CHAPTER 8

FEDERAL MINIMUM WAGE DETERMINATION IN PUERTO RICO

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The Fair Labor Standards Act of 1938 applied fully to Puerto Rico, just as it did to the 48 states. The application of the 25-cents-per-hour minimum in Puerto Rico almost destroyed the home needlework industry, the Island's largest single source of manufacturing employment, and this to a large extent resulted in a basic change in the application of the FLSA to the Island. The Act was amended in 1940 to permit lower minima in Puerto Rico than in covered mainland industries. These lower minima were to be determined by industry committees.

I. Puerto Rico Industry Committees: Structure and Purposes

The industry-committee device has been modified on several occasions, but the objective of federal minimum wage regulation in Puerto Rico has remained the same. For the entire period of regulation, the goal has been to establish minimum wages up to the stateside minimum under the following constraints: [1]

> "The Committee shall recommend to the administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry, and will not give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands."

Or, to express the goal more concisely, the Act states that the policy "is to reach as rapidly as is economically feasible without sub-

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[1] Act of June 25, 1938, 52 Stat. 1060, Public Law 718, Ch. 676, 75th Cong., 3d Sess., as amended.

stantially curtailing employment the objective of a minimum wage" equal to that on the mainland.[2]

From 1940 to 1974 the carrying out of this policy was to be accomplished by the utilization of industry committees. After conducting hearings, an industry committee would find the minimum wage rate for an industry and for the various classifications within the industry. The industry committees were to be tripartite in nature and composed of residents of Puerto Rico and the United States outside of Puerto Rico. A committee was to include the following:

> ". . . a number of disinterested persons representing the public, one of whom the Administrator shall designate chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on." [3]

The charge to industry committees is set forth in Section 8 (b) of the Act as follows: [4]

> ". . . Upon the convening of any such industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, shall after due notice hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry, *and will not give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.*"

Section 8 (c) of the Act empowers industry committees to recommend "reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate" in keeping with the aforementioned criteria.[5] This refining step was

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[2] *Ibid.*
[3] *Id.*, Sec. 5 (b).
[4] *Id.*, Sec. 8 (b).
[5] *Id.*, Sec. 8 (c).

viewed as a means of more rapidly achieving the stateside minimum since rates for some jobs in an industry could advance more rapidly than the average rate for that industry.

Once Congress determined that it would not be feasible to legislate fixed minima for Puerto Rico, it decided to adopt a flexible approach under which industry committees would determine the minimum wage rate for an industry and classifications therein under certain enumerated constraints. This flexible approach, which made for lower minima on the Island than on the mainland, led to many complaints. Both unions that represented employees of competing stateside firms and unions that represented workers in Puerto Rico pressed for the elimination of this wage discrimination. In like manner, competing stateside employers and industry associations pressured for the elimination of Puerto Rican favoritism. On the other hand, many Puerto Ricans, recognizing that the Federal Government could not refrain from regulating wages in Puerto Rico, lauded the flexibility provided by the industry-committee approach, and they endeavored to prevent any departures from the committee approach.

The pressures were great for the elimination of Puerto Rican wage discrimination.[6] The first significant step in this direction was made in 1961 when Congress amended the wage provisions of the FLSA with respect to Puerto Rico. The amendment provided that the minima in Puerto Rico would be increased by 15 percent when the stateside hourly minimum went from $1.00 to $1.15, and by an additional 10 percent when the mainland minimum went from $1.15 to $1.25.

The 1961 amendments also provided for an industry petition for a special review committee to determine whether the legally prescribed automatic increases should be postponed because of grave hardship and the threat of substantial unemployment. As a consequence of the 1961 amendments, the FLSA provided for two types of committees: (1) the industry committee, and (2) the special review committee. Both committees were given identical procedures, but their purposes or objectives were different. The industry committees had the function of determining a minimum wage rate as high as possible and in keeping with the constraints set forth in Section 8 (b) of the Act. The special review commit-

[6] In 1958 the FLSA was amended to require biennial industry reviews.

tees were to hear hardship cases arising from the percentage increases invoked in 1961.[7]

The flexible approach to minimum wage determination in Puerto Rico was further restricted by the 1974 amendments to the Act. The main purpose of achieving minimum wage parity for Puerto Ricans remains, but the means of achieving that parity has been changed. The wage provisions of the 1974 amendments of the FLSA include:

1. Effective May 1, 1974, the minimum hourly wage rate for employees of hotels, motels, restaurants, and food service establishments became the same as the minimum rate for their counterparts on the mainland.

2. The provisions of (1) above were also made applicable to federal government employees in Puerto Rico.

3. Presently covered employees received an hourly increase of 12 cents on May 1, 1974 if their current industry wage-order rates were less than $1.40 an hour, or an increase of 15 cents per hour if their current wage-order rates were $1.40 per hour or higher.

4. Special industry committees were to set wage minima for newly covered employees, including local government employees. The wage rates for these groups may not be less than 60 percent of the otherwise applicable minimum rate for employees newly covered by the 1966 and 1974 amendments or $1.00 an hour, whichever is greater.

5. On May 1, 1975, all employees, other than local government employees, were to begin receiving annual increases of 12 cents per hour if their wage-order rates are less than $1.40 an hour or 15 cents an hour if their wage-order rates are $1.40 an hour or higher. When an employee's wage rate reaches $1.40 an hour, that employee will begin receiving increases of 15 cents an hour. These statutory increases will be granted annually until the employee attains parity with the stateside minimum.

The 1974 FLSA amendments made drastic alterations in the industry-committee setup. The industry committee expired, and the preexisting authority for hardship review by special industry

[7] Subsequently, this same percentage increase approach and committee procedure were reactivated by the 1967 amendments to the FLSA.

committees was discontinued. The special industry committees have remaining jurisdiction only over the wages of newly covered employees, including local government employees. These committees may only provide increases in wage-order rates. Special industry committees are required to recommend the otherwise applicable rate under Section 6 unless, on the basis of substantial documentary data including pertinent financial data, an industry demonstrates an inability to pay the Section 6 rates.

II. Evaluation of the Committee Approach

Assuming that a government wishes to apply minimum wages throughout its jurisdiction, would it be better to determine the minimum by legislative edict or by industry committees? The Puerto Rican committee experience affords one of the few test cases available with regard to this question. Unfortunately, no one has attempted to make a scientific study of the procedural aspects of the Puerto Rican experiences. Most writers on the topic have relied largely on their experience as members of industry wage committees and on their discussions with other committee members.

The writer is in this category, and his comments with respect to administration reflect his own observations. Although he has chaired two Puerto Rican industry committees, he is still awed by the task assigned to such committees. In fact, it is doubtful that any group of nine persons could arrive at a minimum wage for an industry that would wholly satisfy the criteria set forth in the Act. A committee is told that its task is to find the highest minimum wage rate for an industry that will not substantially curtail employment in the industry and will not confer a competitive advantage to that industry over stateside industry. This prescription amounts to an overspecification of the objectives of a committee because it places the members on the horns of a dilemma. The charge also presupposes a preciseness of predictability regarding employment and the competitive effects of a given wage rate change, which we do not find in the real world. As a result, the author has the strong feeling that most industry committees do little more than arrive at a wage that is believed to be within the limits of the industry's ability to pay and local economic conditions. Hence, the legal minimum wages for various industries in Puerto Rico have borne little direct relationship to the guidelines

set forth in the Act. Of course, this is one of the reasons why the program has been viewed as a flexible one, and it also accounts for the general satisfaction of Puerto Ricans with the program. However, while the stated objectives are laudable, the actual results are far less than ideal and amount to little more than a compromise with reality.

