations Board, which reviews the record . . . . If the [NLRB] confirms the finding of violation it publishes its finding[s] . . . and announces that unless the employer in default makes proper restitution it will refer the case to . . . National Recovery Administration, and to other agencies of the Government.

[T]here is no legal compulsion upon the employer to comply . . . . Assuming [upon transmission] the National Recovery Administration decides to remove the Blue Eagle, compliance is by no means assured. The nature of the business may be such that the deprivation of the Blue Eagle has only a negligible effect, in which case the employer may still ignore the decision. If . . . the National Recovery Administrator insignia is of substantial value . . . [the employer] may apply to the Supreme Court of the District of Columbia for an injunction restraining the National Recovery Administration from acting to deprive him of the right to display such an insignia. These injunction suits are becoming almost routine.

_id_.

23. _Id._ at 4. The House of Representatives stated:
When the Board refers a case to the Department of Justice ... the record made up by the Board goes for naught, and weeks or more after the alleged violation the Department must prepare the case for the court, de novo. The Department does not go into court on the record before the Board to enforce the decision of the Board; indeed the Board's findings of fact have not even prima facie weight in subsequent proceedings . . . . [T]he Department in many cases finds it necessary to make extensive investigations before instituting legal proceedings.

_id_.

24. _Id._ at 6-7. The House of Representatives stated:
In brief, such obstructions and burdens occur because of the stoppage of the flow of goods from and into the channels of such commerce, because of the effect on related or independent industries or establishments, and because of cessation of employment and wages, sometimes prostrating whole communities or otherwise impairing such commerce . . . .

Throughout the period of the operation of the National Industrial Recovery Act, there existed or were impending serious conflicts burdening or threatening to burden the free flow of commerce in some of our largest industries . . . .

_id._ at 6.

26. _H.R. Rep._ No. 969, 74th Cong., 1st Sess. 6 (1935). "In enacting the National Labor Relations Act, Congress gave and intended to give the Board the fullest possible
NLRA to promote equality in bargaining power between employees and employers, to diminish the causes of labor disputes, and to create the National Labor Relations Board. The NLRA declares that the United States' policy is to mitigate and eliminate the causes of substantial obstructions to interstate commerce. This national policy is to be achieved, among other courses of action, by encouraging the practice and procedure of collective bargaining and by protecting employee freedom of association, self-organization, and the designation of employee choices for representatives. These representatives are to negotiate the terms and conditions of employment as well as negotiate for other mutual aid and/or protection. Generally, the act sought "to make the appropriate collective action (of employees) an instrument of peace rather than strife." The Board's jurisdiction is limited jurisdiction under the commerce clause of the Constitution. NLRB v. Erlich's 814, Inc., 577 F.2d 68, 70 (8th Cir. 1978). See also NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224 (1963); Polish Nat'l Alliance v. NLRB, 322 U.S. 643 (1944). Under the commerce clause, Congress is given the power "to regulate commerce ... among the several states." U.S. CONST. art. I, § 8, cl. 3. Congress' power under the commerce clause has been extended to intrastate commerce activities when they have such a "close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937). Congress has the "power to regulate the local incidents ... which might have a substantial and harmful effect upon that commerce." Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964). Congress' power under the commerce clause is "broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation[,] it has been the rule of this Court ... not to interfere." Katzenbach v. McClung, 379 U.S. 294, 305 (1964). This power need not await disruption of commerce, but may be exerted to prevent disruption. Id. at 301.

27. H.R. REP. No. 969, 74th Cong., 1st Sess. 1 (1935). "The inequality in bargaining power between employees who do possess full freedom of association of actual liberty of contract, and employers ... organized in the corporate or other form of ownership ... burdens and affects the flow of commerce ...." 29 U.S.C. § 151 (1982). It is the "policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce." Id. "The National Labor Relations Board created by this [Act] ... is continued as an agency of the United States ...." 29 U.S.C. § 153(a) (1982).

28. 29 U.S.C. § 151 (1982). Congress declared that it is "the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred." Id.

29. Id. Congress determined that the declared United States policy could be achieved by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." Id.

30. Id.

31. H.R. REP. No. 969, 74th Cong., 1st Sess. 7 (1935) (quoting Texas & New Orleans R.R. Co. v. Brotherhood, 281 U.S. 548 (1930)). Chairman William M. Leiserson, of the National Mediation Board observed that so long as the employers question the right of the employees to hire personnel managers ... then the employees have to fight for their rights. As soon as the [employer] began [to be amenable to negotiation] ... the type of labor leader ...
by denying power over controversies or practices of purely local significance which do not burden or threaten to burden the free flow of commerce.\textsuperscript{32}

Section 153 of the NLRA created and established the National Labor Relations Board (Board).\textsuperscript{33} The Board is allowed to prosecute any inquiry necessary to its function\textsuperscript{34} in any part of the United States.\textsuperscript{35} The Board also has the authority, as prescribed by the Administrative Procedure Act,\textsuperscript{36} to make, amend, and rescind the rules

\begin{quote}
for the labor people was a more businesslike type, and he is a good deal like the fellow on the employer's side.
\end{quote}

\textit{Id.} at 7-8.

32. \textit{Id.} at 9. The House of Representatives stated:
The bill is based squarely on the power of Congress to regulate commerce among the several States and with foreign nations. It does not apply to controversies or practices of purely local significance which do not presently or potentially burden or obstruct the free flow of such commerce.

\textit{Id.} at 8-9.

33. 29 U.S.C. § 153(a) (1982). The Board consists of five members, although originally it consisted of three, who are appointed by the President with the advice and consent of the Senate. \textit{Id.} The Board is then authorized to delegate to any group of three or more members any or all of the powers it may exercise. 29 U.S.C. § 153(b) (1982). The Board is under an obligation to make an annual report to Congress and the President to summarize significant case activities and operations. 29 U.S.C. § 153(c) (1982). The principal office of the Board is in the District of Columbia, however, members may meet and exercise the Board's powers in any other place. 29 U.S.C. § 155 (1982). The Board shall also have authority to make, amend, and rescind rules and regulations necessary to carry out the Act, in accordance with subchapter II of chapter 5 of title 5. 29 U.S.C. § 156 (1982).

34. 29 U.S.C. § 160 (1982). The Board is empowered to prevent any person from engaging in unfair labor practices affecting commerce. 29 U.S.C. § 160(a) (1982). After a violation has occurred, the Board shall have the power to issue a complaint with a notice for hearing. 29 U.S.C. § 160(b) (1982). The Board may amend this complaint, at its discretion, any time prior to issuance of an order based on the complaint. \textit{Id.} The Board, at its discretion, may hear testimony and/or arguments. 29 U.S.C. § 160(c) (1982). If the Board finds that anyone named in the complaint engaged in or is engaging in unfair labor practices, the Board shall issue a cease and desist order or take necessary affirmative action to effectuate the policies of the Act. \textit{Id.} Any order may be set aside or modified before it is filed in a court. 29 U.S.C. § 160(e) (1982). The Board may also petition the court of appeals or district court (if on vacation) for enforcement of the order and/or for temporary relief or a restraining order for unfair labor practices. 29 U.S.C. §§ 160(e) & (j) (1982). During investigation of unfair labor practices, the Board has access to all evidence of the person being investigated and has similar powers to those of the judicial department in holding hearings. 29 U.S.C. § 161(l) (1982). The Board may decline jurisdiction over labor disputes involving any class or category of employee in which commerce is not sufficiently or substantially affected to warrant exercise of jurisdiction. 29 U.S.C. § 164(c) (1982).


36. 5 U.S.C. §§ 551-559 (1982). This section provides that the agency must give general notice of rule making unless the new rules are interpretive rules, general statements of policy, rules of agency organization, procedure or practice or when the agency, for good cause, believes that such notice is impracticable, unnecessary, or contrary to public interest.
and regulations necessary to carry out the provisions of the Act and is empowered to prevent unfair labor practices affecting commerce. By enacting the NLRA, Congress intended to give the Board the fullest possible jurisdiction over the employee-employer relationship. Judicial review of Board decisions considers factual findings of the Board conclusive, if supported by substantial evidence in the record as a whole. Courts give the Board broad discretion in enforcing the provisions of the Act. However, the United States Supreme Court,

5 U.S.C. § 553(b) (1982). The agency must also give interested parties an opportunity to participate in the rule making process and to allow them to petition for issuance, amendment, or repeal of a rule. 5 U.S.C. §§ 553(c) & (e) (1982). Further, the publication of a substantive rule must be made not less than 30 days before its effective date unless otherwise provided for by the section. 5 U.S.C. § 553(d) (1982).

37. 29 U.S.C. § 156 (1982). This section provides that the Board may make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

Id.

38. 29 U.S.C. § 160(a) (1982). This section, prevention of unfair labor practices, empowers the Board to prevent any person from engaging in any unfair labor practice affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.

Id.

39. The National Labor Relations Act evidences Congress' intent to exercise whatever constitutionally given power it has to regulate commerce. NLRB v. Fainblatt, 306 U.S. 601, 607 (1939). The Board has jurisdiction as long as the effect on commerce is more than "de minimis." Id. In enacting the National Labor Relations Act, Congress left it to the Board as to whether particular practices and situations "adversely affect commerce when judged by the full reach of the constitutional power of Congress." Polish Nat'l Alliance v. NLRB, 322 U.S. 643, 648 (1944). "The extent to which the Board chooses to exercise its statutory jurisdiction is a matter of administrative policy within the Board's discretion .... " NLRB v. WGOK, Inc., 384 F.2d 500, 502 (5th Cir. 1967). See supra note 26 and accompanying text.

40. 29 U.S.C. § 160(e) (1982). See also Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). The legislation precludes courts from determining the substantiality of evidence supporting a Board decision based on evidence which justified it, without looking to conflicting inferences and evidence. Id. at 487-88. The reviewing court may not override the Board's decision without looking at the "whole record" or because the court may have made a different choice. Id. at 488. However, the court is not barred from setting aside a decision when it cannot conscientiously find substantial evidence, in light of the entire record, supporting the Board's decision. Id. The Board's findings on questions of fact are conclusive "when supported by substantial evidence on the record as a whole." NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675, 691 (1951).

