

Invisible Laborers: Sheltered Workers Under the National Labor Relations Act

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Assembly-line workers at a plant in Minnetonka, Minnesota, signed a petition to hold an election for union representation.¹ As one worker stated: "All we want is the same benefits as anyone else—money to live on, to pay the bills, something to retire on when we get old." He continued: "We're being treated as second-class citizens, and I don't think that's fair."² Some workers, employed for as long as twelve years, earned about one dollar per hour after taxes.³ Wages at the shop averaged \$1.30 per hour before taxes in 1980, and decreased to \$1.21 per hour in 1981.⁴

Although their reasons for unionizing are like those of most

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1. Minneapolis Tribune, Jan. 9, 1981, at C12, col. 1. The organizing campaign was largely spurred by Advocating Change Together (ACT), an advocacy group composed primarily of mentally retarded adults and current and former sheltered workers. *Id.* ACT's philosophy is that those labeled as "retarded" can improve their own lives by self-advocacy. Union Advocate, Apr. 19, 1982, at 5, col. 1.

The procedure for seeking an election is set forth in the National Labor Relations Act (NLRA), 29 U.S.C. § 159 (1982):

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section . . . ,

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(1) (1982).

2. Minneapolis Star, Dec. 9, 1981, at C1, col. 5.

3. Minneapolis Tribune, Jan. 9, 1982, at C12, col. 1.

4. Union Advocate, Apr. 19, 1982, at 5, col. 1. Wages at the shop are a percentage of the minimum wage, based on the workers' productivity in proportion to "normal" workers. The figures cited were for the most productive workers, those in the "sheltered work" program. *See infra* note 6. The average hourly wage was

workers, the Minnetonka workers are special. These workers are handicapped.⁵ They sought to unionize a sheltered workshop: a workplace designed to employ people with vocational handicaps resulting from mental, emotional, social, or physical disabilities.⁶

66¢ and 53¢, respectively, for those in the "work activity" and "work component" programs.

5. Minneapolis Star, Dec. 9, 1981, at C1, col. 5. In Minnesota, about two-thirds of the sheltered workers are mentally retarded and one-fourth mentally ill. Program Evaluation Division, Minnesota Office of the Legislative Auditor, Evaluation of Sheltered Employment Programs ix (1984) [hereinafter cited as Minnesota Evaluation]. About one-third of sheltered workers in short-term programs have a secondary disability, most frequently mental retardation or epilepsy. *Id.* at 7. In 1983, over one-half of those in Minnesota who recently entered long-term sheltered employment were mentally retarded, followed in frequency by mental illness and orthopedic handicaps such as cerebral palsy. *Id.* at 9. Blind workers are a small percentage of the total. *Id.*

6. Minnesota Evaluation, *supra* note 5, at ix. Sheltered workshops are intended to provide work and training for handicapped persons as they progress toward competitive employment and permanent employment when competitive job opportunities do not exist. The workshops usually receive government or private contracts for labor-intensive assembly and packaging tasks. *Id.* In Minnesota, the largest number of sheltered workers engage in "sheltered work," which provides "transitional and long-term employment to handicapped persons who are at least 25% as productive as non-handicapped workers." *Id.* Sheltered work programs serve as either part of the employment rehabilitation program or merely as a source of employment. *Id.*

Individuals who are less productive can participate in "work activity" programs (called "work component" programs if they take place in a "developmental achievement center" licensed as such by the Department of Public Welfare). *Id.* at 17. These programs teach manufacturing and production skills, but productive capacity is considered to be inconsequential. *Id.* Work activity programs are highly supervised and pressures to produce are not as strong as in "sheltered work." *Id.* They can be either long-term or temporary. *Id.* Work activity programs usually involve intensive vocational training. Telephone interview with Richard Seuer, social worker (Apr. 1985). Workers in a work activity program often become "floaters," where workshops pull them into regular sheltered work if shorthanded. *Id.* Workers at this level are regularly evaluated, more highly supervised and trained than sheltered work participants, and are the subjects of periodic time studies. *Id.* If a worker rises to a set productivity level, which varies from about 25% to 40% of "normal" productivity, depending on the workshop, she or he may be moved to the sheltered work program. *Id.* Workers may then be considered permanent, but usually have no guaranteed job tenure or seniority rights. *Id.*

The third type of program, "work adjustment training," combines training in basic living skills such as recreation and interpersonal communication with some training in vocational skills. Minnesota Evaluation, *supra* note 5, at 23. Most newcomers to Minnesota workshops start out in a work activity program or in work adjustment training. Telephone interview with Richard Seuer, social worker (Apr. 1985).

Workshops are also big business. In Minnesota alone, total workshop income at workshops other than for the blind was over \$46,000,000 in 1983. Minnesota Evaluation, *supra* note 5, at 25. Many "private companies deal with workshops not solely (and perhaps not at all) for altruistic reasons but because . . . the workshop is 'a good place to do business.'" Brief for the National Federation of the Blind, *Amicus Curiae*, in support of the NLRB at 39, Cincinnati Ass'n for the Blind v. NLRB, 672 F.2d 567 (6th Cir. 1982). "The workshop industry is a significant economic entity not only in terms of pure scale, the types of companies involved, sales volume

The workers' needs for better wages, benefits, and opportunities, however, are not special. Sheltered workers across the nation earn low wages, receive negligible benefits, and are given false promises of rehabilitation.⁷ Workshops legally pay workers hourly wages ranging from a few cents to a few dollars.⁸

Under federal law, workshops may be exempted from the minimum wage laws and may pay workers according to their productivity in proportion to "normal" worker productivity.⁹ The workshops determine what is "normal." Workshops commonly abuse the process.¹⁰ For example, a supervisor reportedly stated that the standard of normal output was inflated at his workshop: "[B]efore the Labor Department inspectors came to check, a contest was held among the supervisors to see who could do the prescribed work fastest: the winners were chosen to perform for the government men."¹¹ One supervisor, a social worker at the workshop, was instructed, "See who can do the most—go as fast as you can."¹² She explained, "It was all a secret from the Labor people. Our bosses would stand over us . . . and watch us like hawks as we did it [the assigned work] for, say, ten minutes—as fast as we possibly could."¹³ By multiplying this rate, she said, the workshop de-

and markets penetrated, but also in terms of the employment opportunities that are offered there." *Id.*

7. See Wall St. J., Oct. 17, 1979, at 1, col. 6; Brief for the National Federation of the Blind, *Amicus Curiae*, in support of the NLRB at 6-12, 18-23, 28-30, *Cincinnati Ass'n for the Blind v. NLRB*, 672 F.2d 567 (6th Cir. 1982); Minnesota Evaluation, *supra* note 5, at x, xii-xiv, 32-38; Union Advocate, Apr. 19, 1982, at 5, col. 1; Minneapolis Star, Dec. 9, 1981, at C1.