Another inherent weakness of the committee approach arises from the fact that the accomplishment of the committee assignment would require a high degree of economic expertise; yet, most committee members have not been outstanding practitioners of the art. In fact, the backgrounds of many committee members have been so diverse that internal communication problems have developed. This does not imply that every committee member should be an economist; rather, the point is that extreme care should be exercised in the selection of committee members. It is not sufficient to assume that industry and labor members will give expertise in the micro-economic aspects of the assignment and that public members will be able to deal with the macro-economic elements. Instead, a compromise on grounds other than those specified in the Act is likely to occur.

There is also reason to be concerned about the adequacy of the preparation of committee members for their task. It is reasonable to assume that industry and labor members will have at least a working knowledge of the industry and the Puerto Rican economy. On the other hand, it is not reasonable to assume that the public members have any great knowledge about the Act, the industry, or the economy of Puerto Rico. Yet, these members have been permitted to appear for their assignments without having been given in advance significant information of a background nature. They have been expected to develop expertise within three or four days of hearings and executive sessions. The fulfillment of such a task is impossible, of course.

Two types of difficulties are readily apparent with respect to the committee hearings. First, the hearings normally last for only three or four days, and this period of time is not adequate for familiarization, the presentation of evidence and witnesses, and the complicated decision-making process. Second, there are obstacles that prevent a committee from obtaining the information necessary for a proper decision. Section 511.8 of the Act prescribes the steps that must be taken by an interested party who

wishes to testify before a committee. Paragraph (b) of that Section states:

"(b) Any interested person who wishes to participate on his own behalf or by counsel shall file a written prehearing statement not later than ten days before the first hearing date set for any committee in a notice of hearing concerning minimum wages for Puerto Rico or the Virgin Islands, or such other period of time as may be prescribed in a notice of hearing, or other notice published in the Federal Register, the original and 11 copies of the prehearing statement shall be filed at the Office of the Director of the Caribbean Office of the Wage and Hour Division, United States Department of Labor, 7th Floor, Condomino San Alberto Building, 1200 Ponce de Leon Avenue, Santurce, Puerto Rico and one copy at the Office of the Administrator of the Wage and Hour Division, United States Department of Labor, Washington, D. C. 20210. If such statements are sent by air mail from Puerto Rico or the Virgin Islands to the mainland, or from the mainland to Washington, such filing shall be deemed timely if postmarked within the time provided. The number of copies of such statements and the time and places for filing them will be specified in notices of hearings to determine minimum wages for American Samoa. The prehearing statement shall describe the person's interest in the proceeding and shall contain (1) the prepared statement he proposes to give, if any; (2) a statement of the individual classifications and minimum wage rates, if any, he proposes to support; (3) the written data he proposes to introduce in evidence, including all tangible objective data to be submitted pursuant to § 511.13; (4) the names and addresses of the witnesses he proposes to call and a summary of the evidence he proposes to develop; (5) the name and address of the individual who will present his case; and (6) a statement of the approximate length of time his case will take. If the prehearing statement is in conformity with the above requirements, the person shall have the right to participate as a party. In accordance with section 6 (c) of the Administrative Procedure Act, industry committee shall, after considering the advice of committee counsel, issue subpoenas authorized by section 9 of the Fair Labor Standards Act of 1938, to parties who make a request therefor accompanied by a clear showing of general relevance and reasonable scope of the evidence sought."

Many interested persons simply refuse to comply with these onerous requirements, and as a consequence committees are often deprived of evidence and testimony that is sorely needed. One analyst also observes: [8]

"One must draw attention to another recent development in Puerto Rico which promotes a downward bias in committee deci-

[8] Val Wertheimer, "Tripartite Wage Determination in Puerto Rico," in *Problems of Proof in Arbitration*, Proceedings of the 19th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), pp. 38–39.

sions. Before the hearings take place, employers often decide to appear before the committees only through those few firms in their industry which have the worst possible record of profitability in the preceding year. Thus, even though such presentations before committees are backed financially by a cross-section of the particular industry, the committees are given only a few, deliberately selected unrepresentative examples. Thus at times public members are, unfortunately, unduly influenced by such deliberately lopsided presentations."

Fortunately, most of these weaknesses can be corrected. When this is done, the industry-committee approach to minimum wage determination would appear to be the most reasonable and realistic form of regulation in an economy such as Puerto Rico.

The following corrections appear desirable: (1) Modify the charge of the committee so as to permit the consideration of criteria additional to those presently prescribed. (2) Provide some reasonable continuity of public membership on successive industry committees. (3) Require the Department of Labor to give greater advance preparation to committee members. (4) Have more and better industry wage surveys, employment studies, competitive studies, and the like made available to each committee by the U.S. Department of Labor. (5) Utilize the subpoena power of the Wage and Hour and Public Contracts Division to acquire desired information for the use of committees.

III. Employment and Unemployment in Puerto Rico

Father Leo C. Brown aptly describes the 1940 Puerto Rican economy as follows: [9]

"Puerto Rico in 1940 was still largely an agricultural economy. Its inclusion for 42 years within the tariff area of the U.S. had accomplished little for the Island beyond giving impetus to the development of a sugar industry. Sugar production increased from 350 thousand tons in 1909 to 485 thousand tons in 1919 and to in excess of a million tons in 1940. Of a national product of about $340 million in 1940, agriculture accounted for more than 30 percent. Manufacture, by contrast, accounted for $30 million or 12 percent, and was confined to the processing of sugar and some other agricultural products, to the production of a limited number of items for the home market, and to a needlework industry. The manufacturing unit was small and was characterized by limited investment and high

[9] Leo C. Brown, S. J., "Tripartite Wage Determination in Puerto Rico," in *Problems of Proof in Arbitration, supra* note 8, at 14–15.

labor input. The needlework industry consisted largely of hand sewing by women working at home. The materials, owned by mainland firms, were distributed to the workers through agents or contractors in Puerto Rico.

"In this economy the ordinary workman eked out a miserable existence on a rural hillside or in a urban slum. Agricultural wages ranged from 6 cents per hour in tobacco to 15 cents per hour in sugar cane, and employment was highly irregular. Wages in manufacturing ranged from a few pennies per hour in the home needlework industry to about 30 cents per hour in sugar refineries. Net per capita income in 1940 was about $121 per year in current dollars and about $252 in terms of 1964 purchasing power. An estimated unemployment figure of 18 percent in 1940 was conservative. It counted as employed not only the home workers in the needle trade but also an unknown but significant number of self-employed in highly marginal occupations."

All articles of recent vintage dealing with the economic development of Puerto Rico have given recognition to the striking growth that has occurred in the post-World War II period. As Lloyd Reynolds indicates: [10]

"The growth rate of total and per capita output in Puerto Rico since 1940 has been one of the highest in the world. Real GNP per capita rose at an average rate of 4.1 per cent a year during the 'forties and 5.2 per cent a year during the 'fifties. In 1954 dollars, per capita GNP rose from $269 in 1940 to $673 in 1961, placing Puerto Rico almost above the range of 'underdeveloped' countries. GNP per employed worker, in 1954 dollars, rose from $932 in 1940 to $2,802 in 1961."