41. See NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). In general, statutory interpretation questions are for the courts to decide with adequate weight given to the administrator's decision. Id. at 130-31. However, in applying broad statutory terms which the administrator must initially determine, the court has a limited function. Id. at 131. The Board's determination under the Act is accepted if it has "'warrant in the record' and
in at least one case, concluded that the Board did not properly exercise its jurisdiction because its distinction between "completely religious" and "merely religiously associated," in connection with religious schools, did not provide a workable guide for the exercise of discretion due to a degree of entanglement within the two distinctions. Before sanctioning such decisions, courts must find a clearly expressed affirmative congressional intention present.

When Congress amended the NLRA in 1947, the Senate and House Reports emphasized the fact that Congress enacted the NLRA to prescribe fair and equitable rules of conduct between labor and management in their dealings affecting interstate commerce, to protect rights of these individual workers in their relations with labor organi-

a reasonable basis in law." \textit{Id.} Due to the complexity of modern industry, Congress realized the necessity of these flexible rules and, thus, gave the Board wide discretion in matters such as shaping the appropriate unit. \textit{Id.} at 134. The extent to which the Board exercises its statutory jurisdiction is within its discretion; thus, absent extraordinary circumstances, determining when and if to exercise this jurisdiction is for the Board, not the court, to decide. \textit{NLRB v. WGOK, Inc.,} 384 F.2d 500, 502 (5th Cir. 1967). The Board has broad discretion in determining whether to exercise its statutory jurisdiction. \textit{NLRB v. Austin Developmental Center, Inc.,} 606 F.2d 785, 790 (7th Cir. 1979). "The Board's decisions will not be reversed absent a showing that it acted unfairly and caused substantial prejudice to the affected employers." \textit{Id.} Although the Board must treat similar cases alike, it may deviate from prior guidelines to effectuate the purposes of the Act. \textit{Id.} Courts should be reluctant to overturn the Board's judgment, substituting their own ideas, without some compelling evidence that the Board has "failed to measure up to its responsibility." \textit{NLRB v. E. C. Atkins & Co.,} 331 U.S. 398, 414 (1947).

\textbf{42.} \textit{NLRB v. Catholic Bishop of Chicago,} 440 U.S. 490, 495 (1979). The Board certified unions as bargaining agents of teachers in schools operated by the church. \textit{Id.} at 491. The Board based its jurisdiction on its policy of declining jurisdiction only when schools are "completely religious" and not "merely religiously associated." \textit{Id.} at 495. The United States Court of Appeals and the United States Supreme Court denied the Board jurisdiction because its standard "failed to provide a workable guide for the exercise of discretion." \textit{Id.} Further, the United States Supreme Court determined that

in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses. \textit{Id.} at 507.

\textbf{43.} \textit{Id.} at 500. The Court indicated that the Board's jurisdiction would be questioned in such cases involving "public questions particularly high in the scale of our national interest." \textit{Id.} \textit{See McCulloch v. Sociedad Nacional de Marineros de Honduras,} 372 U.S. 10, 17 (1963) (Court denied the Board's jurisdiction over foreign seamen). \textit{See also Benz v. Compania Naviera Hidalgo,} 353 U.S. 138, 147 (1957) (Court denied the Board's jurisdiction over foreign seamen on a foreign vessel docked in an American port, for, if Congress had intended to include such an important regulation within the Act, it would have stated as much). Such interference in the delicate area of international relations could only come from Congress' clearly expressed affirmative intention. \textit{Id.}

\textbf{44.} Ch. 120, title I, 61 Stat. 136 (1947).
zations, and to recognize the public interest in labor disputes affecting commerce because of public health, safety, and welfare considerations. During amendment proceedings, the House proposed that the definition of "employer" be amended to exclude from employer status "any corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes... no part of the net earnings of which inures to the benefit of any private shareholder or individual." The House of Representatives felt that such organizations were not engaged in interstate commerce and were, therefore, subject exclusively to local control. The House justified its proposed exclusion by pointing out that such organizations are not engaged in "commerce" or interstate commerce, frequently assist local governments, and, therefore, should fall under local jurisdiction. The Senate proposed that the exclusion

45. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 1, reprinted in 1947 U.S. CODE CONG. & ADMIN. NEWS 1135, 1135. The House Committee of Conference stated that the purpose of the amendment of the bill was to

prescribe fair and equitable rules of conduct to be observed by labor and management in their relations with one another which affect commerce, to protect the rights of individual workers in their relations with labor organizations whose activities affect commerce, to recognize the paramount public interest in labor disputes affecting commerce that endanger the public health, safety, or welfare, and for other purposes...


[churches, hospitals, schools, colleges, and societies for the care of the needy are not engaged in "commerce" and certainly not in interstate commerce. These institutions frequently assist local governments in carrying out their essential functions, and for this reason should be subject to exclusive local jurisdiction.


The other nonprofit organizations excluded under the House bill are not specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities... of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act.

include only "nonprofit corporations and associations operating hospi-
tals." The House Conference Committee agreed with the Senate ex-
clusion and indicated that the other nonprofit organizations, excluded 
under the House bill, would only "in exceptional circumstances and in 
connection with purely commercial activity . . . of such organizations 
or of their employees" be brought within the jurisdiction of the 
NLRA. The Senate version of the exclusion was finally adopted. 
Congress eliminated this exclusion from the Act in 1974 and re-
placed it with special strike notice requirements applicable to such or-
ganizations. The Committee reviewing the section determined that 
there was no acceptable reason to exclude these particular hospital 
employees from the coverage and protection of the NLRA.

In its present form, the NLRA gives the Board jurisdiction over 
"employee(s)." The definition of "employee" includes any employee 
except agricultural laborers, domestic servants working at an individ-
ual's home, persons employed by a spouse or parent, an independent 
contractor, a supervisor, persons employed by an employer subject to 
the Railway Labor Act, or persons employed by another person who is

50. H.R. Rep. No. 245, 80th Cong., 1st Sess. 12, reprinted in Legislative History 


and Conciliation Service to assist resolution of the impasse, by establishing an impartial 
Board of Inquiry to investigate the issues and make a written report to the parties. Id. 
The report is to consist of a finding of facts with recommendations for settling the dispute 
in a prompt, peaceful and just manner. Id. The Board of Inquiry appointed shall have no 
interest or involvement in the health care institution or employee organization(s) in the 
dispute. Id. The provision also provides for the selection and compensation of the Board 
of Inquiry. Id. Upon establishment of the Board of Inquiry and for 15 days after the 
Board of Inquiry issues its report, the parties shall not change the status quo in effect prior 
to the expiration of the contract or the impasse except by agreement. Id. See also S. Rep. 
3946, 3948.

Admin. News 3946, 3948. The Committee decided that it was "in the public interest to 
sure the continuity of health care to the community and the care and well being of pa-
interest also demands that employees not be deprived of their statutory rights. Id. The 
Committee hoped that "parties to a dispute in such an institution would be cognizant of 
such special problems and take steps . . . to mitigate the effects of a scarcity of alternative 
Witnesses stressed the uniqueness of these institutions and the need to avoid disruption. Id. 
not an employer as defined. 55 An "employer" includes anyone acting as agent of an employer, but does not include the United States, a Government corporation, any Federal Reserve Bank, any State or political subdivision thereof, any person subject to the Railway Labor Act, or any labor organization, its officers, or agents. 56

An understanding of the NLRA is important in determining whether handicapped employees in sheltered workshops 57 come within the jurisdiction of the Board. Other factors in consideration of handicapped employees' claims must also be considered. Handicapped individuals encounter special problems, unique to this protected group, which must be addressed. Congress has enacted special legislation which provides special protections to the handicapped in various ways. Part II of this comment focuses on this legislation and provides an overview of significant congressional action in this area.

II. LEGISLATIVE PROTECTION AND FURTHERANCE OF HANDICAPPED INDIVIDUALS

Congress enacted several statutory provisions in an effort to encourage self improvement and rehabilitation of the handicapped while still providing them with some extent of protection. 58 These statutes provide a basis for encouraging and controlling the development of handicapped individuals, enabling them to become more productive citizens. These legislative enactments provide an important basis for understanding congressional problems and goals as they relate to the handicapped.

55. 29 U.S.C. § 152(3) (1982). See supra note 5 and accompanying text for a definition of "employee" under the NLRA.

56. 29 U.S.C. § 152(2) (1982). See supra note 4 and accompanying text for a definition of "employer" under the NLRA.

57. See supra note 9 and accompanying text for the Department of Labor's definition of "sheltered workshop."

A. The Wagner-O'Day Act

Congress enacted the Wagner-O'Day Act in 1938 to promote sheltered workshops for the blind, which were not-for-profit operations providing work for sightless persons. The Senate noted that these types of workshops prevent sightless individuals from becoming public charges. Congress believed that the government should spare no effort to aid and assist these individuals by means other than relief grants. The statute was enacted to broaden the limited market for products produced in these workshops and, thereby, provide more job opportunities for the blind. In 1971, Congress expanded the Act to increase employment opportunities for all handicapped individuals and to promote employment of the blind and severely handicapped. Congress hoped that some of these individuals would acquire sufficient job skills to enable them to enter the competitive job market. Congress ultimately wanted to provide the blind and severely handicapped with skills making them more placeable in private industry, thereby turning these public assistance recipients into wage earners and taxpayers. Congress also addressed concerns about the relationship between these handicapped workers, their workshops, and their fringe benefits. The concerns included unemployment benefits, Social Secur-

61. S. REP. NO. 1330, 75th Cong., 3d Sess. 2 (1938). The Senate referred to "several sheltered workshops for the blind ... which afford to some 3,000 sightless persons productive work." Id. These workshops are "not operated for profit." Id.
62. Id. The Senate encouraged such action because "[t]he employment thus furnished prevents workmen so engaged from becoming public charges." Id. See infra note 63 and accompanying text.
63. Id. The Senate provided that, after supplies from the Federal prisons were no longer available, "the Government [would] be required to purchase their brooms as well as mops from nonprofit-making agencies for the blind." Id. Their purchases would also extend to "other suitable commodities produced by the blind where the procurement of such commodities is not presently required" by another law. Id. The Senate also recognized that "opportunities for gainful employment to those ... with blindness are limited" and that "the Government should spare no effort to aid and assist them by means other than a relief grant." Id.
66. H.R. REP. NO. 228, 92d Cong., 1st Sess. 21, reprinted in 1971 U.S. CODE CONG. & ADMIN. NEWS 1079, 1093. Relative to the House of Representatives Report, the United States Department of Labor Report stated that the legislation was consistent "with the Department's objective to promote employment of the handicapped. Hopefully, it will assist some of the severely handicapped to acquire sufficient job-skill proficiency to enter a competitive job situation." Id.
67. Id. at 1080.
ity, and worker's compensation. Congress suggested that the Committee investigate these concerns.68

The Committee for Purchase from the Blind and Other Severely Handicapped69 was created by the Wagner-O'Day Act to oversee government purchases from the blind and other severely handicapped individuals70 employed in qualified nonprofit agencies71 for the blind and severely handicapped.72 The Act requires the government, or govern-

68. Id. at 1085. Congress stated that:
This Committee's examination of the program has revealed another area of Congressional concern, namely, the need to explore the relationship of the handicapped workers and their workshops to fringe benefits . . . . The Committee believes that studies of policies and practices of workshops with respect to . . . [fringe benefits] should be undertaken promptly by the Department of Labor or in cooperation with appropriate agencies.