8. Wall St. J., Oct. 17, 1979, at 1, col. 6. In Minnesota the average wage for workers in the sheltered work program was estimated at \$1.66 per hour in 1984. The average annual wage in 1983 was \$2,350. Minnesota Evaluation, *supra* note 5, at x.

9. Minnesota Evaluation, *supra* note 5, at 64. The applicable statute is part of the Fair Labor Standards Act. 29 U.S.C. § 214(c) (1982).

10. Wall St. J., Oct. 17, 1979, at 1, col. 6. In Minnesota the situation is comparable. As described in the article, most workshops pay handicapped workers either a percentage of the prevailing wage based on productivity or piece rate wages. Minnesota Evaluation, *supra* note 5, at 34-35. Workshops are required by the Fair Labor Standards Act to conduct periodic surveys to update their information on prevailing wages in the area. *Id.* at 35. The Minnesota Department of Vocational Rehabilitation does not audit workshops to determine if they have correctly established the commensurate wage. *Id.* at n.2. Although the United States Department of Labor is responsible for enforcement, studies by the General Accounting Office have found that the Department does not vigorously enforce the law. *Id.* The Minnesota Legislative Auditor's Office, which prepared the Report on Minnesota Workshops, stated that workshop administrators with whom it had spoken "said that they had been audited very infrequently by the Department of Labor and that those few audits were usually in response to a worker's complaint." *Id.*

11. Wall St. J., Oct. 17, 1979, at 1, col. 6.

12. *Id.*

13. *Id.*

rived the average hourly productivity for a "normal" worker.¹⁴ The Labor Department exempted that workshop from the minimum wage laws as usual.¹⁵

At Goodwill Industries in Atlanta, a worker with epilepsy who could assemble 1,000 boxes in a day made about \$2.19 per hour based on a piece rate.¹⁶ Working beside him, non-handicapped workers produced only about 300 boxes each day but earned \$2.90 per hour—a wage not determined by output.¹⁷

Workshops often justify the low wages by claiming that their intention is to prepare workers for jobs with traditional employers.¹⁸ Most workshops, however, do not achieve that objective. Nationally, about ten to fifteen percent of sheltered workers are placed annually into competitive employment.¹⁹ Only 2.7% of Minnesota's sheltered workers were placed in 1983.²⁰ For many sheltered workers, employment at the workshop is a full-time, permanent job.²¹

In the last decade, sheltered workers have increasingly turned to unions to help them achieve "better wages, better benefits, [and] better opportunities."²² The National Labor Relations Board (NLRB), however, has denied sheltered workers the opportunity to unionize in two of the four cases that have come before it.²³ In those cases denying unionization, the Board held that the

14. *Id.*

15. *Id.* The Department of Labor, however, has enough staff to inspect only three percent to five percent of the workshops every year, and Department officials find substantial wage violations at one-half to two-thirds of the sites they do inspect. Wall St. J., Oct. 17, 1979, at 1, col. 6. Many sites had never been inspected as of late 1979. *Id.* Further, situations such as the disparity in wages paid to different workers in the Goodwill workshop do not constitute violations at all. *Id.*

16. *Id.*

17. *Id.*

18. *See, e.g.*, Goodwill Indus. of S. Cal., 231 N.L.R.B. 536 (1977).

19. This was shown in studies by the United States Department of Labor and others in the late 1970's. Minnesota Evaluation, *supra* note 5, at 32. The studies also showed that most of the workers were placed in competitive work during their first year in the workshop. The annual rate of placement for workers who had been in workshops for more than two years was only three percent nationally. *Id.*

20. Minnesota Evaluation, *supra* note 5, at xiii. This percentage had declined steadily, from 7.5% in 1980, to 5.0% in 1981, to 3.6% in 1982. *Id.* at 32.

21. *Id.* at 32.

22. Unionizing campaigns led to hearings before the National Labor Relations Board in five cases since 1976: Chicago Lighthouse for the Blind, 225 N.L.R.B. 249 (1976); Goodwill Indus. of S. Cal., 231 N.L.R.B. 536 (1977); Cincinnati Ass'n for the Blind, 235 N.L.R.B. 1448 (1978); Houston Lighthouse for the Blind, 248 N.L.R.B. 1366 (1980). In Minnesota sheltered workers attempted unsuccessfully to organize the Opportunity Workshop. *See supra* note 1 and accompanying text. Although other means of ameliorating the plight of sheltered workers may exist, the scope of this article is limited to unionization as a possible solution.

23. The Board denied sheltered workers the right to unionize in Goodwill In-

workshops provided therapeutic services rather than employment.²⁴ Only workers who are "employees" within the meaning of the National Labor Relations Act may unionize.²⁵

This article discusses the right of sheltered workers to unionize under the National Labor Relations Act (NLRA).²⁶ The discussion emphasizes the ameliorative purpose of the Act—to extend its protection to those workers who would benefit from unionization. Part I explains the Board's approach, which denies many sheltered workers the right to unionize. Part II evaluates the Board's decisions and concludes that they are based on unwarranted assumptions and do not accord with the purpose of the NLRA. Part III recommends an alternative "functional" test which is designed to promote the rights of workers under the NLRA.²⁷

I. Case Analysis

Since 1976, most non-profit organizations, including sheltered workshops, fall within the jurisdiction of the NLRB.²⁸ When a

dus. of S. Cal., 231 N.L.R.B. 536 (1977) and Key Opportunities, Inc., 265 N.L.R.B. 1371 (1982). The Board extended the protections of the NLRA, including the right to unionize, in Cincinnati Ass'n for the Blind, 235 N.L.R.B. 1448 (1978) and Houston Lighthouse for the Blind, 248 N.L.R.B. 1366 (1980).

In one other decision the Board permitted sheltered workers to unionize. Chicago Lighthouse for the Blind, 225 N.L.R.B. 249 (1976). In that case the Board determined that it had jurisdiction over the sheltered workers. *Id.* at 249-50. The Board found the workshop to be within its jurisdiction and sheltered workers to be employees, without discussing the goals of the workshop or the charity of the employer. The Board did not apply the complicated analysis it has used in the four subsequent cases, which is the subject of this article. Instead, the Board used the same straightforward approach that it does for non-handicapped workers. *See, e.g.*, NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944), in which employee status depended upon surrounding facts and the economic position of the workers (newsboys). [This principle in *Hearst* was overruled to the extent that it disregarded agency law. *Donovan v. Agnew*, 712 F.2d 1509, 1513 (1st Cir. 1983). In 1947 Congress expressly overruled *Hearst* only to the extent that it amended the NLRA's definition of employee to exclude "any individual . . . having the status of an independent contractor. . . ." 29 U.S.C. § 152(3) (1982).] *Chicago Lighthouse* was the Board's first decision regarding sheltered workshops since it expanded the jurisdictional standard to include non-profit organizations, *see infra* note 28. The Board has not followed *Chicago Lighthouse* in subsequent decisions. Therefore, this article will not discuss the case in detail.