The rapid pace of economic growth has continued since 1961. By 1973, the GNP had risen to $6,430,000,000; per-capita GNP had accelerated to $2,208, and GNP-per-employed worker had climbed to $7,938.[11] While economic growth in Puerto Rico has been rapid, the economy is still in the early stages of industrialization, and the conditions of a surplus labor economy persist. Total employment and unemployment statistics for the period 1951-1973 are shown in Table 1.

These data indicate that while employment has expanded by 34 percent between 1951 and 1973, the numbers of unemployed persons have not declined in any significant degree. In fact, throughout that period the rate of unemployment fluctuated between 11.0 per cent and 15.3 percent. It is also significant that be-

[10] For example, see Lloyd G. Reynolds, "Wages and Employment in a Labor Surplus Economy," *American Economic Review* 55 (March 1965), pp. 19–34.

[11] Economic Development Administration, *Handbook*, 1974.

Table 1
EMPLOYMENT AND UNEMPLOYMENT IN PUERTO RICO, 1951–1973
(In Thousands)

Date	Employment	Unemployment	Percent of Labor Force Unemployed
1951	604	109	15.3
10/1960	576	77	11.8
10/1961	595	91	13.2
10/1962	606	91	13.0
10/1963	637	89	12.2
10/1964	648	90	12.1
10/1965	669	96	12.6
10/1966	678	104	13.3
10/1967	705	89	11.2
10/1968	718	91	11.3
10/1969	729	91	11.0
1970	749	94	11.2
1973	810.5	110.5	12.0
1974 (Nov.)	—	—	13.7

Source: 1951 data from, Reynolds, "Wages and Employment . . . ," p. 24; 1960–1970 data from, *Hearings Before the General Subcommittee on Labor to Amend the Fair Labor Standards Act,* Part II (Washington: U.S. Government Printing Office, 1970), p. 753; 1973 data from Economic Development Administration, *Basic Industrial Facts on Puerto Rico,* 1972.

tween 1951 and 1960 total employment fell, and it was not until 1962 that total employment exceeded its 1951 level. During this period of decline, net out-migration to the United States mainland averaged 43,000 a year, or about three quarters of the increase of the natural population, during the decade. [12] In the decade of the 1960s out-migration continued as a total of 203,000 Puerto Ricans moved to the mainland—an average of approximately 18,500 per year.[13] Since World War II approximately one million Puerto Ricans have emigrated to the United States.[14] The migration "safety valve" has prevented even more catastrophic unemployment.

The following statement of Amadeo I. D. Francis, executive director of the Puerto Rican Manufacturers Association, aptly describes the seriousness of the Puerto Rican unemployment problem.[15]

[12] Reynolds, *supra* note 10, at 23.
[13] *Hearings Before the General Subcommittee on Labor to Amend the Fair Labor Standards Act, Part II* (Washington: U.S. Government Printing Office, 1970), p. 754
[14] *Id.* at 709.
[15] *Id.* at 707.

"Unemployment is Puerto Rico's most severe, persistent and intractable economic problem. . . . [T]he relative situation 10 years ago was much the same as it is today—an unemployment deficiency of 27 percent of the calculated or 'standardized' labor force, compared with the current 29 percent. But the absolute numbers are now much larger because of Puerto Rico's rapid rate of population growth. . . . Employment increased by nearly 200,000 during the decade [of the 1960s], but in spite of this impressive increase, the deficiency in jobs also increased by nearly 100,000. To have held the employment deficiency constant would have required an increase in employment of about 28,000 jobs a year instead of the actual increase of about 19,000 a year. To have reduced unemployment to 4 percent of the labor force (41,000) by 1970 would have required an average annual increase in employment of 44,000, more than twice the increase that was actually realized during the decade."

A striking aspect of the unemployment problem in Puerto Rico is revealed by the age and sex breakdown of unemployed workers. Reynolds reported that in 1951, 15.3 percent of Puerto Rican males and 15.6 percent of the female labor force were unemployed, and that in 1961 the figures were 14.1 percent and 8.9 percent, respectively.[16] In 1973, 12 percent of males in the labor force were unemployed, while 10.3 percent of the women were unemployed.[17] As the data in Table 2 indicate, Puerto Rican males continue to be a disadvantaged group in the labor force, and this is particularly true for the age groups under 25 years. Both declining employment sectors and expanding sectors have been more favorable for females. The largest decline in employment from 1950 to 1960 was in agriculture where employment dropped from 214,000 to 124,000, and by 1970 further declines had reduced agricultural employment to approximately 75,000. From 1950 to 1970 agricultural employment declined by 65 percent, and now accounts for only 10 percent of Puerto Rican employment versus 35.4 percent in 1950. On the other hand, estimates are that approximately 60 percent of the jobs created in new manufacturing establishments are held by women.[18]

In June 1973, approximately 84.3 percent of the unemployed were experienced workers—some 7 percent having been last employed in agricultural work and 78 percent in nonagricultural industries. Slightly more than 25 percent of the unemployed had

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[16] Reynolds, *supra* note 10, at 24.
[17] Economic Development Administration, *Labor Force*, Section II (1973), p. 2.01.
[18] *Ibid.* A fuller discussion of the trends can be found at 24–26.

Table 2

UNEMPLOYMENT IN PUERTO RICO BY AGE AND SEX, 1970

Age and Sex	Total	Percent
Male	*68,000*	*72.3*
14–19 years	13,000	13.6
20–24 years	21,000	22.0
25–34 years	14,000	15.3
35–44 years	8,000	8.7
45–54 years	6,000	6.6
55–64 years	4,000	4.7
65 years and over	a	–
Female	*26,000*	*27.7*
14–19 years	5,000	5.4
20–24 years	9,000	9.4
25–34 years	7,000	7.2
35–44 years	4,000	3.8
45–54 years	a	–
55–64 years	a	–
65 years and over	a	–

Source: Puerto Rico Department of Labor, *Employment and Unemployment in Puerto Rico,* 1970.

[a] Not enough cases in the sample for reliable estimates.

last worked in manufacturing, and 11 percent of them had no prior work experience.[19] In 1973, the median years of school completed by the unemployed was 9.4. Some 30 percent had completed six or less years of schooling, and only 21.8 percent had acquired a 12th grade education.[20]

Not only does Puerto Rico have a high unemployment rate, it also has a high underemployment rate. The underemployment rate as of June 1973 was estimated at 17.1 percent.[21]

Trends in the distribution of employment in the decade of the 1960s are recorded in Table 3. These data reveal significant declines in employment in agriculture, home needlework, and transportation. Significant increases in employment occurred in manufacturing, construction, government, and services, and slight growth occurred in wholesale and retail trade. As previously indicated, employment in the decade grew by 173,000, which is a gain of 30.0 percent.

[19] *Id.* at 2.04.
[20] *Ibid.*
[21] *Ibid.*

Table 3

DISTRIBUTION OF EMPLOYMENT BY MAJOR INDUSTRY GROUPS IN PUERTO RICO, 1960–1970

Industry Group	Percent	
	1960	1970
Agriculture	22.9	10.0
Forestry and fisheries	.2	.1
Mining	.3	.2
Manufacturing (except home needlework)	15.0	19.1
Home needlework	1.9	.1
Construction	8.3	11.2
Wholesale trade	1.7	2.0
Retail trade	16.2	16.8
Finance, insurance, real estate	1.1	1.9
Transportation	5.0	4.0
Communication and public utilities	2.2	2.7
Services	13.9	16.7
Government	11.5	15.3

Source: Hearings, Part II (see Table 1 above), p. 753.