Id.

71. A "qualified nonprofit agency for the blind" is defined as an agency organized under the laws of the United States or of any State, operated in the interest of blind individuals, and the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual; which complies with applicable occupational health and safety standards prescribed by the Secretary of Labor; and which in the production of commodities and the provision of services (whether or not the commodities or services are procured under these regulations) during the fiscal year employs blind individuals for not less than 75 percent of the man-hours of direct labor required for the production or provision of the commodities or services.

Committee for Purchase from the Blind and Other Severely Handicapped, 41 C.F.R. § 51-1.2(h) (1988). A "qualified nonprofit agency for other severely handicapped" is defined as an agency organized under the laws of the United States or of any State, operated in the interests of severely handicapped individuals who are not blind, and the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual; which complies with applicable occupational health and safety standards prescribed by the Secretary of Labor; and which in the production of commodities and the provision of services (whether or not the commodities or services are procured under these regulations) during the fiscal year employs severely handicapped individuals for not less than 75 percent of the man-hours of direct labor required for the production or provision of the commodities or services.

Committee for Purchase from the Blind and Other Severely Handicapped, 41 C.F.R. § 51-1.2(i) (1988).
ment agency, to procure a commodity or service on the procurement list from a blind or handicapped nonprofit agency, if available within the period needed, unless under a section 4121 exception.

The Wagner-O'Day Act is but one example of congressional intent to provide special protections to the handicapped. The Fair Labor Standards Act is another provision which further evidences Congress' intent to protect the handicapped.

B. *The Fair Labor Standards Act* 76

Since its original enactment in 1938, the Fair Labor Standards Act 77 has promoted economic justice and security for the lowest paid workers, created employment stability, and eliminated unfair competitive labor practices. 78 The policy of the Act is to correct and eliminate labor conditions detrimental to the maintenance of minimum standards of living necessary for health, efficiency, and general well-being of workers without substantially curtailing employment or earning power. 79

Upon receipt of a certificate issued by the Administrator of the Wage and Hour Division of the Department of Labor, 80 the original act allowed subminimum rates to be paid to specified groups, includ-
ing handicapped workers. The Act was amended in 1961 in response to questions raised about the adequacy of minimum wage protection for handicapped employees, especially those in sheltered workshops. When the Secretary of Labor grants a sheltered workshop certificate to an individual workshop, it specifies minimum operational requirements, but leaves workshop managers with broad discretion in deciding appropriate wage rates. This rate may fall somewhere between certificate minimum and statutory minimum. The Senate observed that the procedure, although flexible, permitted abuse at the expense of the handicapped. The Senate also noted that there were complaints that these wages were inadequate, allowing


81. 29 U.S.C. § 214(c) (1982 & Supp. IV 1986). See also Walling v. Portland Terminal Co., 330 U.S. 148, 151-52 (1947) (employers of the handicapped must pay them minimum wage, unless a permit or certificate allowing them not to pay minimum wage is obtained from the Administrator).


83. Employment of Handicapped Clients in Sheltered Workshops, 29 C.F.R. § 525 (1987). A sheltered workshop is defined as a "charitable organization or institution conducted not for profit but for the purpose of carrying out a recognized program of rehabilitation . . . or other occupational rehabilitative activity of educational or therapeutic nature" for handicapped workers. 29 C.F.R. § 525.2(b) (1987). In issuing a special certificate for a sheltered workshop, the Administrator may consider certain specified criterion, including but not limited to, present or past earnings of the handicapped workers; whether wages are commensurate with those paid to nonhandicapped workers in the vicinity for like work; nature and extent of the disabilities involved; wages of comparable work in private industry; types and duration of other rehabilitative services given to handicapped workers; extent of worker's previous experience; and whether the organization is exempt under section 501(c)(3) of the Internal Revenue Code and has registered as a non-profit organization. 29 C.F.R. § 525.7 (1987). The regulations also establish requirements for those operating under such certificates as well as grounds for review or revocation of said certificates. 29 C.F.R. § 525 (1987). See supra note 9 and accompanying text for a complete definition of "sheltered workshop."

84. 29 U.S.C. § 214(c) (1982 & Supp. IV.1986). The Secretary issues special certificates to those who employ handicapped individuals—thereby allowing them to pay wages to such individuals that are lower than statutory minimum wage; commensurate to wages paid to nonhandicapped employees in the same vicinity doing the same type, quality and quantity of work; and related to productivity. 29 U.S.C. § 214(c)(1) (Supp. IV 1986). No employer can reduce this certificate wage rate for at least two years without prior authorization of the Secretary. 29 U.S.C. § 214(c)(3) (Supp. IV 1986). See also Walling v. Portland Terminal Co., 330 U.S. 148 (1947) (discussing the necessity of obtaining a certificate before being authorized to pay handicapped employees less than minimum wage).


86. S. REP. No. 145, 87th Cong., 1st Sess. 46, reprinted in 1961 U.S. CODE CONG. & ADMIN. NEWS 1620, 1665. Congress observed that “subminimum rates . . . while commendably flexible, also obviously permits ready abuse at the expense of handicapped workers, particularly in the absence of a vigorous investigation and enforcement program.” Id.
these workshops to undercut competitive industry. The Senate suggested that either an administrative or, if need be, a statutory remedy could be used to curb these abuses. Later, Congress incorporated its own handicapped employee minimum wage requirement. The requirement provided a wage of not less than fifty percent of the statutory minimum wage, commensurate with those wages paid to nonhandicapped employees who have the same type, quality, and quantity of work in the same vicinity and with the same productivity level. Congress established these requirements in order to improve the economic standards of the handicapped, assure their rapid advancement into private industry, and to reduce exploitation through wages. In 1986, in response to the increasingly large number of severely handicapped individuals employed by sheltered workshops, Congress amended the Act by eliminating the fifty percent of minimum wage provision and providing wage review procedures. Congress enacted the amendment "to provide a more rational, fair and objective basis for determining wages to be paid to handicapped employees with impaired productivity while fully protecting the rights of individual workers." Because sheltered workshop employers are given great management flexibility, Congress intended to ensure that handicapped workers would receive procedural due process protection.

87. S. REP. NO. 145, 87th Cong., 1st Sess. 46, reprinted in 1961 U.S. CODE CONG. & ADMIN. NEWS 1620, 1665. The Senate observed that with the substantial growth in the number of sheltered workshops, workshops are able to significantly undercut competitive industries which are obligated to pay their workers minimum wage. Id.

88. Id. The Senate felt that while wage rates in sheltered workshops were "commendably flexible, [it] also obviously permits ready abuse at the expense of handicapped workers." Id. The Senate felt that "more satisfactory standards can be accomplished through administrative machinery now functioning." Id. If this method did not succeed, the Senate hoped "to explore and develop formal statutory standards to assure adequate minimum wage protection for all handicapped persons." Id.

89. 29 U.S.C. § 214(c) (1982).


91. S. REP. NO. 1487, 89th Cong., 2d Sess. 23, reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 3002, 3025. The Senate stated that it believed that the amendment "serves the purpose of improving the economic circumstances of handicapped workers, speeding their movement into fully productive private employment, and assuring that such workers are not exploited through low wages." Id.


93. See infra notes 97-105 and accompanying text for discussion of procedure.

94. 132 CONG. REC. S13,860 (daily ed. Sept. 26, 1986) (statement of Sen. Hatch). The amendment was also drafted to allow for "procedural due process safeguards for handicapped employees who are paid under special minimum wage rate certificates." Id. This due process protection was thought to be necessary to protect "this vulnerable sector of our work force." Id. Included with the joint statement in the Record are letters supporting the amendment from associations involved in the servicing and employment of the handicapped. Id.
guaranteeing wages commensurate with productivity.\textsuperscript{95} Congress hoped that, by enacting the present legislation, workers would be guaranteed wages according to individual productivity while reducing the employers' paperwork enough to allow for concentration on improving client services.\textsuperscript{96} Congress hoped that employer's concentration on services would aid and further the positions of the handicapped.