24. Key Opportunities, Inc., 265 N.L.R.B. 1371, 1374 (1982); Goodwill Indus. of S. Cal., 231 N.L.R.B. 536, 537 (1977).

25. 29 U.S.C. § 161 (1982).

26. The NLRA is codified at 29 U.S.C. §§ 151-169 (1982).

27. This is the purpose of the Act. *See infra* note 77.

28. None of the Board's decisions since 1976 has found sheltered workshops to be outside its jurisdiction. Congress vested the Board with the fullest jurisdictional breadth constitutionally possible under the commerce clause. *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 684 (1951). "The extent to which the

workshop is within the NLRB's jurisdiction, the Board determines the appropriateness of unionization for handicapped workers.²⁹ Central to this question is the status of the workers as "employees."³⁰ Only employees have the right to unionize and engage in collective bargaining.³¹ Section 152(3) of the NLRA provides that the "term 'employee' shall include any employee . . . unless the Act explicitly states otherwise."³² The Act explicitly excludes certain workers from its protection but does not affirmatively define "employee."³³ The Act does not expressly exclude sheltered work-

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). Before 1976, the Board had different standards for asserting jurisdiction over non-profit organizations and for-profit enterprises. *Rhode Island Catholic Orphan Asylum, aka St. Aloysius Home*, 224 N.L.R.B. 1344 (1976). The worthy purpose and non-profit status of an organization exempted it from Board jurisdiction, *id.* at 1345, unless the organization had a "massive" impact on commerce, as opposed to the lesser impact needed by profit-oriented concerns. *Cornell Univ.*, 183 N.L.R.B. 329, 332 (1970). The Board refrained from asserting jurisdiction over sheltered workshops because of their "close affiliation with State agencies and philanthropic organizations," "the limited effect on commerce of labor disputes involving such rehabilitation centers," and because their commercial activities were "only a means" toward their goal of "rehabilitation of employable persons." *Sheltered Workshops of San Diego*, 126 N.L.R.B. 961, 964 (1960) *quoted in* *Key Opportunities, Inc.*, 265 N.L.R.B. 1371, 1372 n.5 (1982). Cases in which the Board refused to assert jurisdiction over sheltered workshops before 1976 were *Sheltered Workshops of San Diego*, 126 N.L.R.B. 961 (1960) and *Epi-Hab Evansville, Inc.*, 205 N.L.R.B. 637 (1973).

In the 1976 case, *St. Aloysius Home*, the Board held that it would no longer consider an organization's "worthy purpose" as a factor in determining whether to assert jurisdiction. 224 N.L.R.B. at 1345. The Board noted that the recent health care amendments to § 2(2) of the NLRA deleted the only reference to the exclusion from Board jurisdiction of charitable organizations, i.e., the one for non-profit hospitals. *Id.* at 1344 (the Board referred to the amendments to the National Labor Relations Act, Pub. L. No. 93-360, 88 Stat. 395 (1974) (codified as amended at 29 U.S.C. § 152(2) (1982))). Thus the amendments removed any statutory basis for declining jurisdiction over non-profits on the basis of their charitable function or worthy purpose. *Id.*

In *St. Aloysius Home*, the Board also abandoned the "massive impact" standard in favor of a uniform "affecting commerce" standard of selling goods in excess of \$50,000. *Id.* at 1345. Now the enterprises' yearly volume of business and/or amounts of interstate inflow or outflow is the sole basis for asserting jurisdiction over charitable and non-charitable institutions alike. *St. Aloysius Home*, 224 N.L.R.B. at 1345.

29. *Key Opportunities, Inc.*, 265 N.L.R.B. 1371, 1372 (1982).

30. *Id.*

31. 29 U.S.C. § 157 (1982).

32. 29 U.S.C. § 152(3) (1982).

33. At the time Congress was considering the major Taft-Hartley amendments to the NLRA, the United States House of Representatives record noted: "[a]n '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." H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947); see *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167 (1971). At the same time, "employees," as used in the NLRA, "in

ers from the definition of employee.³⁴ The Supreme Court has interpreted the Act to vest in the NLRB the authority to formulate a "completely definitive limitation around the term 'employee.'"³⁵ Thus, the status of sheltered workers under the Act is a matter within the Board's discretion.

The Board has established the status of handicapped sheltered workers in four cases.³⁶ Two cases, *Cincinnati Association for the Blind*³⁷ and *Lighthouse for the Blind of Houston*,³⁸ involved workshops for the blind where the visually handicapped workers voted in favor of union representation in NLRB-approved elections.³⁹ In representation hearings, the Board held that the handicapped sheltered workers were "employees" within the meaning of the NLRA, and therefore entitled to organize and bargain collectively.⁴⁰ The Board reasoned that the workers were employees in a "factual" sense because they were "treated essentially as are regular employees in the private sector" and the workshop "operate[d] like any manufacturing operation."⁴¹ Furthermore, because the employer's relationship with the workers was "guided to a great extent by business considerations," collective bargaining was appropriate for the workers.⁴² The Board thus permitted workers in the two workshops to organize into unions.

In *Goodwill Industries of Southern California*⁴³ and *Key Op-*

the absence of specific limitation, . . . includes . . . in a generic sense, members of the working class." *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 146 (6th Cir. 1977).

34. Brief for the NLRB at 24, *NLRB v. Lighthouse for the Blind of Houston*, 696 F.2d 399 (5th Cir. 1983).

35. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 693 n.1 (1980) (quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944)). The legislative history of the Taft-Hartley Act indicates that Congress did not explicitly list certain categories of employees as excluded from the Act because such individuals, including managerial and confidential employees, are "so clearly outside the Act that no specific exclusionary provision was thought necessary." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283 (1974). Nothing in the legislative history, however, suggests that Congress intended to place sheltered workers outside the scope of the Act. *Cincinnati Ass'n for the Blind*, 672 F.2d 567, 570-71 (6th Cir. 1982).

36. See *supra* note 23 for identification and a brief discussion of these four cases.

37. 235 N.L.R.B. 1448 (1978), *enforcement granted*, 672 F.2d 567 (6th Cir. 1982).

38. 248 N.L.R.B. 1366 (1980), *enforcement denied*, 653 F.2d 206 (5th Cir. 1981), *enforced*, 696 F.2d 399 (5th Cir. 1983).

39. *Houston*, 248 N.L.R.B. at 1366; *Cincinnati*, 235 N.L.R.B. at 1448.

40. *Houston*, 696 F.2d at 399; *Cincinnati*, 672 F.2d at 567.

41. *Houston*, 244 N.L.R.B. at 1147 (the court quoting a witness at the representation hearing).

42. *Id.* (quoting *Cincinnati*, 235 N.L.R.B. at 1449). The courts of appeals dealt with the Board's *Goodwill* decision by distinguishing its facts from those in the *Houston* and *Cincinnati* workshops.