IV. Manufacturing Dependence

Between 1960 and 1970, the gross product from primary sources increased by $1.2 billion, and manufacturing was responsible for 61 percent of this increase. Puerto Rico's growth is heavily dependent upon manufacturing, and the following statement of the executive director of the Puerto Rico Manufacturers Association explains this dependency: [22]

> "Population density effectively prevents agriculture from making a major contribution to the Island's economic growth. The 48 contiguous states could house the entire population of the world if they had a population density equal to Puerto Rico's. We have only half an acre of arable land per person. We have only limited mineral resources none of which are yet being exploited and the sea around us is great for game fishing but commercially unproductive. Manufacturing and, to a much lesser extent, tourism have been and must continue to be our main source of economic growth. Moreover, because of our comparative lack of raw materials, most of our industries must be supplied by imports and because of our comparatively small local market, most of our industrial products must be sold outside Puerto Rico."

In the early 1940s the Puerto Rican Government acknowledged this dependence by creating a development organization to con-

[22] *Hearings, supra* note 13, at 714.

struct and operate manufacturing plants to produce goods for the local market. This program introduced modern industry to the Island, but the undertaking was doomed to failure. Local markets were insufficient to support any meaningful degree of manufacturing, and governmental resources were too limited to create enterprises that could make a substantial contribution to the reduction of unemployment. The government divested itself of the government-owned plants and adopted a new program to attract private investment in manufacturing.

Under the new program, manufacturing establishments have been lured by a host of inducements. Full exemption from income and property taxes is available for periods ranging from 10 to 17 years for manufacturers of products that were not being produced in Puerto Rico in 1941. The highly active and effective Economic Development Administration offers a wide range of services to prospective manufacturers, including market research plant location and construction, labor training, financing, and technical advisory services. Since 1947 Operation Bootstrap, as the program is popularly called, has been instrumental in the attraction of 2,780 manufacturing plants. These plants have given direct employment to over 100,000 employees—approximately three fourths of manufacturing employment in Puerto Rico.[23]

Puerto Rico did not depend solely on the aforementioned lures and its large supply of labor for the attraction of manufacturers. Two additional important inducements were these: (1) Corporate and personal income earned in Puerto Rico is not subject to federal taxation—yet Puerto Rico offers all of the benefits of operating within the United States, under the U.S. Constitution, and within its tariff area; and (2) wage rates were comparatively low, as evidenced, for example, by the fact that as late as 1949 the Puerto Rican median industry wage minimum under the Fair Labor Standards Act was 30 cents per hour.

Most of the manufacturers attracted to the Island have labor-intensive operations. "In January 1970, textiles and wearing apparel, food processing, tobacco and leather products alone accounted for 61% of all manufacturing employment." [24] In recent years significant capacity has been added in a number of diversified and less labor-intensive plants, which produce such

[23] *Id.* at 716.
[24] *Ibid.*

items as petrochemicals, pharmaceuticals, scientific instruments, and metals. Yet, textiles and apparels continue as the dominant job-producing industries.

V. Wage Determination

Despite persistently high levels of unemployment, Puerto Rican average hourly earnings have advanced rapidly. In fact, prior to 1970 manufacturing average hourly earnings advanced more rapidly than they did for mainland manufacturers. In 1939 average hourly earnings of all Puerto Rican manufacturing wage earners was 31.8 percent of those of their stateside counterparts. By 1970 the averages had increased to 52.3 percent of the stateside average, and they have maintained that same relationship up to June 1973.[25] The data recorded in Table 4 show the movement of average hourly earnings in both Puerto Rico and the United States for the period from 1939 to July 1974, and document the aforementioned trends. The basic conclusion is that between 1939 and July 1974 average hourly earnings in Puerto Rican industries gained more rapidly than they did in their U.S. counterparts.

The basic ingredient of escalating average hourly earnings is rising hourly wage rates. The data contained in Table 5 reveal the rapidity with which Puerto Rican minimum wage orders escalated basic hourly wage rates. The median minimum wage rate of 30 cents in 1949 advanced to $1.00 in June 1963, $1.50 in July 1970, and $1.60 in January 1975. During this 26-year period, the median wage rate advanced by 433.3 percent, or nearly 17 percent per year. This is an extremely high rate of growth, particularly for a surplus labor economy.

The data reported in Table 5 reveal two additional points of interest. First, as the years have gone by, there has been a tendency for the monetary range of wage orders to expand. In 1949, for example, wage orders ranged from slightly less than 25 cents per hour to just under 45 cents per hour. On the other hand, in January 1975 they ranged from 50 cents per hour to $2.10 per hour. Secondly, with the passage of time there has been a tendency toward the development of concentrations of wage orders in the upper reaches of the range. This indicates, of course, that

[25] Economic Development Administration, *supra* note 17, at 2.18.

Table 4

INCREASE IN AVERAGE HOURLY EARNINGS IN PUERTO RICO AND THE UNITED STATES, 1939, 1970, and 1974

Industry	Puerto Rico AHE			United States AHE			Puerto Rico as a Percent of U.S.		
	1939	1970	July 1974	1939	1970	July 1974	1939	1970	July 1974
All manufacturing	$0.20	$1.72	—	$0.63	$3.29	—	31.8	52.3	52.3
Food and kindred products	.22	1.74	$2.36	.61	3.07	$4.19	36.0	56.7	56.3
Textile mill products	.23	1.56	2.07	.46	2.42	3.24	50.0	64.5	63.9
Apparel and related products	.17	1.59	1.96	.53	2.36	2.99	32.0	67.8	65.6
Paper and allied products	.26	2.12	3.07	.74	3.59	4.52	35.0	60.0	67.9
Chemicals and allied products	.24	2.13	3.13	.65	3.59	4.85	37.0	59.2	64.5
Leather and leather products	.14	1.52	1.83	.53	2.47	2.99	26.6	61.5	61.2
Lumber and wood products	.14	1.56	2.05	.50	2.77	3.92	28.0	56.7	52.3
Metal products	.20	1.99	2.69	.74	3.65	4.57	27.0	54.5	59.0
Machinery except electrical	.24	2.30	3.01	.82	3.84	4.87	29.2	60.0	61.8
Electrical machinery	.16	1.84	2.55	.70	3.20	4.15	22.9	57.5	60.2
Miscellaneous manufacturing	.25	1.59	2.17	.61	2.80	3.48	31.1	56.8	62.1

Source: Hearings, Part II (see Table 1 above), p. 362; Puerto Rico Department of Labor, Bureau of Labor Statistics, *Employment, Hours, and Earnings in the Manufacturing Industries,* July 1974.