In order to prevent curtailment of opportunities for employment of certain specified individuals, the Fair Labor Standards Act\textsuperscript{97} allows the Secretary of Labor, by regulation or order, to provide for the employment of, among others, individuals "whose earning or productive capacity is impaired by age, physical or mental deficiency."\textsuperscript{98} The Secretary shall allow wages paid to such individuals to be "lower than the minimum wage applicable under section 206,"\textsuperscript{99} "commensurate with those paid to nonhandicapped workers" for the same type, quality and quantity in the same vicinity,\textsuperscript{100} and "related to the individual's pro-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{95} \textbf{132 CONG. REC. H8825} (daily ed. Oct. 1, 1986) (statements of Rep. Murphy). Representative Murphy stated that:
\begin{quote}
Since we are granting employers greater flexibility to manage their handicapped enterprises, it is absolutely essential that we preserve protections for handicapped workers which guarantees wages commensurate with their productivity. Thus, H.R. 5614 provides a necessary procedural due process safeguard for handicapped workers who are paid under special minimum wage rate certificates . . . . This due process protection is an essential element in the compromise legislation before us and will hopefully insure against exploitation of this vulnerable sector of our workforce.
\end{quote}

\textit{Id.}

\item \textsuperscript{96} \textbf{132 CONG. REC. H8826} (daily ed. Oct. 1, 1986) (statements of Rep. Petri). Representative Petri observed that:
\begin{quote}
The intent of the bill is to rationalize and simplify the administration of sheltered workshops, not to lower or change what anyone is paid. The current system of multiple certificates has been called an administrative nightmare . . . . By making these improvements . . . . we can free both the Labor Department and the workshops to spend more of their time on improving services to clients . . . .
\end{quote}

\textit{Id.}

\item \textsuperscript{97} 29 U.S.C. §§ 201-219 (1982).
\item \textsuperscript{98} 29 U.S.C. § 214(c)(1) (Supp. IV 1986).
\item \textsuperscript{99} 29 U.S.C. § 214(c)(1)(A) (Supp. IV 1986).
\item \textsuperscript{100} 29 U.S.C. § 214(c)(1)(B) (Supp. IV 1986). Representative Murphy emphasized the necessity of this standard in the statute by explaining that since Congress is "granting employers greater flexibility to manage their handicapped enterprises [by eliminating the fifty percent of minimum wage floor], it is absolutely essential that we preserve protections for handicapped workers which guarantees wages commensurate with their productivity." \textbf{132 CONG. REC. H8825} (daily ed. Oct. 1, 1986) (statements of Rep. Murphy). \textit{See supra} note 95 and accompanying text.
\end{enumerate}
\end{footnotesize}
duction."101 Employers qualifying under this section must provide written assurances that wages will be reviewed every six months and adjusted at least once a year, to reflect wages paid to comparable non-handicapped employees,102 and must not reduce the wages of a handicapped individual for two years without prior authorization of the Secretary.103 Any employee or guardian of the employee may petition the Secretary to initiate a review of the wage rate.104 Under the Act, employers are not prohibited from "maintaining or establishing work activities centers to provide therapeutic activities for handicapped clients."105

Although the Fair Labor Standards Act focused on stabilizing and assuring a wage level for handicapped employees, other issues in the handicapped employment situation needed to be addressed. Congress enacted the Rehabilitation Act of 1973 in response to these additional issues and concerns.

C. The Rehabilitation Act of 1973 106

Congress enacted the Rehabilitation Act of 1973 to promote vocational rehabilitation and more independent living through, among other programs, employment of the handicapped.107 The state

102. 29 U.S.C. § 214(c)(2) (Supp. IV 1986). The provision provides that the Secretary of Labor
shall not issue a certificate . . . unless the employer provides written assurances to the Secretary that . . . wages paid . . . will be reviewed by the employer at periodic intervals at least once every six months, and . . . will be adjusted by the employer at periodic intervals, at least once each year, to reflect changes in the prevailing wage paid to experienced nonhandicapped individuals employed in the locality for essentially the same type of work.

Id.

103. 29 U.S.C. § 214(c)(3) (Supp. IV 1986). Sheltered workshops are restricted further for "no employer shall be permitted to reduce the hourly wage rate prescribed by certificate under this subsection . . . of any handicapped individual for a period of two years from such date without prior authorization of the Secretary." Id.
104. 29 U.S.C. § 214(c)(5) (Supp. IV 1986). The Secretary must determine if the wage is justified in the particular circumstance. Id. If the petition is brought, the employer has the burden of proving the wage is necessary in order to prevent curtailment of employment opportunities. 29 U.S.C. § 214(c)(5)(c) (Supp. IV 1986).
107. S. REP. NO. 318, 93d Cong., 1st Sess. 5, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2076, 2079. The Committee sought to "improve in every possible respect the lives as well as livelihood of [handicapped] individuals served." Id. The Act not only was intended to promote a "better basic program of service" but also was "designed to focus research and training activities on making employment and participation in society
agency involved is required to place handicapped individuals in employment or training whenever possible and to review and evaluate periodically the status of handicapped individuals placed in extended employment in rehabilitation facilities, like sheltered workshops. The review is designed to determine the feasibility of the employment in the competitive labor market. Under the Act, the federal government is authorized to review and amend state programs whenever it deems it necessary for enforcement of the policies and purposes of the Act. Vocational rehabilitation goods and services necessary for the employment of the handicapped include training and recruitment services as well as providing new employment for handicapped individuals. Group rehabilitation may be in the form of public or non-profit facilities and services that promise to contribute substantially to the rehabilitation of the group.

The Rehabilitation Act was created to develop and implement programs of vocational rehabilitation and independent living. The legislation is intended to improve every possible aspect of the lives and livelihoods of the handicapped and other individuals through services responsive to each individual's needs as well as ensuring that no individual, especially the severely handicapped, would be excluded. Although not possible in many cases, the ultimate goal of the Act is to

more feasible for handicapped individuals.” Id. at 19, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS at 2092.

108. 29 U.S.C. § 721 (1982 & Supp. IV 1986). To qualify to participate, a state is required to submit to the Commissioner a three-year plan for vocational rehabilitation. Id. The plan has to “designate a State agency as the sole State agency to administer . . . or to supervise” administration of the plan. Id. The Act further designates specific qualifications and requirements for each segment of the handicapped population. Id.


110. Id.


116. Id. at 5, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS at 2079. Congress attempted to develop a method of providing services which would be responsive to individual needs and would ensure that no individual would be excluded from the program merely because his handicap appeared to be too severe. The Committee thus expanded the range of services to be provided and sought to assure that there would be a first priority to serve those individuals with the most severe handicaps. Id. Congress indicated “the new thrust of the bill [is] that individuals who apply for services must be given every opportunity to achieve a vocational goal.” Id. at 19, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS at 2092. See supra note 107 and accompanying text.
prepare individuals for work in competitive industry and to allow a more independent life,\textsuperscript{117} emphasizing the view that a productive and financially independent life is desirable.\textsuperscript{118}

The 1973 revisions of the Rehabilitation Act sought to provide more complete and comprehensive services for a large number of the severely handicapped by setting up a committee to study the role and running of sheltered workshops employing the handicapped.\textsuperscript{119} The 1974 amendments to the Rehabilitation Act included a provision—White House Conference on Handicapped Individuals Act—allowing the President to call a conference\textsuperscript{120} to focus greater public attention on the problems and needs of these individuals and to vitalize the commitment of the United States to overcome these problems.\textsuperscript{121} The Act was revised in 1978\textsuperscript{122} in order to provide more extensive employment opportunities for the handicapped.\textsuperscript{123} Such programs include providing a community service program for employment of the handicapped and entering jointly financed projects with private industry for on-the-job training and employment for the handicapped.\textsuperscript{124}

Congress has addressed and incorporated protections and privileges for sheltered workshops and other charitable organizations in

\textsuperscript{117} Id. at 19, \textit{reprinted in} 1973 U.S. CODE CONG. \& ADMIN. NEWS at 2092. While Congress wishes the programs in the Act to "remain vocationally oriented, it does not believe that there are handicapped individuals whose handicaps are so severe, or because of other circumstances, such as age, that they may never achieve employment. The Committee feels that they should not be denied services." \textit{Id.} Congress strived to find methods so that "such individuals may gain entrance to the vocational rehabilitation program or may be enabled to live more independently." \textit{Id.} at 19, \textit{reprinted in} 1973 U.S. CODE CONG. \& ADMIN. NEWS at 2093. The amendments to this Act expand "comprehensive rehabilita­

\textsuperscript{118} Id. at 5, \textit{reprinted in} 1973 U.S. CODE CONG. \& ADMIN. NEWS at 2079. \textit{See supra} note 107 and accompanying text.

\textsuperscript{119} Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 357. This amendment is just one of the examples of the numerous amendments of the Rehabilitation Act since its original enactment as the Smith-Fees Act in 1920. S. REP. No. 318, 93d Cong., 1st Sess. 9, \textit{reprinted in} 1973 U.S. CODE CONG. \& ADMIN. NEWS 2076, 2082. Although originally concerned with veterans, the Act has progressively changed and modified in order to serve a larger and more diversified group of individuals with more expansive service and programs. \textit{Id.}

\textsuperscript{120} Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1617, 1631-34.

\textsuperscript{121} S. REP. No. 1297, 93d Cong., 2d Sess. 51, \textit{reprinted in} 1973 U.S. CODE CONG. \& ADMIN. NEWS 6373, 6401.


\textsuperscript{124} \textit{Id.}
more generalized statutory enactments. These protections and privileges indicate a congressional concern for such organizations and the individuals they serve.

D. *The Internal Revenue Code*

Incentives and protections for the handicapped and sheltered workshops have also been provided for within the federal income tax system. The Internal Revenue Service (IRS) has exempted certain corporations from paying taxes, including those corporations organized and operated exclusively for charitable purposes, where no part of the net earnings are for the benefit of any private shareholder or individual and where no activity attempting to influence legislation or a political campaign exists. Sheltered workshops have qualified under this definition of the exempt corporation.

This "charitable purpose" exemption was originally introduced into the Internal Revenue Code prior to the Reform Act of 1939 and has remained intact. The 1954 enactment was developed through extensive and lengthy study of the ways and means to remove tax inequities and restraints, increase employment, and produce a

---

128. The Internal Revenue Service (IRS) and the courts have determined that similar organizations have qualified as exempt organizations under § 501(c)(3). The IRS studied a nonprofit organization which operated a number of community programs, including classes, counseling services, and job training, which centered around the manufacture and sale of a product. Rev. Rul. 73-128, 1973-1 I.R.B. 222. These programs provided unskilled and unemployed individuals with skills which eventually enabled them to obtain permanent employment. *Id.* The IRS determined that the organization qualified for the exemption since its operations accomplished a charitable purpose. *Id.* The determinative question is whether the organization's operation of its manufacturing facilities is a means of accomplishing the charitable purpose or merely an end in itself. *Id.* “Providing vocational training and guidance to the unskilled and under-employed . . . may qualify as a charitable purpose so long as the manner of its achievement is otherwise charitable.” *Id.* at 223. A charitable tax exemption under § 501(c)(3) depends on common-law standards of charity by serving a public purpose and is not to be contrary to established public policy. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983). These exemptions are justified because the exempt entity confers a public benefit which the society or community may not choose or be able to provide or which supplements and advances work of public institutions supported by tax revenues. *Id.* at 591. Further, a corporation that was organized to operate a camp and services for the deaf and that realized a profit which was devoted to maintenance of its operations was exempt for income tax purposes. *Jack Little Found. for Aid to Deaf v. Jones*, 102 F. Supp. 326 (W.D. Okla. 1951).
higher standard of living.\textsuperscript{132} However, abuse of the exempt status prompted Congress, in 1969,\textsuperscript{133} to enact provisions to tighten permissive activities of private foundations—to prevent self dealing between the foundation and its contributors, to require distribution of income for charitable purposes, to limit holdings of private businesses, and to assure that activities are restricted as provided by the exemption.\textsuperscript{134} Congress attempted to achieve, through these and other revisions, a fair and more efficient tax system.\textsuperscript{135}

All of these statutory provisions seem to indicate a congressional concern of protection of the handicapped. This apparent concern, however, has not been specifically incorporated into the NLRA. As a result, courts have applied various interpretations in determining whether handicapped individuals in sheltered workshops are “employees” within the NLRA and, thus, within the jurisdiction of the Board.