43. 231 N.L.R.B. 536 (1977).

portunities, Inc.,⁴⁴ the Board denied sheltered workers the right to unionize.⁴⁵ Both workshops employed workers with some sort of employment disability resulting from mental illness or retardation, physical handicap, insufficient education, or penal records.⁴⁶ Goodwill's sheltered workers collected, repaired, and refurbished discarded household items and sold them at the Goodwill stores.⁴⁷ Key's sheltered workers performed services such as manufacturing, packaging, and assembly work on contract from manufacturers, as well as out-of-plant services such as lawn care and wood cutting.⁴⁸ In both cases, the Board conceded that the workers may indeed have been employees in the usual sense of the word.⁴⁹ The Board concluded, however, that to permit collective bargaining would not effectuate the Act's purpose—to help workers increase their bargaining power and thereby lessen the “exploitation of employee by employer.”⁵⁰ On the contrary, collective bargaining would interfere with or would be irrelevant to the employer's charitable efforts.⁵¹

The Board follows a consistent framework for determining the workers' status under the Act. Initially, the Board asks whether sheltered workers are employees in “the generic sense of the term.”⁵² Sheltered workers who “work for a set number of hours a day, perform functions which are of recognized economic value, and are paid for the performance of those functions” are “generic” employees.⁵³ Although the Board has not yet directly

44. 265 N.L.R.B. 1371 (1982).

45. *Goodwill*, 231 N.L.R.B. at 538; *Key*, 265 N.L.R.B. at 1374. In *Key*, however, the sheltered workers were not seeking to be covered by the NLRA; their non-handicapped supervisors were. *Key*, 265 N.L.R.B. at 1372. The supervisors were fired for activities protected by the Act. *Id.* For that reason they sought coverage so that Key could be found guilty of an unfair labor practice and be required to reinstate the supervisors with back pay. *Id.* at 1376. If the sheltered workers were found to be “employees” within the meaning of the Act, then those who direct activities would be “supervisors” according to the Act's definition. *Id.* at 1372; see 29 U.S.C. § 152(1) (1982). Supervisors are specifically excluded from the coverage of the NLRA. 29 U.S.C. § 152(3) (1982). Instead, the Board found that the sheltered workers were not “employees” protected by the Act—and therefore the supervisors were “employees” protected by the Act. *Key*, 265 N.L.R.B. at 1374.

46. *Key*, 265 N.L.R.B. at 1373; *Goodwill*, 231 N.L.R.B. at 537.

47. *Goodwill*, 231 N.L.R.B. at 536.

48. *Key*, 265 N.L.R.B. at 1373.

49. *Id.* at 1374; *Goodwill*, 231 N.L.R.B. at 537.

50. *Key*, 265 N.L.R.B. at 1374. See also *Goodwill*, 231 N.L.R.B. at 537.

51. *Goodwill*, 231 N.L.R.B. at 537-38. In *Key*, the Board found that collective bargaining would be irrelevant to the employer's charitable efforts. *Key*, 265 N.L.R.B. at 1374.

52. *Key*, 265 N.L.R.B. at 1374 (quoting *Goodwill*, 231 N.L.R.B. at 537). See also *Houston*, 244 N.L.R.B. at 1147; *Cincinnati*, 235 N.L.R.B. at 1449.

53. *Goodwill*, 231 N.L.R.B. at 537. See also *Key*, 265 N.L.R.B. at 1374; *Houston*, 244 N.L.R.B. at 1147; *Cincinnati*, 235 N.L.R.B. at 1449; In *Cincinnati* the Board was

confronted the situation, if workers were not "generic" employees they would not be employees protected by the Act.⁵⁴

Beyond this threshold question, the workers' status depends upon the principles that guide the workshop's operation. If a workshop's primary goal is to benefit the workers, then the workers are not employees under the Act.⁵⁵ Sheltered workers are deemed "employees" and may unionize if business considerations guide the workshop's operation.⁵⁶

To determine the prominence of business considerations, the Board examines a workshop's method of operation and production, its compensation levels, and its marketing strategy.⁵⁷ In *Cincinnati* and *Houston*, the Board found that business motives prevailed in the workshops' operation because employers' and workers' economic interests conflicted.⁵⁸ Sheltered workers faced the same responsibilities and pressures as did ordinary employees in blue-collar jobs and were to some extent disciplined and rewarded according to their behavior and work records.⁵⁹ Efforts at rehabilitation were so slight that the workshop was essentially a

less explicit about its definition of generic employees. The Board emphasized that the workers must meet quality and productivity standards; in addition, the disabled workers shared with non-disabled employees "common supervision and substantially similar terms and conditions of employment." *Cincinnati*, 235 N.L.R.B. at 1448-49.

54. This is clear because the Board's threshold determination is whether workers are employees in the usual sense of the term. *Key*, 265 N.L.R.B. at 1374; *Goodwill*, 231 N.L.R.B. at 537.

55. *Key*, 265 N.L.R.B. at 1374; *Goodwill*, 231 N.L.R.B. at 537. In *Houston* and *Cincinnati* the court of appeals implied disagreement with this Board premise. In *Houston*, the court stated that no congressional policy holds collective bargaining to be "totally inconsistent with rehabilitative policy." *Houston*, 696 F.2d at 407. The *Cincinnati* court noted that Congress did not necessarily intend to keep collective bargaining out of sheltered workshops. *Cincinnati*, 672 F.2d at 570-71. Even if Congress did so intend, not all sheltered workshops are primarily therapeutic so a blanket exemption would not be appropriate. *Id.* at 571. The court reasoned that Congress has not expressed its intent on the fundamental compatibility or incompatibility of collective bargaining and any form of "therapy," so the court simply lacked the basis on which to make an informed judgment in the area. *Id.* Faced with the choice of "attempting to 'second guess' Congress on a political and philosophical issue and relying on the broad, unequivocal language of the statute," the court chose the latter, and accordingly, declined "to carve out an exception to the plain language of section 2(3) of the Act." *Id.*

56. *Houston*, 244 N.L.R.B. at 1147; *Cincinnati*, 235 N.L.R.B. at 1449. See also *Key*, 265 N.L.R.B. at 1374; *Goodwill*, 231 N.L.R.B. at 537.

57. *Key*, 265 N.L.R.B. at 1373-74; *Houston*, 244 N.L.R.B. at 1147; *Cincinnati*, 235 N.L.R.B. at 1448-49; *Goodwill*, 231 N.L.R.B. at 537.

58. That is, normal economic considerations are a significant factor in the employer-worker relationship. *Houston*, 244 N.L.R.B. at 1147; *Cincinnati*, 235 N.L.R.B. at 1449.

59. *Houston*, 244 N.L.R.B. at 1147; *Cincinnati*, 235 N.L.R.B. at 1449.

permanent employer.⁶⁰ The workshop was operated as a profit-oriented business.⁶¹ These conditions reflected a workplace where the interests of the worker were adverse to those of the employer. The employer's interest in higher profits and productivity conflicted with the workers' interest in better wages, benefits, and working conditions. These differences, the Board held, are the "grist for the mill" of collective bargaining.⁶²

In contrast, the Board found that workers were not "employees" when their workshop was not run for financial gain and accommodated its workers' needs more than did typical workshops. In *Goodwill Industries*, the Board concluded that the union's objective to represent the employees' best interests was "avowedly and convincingly embraced by the Employer itself."⁶³ Goodwill's "ultimate hope [was] that its clients [would] find employment in private competitive industry."⁶⁴ To that end a job placement spe-

60. *Houston*, 244 N.L.R.B. at 1147; *Cincinnati*, 672 F.2d at 570.