Table 5

PUERTO RICAN WAGE ORDERS OUTSTANDING, 1949–1975

Minimum Wage Rates	Number of Wage Orders Outstanding			
	1949	June 1963	July 1970	January 1975
Under $0.25	37			
$.25–34.9	37	2		
.35–44.9	51			
.45–59.9		4	3	1
.60–69.9		2	3	
.70–79.9		27	5	1
.80–89.9		20		2
.90–99.9		19	1	
1.00–1.149		38	4	
1.15–1.249		36	12	1
1.25–1.349			19	7
1.35–1.449			18	9
1.45–1.549			43	22
1.55–1.649			88	82
1.65–1.749				3
1.75–1.849				11
1.85–1.949				8
1.95–2.049				16
2.05–2.149				15

Source: Hearings, Part II (see Table 1 above), p. 378; Reynolds, "Wages and Employment . . . ," p. 29; Bureau of National Affairs, Inc., *Wage Hour Manual,* 95:241, No. 230, January 18, 1975, pages WHM–5–15.

over time Puerto Rican wage minima have more closely approached those of the U.S. mainland.

Yet, there is a major difference between Puerto Rican and stateside responses to minimum wages. On the mainland relatively few workers in covered employment are paid the bare legal minimum; the vast majority of workers earn a much higher wage. Moreover, when the legal minimum remains unchanged for extended periods of time, stateside wage rates continue to move upward. The situation is different in Puerto Rico, where excessive unemployment makes it possible to hold the pay of most workers at or near the legal minimum and to forestall significant wage increases between minimum wage determinations.

VI. Conclusions

Rapidly advancing wage rates in the face of the persistently high level of unemployment suggest that market forces play a

minimal role in Puerto Rican wage determination. Also, available data suggest that trade-union wage policy and collective bargaining played less than a major role in the rapid upward movement of wage rates. Trade union membership in Puerto Rico in all nonagricultural industries was estimated at 19 percent in both 1965 and 1973, with concentrations in each year in the communications, public utilities, and transportation industries.[26]

The major force affecting the upward movement of Puerto Rican wage rates has been federal minimum wage legislation. Two sets of minimum wage regulations are applicable in the Island. Wage rates of those industries that produce only for local consumption are regulated by the Puerto Rico Minimum Wage Board. Industries engaged in the production of goods for interstate or foreign commerce are covered by the provisions of the Fair Labor Standards Act. The FLSA rates have been generally higher than those prescribed by the PRMWB, but Puerto Rico is in the process of increasing its minimum wages to reach parity with FLSA rates.

It does not necessarily follow that higher wage minima in the face of a continued labor surplus mean that the former created the latter. For example, the inordinately high birth rates on the Island have contributed more heavily to a rapid increase in the labor force than economic growth has contributed to an expansion of jobs. Yet, excessive wage minima can exacerbate the problem. This suggests that the proper approach to minimum wage determination in Puerto Rico was the industry-committee approach of flexibility, under which some extralegal consideration was given to economic conditions in Puerto Rico. This is preferable to the present approach, which fixes wage minima in Puerto Rico largely on the basis of economic conditions and needs of the United States outside of Puerto Rico.

Comment—

DAVID M. HELFELD*

I think Fred Holly's conclusions are absolutely right. I agree with them, but I do have some points to add and some critical remarks to make.

[26] *Id.* at 2.09. Of course, unions have lobbied for higher wage minima in Congress, and their representatives have been members of Industry Wage Boards. In both of these endeavors, unions have exerted upward pressures on wages.

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As my first critical remark, I would suggest that he change the title of his paper. Instead of "Federal Minimum Wage Determination in Puerto Rico," the appropriate title should be "A Requiem for a Federal Policy," because, in fact, what the 1974 amendments do to the Fair Labor Standards Act, as far as they relate to Puerto Rico, is reject the policy of wage determination by industry committees. We are now in a phasing-out period, and within a few very short years there will be no special dispensation in the Fair Labor Standards Act to deal with Puerto Rico's special economic circumstances. Within a short number of years, there will be no federal minimum wage committees functioning.

With all deference to my colleague, I think that what is needed in his paper is an emphasis on that point—that effectively the Congress has made the judgment that the minimum-wage-committee process can be phased out without doing substantial harm to the Puerto Rican economy, something which I doubt very strongly.

If I am right in my assumption that phasing out industry committees over a period of three to five years for most covered industries, and over a somewhat longer period in the case of agriculture, will cause the Puerto Rican economy great damage, then there should be included in the paper an analysis of the consequences of the congressional decision in 1974 to eliminate industry committees and some consideration of possible alternative policies.

When industry committees disappear, and when all employees in Puerto Rico covered by the Fair Labor Standards Act have to be paid the federal stateside minimum, how is that going to work? Assuming that it works badly, contrary to the expectations of Congress, and substantial unemployment results as a consequence of this new federal policy, what ought the response of Congress to be? What ought the response of the Commonwealth of Puerto Rico to be, faced by a disaster of that sort?

Turning now to the standards in Section 8 of the statute—which are so unsatisfying to an economist, who would prefer more particular and concrete standards—these standards are ideal from the point of view of a lawyer. They are ideal standards because they say in effect to the industry committee: Make a responsible judgment. And the outer parameters are fixed in terms

of not making a judgment that will result in substantial curtailment of employment, certainly a very important consideration to keep in mind. I would say that it is the principal consideration to keep in mind. At the other extreme, the standards say: Do not set the wages so low that it will give industry in Puerto Rico, which is competing with industry in the United States, an unfair competitive advantage. That comes under the heading of fairness and equity. Puerto Rico is an integral part of the American common market, and it ought not to have an advantage of such proportions that it can compete unfairly with producers on the mainland.

In addition, there is another paragraph in Section 8 that specifically directs industry committees to take into account a whole series of economic factors, including, for example, competition from foreign-produced merchandise, the cost of living, and other general economic considerations. Those are operative standards that also must be taken into account by industry committees.

From the point of view of an industry committee, the statutory standards amount to the following directive: Use your best judgment. Do not recommend any rate that is going to do harm to the chances of the economy of Puerto Rico to grow and prosper, but do not be so concerned with that objective that you lose sight of the fact that Puerto Rico is part of the American economy and it ought not to have any unfair competitive advantage in the national marketplace.

There was a criticism in the paper that at times the chairman of the committee has to mediate. What's wrong with mediation? I think it is perfectly appropriate, if the mediation is carried out in a responsible way—and that means that the chairman cannot play God. He has to keep in mind the various factors that the statute requires the committee to take into account. It seems to me that mediation within the statutory framework is a desirable and civilized thing for the chairman to do. The chairman is not a judge sitting apart from the parties, who hears evidence and to whom neither party can approach for discussion. This is not an adversary type of proceeding—as that concept is normally understood in the courts. It seems to me perfectly proper at the appropriate time in the hearing process for the chairman himself, or using his two fellow public members as mediation emissaries, to explore

possible wage rates with both the management representatives and the labor representatives to try to work out a consensus. I think the statute visualizes mediation; it's the thing to do. There is nothing shameful about mediating as long as it is done in the light of the economic evidence that has been presented and within the statutory framework.

Nowhere in the paper do I find sufficient recognition or appreciation of the work of the economists, both those here in Puerto Rico and those in Washington, who prepare what we usually call the Blue Book for these hearings. This is an economic study of the industry and includes all relevant background economic data. I would agree with Professor Holly's criticism that sometimes the Blue Book arrives at the last moment, but if you were in charge of the corps of economists who have to be constantly making these studies, I think you would recognize that it isn't always possible to get the Blue Book out one or two months in advance of the hearing. In my experience, the Blue Book is very valuable as a working instrument. It permits the committee members, once they read and study it, to realize what the limits of possibility are in that particular industry, and that is its function. It is a very helpful document, and it serves, in my experience, to set a realistic framework within which the committee members can work.

