[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN TRAMWAY AND MOTOR OMNIBUS EMPLOYEES' ASSOCIATION } APPLICANT;

AND

THE COMMISSIONER FOR ROAD TRANSPORT AND TRAMWAYS (NEW SOUTH WALES) AND ANOTHER . . . . . } RESPONDENTS.

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SYDNEY, *Feb.* 7, 8.

Evatt J.

Industrial Arbitration—Industrial dispute—Extending beyond limits of any one State—Motor-omnibus passenger transport—Genuineness of demands—Pre-existence of the dispute in one State—Employees' organization—Motive—Number of members affected—Rules—Compliance—Commonwealth Conciliation and Arbitration Act 1904-1934 (*No.* 13 *of* 1904—*No.* 54 *of* 1934), *secs.* 4, 21AA.

If after considering all the circumstances it is shown that demands in respect of wages and working conditions in an industry were genuinely made in the interests of an organization or its members, and that those demands have not been acceded to, then, so long as the geographical limits of one State are exceeded, there is an industrial dispute extending beyond the limits of one State within the meaning of sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934.

The existence of an industrial dispute extending beyond the limits of one State is not negatived (*a*) by the fact that at some anterior point of time there has come into existence in one State only an industrial dispute between the same parties and relating to the same subject matter, (*b*) by the mere proof that the organization which made the demands also sought to increase or retain its membership, or (*c*) merely by the fact that in one of the States where the dispute is alleged to exist, very few of the members are directly affected by the demands of the organization. Such matters are merely circumstances to be considered in determining the genuineness of the demands.

Caledonian Collieries Ltd. v. *Australian Coal and Shale Employees' Federation* [*No.* 1], and [*No.* 2], (1930) 42 C.L.R. 527, 558, referred to.

Although a demand in a log cannot be embodied in an award of the court it can form the subject of an industrial dispute.

Anthony Hordern & Sons Ltd. v. *Amalgamated Clothing and Allied Trades Union of Australia*, (1932) 47 C.L.R. 1, referred to.

SUMMONS under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1934.

A summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 was taken out by the Australian Tramway and Motor Omnibus Employees' Association for the determination of the question whether an industrial dispute extending beyond the limits of one State existed on 5th August 1937, when Judge *Drake-Brockman* made an order of reference, and still existed or was pending or probable, as to certain industrial matters, between the applicant and the respondents to the summons, namely, the Commissioner for Road Transport and Tramways (New South Wales), and the Melbourne and Metropolitan Tramways Board.

In an affidavit filed on behalf of the applicant it was stated that on 24th June 1937 the secretary of the applicant association posted by prepaid registered post to each of the respondents a log of wages and working conditions which had been adopted by the applicant to govern the wages and working conditions of members of the association employed by the respondents in the motor-omnibus section of the passenger transport industry. The Melbourne and Metropolitan Tramways Board replied that it was unable to accede to the demands presented in the log. The Commissioner for Road Transport and Tramways did not reply. A compulsory conference under sec. 16A of the Act was held at Sydney, and as no agreement was arrived at the matter was, pursuant to sec. 19 (*d*) of the Act, referred by Judge *Drake-Brockman* to the Commonwealth Court of Conciliation and Arbitration. At the direction of the judge the parties met again on 6th and 7th August 1937, but failed to agree. On 14th May 1935, an award, made on 17th September 1927, in respect of the wages and working conditions of tramway employees, members of the applicant, was, upon the application of the respondent board, varied to include motor-omnibus drivers and conductors. On 13th October 1937, the original award was varied by consent, so far as it applied to the respondent commissioner, to provide that

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when permanent tramway conductors were transferred to motor omnibuses they were to be paid the rates for tram conductors fixed by that award and when permanent tramway drivers were transferred to motor-omnibuses they were to be paid the same rates paid to other motor-omnibus drivers in the employ of the commissioner, but no provision was made for other persons, members of the applicant association, who might be employed as drivers and conductors. The matter of conditions was not dealt with, other than by a provision that those transferred men should have the same conditions as applied to other drivers and conductors whose conditions of employment were fixed by a State award. Members of the applicant had been and were being transferred to motor omnibuses in New South Wales and there were also members in that State who were working part time on motor omnibuses and part time on trams. Prior to the service of the log a copy thereof was forwarded to each of the nine members of the federal executive of the applicant association and the claims therein set forth were approved by the six members who replied. The federal executive consisted of representatives from the various States. Subsequently thereto, but prior to the service of the log, it was adopted by the executive of the New South Wales branch of the applicant association, and the secretary of the branch was instructed to take the necessary action to make it an award of the Federal Arbitration Court. It was also submitted to a general meeting of members of the Newcastle (New South Wales) branch of the applicant association, held on 3rd June 1937, and of the Victorian branch, held on 13th June 1937, and approved, and instructions were given that the log should be served on the respondents. The applicant insisted on the claims set forth in the log and stated that the wages so claimed were in every case higher than the wages presently paid by either of the respondents to the employees therein mentioned. It was also stated in the affidavit that there was every likelihood of a rapid extension of the motor-omnibus services carried on by each of the respondents ; that upon the proposed change-over in New South Wales from the tramway to the motor-omnibus system of passenger transport the motor omnibuses would be operated by drivers and conductors who formerly had been employed on trams ;

and that all the motor-omnibus employees in Victoria employed by the respondent board were members of the applicant association.