61. *Houston*, 244 N.L.R.B. at 1145; *Cincinnati*, 235 N.L.R.B. at 1448.

62. "The panoply of working conditions and benefits which the Lighthouse has paternalistically given to Workshop A employees are the normal and usual grist for the mill of collective bargaining." *Houston*, 696 F.2d at 406 (interpreting *Goodwill*, 231 N.L.R.B. at 536). See also *Cincinnati*, 672 F.2d at 570.

63. 231 N.L.R.B. at 537. The Board added that the employer did have a "difference in emphasis as to how that goal should be accomplished." *Id.*

The Fifth Circuit Court of Appeals distinguished the *Houston* workshop from Goodwill's on the grounds that at Goodwill the

Board found that "rehabilitation" activities and goals permeated the "employer-client" relationship, that productivity did not affect remuneration or tenure, that discipline was rarely invoked, that fifty percent of job openings were reserved for short-term training of individuals who would shortly move into the open market, and that a formal, full-time placement program existed.

Houston, 696 F.2d at 406. There the Board concluded that the "employer's primary objectives are the converse of a normal employer's objectives—so much so that Goodwill might better be classified as a vocational clinic than as a viable entrepreneurial concern," and that permitting collective bargaining would "risk a harmful intrusion on the rehabilitative process." *Id.* On the other hand, the *Houston* workshop's environment and working conditions were typical of those workshops in which collective bargaining was appropriate. *Id.*

In *Cincinnati* the court echoed the Board to the effect that *Goodwill* involved a rare workplace in which the employer's concern for employee well-being displaced the need for a union—implying that in most employment, including most other workshops, employers are not concerned with employees' interests. *Cincinnati*, 672 F.2d at 573. Next, the court emphasized Goodwill's placement of workers into the "competitive market" as opposed to the *Cincinnati* workshop's offering "long-term employment with little emphasis on the acquisition of skills other than those required for Workshop production." *Id.* Third, at Goodwill "counseling and other social services were an integral part of a worker's relationship with the employer," making the work program and its resulting production "one element of the rehabilitation plan, not an enterprise in itself." *Id.* (quoting 235 N.L.R.B. at 1448). On the other hand, workers at the *Cincinnati* workshop had access to social services only to the same extent as other blind members of the community. *Id.*

64. *Goodwill*, 231 N.L.R.B. at 536.

cialist worked full-time seeking jobs for clients outside the workshops.⁶⁵ Goodwill also kept a "client's" job open while he or she was "sent out on a 1-month trial basis" to outside employment so that the client could return if unable to adjust.⁶⁶ This practice was intended to relieve pressure on the client as well as encourage private employers to extend job offers to clients which they might not be willing to make otherwise.⁶⁷ Goodwill's actions convinced the Board that the overriding concern of the workshop was rehabilitating the workers.⁶⁸ Because it assumed that collective bargaining interferes with the rehabilitation process, the Board declined to extend NLRA coverage to the workers.⁶⁹

In *Key*, the Board focused on rehabilitation goals as only one factor leading to the conclusion that "Key does not employ clients with the intention or expectation that it will benefit from their output. Rather, Key provides the clients with tasks that result in marketable output solely for the clients' benefit."⁷⁰ First, the Board stressed that Key's sole purpose was to provide work rehabilitation and work-based therapy to handicapped persons.⁷¹ The "intended product" was the improvement in the client's well-being; the services and goods produced by the clients were "merely part of the process for benefiting those same clients."⁷² Second, Key conducted its business in keeping with that purpose and accepted clients according to their potential benefit from the programs.⁷³ Third, Key lost money on its contracts.⁷⁴ For these reasons the Board concluded that Key's workers were "not the kind of workers the Act is intended to cover."⁷⁵ As in *Goodwill*, the Board interpreted the Act to be concerned with remedying the exploitation of workers. Because the Board found that the workshops in *Key* and *Goodwill* benefited rather than exploited their workers, and that collective bargaining was therefore unnecessary and intrusive, the Board denied the workers the right to form unions.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 537-38. The Board stated, however, that workshops such as Goodwill's are the rare exception to the rule that a union better represents workers' interests than does the employer. *Id.* at 537.

70. 265 N.L.R.B. at 1374.

71. *Id.*

72. *Id.*

73. *Id.* This practice is "the very reverse of the normal hiring standard, which is whether the organization will benefit from the worker's services." *Id.*

74. *Id.*

75. *Id.*

II. Critique of the Board's Theory and Its Application

The Board espouses a common principle in the four cases—that the rehabilitative nature of a workshop precludes the need for collective bargaining. Under this formulation the workers' status under the Act depends upon a workshop's articulated goals rather than its accomplishments and the reality of working conditions.⁷⁶ In taking such an approach, the Board has denied sheltered workers the protection of the NLRA without reference to the workers' actual needs and has deferred to the workshops to assure that those needs are met. The Board's position violates the spirit of the Act, which is to protect the right to unionize for those workers who would benefit from collective bargaining.⁷⁷

76. See *supra* notes 52-75 and accompanying text.

77. Two purposes animated the passage of the Act: (1) to eliminate disruptions to interstate commerce caused by labor unrest and (2) to establish and protect workers' rights to organize into unions and to bargain collectively. 29 U.S.C. § 151 (1982); *NLRB v. Jones & Laughlin*, 301 U.S. 1, 42 (1937). One goal was intended to achieve the other. In the era of violent and widespread labor disputes of the 1930's, Congress realized that collective bargaining was the most effective means for "promoting industrial harmony." *NLRB v. North Ark. Elec. Coop., Inc.*, 446 F.2d 602, 608 (8th Cir. 1971) (quoting *NLRB v. Wheeling Elec. Co.*, 444 F.2d 783, 788 (4th Cir. 1971)).

The provisions of the NLRA operate to equalize the bargaining power between employees and employers and thereby achieve the broader purpose of the Act: to eliminate disruptions of interstate commerce. 29 U.S.C. § 151 (1982). The theory was that workers would gain leverage to improve their wages and working conditions, and that satisfied workers would not find it necessary to strike or otherwise interfere with the workplace. Collective bargaining is a procedure designed to produce collective agreements between employers and accredited representatives of employees concerning wages, hours, and other conditions of employment, and "requires that parties deal with each other with open and fair minds and sincerely endeavor to overcome obstacles existing between the employer and the employees to the end that employment relations may be stabilized and obstruction to the free flow of commerce prevented." *Rapid Roller Co. v. NLRB*, 126 F.2d 452, 460 (7th Cir. 1942) (quoting *NLRB v. Boss Mfg. Co.*, 118 F.2d 187, 189 (7th Cir. 1941)). Employees are given rights to organize for the purpose of collective bargaining in the heart of the NLRA, which provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3).