III. CASE HISTORY INVOLVING THE DEFINITION OF “EMPLOYEE” WITHIN THE NATIONAL LABOR RELATIONS ACT

A. The Chicago Lighthouse for the Blind\textsuperscript{136}

An early Board decision interpreting the word “employee” as defined in the NLRA\textsuperscript{137} involved the Chicago Lighthouse for the Blind. The Chicago Lighthouse is a northern Illinois nonprofit organization that serves the blind community through fifteen different programs, including admissions and evaluations, vocational job placement in the community, work adjustment, and on-the-job training which prepares blind persons to move into competitive job situations. The work adjustment and on-the-job training is done in an assembly and packaging sheltered workshop, which subcontracts with several private employers.\textsuperscript{138} The job training and counseling program lasts about twelve weeks, at the end of which time the employee is ready for competitive employment. The workshop, however, continues to employ these individuals until an opportunity in the private sector occurs. In one year, the organization’s total income was about $1,600,000.00; of this

\begin{thebibliography}{99}
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Pub. L. No. 91-172, 83 Stat. 492 (1969).
\item \textsuperscript{135} S. REP. NO. 552, 91st Cong., 1st Sess. 2, \textit{reprinted in} 1969 U.S. CODE CONG. & ADMIN. NEWS 2027, 2028.
\item \textsuperscript{136} 225 N.L.R.B. 249 (1976).
\item \textsuperscript{137} See \textit{supra} notes 5 \& 55 and accompanying text for an explanation of the word “employee” under the NLRA.
\item \textsuperscript{138} The Chicago Lighthouse for the Blind, 225 N.L.R.B. 249, 249 (1976).
\end{thebibliography}
amount, a little over $500,000.00 came from private subcontracts; and the rest came from Government and private grants, donations, and funds.  

The petitioner, a union, sought to represent a unit consisting of the employees and clients of the Chicago Lighthouse's two facilities. The Regional Director concluded that the Chicago Lighthouse's activities are "intimately connected with [ ] educating and training blind persons to enhance their employment opportunities in the outside community and thus are noncommercial." The Regional Director refused to assert jurisdiction and allow the unionization of the organization.

The Board, in accordance with the St. Aloysius decision, refused to deny jurisdiction based solely on the charitable function or worthy purpose. It instituted a policy to classify such employers according to what they do in order to determine whether the Board may assert jurisdiction. The Board determined that this employer, for all intents and purposes, was engaged in the nonretail performance of services. The Board asserted jurisdiction over the employees based on the St. Aloysius decision and determined that, because the organization derived a substantial amount of money from private subcontracts, it effectuated the policies of the Act to assert jurisdiction.

B. NLRB v. Lighthouse for the Blind of Houston

Lighthouse for the Blind of Houston is a nonprofit, charitable corporation that provides services and programs for the visually impaired. Among these programs and services is the operation of workshops and services for the community. The corporation supports these

139. Id.
140. Id.
141. The Rhode Island Catholic Orphan Asylum, 224 N.L.R.B. 1344 (1976). The St. Aloysius court addressed the issue of whether a nonprofit institution was an "employer" within the meaning of the NLRA. Id. Although, traditionally, the Board had declined to assert jurisdiction over this type of employer simply because of its nonprofit status and its noncommercial activities closely related to a charitable purpose, the Board decided that, due to removal of the health care exemption from the NLRA definition of "employer," the only basis for declining jurisdiction over charitable organizations was a finding of insufficient impact on interstate commerce. Id. at 1344-45. The Board interpreted Congress' deletion as eliminating the distinction between profit and nonprofit institutions and, thus, eliminating the distinction between charitable and noncharitable organizations. Id. at 1345. Chairman Murphy, in his dissenting opinion, felt that Congress intended such organizations to be exempt from jurisdiction unless they had a "substantial" impact on commerce. Id. at 1347. Murphy based this interpretation on legislative history. Id.
142. The Chicago Lighthouse for the Blind, 225 N.L.R.B. at 250.
143. 696 F.2d 399 (5th Cir. 1983).
programs through state and federal funding and profits from workshops "A" and "B". Workshop "A" operates at a fairly substantial profit and is not supported by public or private funds. Workshop "B" consists of severely handicapped employees who are paid fifty percent of minimum wage; while workshop "A" consists of ninety percent blind individuals who are paid wages reflecting productivity, beginning at least at minimum wage. Employees are given merit increases and provided with worker's compensation, unemployment, and hospital insurance. Workshop "A" also provides pension rights, paid holidays, vacations, sick leave, and overtime. A system of progressive discipline is used for low productivity, improper performance, and tardiness. No formal employee placement in private industry is provided; however, three to four employees are annually placed on an ad hoc basis. Many of the employees are employed for ten to twenty-year periods.

A union had been duly certified as the exclusive bargaining representative of the Houston Lighthouse's employees, but the Houston Lighthouse refused to bargain collectively with the union. The Regional Director supervised the election of the union, claiming that the Board had jurisdiction over Houston Lighthouse with respect to persons employed in its workshop. In response, Houston Lighthouse filed a request for review arguing that the Regional Director had departed from Board precedent and that the Board had improperly asserted jurisdiction over institutions such as Houston Lighthouse. The Board affirmed the Director's decision and determined that it effectuated the purposes of the Act to assert jurisdiction and that the Houston Lighthouse's clients were "employees" under the NLRA.

The Fifth Circuit United States Court of Appeals upheld the Board decision that these individuals were "employees" within the meaning of the NLRA. The decision hinged on a determination of whether the essential nature of the workshop was "rehabilitative" or "typically industrial." The Board decided not to assert jurisdiction over those operations that were primarily rehabilitative or therapeutic in function, but rather, to assert jurisdiction over those

144. Id. at 401-02.
145. Id. at 406.
146. Id. at 403.
148. NLRB v. Lighthouse for the Blind of Houston, 696 F.2d at 407. See supra notes 5 & 55 and accompanying text for an explanation of "employee" under the NLRA.
149. Id. at 404-06. See infra note 155 and accompanying text for a discussion of this standard.
150. Id. See infra note 153 and accompanying text for a discussion of this standard.
organizations with predominately business or economic characteristics. The court determined that working at workshop “A” was contingent upon certain typical business criteria. The court stated that employees were working under “commercial and business conditions.” The decision was based on the fact that employees were compensated at or above minimum wage, received merit raises, were disciplined for low productivity, punched a clock, had production deadlines, and worked a forty-hour week. Also, employees, in many instances, were permanently employed, and the workshop was not supported by additional outside funds, but ran the facilities for the most part on profits from the workshops. Because the court determined that these characteristics were typical of working conditions and work environments normally subject to collective bargaining, the court ruled that the workshop should fall under the jurisdiction of the National Labor Relations Board. The court concluded that the Lighthouse for the Blind of Houston should follow Cincinnati Association for the Blind v. NLRB due to the similarities in operational, productivity, compensation, and marketing factors between the two cases. The Cincinnati court developed an “economic” pattern in which business characteristics predominate rather than the “therapeutic” pattern of Goodwill Industries of Southern California. The court recognized

151. Id. at 404.
152. Id. at 405-06.
153. 672 F.2d 567 (6th Cir. 1982). Cincinnati Association is a nonprofit corporation dedicated to the interests of the visually impaired. It offers training, counseling, and social services to all blind members of the community. Id. at 569. The workshop, employing seventy blind and four sighted individuals, made $144,000.00 in profits that it used to defray unrelated expenses. Id. Blind individuals are paid on a piece work basis while sighted individuals receive an hourly wage. Id. All employees work a forty-hour week, receive paid holidays, and paid vacation time, worker’s compensation and life insurance, and are disciplined for serious misconduct. Id. at 570. The court determined that the program contemplated long term employment with very few leaving into the competitive market. Id.

The Board and the court were faced with deciding whether handicapped workers in sheltered workshops are “employees” under the NLRA. The court discussed the fact that sheltered workshop workers were not, as a matter of law, excluded from the NLRA. The court was faced with deciding whether the Board had adequate facts characterizing sheltered workshop employees as “employees” under the NLRA. Id. at 572. The court upheld the decision of the Board, deferring to the Board’s discretion in determining the employees’ status. Id. at 572-73. However, the court agreed with the Board that the case strongly suggested that the “‘rehabilitative’ and ‘therapeutic’ nexus is . . . subordinate to routine business considerations.” Id. at 571. The Board concluded that the similarities between clients and private workers outweighed the differences and that economic motives prevailed despite the professed therapeutic orientation. Id. at 572-73. The Board stated that, overall, the workshop was based on economic considerations. Id. at 573.

154. NLRB v. Lighthouse for the Blind of Houston, 696 F.2d at 406.
155. 231 N.L.R.B. 536 (1977). Goodwill is a nonprofit, charitable organization pro-
the Board’s broad discretion in determining the status of individuals under the NLRA and the well established limited review of such decisions by the court.\textsuperscript{156} The court found no error in the Board’s determination. The court also noted that there was no congressional policy establishing that collective bargaining is totally inconsistent with a rehabilitative activity.\textsuperscript{157}

C. \textit{Key Opportunities, Inc.}\textsuperscript{158}

Key Opportunities operates a sheltered workshop employing seventy to eighty mentally, emotionally, socially, or physically handicapped “clients.” Key Opportunities’ “work activities” program serves about thirty clients who, due to their handicaps, would in all probability always need a sheltered workshop. Clients receive wages which vary according to production, punch a time clock, work regular hours, receive paid holidays and vacations, and are disciplined for misbehavior. Key Opportunities does not make a profit.\textsuperscript{159}

The Board refused to assert jurisdiction over the clients at Key

\textsuperscript{156} NLRB v. Lighthouse for the Blind of Houston, 696 F.2d at 404.
\textsuperscript{157} Id. at 407.
\textsuperscript{158} 265 N.L.R.B. 1371 (1982).
\textsuperscript{159} Id. at 1373.
Opportunities due to its determination that the clients were not "employees" within the meaning of the National Labor Relations Act. The Board determined that Key Opportunities did not employ individuals expecting to benefit from their output, but that their sole purpose was to provide work rehabilitation and work-based therapy for handicapped individuals. The organization intended only to provide jobs as a form of therapy, and thus, their only hiring criterion was whether the client would benefit. The Board justified its decision by stating that the "exploitation" which the National Labor Relations Act attempts to regulate only exists where a person employs another person to derive some net benefit from the other's output.160

This overriding therapeutic purpose distinguishes "employees" from "clients." This analytical approach has been determinative in other situations involving sheltered workshops employing handicapped individuals.