There is a statement in the paper that I think ought to be corrected; it is to the effect that industry committees are no longer functioning. They are still functioning, for all wage levels except those that have already reached the stateside statutory minimum. The big difference is that an industry committee today, under the amendments to the Fair Labor Standards Act, really does not have very much flexibility. It cannot recommend any minimum wage that is below the statutory mandated increase. By way of example, consider the situation of an industry where the minimum wage level is $1.70. By statutory mandate, it will get a 15-cent annual increase until the minimum wage reaches $2.30. That's when the industry-committee device will cease to be used as far as that particular industry is concerned. But if our hypothetical industry, which has a minimum of $1.70, fails to come in with the necessary economic data, then the industry committee, according to the statute, finds itself in what I would term a statutory straitjacket and must recommend the statutory minimum on the mainland, which will be $2.30 an hour after December 31, 1975.

On that statutory provision, prior to its passage, I testified as follows during the hearings held here in San Juan by the House Labor Subcommittee:

> "Perhaps the most seriously harmful of the 1973 amendments was the proposal to confine industry committee process within an evidentiary straitjacket, which in its probable operative effects could have caused curtailment of employment in the tens of thousands. [I'm referring here to similar proposed amendments in 1973 that were rejected, but were subsequently adopted in 1974.] Under the proposed amendment to Section 8 (b) an industry committee is obliged without regard to the economic dislocation which might ensue to recommend the national statutory minimum: 'unless there is substantial documentary evidence, including pertinent unabridged profit and loss statements and balance sheets for a representative period of years . . . in the record which establishes that the industry or a predominant portion thereof is unable to pay that wage.' Failure to satisfy the evidentiary norm would leave an industry committee no alternative but to recommend a wage order applying the national minimum. The result would inevitably be further decline in agricultural employment, at a time when serious efforts are being undertaken to save agriculture, unless of course the government of Puerto Rico were prepared to assume the cost of vastly expanding its subsidy program by paying to each covered agricultural employee the difference between what his employer can afford to pay and the minimum wage. The same analysis applies to all covered employment and small enterprises where either poor and inadequate financial records are kept or it would be next to impossible for many dispersed and small employers to join forces and prepare the kind of financial statement which Congress decided to require under the proposed amendment to Section 8 (b)."

Let's understand what this means. In a particular industry, as defined under the Fair Labor Standards Act—that means as defined by the Wage and Hour administrator—employers must be prepared to come forward with a presentation in terms of financial records covering the predominant part of that industry to demonstrate their inability to pay the stateside minimum. If they cannot do that or if they do not do that, then the minimum wage committee is obliged under the statute to recommend the national statutory minimum. I should say that "recommend" is a euphemism. Industry committees do not really recommend. They really make the wage orders, because the Secretary of Labor under the statute has a purely ministerial function. He cannot in any way change what the committee does. He simply sends the committee's recommendation over to the *Federal Register* where it is published. It then becomes the legal minimum.

How has the new policy actually worked out? A study has yet to be made of how the amendments passed in 1974 are affecting the economy of Puerto Rico. There are no comprehensive data yet on that, but the fact is that we are suffering a great many plant closings. We are losing jobs. Here is where I do think the economists, and not lawyers, come in. We do need an analysis by competent economists on the factors that are at work in reducing employment in Puerto Rico. The way the game is usually played is that the finger of blame is pointed at the general economic situation, the depression, and so forth. But since I know so little about economics, I am almost certain that the economists can tell us to what extent the Fair Labor Standards Act and the automatic statutory increases are contributing to the loss of employment in Puerto Rico.

I do have one recent concrete example of how the evidentiary standard in Section 8 (b) is working out in practice. I was talking with a public member, whose name I cannot give because he did not authorize me to give it and I would certainly not want to cause him any problems, and his story, I think, is a pertinent one and bears directly on the question we are considering. He served on a committee that held hearings on an industry that failed to bring in the necessary financial data covering a predominant part of that industry. Consequently, by statute, the industry committee had no choice but to recommend the highest possible minimum under the Fair Labor Standards Act. But the committee didn't. To avoid causing an economic disaster, the committee recommended something less—a rate that was economically feasible and consistent with the industry's survival.

Imagine the problem facing the members of that committee! This is an industry that just does not have the necessary organization. Most of the employers in the industry do not keep the kind of records that Congress assumed everybody keeps these days, such as unabridged profit-and-loss statements. Most of the small scale enterprises in this industry do not keep either abridged or unabridged profit-and-loss statements. But Congress insists upon it. Well, its insistence is not going to make the documents forthcoming. The documents just will not appear. Imagine yourself on the industry committee, having to choose between following or not following the statutory mandate when your sense of responsibility assures you that if you do follow it, you will be causing

massive unemployment in the particular industry. Now, what do you do?

Well, I think the industry-committee members did the responsible thing. I'm glad I wasn't faced with that problem, but I do think they acted correctly. Not only did they come out with a recommendation below the statutory requirement of the mainland minimum, but the chairman—and I would suppose he did a magnificent job of mediating—got a unanimous vote. Now, imagine that—a unanimous vote. That included all the public members, the union members, and the management representatives. Unanimity may not result in salvation because under the statute as amended—and this is another amendment that may prove disastrous—the role of the federal courts has been expanded; and now any adversly affected party can go into court and challenge the decision of the industry committee, on the ground that the committee simply did not follow the instructions of the Congress, and can obtain a judicial remedy not formerly available. I do not know what the courts are going to do with cases in which industry committees refuse to practice economic destruction. But if the evidentiary test is not met, any adversely affected party can go into federal court and the judge has the responsibility, under the statutory amendment, to follow the law and, if a committee failed to follow the law, to set the minimum wage in that industry in Puerto Rico at the mainland statutory rate, which will be $2.30 by the end of this year.

On the latter problem, I made the following statement to the House Labor Subcommittee:

> "Equally troubling is an amendment proposing an expanded judicial review which would authorize the Court of Appeals of the District of Columbia to modify a wage order, including provision for the payment of an appropriate minimum wage. This could have the effect of transferring the rate-making power to the courts, depending upon how the scope and intensity of review will actually be implemented. At the least, if the court were to conclude that in a particular record there was an absence of sufficient, substantial documentary evidence, it would then be duty bound to issue the appropriate minimum wage rate, which by statutory definition is the national rate. At most, it could substitute its judgment for that of the industry committee, even when there was a sufficiency of financial evidence, if the court evaluated the significance of the evidence differently. In the initial period of such an amendment, one could almost certainly expect an increase in appeals and consequently of uncertainty

with regard to the operative meaning of the statutory criteria, at least until the courts clarify the criteria and how they are going to utilize their expanded review power."

In the light of modern administrative law developments, it is surely pertinent to question whether imposing this type of expanded judicial review on the court of appeals is wise. Wise or not, it is the law. There is a case pending, so we are about to find out how this particular statutory provision will work out in practice.

To leave some time for discussion to my friend, Paul Sanders, who along with myself is a veteran of many industry-committee proceedings, I shall limit myself to a few concluding comments.