29 U.S.C. § 157 (1982).

If an employee is covered by the NLRA, the Board will protect her or his rights enumerated above by making it unlawful for an employer to interfere with the exercise of those rights, by supervising representation elections and certifying elected unions, and by ordering the employer to collectively bargain with the certified representative union. *Id.* § 158(a)(1), (5). If employees are covered, they or a labor organization acting on their behalf may petition the Board to hold a representation election. *Id.* § 159(c)(1)(A). The provisions of the Act ensure that the elec-

The Board's reasoning is based on the fear that collective bargaining would "risk a harmful intrusion on the rehabilitative process,"⁷⁸ by distorting "the unique relationship" between employer and sheltered workers and impairing "the Employer's ability to accomplish its salutary objectives."⁷⁹ The Board implicitly assumes that a union would press only for traditional economic benefits and would sacrifice rehabilitation objectives for higher wages.⁸⁰

This view embodies a substantive distinction between the benefits of a rehabilitation program and the benefits sought through collective bargaining. The Board itself has difficulty maintaining such a distinction. For example, in *Goodwill* the Board asserts that an employer's attempts to keep workers employed for as long as necessary is part of the workshop's rehabilitative program.⁸¹ This is one characteristic of the workshop's operation upon which the Board relies to conclude that a workshop is more concerned with workers' needs than with normal business considerations.⁸² The Board also warns in *Goodwill*, however, that a union demand for unlimited employment tenure would impair the employer's ability to accomplish its salutary objectives.⁸³ Another example is a statement in *Goodwill* characterizing wages to be "as much an instrument of the rehabilitative process as they are recompense for productive activity."⁸⁴ This statement is inconsistent with the warning that union pressure for higher wages would interfere with rehabilitation. By creating a false distinction between a benefit as part of a rehabilitation program and the benefit as an element of a union's agenda for workers, the Board has clearly deferred to the employer's conception of the needs of the sheltered workers.

The Board was also concerned that workshops might respond

tion is fair. If only a minority of employees vote in favor of unionization, the Board will not certify any union to represent the employees. Thus, coverage under the Act does not automatically result in unionized employees; rather, it offers an opportunity for employees to choose whether to unionize, without coercion that would interfere with their free choice.

78. *Goodwill Indus. of S. Cal.*, 231 N.L.R.B. 536, 537 (1977).

79. *Id.* at 538.

80. *Id.*; *Key Opportunities, Inc.*, 265 N.L.R.B. 1371, 1374 (1982). The difference, if any, between these realms of workers' interests is concentrated in programs that attempt to place workers in outside employment. Maintaining a full-time placement counselor, for example, is not a benefit ordinary workers value, but one sheltered workers prize. Although it is not a typical subject of collective bargaining, none of the Board's arguments have explained why it should not be.

81. 231 N.L.R.B. at 537.

82. *Id.* In *Key* the Board relies upon similar characteristics to reach the same conclusion. See *supra* text accompanying notes 71-74.

83. 231 N.L.R.B. at 537.

84. *Id.*

to demands for higher wages by reducing the "client" workforce or hiring more productive workers.⁸⁵ Union demands for seniority rights "might tempt the Employer to reconsider its policy of keeping clients on as long as necessary" or reduce the number of handicapped workers receiving sheltered employment.⁸⁶

The Board's premise that better wages and benefits to employees will actually hurt the employees is as old as unions.⁸⁷ It is the argument commonly raised by *any* employer facing the prospect of an unwanted union election. The argument that workers should not be allowed to unionize because the employer claims not to be able to afford higher wages has absolutely no support in the labor law.⁸⁸ Moreover, it does not state reasons why sheltered workers in particular should not be able to unionize.

Furthermore, the Board erroneously blames collective bargaining for creating a conflict between different employment practices and thereby impairing the rehabilitative process.⁸⁹ The Board is concerned that union demands would create a tension be-

85. *Id.*

86. *Id.*

87. The argument was used in the first American labor court case, which arose from the 1805 cordwainers' (footwear crafters) strike in Philadelphia. The eight leaders of an organized strike were charged with criminal "conspiracy to raise their wages." The prosecution's major argument was that organizing into a union would destroy the industry. The "masters" could stand the loss but the workers would be ruined, the prosecutor argued. Walter Nelles, *The First American Labor Case*, 41 Yale L.J. 165, 165-85 (1931).

88. Under the Act the Board's function is to determine if workers may unionize with reference to the definitions in the Act. 29 U.S.C. §§ 151-69 (1982). The Act's other provisions revolve around the paramount right established in the statute: employees' "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1982). No limitations on that right depend on the parties' respective economic positions. 29 U.S.C. §§ 151-69 (1982).

On the contrary, the Board oversteps its bounds when it tries to regulate what economic weapons a party might summon to its aid. Archibald Cox, *Good Faith in Collective Bargaining*, 71 Harv. L. Rev. 1401, 1409 (1958). If the Board can regulate that, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. Our labor policy is not presently erected on a foundation of government control of the results of negotiations. *Id.* The legislative intent behind the Act does not "contain a charter for the NLRB to act at large in equalizing disparities of bargaining power between employer and union." *NLRB v. Insurance Agents*, 361 U.S. 477, 490 (1960).

The Board itself recognizes that "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the [NLRA has] recognized." *Id.* at 489. Economic force can be described as "a prime motive power for agreements in free collective bargaining." *Id.* (quoting G.W. Taylor, *Government Regulation of Industrial Relations* 18 (1948)). Economic force has no part, however, in deciding whether certain workers may unionize.

89. See *supra* text accompanying notes 81-86. In all of the cases the Board ad-

tween providing employment to as many workers as possible and employing each worker for as long as possible. Such tensions, however, exist independently of collective bargaining. Because workshops have limited resources, each salutary objective already impairs the possibility of achieving the other. Although the Board implicitly assumes that the two policies cannot peacefully coexist, in reality a workshop must continually balance such priorities. Therefore, union demands through collective bargaining would no more prejudice the employer's rehabilitative efforts than do the competing pressures to which the employer is already subject.

Alternatively, the Board may not be arguing that collective bargaining would create new tensions in a workshop. Rather, the Board is choosing the workshop's judgment over the bargaining process to strike the balance of employment policies. Such deference exceeds the Board's authority under the NLRA. Congress limited the Board's function to determining the status of workers and their workplaces within the Act's definitions.⁹⁰ The Board should not condition NLRA protection upon its discretionary judgment that a union or the workshop will best safeguard workers' interests.⁹¹ Instead, the crucial factors should be the workers' needs and their potential benefit from union representation.

The Board's bias toward the employer's perspective is further evidenced by the manner in which the Board applies its own theory. The Board relies on a workshop's articulated purpose and its

hered to the principle that collective bargaining impairs the rehabilitative process. See *supra* notes 52-75 and accompanying text for a discussion of the cases.