IV. ARKANSAS LIGHTHOUSE FOR THE BLIND v. NLRB161—HISTORY AND ANALYSIS

The Arkansas Lighthouse for the Blind was brought before the Board in 1987 for engaging in unfair labor practices as described in the National Labor Relations Act. Arkansas Lighthouse was accused of violating provisions of the NLRA by, among other things, threatening employees with plant closings and/or loss of work, promising increased compensation to discourage union support, refusing to bargain with the union, soliciting revocations of union authorization cards, and interrogating employees.162 The Arkansas Lighthouse claimed that their handicapped workers did not fall within the definition of "employee" as covered by the NLRA.163 The Board dismissed the Lighthouse's argument and determined that the Lighthouse workers are "employees" within the NLRA.164 The Board looked to a determination of an industrial versus a rehabilitative purpose of the organization in deciding that it was not rehabilitative in nature and, thus, within the jurisdiction of the Board.165 Arkansas Lighthouse appealed this decision to the court of appeals for review of the Board's determination.

Arkansas Lighthouse for the Blind is a nonprofit, charitable cor-

160. Id. at 1374.
161. 851 F.2d 180 (8th Cir. 1988).
163. Id.
164. Id.
165. Id.
poration which is engaged in manufacturing products under a sheltered workshop certificate issued by the Department of Labor under section 14(c)(1) of the Fair Labor Standards Act. 166 Eighty-four percent of the Lighthouse's employees are blind. Although the Lighthouse may pay its workers fifty percent of minimum wage under the sheltered workshop certificate, all of the employees are paid identical hourly wages above minimum wage, regardless of productivity and length of service and receive yearly increases. Employees are disciplined for serious misconduct and may be discharged for severe offenses. However, employees do have a grievance procedure as established by the employee manual. 167 Employees work a full work week, punch a time clock, and receive overtime compensation, insurance benefits, unemployment benefits, worker's compensation, and paid holidays and vacation time. 168 The Lighthouse does not provide social and counseling services or a recreational area for its employees or the blind community as a whole, but merely complies with the Department of Labor requirements for placement and counseling by sending an annual list of clients capable of competitive employment to the Office of the Blind and Visually Impaired. 169

The employees, referred by the state Office of the Blind and Visually Impaired (about 98%), undergo a thirty-day training period after which they are retained if minimum production requirements are satisfied. Clients not producing sufficiently may be involuntarily transferred to another department or not recalled from a layoff. However, clients are never forced to leave, even if capable of working elsewhere. On occasion, the Lighthouse has removed sighted employees to make jobs available to clients, and at one point, a job position was subdivided into two in order to make room for a client. 170 Actual production ranges from under fifty to about eighty percent that of a sighted employee with about thirty-five to forty percent of the workers producing close to eighty percent; fifty percent produce at about fifty to sixty percent; and ten to fifteen percent produce at a lower rate. 171

The ultimate goal of the Lighthouse is to place its employees in private industry. In prior years, the actual number of placements has

---


167. Id. at 181.

168. Id. at 182.

169. Id. at 183-84.

170. Id. at 183.

ranged from five to eight per year. The Lighthouse sells over ninety percent of its products to the government under contracts pursuant to the Wagner-O'Day Act.\textsuperscript{172} Although annual sales exceeded $500,000.00 with over $50,000.00 of that being shipped to points outside of the state, the Lighthouse does not make a profit.\textsuperscript{173}

The court stated that the National Labor Relations Board took a much too restrictive view of what constitutes "rehabilitation" or "therapy."\textsuperscript{174} The court held that the Board abused its discretion and declared that the Lighthouse's employees were not employees within the meaning of the National Labor Relations Act, thereby denying the Board jurisdiction over these workers.\textsuperscript{175}

The court explained that although the Act defines the word "employee" very broadly, the Board has subdivided the term into two distinct groups. The first group is considered to be "rehabilitative" or "therapeutic," and the second is "primarily industrial."\textsuperscript{176} Although the Lighthouse operations resemble that of private industry, this is as much an instrument of the rehabilitative process as any other aspect. Especially determinative was the fact that all employees are paid an equal wage regardless of productivity. The court stated that wages related to productivity and tenure are usually a "hallmark" of private employment. The fact that the workshop environment resembles that of private employment was a useful rehabilitative and therapeutic device, used to prepare the "clients" for private employment.\textsuperscript{177} The Lighthouse has a production goal of eighty percent of the production of a sighted employee; however, only about sixty to sixty-five percent of its employees ever produce above the sixty percent level.\textsuperscript{178} Although it was determined that an in-house counselor would aid the overall placement effort, it was not \textit{per se} insufficient to simply comply with Department of Labor requirements.

Further, in the past, the private sector has not been anxious to hire blind workers.\textsuperscript{179} Before inferring an industrial motive upon such a basis, the handicaps involved should be considered.\textsuperscript{180} The Board's

\begin{footnotes}
\footnote{172. Arkansas Lighthouse for the Blind v. NLRB, 851 F.2d 180, 181 (8th Cir. 1988). See infra notes 59-75 and accompanying text for a discussion of the Wagner-O'Day Act.}
\footnote{173. \textit{Id.} at 182-83.}
\footnote{174. \textit{Id.} at 182.}
\footnote{175. \textit{Id.} at 185.}
\footnote{176. \textit{Id.} at 182. See supra notes 148-53 and accompanying text for further discussion of these standards.}
\footnote{177. \textit{Id.} at 183-84.}
\footnote{178. \textit{Id.} at 183 n.3.}
\footnote{179. \textit{Id.} at 184.}
\footnote{180. \textit{Id.} at 185.}
\end{footnotes}
action and view would tend to discourage the formation and operation of non-profit projects to aid and assist therapeutic and rehabilitative efforts and the employment of the handicapped as promoted by the Wagner-O'Day Act.\textsuperscript{181}

Furthermore, due to the nature of the workshop, the normal objectives of a labor union, although emphasized in a different manner, are overtaken by the employer itself. If a union were established and demanded higher wages and/or better benefits, the employer might be forced to reduce the number of handicapped individuals it employs, employ more productive workers, or change employment policies in order to waylay harmful union demands.\textsuperscript{182} The ultimate goal of the workshop was to help the employees obtain skills and a sense of self-worth rather than financial gain.\textsuperscript{183} The court acknowledged the fact that the other court of appeals’ cases analyzing this issue agree with the Board’s decision, thus creating a split in interpretation by the federal court system.\textsuperscript{184}

The \textit{Arkansas Lighthouse} court acknowledged other policies and legislation, such as the Wagner-O'Day Act, involving handicapped employees in sheltered workshops. Prior to the \textit{Arkansas Lighthouse} decision, courts, such as the \textit{Houston Lighthouse} court, neglected to address the legislative and policy issues relevant to these individuals.

\section*{V. Analysis of \textit{Arkansas Lighthouse for the Blind} Decision Considering Policy and Prior Decisions}

The NLRA defines the terms used in the Act very broadly.\textsuperscript{185} Although the Board has been given broad discretion in interpreting these terms, the Board must still exercise this discretion within the constraints and limitations prescribed by Congress.\textsuperscript{186} The NLRA does not specifically exclude handicapped employees in sheltered

\begin{flushright}
\begin{itemize}
\item Id. at 183. See supra notes 59-75 and accompanying text for a further discussion of the Wagner-O'Day Act.
\item Id. at 183.
\item Id. at 185.
\item Id. at 183.
\item Id. at 184.
\item Id. at 184.
\item NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). "[T]he broad language of the Act's definitions . . . of 'employee,' 'employer,' and 'labor dispute,' leaves no doubt that its applicability is to be determined broadly . . . ." Id. at 129-30. See supra notes 4-7 and accompanying text for a further discussion of the definitions and their interpretation under the NLRA.
\item H.R. REP. NO. 245, 80th Cong., 1st Sess. 18 (1947). "It is inconceivable that Congress, when it passed the act, authorized the Board to give every word in the act whatever meaning it wished . . . . Congress intended . . . . that the Board give to the words not far-fetched meanings but ordinary meanings." Id. See supra notes 4-8 and accompanying text for a further discussion of the Board's discretion.
\end{itemize}
\end{flushright}
workshops from the Board's jurisdiction, but does exclude other specified groups.\textsuperscript{187} Congress previously expressed its intention to give the Board the full breadth of congressional power under the commerce clause.\textsuperscript{188} Accordingly, courts also entrusted the Board with broad powers when interpreting and enforcing the Act.\textsuperscript{189} In the Amendments of 1947, Congress expressed the view that nonprofit charitable organizations, in general, would not fall within the Board's jurisdiction because they did not affect commerce, but Congress did not specifically deny the Board's jurisdiction over such organizations.\textsuperscript{190} If Congress intended to bar completely the Board from exercising jurisdiction in such situations, it would have amended the statute to indicate that intention, as it did in other specific instances.\textsuperscript{191} Congress' failure to amend the statute in this manner has left the Board to decide in which cases to exercise jurisdiction over nonprofit organizations. As discussed in the Catholic Bishops decision,\textsuperscript{192} the Board's standards may not constitute a workable guide for exercise of its jurisdiction.\textsuperscript{193} The Board has never outlined clear guidelines or standards to explain

\textsuperscript{187}. 29 U.S.C. § 152(3) (1982). See supra notes 4-5 & 55-56 and accompanying text for a further discussion of the definitions of "employee" and "employer" under the NLRA.