I think it is important to recognize that Puerto Rico has its own minimum wage law, which in many ways parallels the Fair Labor Standards Act. It is not generally understood that these two statutes work in harmony. Under the FLSA, the Congress authorizes any state jurisdiction—and that includes Puerto Rico—to set minimum wages and hourly regulations that are more favorable to employees, even within the coverage of the FLSA. Consequently, at times particular segments of industries under the FLSA have also been covered by minimum wage decrees under the Minimum Wage Law of Puerto Rico, and that is because mandatory decrees under the Puerto Rico law have in fact provided superior benefits to the covered employees. The Puerto Rican statute includes not only wages and hours but also fringe benefits, such as vacation pay and sick leave.

However, the Puerto Rican law, in contrast to the 1974 FLSA amendments, continues to rely on a policy of flexibility. The highest rate that a minimum wage committee can set under the Puerto Rican law is $2.50 an hour. So, in fact, the concept of ability to pay under the Puerto Rican law is being applied with even greater latitude than it is under the federal statute.

Another point worth bringing out has to do with the percentage of employees who work for the government. That is something that is obscured by the statistics as released by the Puerto Rican Department of Labor. The important point is that if you merge a number of Professor Holly's tables, you come out with a very imposing statistic to the effect that 28 percent of the people employed in Puerto Rico work for the government. I consider

that to be a very imposing statistic because in the United States only 16 percent of all employees work for federal, state, and local governments. Whereas in the United States one out of six employees is a government employee, in Puerto Rico it is a little over one in four. Of course, that statistic, in turn, depends on how you define government employee; and within the definition that I think makes sense are included all state employees, municipal employees, employees of the public corporations, and the employees of all government-owned enterprises.

What has been happening in Puerto Rico—something not noticed as being a development of great importance, and yet to me it is obviously a matter of great significance—is a tendency, when particular industries are in trouble, for the government to take over. Almost everybody in the sugar industry today is directly or indirectly a government employee because, as the sugar mills went bankrupt, the government of Puerto Rico took them over. The real owner of those mills is the government of Puerto Rico. The same thing has happened with quite a number of hotels.

On the state of union organization in Puerto Rico and how this relates to minimum wages: In certain sectors—government corporations, for example—70 percent of the employees are organized. Those employees all get well above the statutory minimum rate. It is true that only 20 percent are organized in the private sector, but I find it very significant that collective bargaining on the part of powerful unions in the private sector has, on the whole, implicitly recognized the soundness of industry-committee wage determinations. If you look at the collective bargaining contracts that these powerful unions have negotiated, you will usually find the provision that the minimum contract rate will be 5 or 10 cents above the federal statutory minimum wage order. The best explanation for this phenomenon is that in the judgment of these union leaders, that is all the industry can afford to pay without substantially curtailing employment, i.e., without curtailing union membership.

As I see it, the response of the private sector's union leaders is the best vote of confidence in the sound judgment of industry committees that you could possibly find. When union leaders, who are sophisticated, who have a corps of working economists, and who understand their industries, go into negotiations—and in some of these industries they are the most powerful factor in

the making of the bargain—and put into their contracts 5 or 10 cents above the minimum wage order, what they are saying indirectly is that that is all the industry can afford to pay and stay in business.

I want to close on one point that has to do with the interrelationships between unemployment, migration, and welfare. It is true that we have very high unemployment in Puerto Rico; it is always two or three times the rate in the United States. The safety valve until recently has been out-migration. Employees who could not find work in Puerto Rico had the option of trying their luck in the United States, and many did. About one out of every three Puerto Ricans lives in the United States, and this is not because the climatic conditions, or even the social and cultural conditions, are better than in Puerto Rico, but simply because they had no choice. It was the economic imperative that caused them to leave.

When employment opportunities go up in Puerto Rico, when our Economic Development Administration is functioning effectively and can create new jobs, the out-migration rate goes down and people start coming back. When the job opportunities are scarce, they leave in greater and greater numbers. Puerto Rico and the United States have a joint negative interest in avoiding substantial curtailment of employment, as they have an affirmative interest in promoting full employment. There is a clear connection between the number of people on welfare and the number who migrate to the mainland on one side, and the availability of jobs on the other. Consider, for example, the correlation of only two of these factors: During 1960-1965, the period of the most rapid employment growth in Puerto Rico, net migration to the mainland amounted to 68,600, whereas in the preceding and subsequent five-year periods, when employment growth was slower, net migration reached 187,000 and 204,000, respectively. In the light of that correlation, with all the human consequences it implies, the Congress would do well to reassess the 1974 amendments to the FLSA and their potential for substantially curtailing employment.

Fortunately for Puerto Rico, the same Congress that enacted the 1974 FLSA amendments, which in my judgment will almost surely have disastrous effects on the Puerto Rican economy, very generously included Puerto Rico in the foodstamp program.

So we have no starvation in Puerto Rico, and we really do not have any substantial malnutrition. In addition, we have all kinds of welfare programs, most of them functioning through the generosity of the Congress. Ironically, what the Congress takes with one hand, it gives with the other. But in terms of human dignity, it seems to me it is much better for people to earn their way in this world, not subsist through the bounty of welfare payments, but rather through their own work, relying on their own efforts. If my appraisal of the likely consequences of the 1974 amendments should turn out to be correct, a future Congress, concerned with human dignity and with Puerto Rico's hopes for economic progress, will surely consider incorporating once again in the Fair Labor Standards Act the policy of flexible wage determinations for Puerto Rico.

Comment—

PAUL H. SANDERS*

David Helfeld and I have sat together on so many industry committees that I was very confident, in urging that he go first, that he would say practically everything I would want to say. I have found in the past that we tended to think pretty much the same way about processes and solutions in individual cases. He has also given us an excellent look at recent developments in the law and the general situation here.

I am going to take a few minutes to ask some basic questions and to give you my own reactions to the total program. Much of this is not really current. It involves looking back at the industry-committee process as I have seen it, beginning in 1950, and asking some questions. Did the process work? Did it seem to make use of the criteria in the statute and the evidence presented? Will the process rock along reasonably well?

First, looking at Professor Holly's prior suggestions, I believe that each one of them is excellent in substance. A question of a practical nature might be raised in connection with his suggestion regarding subpoena power because of the problems this would produce. It would be helpful always, of course, to get

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more information. However, my impression has been that these committees (at least those I've been on) have received a very substantial amount of information. We weren't bothered too much by the technical requirements of what it took to be an interested party. If a party did not qualify under all of the rigorous requirements that were specified in Professor Holly's paper, we would ask them to stick around and be a witness and thus get the material before the committee anyway. Those of us here who have been on committees will remember, I believe, that we got the proffered material one way or another. The question of the exact status of it was dependent on the hurdles that Fred Holly has specified. I would agree with him that undoubtedly the existence of these requirements might scare off some people from coming in and telling about their exact situations.

As lawyers, we also would tend to draw an adverse inference concerning the position of persons who withhold relevant information they possess. There is a rule of evidence on this point that I follow in arbitration every now and then. We are entitled to assume that if the withholding party had come forward, the evidence would not have helped its position. That rule of inference would apply in this kind of proceeding as well as in others. It is true, of course, that the committee action should be supported and must be supported by the record that is made before it. In my opinion, the important problems have related to judgment as opposed to the adequacy of records.

Another problem that Fred Holly touched on and that has not been emphasized so much in Dave Helfeld's discussion is the interrelationship between the minimum wage program and the Puerto Rican industrial development program, plus the fact of complete exemption from federal income tax. Really, you have to look at those programs in a unitary way; in some senses, it's a seamless web. The fact that income generated in Puerto Rico is not subject to federal income tax is a tremendous foundation for much else that goes on here, not only in industrial development but also in connection with the matter of minimum wage rates.