90. The provisions material to representation elections allow the Board only to determine if the workers are employees and other definitions are met, and if a bargaining unit is composed of appropriate employees. 29 U.S.C. §§ 152, 159(b) (1982). If so, the Board must proceed to certify a union as representative or hold an election. *Id.* § 159(c). The only guidance within the Act for interpreting the definitions are the policy statement in section 1 (*see infra* note 105) and the provisions as a whole. From these sources emanate Congress' intention that workers regain some control over their employment conditions, *not* that the Board should defer to employers' traditional dominance in the relationship.

91. The Board flaunts precedent by deciding on these grounds. The major cases hold that employees' status under the Act is determined by examining the character of the work they perform for their employer. *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 303 (1977). For example, managerial employees are defined as those "who formulate and effectuate management policies by expressing and making operative [the] decisions of their employer." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 286 (1974). In the seminal decision of *NLRB v. Hearst Publications*, the Board decided that newsboys were employees and not independent contractors because of the nature of their work. 322 U.S. 111, 131 (1944). For example, they worked continuously and regularly and relied upon their earnings for support; their wages were influenced greatly by the publishers; and their hours of work and job efforts were supervised by the publishers. *Id.* In addition, the policy and purposes of the Act would be fulfilled by finding them to be employees. *Id.* at 132.

material gain rather than the realities of the workers' needs. Considering the employer's articulated objectives rather than the actual facts is an unprecedented manner of determining status under the Act.⁹²

The Board ignores facts which demonstrate that sheltered workers have valid and traditional grievances about their working conditions. For example, the Board did not consider that workers were earning an average of only one dollar per hour in one workshop.⁹³ The Board's finding of a rehabilitative objective also fails to consider the workshop's actual rate of success in helping workers become more capable of independently earning their livelihoods.⁹⁴

In *Key*, the Board stated "that Key makes every effort to train its clients so that they may leave Key for better paying jobs elsewhere," but "relatively few of Key's clients are able to obtain nonsheltered employment and some of the clients in fact stay with Key 'indefinitely.'"⁹⁵ Also, the *Goodwill* decision states that many of the clients "suffer[ed] from disabilities which are not readily curable," and for that reason one-half of the jobs were reserved for long-term employment.⁹⁶ In other words, many of the workers

92. By looking at one party's subjective motivations, the Board is deeming *intent* to be crucial. Nothing in the NLRA's provisions or underlying purposes suggest that an employer's intent to represent workers' interests is relevant to the workers' coverage under the Act. Rather, the Act provides that the *exclusive* representatives of workers in a unit shall be those "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees. . . ." 29 U.S.C. § 159(a) (1982).

93. *Key*, 265 N.L.R.B. at 1373.

94. See *supra* notes 49-75 and accompanying text for discussion of the central thesis that the Board's determination of employee status ignores the workers' actual functioning as employees, as well as the workshops' failure to rehabilitate the "clients."

95. 265 N.L.R.B. at 1374.

96. 231 N.L.R.B. at 537. Furthermore, even if the *Key* and *Goodwill* workshops did concentrate on rehabilitating some of their workers, the portion of workers in long-term employment could be an appropriate bargaining unit alone. See 29 U.S.C. § 151 (1982). In *Lighthouse for the Blind of Houston*, the Board granted NLRA coverage to Workshop A, which employed approximately 70 individuals, 63 of whom were blind, and had certain production standards. 244 N.L.R.B. 1144, 1147 (1979). Workshop B, which included "approximately 30 individuals who [were] severely handicapped in addition to being blind and who [were] not engaged in substantial production work for sale," was not seeking to unionize. *Lighthouse for the Blind of Houston*, 696 F.2d 399, 402 (5th Cir. 1983). The Board was amenable to approving a unit comprised of only one part of the workshop. 244 N.L.R.B. at 1147. Of course, in *Goodwill*, the long-term workers were characterized as the "un-curable" handicapped, while in *Houston*, Workshop A workers were those who had already "graduated" from Workshop B or had started at a higher level of ability. *Houston*, 696 F.2d at 402. Despite these labels, the long-term workers in *Goodwill* were engaged in "substantial production work for sale," within the meaning of *Houston*, 696 F.2d at 402, and may not have been any more disabled than *Houston*'s

could never be rehabilitated or moved into private industry. Nonetheless, the Board concluded that the focus of the workshop was "upon rehabilitating its clients and preparing them for work in private competitive industry, not on producing a product for profit."⁹⁷

Even when the Board concluded that the concern of a workshop was rehabilitation, the Board essentially excused the workshop for not achieving this objective. Thus the Board's decisions are swayed by a workshop's asserted objectives rather than its actual achievements. Such deference to workshops is both unprecedented and violates the spirit of the NLRA.

III. An Alternative Theory: The Functional Test

The Board's interpretation of the meaning of "employee" for sheltered workers rings hollow. It ignores the workers' overall needs and therefore does not lead to decisions that ameliorate the workers' conditions. A fairer and simpler approach would be to look at the workshop from the workers' perspective. The Board should use a functional test that determines employee status according to workers' capacities and needs. The functional test presumes that workers who can handle the responsibilities of a steady job, perform the same tasks as ordinary workers, and who are subject to the harm the NLRA was intended to rectify, should receive the Act's benefits.

The test contains two parts. First, the test requires workers to function as employees in the ordinary sense of the term. Any handicapped person who puts in a day's work under conditions which are sufficiently similar to those at other workplaces so that the workers are considered "generic" employees is capable of making a reasoned choice regarding the structure of the workplace. Determining workers' abilities according to how they function in practice resolves the question the Board raised in dicta: "whether the Act, which is predicated on the ability of employees to choose to act or refrain from acting in concert with others, ought to apply to persons so handicapped by mental or emotional abnormalities that they can work only in a sheltered environment."⁹⁸ A legal

Workshop A workers, some of whom had disabilities in addition to blindness. See *Houston*, 696 F.2d at 402; *Goodwill*, 231 N.L.R.B. at 536-37.

97. *Goodwill Indus. of S. Cal.*, 231 N.L.R.B. 536, 542 (1977).

98. *Key Opportunities, Inc.*, 265 N.L.R.B. 1371, 1375 (1982). In fact, because of handicapped workers' history of lack of empowerment, and because of their intellectual impairment, the workers probably speak better as a unit. Interview with Richard Seuer, *supra* note 6. In *Goodwill Indus. of S. Cal.*, 231 N.L.R.B. 536, 537 (1977), some sheltered workers were at *Goodwill* because of their penal records and many worked there because of physical disabilities. Neither "handicap" affects a worker's capacity to make decisions.

standard for competency already exists.⁹⁹ The vast majority of sheltered workers are considered legally competent to pay taxes, to work at steady jobs, and otherwise to meet the obligations of responsible citizens.¹⁰⁰ The standard of competence to organize with others to improve wages and benefits should not be stricter.