\textsuperscript{188}. H.R. REP. No. 969, 74th Cong., 1st Sess. 6 (1935). "In enacting the National Labor Relations Act, Congress gave and intended to give the Board the fullest possible jurisdiction under the commerce clause of the Constitution." NLRB v. Erlich's 814, Inc., 577 F.2d 68, 70 (8th Cir. 1978). See also NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224 (1963); Polish Nat'l Alliance v. NLRB, 322 U.S. 643 (1944). See supra note 26 and accompanying text for a further discussion of Congress' power under the commerce clause.

\textsuperscript{189}. Katzenbach v. McClung, 379 U.S. 294 (1964). Congress' power under the commerce clause is "broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court . . . not to interfere." \textit{Id.} at 305. This power may be exerted to prevent the disruption of commerce. \textit{Id.} See supra note 26 and accompanying text for a further discussion of Congress' power under the commerce clause.

\textsuperscript{190}. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 32, \textit{reprinted in} 1947 U.S. CODE. CONG. & ADMIN. NEWS 1135, 1137. "The other nonprofit organizations . . . are not specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities . . . [have they] been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act." \textit{Id.} See supra notes 47-48 and accompanying text for a further discussion of organizations exempt from the NLRA.


\textsuperscript{192}. 440 U.S. 490 (1979). See supra notes 42-43 and accompanying text for a further discussion of the Catholic Bishops decision.

\textsuperscript{193}. NLRB v. Catholic Bishops of Chicago, 440 U.S. at 490. The Board's standard to establish its jurisdiction over religious schools entailed a determination of whether the school is "completely religious" and not "merely religiously associated." \textit{Id.} at 495. This standard "failed to provide a workable guide for the exercise of discretion." \textit{Id.} See supra notes 42-43 and accompanying text for a further discussion of the Catholic Bishops decision.
the “typically industrial” or “rehabilitative” categories concerning sheltered workshops.\footnote{194} The \textit{Arkansas Lighthouse} court did not deny the fact that the Board may, in certain circumstances, have jurisdiction over these types of employees; however, it questioned the Board’s application of these broad guidelines in light of other legislative policies involving handicapped individuals.\footnote{196} The \textit{Arkansas Lighthouse} court indicated that in the present case the Board took a much too restrictive view of “rehabilitative” workshops, thereby abusing its discretion.\footnote{197}

The \textit{Arkansas Lighthouse} court was concerned that the Board’s exercise of jurisdiction in these situations tended to discourage the formation and operation of sheltered workshops, undermining congressional intention to protect and further the interests of the handicapped.\footnote{198} Unionization may force such organizations to change their operations significantly enough to defeat the purposes of these organizations and the congressional policies to provide and encourage employment for handicapped individuals.\footnote{199}

The legislation pertaining to handicapped individuals indicates some underlying policies which cannot be ignored. Congress enacted this legislation to encourage the hiring and retention of such individu-
This legislation has resulted in concerted efforts to focus attention on the problems and needs of the handicapped and to vitalize the commitment of the United States to overcome these problems. Programs and policies instituted through the Wagner-O'Day Act, the Fair Labor Standards Act, the Rehabilitative Act of 1973, and the Internal Revenue Code provide a basis for understanding congressional intent with respect to these individuals. Although handicapped individuals should be treated as pro-

200. H.R. REP. No. 228, 92d Cong., 1st Sess. 21, reprinted in 1971 U.S. CODE CONG. & ADMIN. NEWS 1079, 1093. The Wagner-O'Day Act is consistent with "the Department [of Labor]'s objective to promote employment of the handicapped." Id. Congress hoped that the handicapped would "acquire sufficient job-skill proficiency to enter a competitive job situation." Id. The Fair Labor Standards Act allows for the operation of the sheltered workshop which is defined as a "charitable organization or institution conducted not for profit, but for the purpose of carrying out a recognized program of rehabilitation . . . or other occupational rehabilitative activity of an educational or therapeutic nature" for handicapped workers. 29 C.F.R. § 525.2(b) (1988). The Rehabilitation Act of 1973 was designed, in part, "to focus research and training activities on making employment and participation in society more feasible for handicapped individuals." S. REP. No. 318, 93d Cong., 1st Sess. 19, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2076, 2092. See supra notes 58-135 and accompanying text for a further discussion of legislation pertaining to handicapped individuals.

201. S. REP. No. 1330, 75th Cong., 3d Sess. 2 (1938). In enacting the Wagner-O'Day Act, Congress recognized that the employment opportunities for the blind are limited, and, therefore, "the Government should spare no effort to aid and assist them by means other than relief grant." Id. The Fair Labor Standards Act was amended in 1966 for the "purpose of improving the economic circumstances of handicapped workers, speeding their movement into fully protective private employment, and assuring that such workers are not exploited through low wages." S. REP. No. 1487, 89th Cong., 2d Sess. 23, reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 3002, 3025. The Act was further amended to provide handicapped individuals with the "due process protection [that is an essential element in the [Act] . . . and will hopefully insure against exploitation of this vulnerable sector of our work force." 132 CONG. REC. H8825 (daily ed. Oct. 1, 1986) (statements of Rep. Murphy). The Rehabilitation Act of 1973 sought to "improve in every possible respect the lives as well as the livelihood of [handicapped] individuals served." S. REP. No. 318, 93d Cong., 1st Sess. 5, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2076, 2079. The Act is intended to promote a "better program of service" and "designed to focus research and training activities on making employment and participation in society more feasible for handicapped individuals." Id. at 19, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS at 2092. See supra notes 62-63, 91-96, 107, & 114-18 and accompanying text for a further discussion of Congress' commitment to handicapped individuals.


ductive and worthwhile citizens, employers must be aware of limited capabilities due to their handicap(s). These congressional policies and intentions must be considered in situations involving the handicapped.

Although it wished to encourage the handicapped to seek employment in private industry, Congress realized that this goal may not always be obtainable—depending on both the handicap and the individual. Though balancing the actual limitations of the handicapped against hopes of rehabilitation invokes the realization that the relationship between these individuals and present and potential employers must be dealt with carefully. In realizing the need to encourage employers to hire the handicapped, Congress requires the government to purchase products made by the handicapped, gives such nonprofit charitable organizations hiring the handicapped tax exempt status, allows employers of the handicapped to pay wages below minimum wage upon approval by the Secretary of Labor, and requires state and federal programs to address and oversee matters involving the handicapped, including provisions trying to eliminate discrimination against the handicapped. Through this type of legislation, Congress encourages employment of the handicapped while also trying to curb abuse of flexibilities and incentives given to employers employing such individuals. Legislation has developed in response to these concerns.

206. S. Rep. No. 318, 93d Cong., 1st Sess. 19, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2076, 2092. Congress wishes for the programs in the Rehabilitation Act to "remain vocationally oriented, it does believe that there are handicapped individuals whose handicaps are so severe, or because of other circumstances, such as age, that they may never achieve employment." Id. Congress strived to find methods so that "such individuals may gain entrance to the vocational rehabilitation program or may be enabled to live more independently." Id. at 2093. The Wagner-O'Day Act was expanded to "promote employment of the handicapped. Hopefully it will assist some of the severely handicapped to acquire sufficient job-skill proficiency to enter a competitive job situation." H.R. Rep. No. 228, 92d Cong., 1st Sess. 21, reprinted in 1971 U.S. CODE CONG. & ADMIN. NEWS 1079, 1093. See supra notes 64-66 & 114-18 and accompanying text for a further discussion of congressional policy.


gress has set up committees to investigate the social and economic situations confronting the handicapped,212 encouraged providing fringe benefits to these employees,213 allowed subminimum wages to be paid upon approval of the Secretary of Labor, and provided employees with a means to petition the Secretary of Labor for wage reviews.214 The Arkansas Lighthouse court and Congress recognize that employers in private industry may not always be willing or able to hire the handicapped and that placement records from sheltered workshops may not be an accurate measure of the rehabilitative process.215

Unlike the Arkansas Lighthouse court, the Houston Lighthouse court did not address the relevant policy and legislation considerations that concern handicapped individuals. The Houston Lighthouse court based its decision solely on whether the Board abused its discretion under the NLRA as indicated from inferences drawn from the factual situation.216 Despite the factual similarities between the Houston Lighthouse and the Arkansas Lighthouse, the two courts came to conflicting decisions concerning the discretion of the Board to assert jurisdiction over these employees.217 While the Houston Lighthouse court found that the operations of the Lighthouse too closely paralleled

212. 41 U.S.C. § 47(e) (1982). Congress created a committee to conduct "continuing study and evaluation of its activities ... for the purpose of assuming effective and efficient administration of [the Wagner-O'Day Act]." Id. See supra notes 68-72 & 119-221 and accompanying text.

213. H.R. REP. NO. 228, 92d Cong., 1st Sess. 8, reprinted in 1971 U.S. CODE CONG. & ADMIN. NEWS 1079, 1085. The House of Representatives indicated that there was "another area of Congressional concern, namely the need to explore the relationship of the handicapped workers and their workshops to fringe benefits." Id. The House of Representatives suggested that "studies of policies and practices of workshops with respect to [fringe benefits] should be undertaken." Id. See supra note 68 and accompanying text.


215. Arkansas Lighthouse for the Blind v. NLRB, 851 F.2d 180, 184 (8th Cir. 1988). "Lighthouse's rehabilitative object is not undermined by its unspectacular placement rate. Experience indicates that the private sector is not very anxious to hire blind workers." Id. "[T]here are handicapped individuals whose handicaps are so severe, or because of other circumstances, such as age, that may never achieve employment." S. REP. NO. 318, 93d Cong., 1st Sess. 19, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2076, 2092. See supra notes 117 & 178 and accompanying text.

216. NLRB v. Lighthouse for the Blind of Houston, 696 F.2d 399, 406-07 (5th Cir. 1983). "We can find no error in the Board's determination ... ." Id. "The Board has determined that application of the Act to workers in workshops such as the Lighthouse ... is entirely consistent with the statutory purpose. We find that such a determination has a 'reasonable basis in law.'" Id. at 407 (quoting NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131). See supra notes 156-57 and accompanying text.