You have to be aware of the highly sophisticated *Fomento* program, which provides in a flexible fashion for exemption from local taxation, along with other incentives, to promote the establishment and development of industry and to aid enterprises in getting started, training labor, and all that sort of thing. It is dif-

ficult enough for a committee member to look at the wage data and organize it and analyze it properly, but he also has to be aware of these other related programs and figure out how much of what he's looking at is related to the appropriate minimum wage and is not a reflection of other aspects, such as tax exemption, under the local industrial development program or the exemption of Puerto Rican income from federal income taxes.

The data on industry profitability submitted to a committee sometimes would have a question mark because, in terms of federal income tax exemption, the more income attributable to Puerto Rico, the greater the noncoverage under the U.S. federal income tax in the case of the corporation with subsidiaries here and on the mainland. All of this shows how difficult it can be to understand and make discriminating use of the data that are supplied.

On the matter of adding criteria beyond those presently specified in the statute—do not go so high with your rate that you substantially curtail employment in Puerto Rico, but do not go so low that you give the Puerto Rican operation a competitive advantage over mainland-based industry—I would agree with Dave Helfeld. Those two poles were comfortable as far as I was concerned in terms of making a judgment that had to fall between them. Now as to getting additional data, it was my impression, and still is, that we received all kinds of data that had any possible relationship to either of those two poles—for instance, cost-of-living increases, tariff rates, anything and everything; you name it, and it seems to me it got into our record. I do not recall that any data were ever excluded that had any arguable economic bearing on an appropriate minimum wage level for the industry under consideration.

The matter of whether the committee should proceed on a scientific basis or whether it should use the mediation process or the "educated hunch" process in arriving at a recommended figure is an important problem, but I doubt if any useful generalization can be made. I can recall sitting with a very distinguished economist in a hearing that lasted more than a week and requesting at its conclusion that he make a "scientific diagnosis" and come up with a proper figure. His immediate reply was, "Give them a nickel." (That was a long time ago!) Putting this judgment into a carefully articulated measured model might have im-

proved the respectability of the recommendation, but I know it would not have improved the quality of the judgment in that particular situation.

On the subject of mediation, I am one who has to plead guilty. Most of my recent committees have come out with unanimously agreed-upon internal settlements. Actually, it was a result not so much of mediating by public members as of their encouraging bargaining by interested parties, including industry and labor members of the committees. In these cases, the public members would caucus so that we would know what we were going to do—that is, that in a particular case we would approve within a specified range of rates. Then the matter would be placed in the hands of the industry and labor representatives of the committee to work out a settlement or to narrow the range of possibilities. You might say that we public members were just getting out of work by refusing to commit ourselves early in the deliberations. But the industry and labor members would invariably come up with a figure within our predetermined approvable range. It seems to me that if a committee were balanced in terms of the various interests, as good a result as any could be produced. Union representatives and business representatives in Puerto Rico and on the mainland know better than anyone else what the impact of a certain figure is going to be on operations in the industry.

Now let me give an example of when that system does not work, and this is not a denial of the basic idea of mediation. The system does not work when the committee personnel is not properly balanced in terms of the interests that are important in the particular industry. In one case, our committee action was too low. Based on the record, the minimum acceptable to the labor and industry members of the committee was too low. Who made it too low? It was made too low because union-labor representatives had made a deal in New York City with the manufacturers there, and they had enough votes on our committee to make the arrangement stick. The record made before us would not have justified stopping anywhere short of the statutory minimum, and the law states that the record must show reasons for recommending less than the mainland minimum.

The president of the interested international union was sitting on that wage committee, and I remember asking him: "What are you going to do if I move to go to the statutory minimum?"

Well, I did dissent, but I was persuaded not to make the above motion by a man high in the commonwealth government of Puerto Rico (a public member of the committee) and by an Assistant Secretary of Labor with a major responsibility for the industry-committee system. Actually, I failed to carry out my responsibility to the portion of the mainland industry that had no substantial interest in Puerto Rico, and to the Puerto Rican workers who did not receive under the law what they were entitled to receive.

On the matter of competitive advantage, you can get data. We received data that would show an expansion of the industry in Puerto Rico and more shipments of certain items into the national market from Puerto Rico as compared with other sources. If the brassiere industry on a national basis was doing all of its expansion in Puerto Rico and relatively none on the mainland (the mainland being subject to the Fair Labor Standards Act for the full statutory minimum), then clearly, on the face of it, the rate in Puerto Rico was too low. It did give a substantial competitive advantage to Puerto Rico, and we were not following the statute if we prescribed a rate that would maintain or aggravate this unbalanced situation.

We were supposed to get the factor of labor out of competition. So maybe you are someone in the United States and you have to decide: Do I want to start a factory in Puerto Rico, or do I want to do it in Mississippi? Your decision might be to come to Puerto Rico by reason of everything that *Fomento* and "quid pro quo" will do for you. You might do that. But if you come to Puerto Rico because of the labor-cost factor—if that's the reason—then the statute is not being followed. The particular arrangement probably would result in a greater gross wage bill to be distributed to workers in Puerto Rico. I can remember only one or two instances of such situations.

The other problem is: What about the rate being too high? Most of my experience, which has usually been in needlework, has been in cases where there tended to be pressures to make the rate too high—too high because it would substantially curtail established employment in the Puerto Rico industry.

Look at the history of what has happened to the needle trades in Puerto Rico. Look at the history of what has happened to

sugar in Puerto Rico. I might mention tobacco and coffee also, although I do not claim intimate knowledge of these areas. But in certain aspects of needlework and in certain aspects of sugar, I believe it must be said that the federal wage program really did substantially curtail employment in Puerto Rico. Now maybe it was a good idea, but it certainly was not consistent with the statute. It can be said that it was desirable to get rid of home workers; you do not want hand needlework, and all that. I have never been persuaded that it was a good idea to get rid of Puerto Rican needlework activities, even of the hand nature, in light of the continuing substantial unemployment situation in areas of this Island where needlework was important. Realistically, the competitive advantage attached to the established Puerto Rican rates was of no significance.

To conclude, there have been some few places where the rate has been too low; but, I believe, there have been a substantial number of cases where the rate went too high too quickly. The recommendations were made by people who looked at low rates and reacted emotionally: "Surely this rate must be wrong!" They were thinking in stateside terms; they were not thinking in terms of a precise economic condition that surrounded the determination here and what would be needed to maintain a viable industry in Puerto Rico. This emotional reaction against a low wage figure (and transplanting this feeling to Puerto Rico), I think, would be the main reason why there have been some errors by these well-intentioned persons. They would say to themselves: "We're going to do these people a lot of good by raising these rates to what we regard as a decent, desirable rate which anybody ought to have." (I'm always in favor of giving the highest wages that are economically feasible.)

But you do have the constant question: What's going to happen to employment opportunity when this rate is put into effect? We have definitely had some cases where the do-gooders, in terms of raising rates, have harmed rather than helped. I agree with David Helfeld—if you take away the possibility of flexibility in consideration of all of the realities of the particular problem, you are going to have a situation where it will be necessary to come back and look at it again and correct the mistake, or else workers in Puerto Rico will be deprived permanently of employment opportunity.