The second part of the test asks whether the workers receive inadequate compensation and work benefits and whether these grievances are appropriate subjects for collective bargaining.¹⁰¹ Workers who are subject to the exploitive conditions the NLRA was intended to remedy¹⁰² will meet the second part of the test.

The functional test is not so relaxed as to find every sheltered worker to be an employee protected by the NLRA. For example, those who would not be functional employees would probably include legally incompetent people who would be excluded not because of their legal status as incompetent but by virtue of the diminished level of activities they are able to perform. Handicapped individuals in purely training programs whose workshop schedule consisted of attending classes on various subjects such as hygiene, interpersonal communication, and work skills training would not be employees because true employees spend the bulk of their time producing goods or services.¹⁰³ The test, not unlike the Board's approach to the statutory definition of employee, would exclude those who are not employees in the generic sense of the term.¹⁰⁴

The advantage of the functional approach is its potential for

99. Interview with Richard Seuer, *supra* note 6. For example, under Minnesota probate law, any person over 18 "who is of sound mind may make a will." Minn. Stat. § 524.2-501 (1984). Sound mind or capacity has been interpreted to mean that when making the will, testator understands the nature, situation, and extent of his [or her] property and claims of others on his [or her] bounty or his [or her] remembrance, and he [or she] is able to hold these things in his [or her] mind long enough to form a rational judgment concerning them. Matter of Estate of Congdon, 309 N.W.2d 261, 266 (Minn. 1981).

100. Interview with Richard Seuer, *supra* note 6.

101. Compare analysis in *Key*, 265 N.L.R.B. at 1371, discussed *supra* notes 70-75 and accompanying text, with *Goodwill*, 231 N.L.R.B. at 536, discussed *supra* notes 63-69 and accompanying text.

102. See *supra* note 77.

103. These programs include work component, work activity, and work adjustment training, programs which use production work and training in work-related behaviors to develop the client's optimal functioning based on the recommendations developed during vocational evaluation. Minnesota Evaluation, *supra* note 5, at 18. The client may participate in production work and may also attend classes for the "development of work related behaviors such as appropriate attitudes and work habits, physical endurance, and orientation to the job market." *Id.* See also *supra* notes 5-6 and accompanying text.

104. *Key Opportunities, Inc.*, 265 N.L.R.B. 1371, 1374 (1982); *Goodwill Indus. of S. Cal.*, 231 N.L.R.B. 536, 537 (1977).

curing the hardships sheltered workers face beyond the struggles inherent in being handicapped in the eyes of society. The test would help extend the Act's protection and the right to unionize to those workers who lack bargaining power in the workplace.¹⁰⁵

The functional test approach thereby comports with the accepted legal theory that those who should be protected by the law are those who suffer the injuries the law was designed to remedy.¹⁰⁶ Specifically, the test reflects the United States Supreme Court's directive that the meaning of the word "employee" under the NLRA "takes color from its surroundings in the statute where it appears,"¹⁰⁷ and derives meaning from the context of that statute which "must be read in the light of the mischief to be corrected and the end to be attained."¹⁰⁸ The NLRB's mandate from Congress is to protect the bargaining power of employees in order to ensure that workers will attain satisfactory rewards for their labor.¹⁰⁹

The equitable argument in favor of the functional test is that it will allow more workers to unionize in a particularly exploitive industry. The Board would agree that it is desirable for either a union or the employer to represent the workers' interests. Union representation, however, does not merely substitute one paternalistic entity, the union, for another, the employer. Unionization is preferable to the existing system which allows the employer to decide that it is in the best interests of sheltered workers not to pay them a living wage. Unionization also has advantages absent from other forms of government intervention to improve workers' wages and benefits.¹¹⁰ The NLRA's provisions for unionization do

105. The findings and policies set forth in the introduction to the Act state: [e]xperience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees. . . .

29 U.S.C. § 151 (1982).

106. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944); *NLRB v. Wheeling Elec. Co.*, 444 F.2d 783 (4th Cir. 1971).

107. *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 144-45 (6th Cir. 1977) (quoting *United States v. American Trucking Ass'ns*, 310 U.S. 534 (1940)).

108. *Id.* at 145 (quoting *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940)).

109. *See supra* note 77.

110. For example, most welfare or government benefit programs directly distribute, however inadequately, income or services, which do not provide the recipient a commensurate increase in control over their poverty or societal powerlessness.

not shelter workers from the hardships of a capitalist society. Instead, they facilitate and uphold the rights of workers to join together to communicate their common interests through one voice, to increase their influence in their own workplaces, and to help close the gap in bargaining power between employer and employee.¹¹¹

The functional test might also be part of a broader solution to the inequitable treatment of sheltered workers by deterring employers from treating sheltered workers as second-class workers. Critics might argue that employers would no longer provide even a facade of rehabilitation because to do so would not improve their case against unionization, as it would under the NLRB's current standard. If, however, the workers received low wages under the sheltered workshop exception to the minimum wage and were not receiving training to enable them to move into private industry, these facts would constitute grievances well-suited to the bargaining table and would create a good case for unionization.¹¹² Thus the functional test should provide a remedy for sheltered workers who labor for low wages, without job security or benefits, under a false hope of being rehabilitated.

In *Goodwill Industries*, the Board stated that the workshop furnished numerous services to its employees "[a]s part of its effort to foster dignity and self-confidence among its clients."¹¹³ But, especially for the handicapped, whom society is convinced are inevitably dependent, dignity comes not from charity but from taking charge of one's life and helping to determine one's future. Many of the workers at the Minnesota workshop belong to an advocacy organization, Advocating Change Together (ACT), which

111. As early as 1921 the United States Supreme Court recognized that it is a reality of modern industrialism that unions are essential for achieving equality of bargaining power between employers and workers.

Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.

NLRB v. Jones & Laughlin, 301 U.S. 1, 34 (1937) (gender-specific pronouns in original) (citing *American Steel Foundries v. Tri-City Cent. Trades Council*, 157 U.S. 184, 209 (1921)). See also *infra* notes 112-115 and accompanying text.

112. Compensation, disciplinary practices, work schedules and requirements, benefits, and work tenure are the typical "grist for the mill" of collective bargaining. NLRB v. Lighthouse for the Blind of Houston, 696 F.2d 399, 406 (5th Cir. 1983).

113. 231 N.L.R.B. 536, 537 (1977).

takes the view that people labeled "mentally retarded" can often fend for themselves.¹¹⁴ As one former ACT organizer stated, "If we continue to create an environment of dependence, we will create dependent people."¹¹⁵ Handicapped workers' proven efforts to overcome society's expectation of dependency should be supported and legitimated by extending to handicapped workers the same legal rights to choose to unionize and bargain collectively to which other workers are entitled.

114. Minneapolis Star, Dec. 9, 1981, at C1, col. 5. Many of its members have left sheltered workshops against the advice of their supervisors and have found work in the private sector.

115. *Id.*