217. NLRB v. Lighthouse for the Blind of Houston, 696 F.2d at 404; Arkansas Lighthouse for the Blind v. NLRB, 851 F.2d at 182. See supra notes 156 & 175 and accompanying text for a further discussion of the courts' decisions.
those found in private industry,218 the Arkansas Lighthouse court found these parallels to be good preparation for employment in private industry and useful in acclimating handicapped employees to private industry.219 The Arkansas Lighthouse court indicated that this type of environment is probably the most successful method of rehabilitation.220

The Houston Lighthouse court did not address the policies and legislation relevant to sheltered workshops and handicapped employees, but simply deferred to the Board’s discretion.221 It ignored the unique situation of these individuals and the economic realities of workshops and their clients in the realm of private industry and employers. Although this decision is consistent with the Board’s discretion, it failed to address the relevant underlying issues,222 which include government purchases required by the Wagner-O’Day Act, wage provisions instated by the Fair Labor Standards Act, policies and programs underlying the Rehabilitation Act of 1973, and the tax exempt status of sheltered workshops provided by the Internal Revenue Code.

The Board seems to use inconsistent criteria in determining whether a specific sheltered workshop is within its jurisdiction. When the Board chooses not to assert jurisdiction, it focuses on its own view of the employer’s objectives.223 In decisions where jurisdiction is as-

---

218. NLRB v. Lighthouse for the Blind of Houston, 696 F.2d at 405-06. “These working conditions and this working environment are in dominant measure typical of working conditions and a working environment subject to collective bargaining . . . . The panoply of working conditions and benefits which the Lighthouse has paternalistically given to Workshop A are the normal and usual grist for the mill of collective bargaining.” Id. at 406. See supra note 152 and accompanying text.

219. Id. at 183. “There may be no better preparation for work in private industry than time spent in a caring environment which in some respects parallels private industry.” Id. See supra note 177 and accompanying text.

220. Arkansas Lighthouse for the Blind v. NLRB, 851 F.2d at 183. “Work is probably the most productive and successful method of rehabilitation for handicapped persons who are able to work, and particularly the blind.” Id.

221. NLRB v. Lighthouse for the Blind of Houston, 696 F.2d at 404. See supra note 156 and accompanying text.

222. NLRB v. Lighthouse for the Blind of Houston, 696 F.2d at 407. The court determined that the Board’s application of the NLRA to such employees “is entirely consistent with the statutory purpose.” Id. The court found that “such a determination has a ‘reasonable basis in law.’” Id. Further, the court stated that “[t]here is no Congressional policy that collective bargaining is totally inconsistent with rehabilitative activity.” Id. See supra notes 156-57 and accompanying text for a further discussion of the Houston Lighthouse court’s reasoning.

223. See Key Opportunities, Inc., 265 N.L.R.B. 1371 (1982) (the Board found that Key did not employ individuals expecting to benefit from their output). See also Goodwill Industries of Southern California, 231 N.L.R.B. 536 (1977) (the Board determined that
asserted, the Board has made sweeping conclusions concerning the underlying economic motives of the employer.224 Consistency and predictability are lacking in these decisions, thereby failing to provide any substantial basis for future determinations.

In determining whether handicapped employees in sheltered workshops come under the NLRA, the Board has exercised its discretion in deciding if the Board has jurisdiction in a particular case. The courts have, for the most part, deferred to the Board's discretion, recognizing the broad definitions used in dictating jurisdiction under the NLRA.225 The Arkansas court expressed the need to go beyond the actual language of the NLRA and to consider other policies and concerns involving handicapped employees in sheltered workshops.226 The Arkansas court realized the problems in applying the "rehabilitative" or "typically industrial" distinction applied by the Board to handicapped employees in sheltered workshops.227 Although the Arkansas court addressed the issue, the language and legislative history of the NLRA precludes courts from determining that the Board may not exercise jurisdiction in these environments.228

In examining the policy and history behind the NLRA, Congress created exemptions and special provisions in order to regulate the individuals that are within the exercise of the Board’s jurisdictional power

Goodwill's concern was for rehabilitating its clients and not for producing a product for profit). See supra notes 155 & 158-60 and accompanying text for a further discussion of these decisions.

224. See Cincinnati Assoc. for the Blind v. NLRB, 672 F.2d 567 (6th Cir. 1982) (the court determined that economic motives prevailed despite the therapeutic orientation). See also The Chicago Lighthouse for the Blind, 225 N.L.R.B. 249 (1976) (the Board determined this employer, engaged in non-retail performance of services, derived a substantial part of money from private subcontracts, and, thus, it effectuated the policies of the Act to assert jurisdiction). See supra notes 136-42 & 153 for a further discussion of these decisions.

225. Cincinnati Assoc. for the Blind v. NLRB, 672 F.2d 567 (6th Cir. 1982). The Cincinnati court indicated that the “Board['s] discretion . . . is subject to limited judicial review.” Id. at 572. The court “decline[d] to disturb this exercise of the Board’s discretion.” Id. at 573.

The Houston Lighthouse court found “no error in the Board’s determination.” NLRB v. Lighthouse for the Blind of Houston, 696 F.2d 399, 407 (5th Cir. 1983). The court further found that “such a determination has a ‘reasonable basis in law.’” Id. See supra notes 153, 156-57, & 215 and accompanying text.

226. See supra notes 180-82 and accompanying text for a further discussion of the Arkansas Lighthouse court’s reasoning.

227. See supra notes 174-79 and accompanying text for a further discussion of the Arkansas Lighthouse court’s reasoning.

228. 29 U.S.C. §§ 151-169 (1982). See supra notes 16-56 and accompanying text for a further discussion of the NLRA, the Board’s jurisdictional power, and the exemptions from the Board’s jurisdiction.
and the extent to which that jurisdiction may be exercised. The Arkansas Lighthouse court correctly examined other factors, external to the NLRA, in determining that there is a strong public policy to encourage and protect employment of handicapped individuals in sheltered workshops. The court recognized the potential problems which may result from unregulated and uncontrolled unionization of handicapped employees in sheltered workshops. One of the purposes behind the extensive legislation involving the handicapped is to encourage employment opportunities for handicapped individuals. This purpose is furthered by offering incentives to potential employers to encourage the formation and operation of sheltered workshops em-


230. Arkansas Lighthouse for the Blind v. NLRB, 851 F.2d at 183. The court stated that:

Our society through its government recognizes . . . [work as a successful method of rehabilitation] by aiding and assisting with the Wagner-O'Day Act . . . . The Wagner-O'Day Act assists projects aiding the handicapped by providing a ready market and purchase of the productive efforts engendered by the not-for-profit groups seeking to employ handicapped people. The Board's action and view of its majority adopts the opposite view of discouraging the formation and operation of non-profit projects to aid and assist therapeutic and rehabilitative efforts to employ the handicapped.

Id. See supra notes 180 & 198 and accompanying text.

231. Arkansas Lighthouse for the Blind v. NLRB, 851 F.2d at 183. "The usual employer-employee relationship in our competitive marketplace is not present in these good faith efforts to employ the handicapped nor is the Union's normal objective of securing improved working conditions for the employees either necessary or productive of that objective." Id. "To permit collective bargaining in this context is to risk harmful intrusion on the rehabilitative process . . . . The collective bargaining process . . . is likely to distort the unique relationship between Employer and client and impair the Employer's ability to accomplish its salutary objectives." Id. (quoting Goodwill Industries of Southern California, 231 N.L.R.B. 536, 537-38 (1977)). See supra notes 155, 181, & 198 and accompanying text.

232. S. REP. No. 1330, 75th Cong., 3d Sess. 2 (1938). Because limited employment opportunities are available to the blind, the Wagner-O'Day Act provided that "the Government should spare no effort to aid and assist [the blind] by means other than relief grant." Id. The Fair Labor Standards Act has been amended for the purpose of "improving the economic circumstances of handicapped workers, speeding their movement into fully protective private employment, and assuring that such workers are not exploited through low wages." S. REP. No. 1487, 80th Cong., 2d Sess. 23, reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 3002, 3025. One of the purposes of the Rehabilitation Act of 1973 is to "focus research and training activities on making employment and participation in society more feasible for handicapped individuals." S. REP. No. 318, 93d Cong., 1st Sess. 19, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2076, 2092. See supra notes 62-63, 91-96, 107, 114-18 & 200 and accompanying text for a further discussion of Congress' commitment to handicapped individuals.
ploying handicapped individuals. 233

Although the Board does have the power to assert jurisdiction over handicapped employees in sheltered workshops, 234 it may not be desirable to allow the unionization that may result. In accordance with the specific legislation and policies involved, handicapped individuals and their interests must be understood and represented sufficiently in the bargaining process between the employer and the representative union. To allow unregulated negotiations between parties with little understanding of the special place in society of the handicapped could be devastating for the parties involved. Handicapped individuals employed in sheltered workshops and sheltered workshops employing the handicapped as well as the handicapped population in general could be adversely affected. There is a strong public policy, indicated by legislation, to regulate and control the employment relationship. 235 Although public interest demands that handicapped employees not be deprived of their statutory rights, it is necessary for parties involved to understand the special problems involved and to mitigate the possible effects. 236 The uniqueness of sheltered workshops along with the specific issues involving the handicapped dictates the need to have some regulation and control


234. 29 U.S.C. § 152 (1982). See supra notes 16-57 and accompanying text for a further discussion of the Board's jurisdiction over handicapped employees under the NLRA.


236. 41 U.S.C. § 47 (1982). "The Committee [for Purchase from the Blind and Other Severely Handicapped] shall make a continuing study and evaluation of its activities . . . for the purpose of assuring effective and efficient administration of the [Wagner-O'Day] Act." Id. These studies and evaluations address problems of employment of the handicapped and greater utilization of the handicapped. Id. See supra notes 53-54 and accompanying text for a further discussion of the health care industry provisions.
over the employment relationship.237

CONCLUSION

The National Labor Relations Board has been given broad enough discretion to exercise jurisdiction over handicapped employees in sheltered workshops. They have exercised this jurisdiction by establishing broad categories for determining whether certain organizations fall under the Act. The *Arkansas Lighthouse* court is the first court of appeals to question the distinctions made by the Board in determining when to assert jurisdiction. The *Arkansas Lighthouse* court takes a view of handicapped individuals, not only as they fall within the Act, but also in light of other legislation aimed at providing and extending employment opportunities for the handicapped. The analysis of the *Arkansas Lighthouse* court seems to be a realistic position in response to legislative, economic, and social policies.

*Catherine A. Bean*

---

237. See *supra* note 54 and accompanying text for a discussion of the underlying policies in enacting the health care provision of the NLRA.