The rules of the applicant association are sufficiently stated in the judgment hereunder, wherein, also, further facts appear.

G. A. Mooney (industrial advocate), for the applicant.

V. G. Hall (industrial advocate), for the respondent commissioner.

Stanley Lewis, for the respondent board.

W. Lieberman, for the Motor Omnibus Employees' Association.

EVATT J. This is a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* for the determination of the question whether on August 5th 1937, when *Drake-Brockman* J. made the order of reference referred to in the affidavit of Michael John Stapleton, there existed both in New South Wales and Victoria the industrial dispute specified in such order.

I shall deal at once with several of the principles which were ably discussed by Mr. *Stanley Lewis*.

In the first place, it is plain that the existence of a dispute extending beyond the limits of one State is not negatived by the fact that at some anterior point of time there has come into existence in one State only an industrial dispute between the same parties and relating to the same subject matter. Everyone with the slightest experience of industrial affairs knows that over and over again serious inter-State disputes have had their historical origin or their cause in industrial trouble or dispute confined to one State. Suppose that, in one State only, members of an organization, because of local circumstances such as discrimination or boycott, are in dispute as to the right to wear a union badge while actually employed. In such a case the Australian organization of employees may decide to make common cause in the matter and endeavour to insist upon recognition of the right throughout Australia. In such a way an individual dispute which at the first does not extend beyond one State may be the origin of a genuine inter-State dispute. Upon the

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contrary view, there could never be an inter-State dispute unless, by some miracle, there arose throughout Australia a spontaneous and simultaneous demand for a specified industrial condition. But in Australia as elsewhere serious and extensive industrial disputes have frequently arisen from local disputes which at the first seemed to be of trifling importance.

Caledonian Collieries Ltd. v. *Australian Coal and Shale Employees' Federation* [*No.* 1] and [*No.* 2] (1), to which reference was made, are quite consistent with this view. In those instances the court found, as a fact, that at the time of the two alleged inter-State disputes there existed in reality only one New South Wales dispute and that the name of the Australian organization of employees was being used merely for purposes of conformity, and with no real desire on the part of the organization or its members to obtain from the employers outside the State of New South Wales the altered conditions said to be the subject of the Australian dispute. In other words, it was found as a fact that the particular demand was nothing but a device for the purpose of enabling the Federal arbitrator to intervene in the matter of a lock-out which was confined to New South Wales. Of course, the *Caledonian Collieries Cases* (1) also show that, in some circumstances, the pre-existence of a one-State dispute may have a considerable bearing upon the question whether any secondary inter-State dispute has arisen. The cases do not profess to depart from the prior definitions of inter-State disputes.

In the second place, the existence of a dispute extending beyond the limits of one State is not negatived by mere proof that the organization which is making demands upon employers is also seeking to increase or retain its membership. That circumstance, with all other circumstances, may be examined for the purpose of determining whether the demands for industrial conditions are genuine or a sham. Arguments of the character which I am rejecting are analogous to the old fallacy that, because the employees or employers who were making demands desired a Federal award, such a desire was itself sufficient to preclude them from getting what they desired. The argument was that, in such cases, what

(1) (1930) 42 C.L.R. 527, 558.

was desired was an award rather than the industrial conditions contained in the log of demands. Why the organizations should not genuinely desire both the conditions and a subsequent award was never explained by the exponents of this subtle argument. In *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Proprietary Co. Ltd.* (1), *Griffith* C.J. definitely rejected the implications of such a contention, because he plainly treated the union's desire and intention to obtain a Federal award as some indication of the genuine inter-State character of the dispute. In every case where an organization brings an alleged inter-State dispute to the notice of the Federal arbitrators, it desires to obtain a Federal award.

In the third place, an industrial dispute extending beyond the limits of one State is not negatived merely by the fact that in one of the States where the dispute is alleged to exist very few of the members of the organization are directly affected by the demands of the organization. In the present case, for instance, comparatively few members of the applicant organization are regularly employed on the motor-buses of the New South Wales employer respondent. The number affected may diminish, but the evidence shows that it is far more likely to increase rapidly as the State policy of substituting bus for tram is carried into effect. No doubt the smallness of the number of members affected is a circumstance to be considered in determining the genuineness of the demands, and, in some cases, the fact might help to turn the scale. For that reason I would be prepared to hold that, in *Federated Saw Mill &c. Employees of Australasia* v. *James Moore & Sons Pty. Ltd.* (2), *Isaacs* J. went too far in declaring that it was not *material* "that at the moment of the dispute the South Australian employers have as yet erected no bush mills, or that a Victorian employer has so far no timber yard." In my opinion such facts were and similar facts are "material," but not conclusive. But the true principle is clearly stated by the same learned judge in two passages in the same judgment (3). The first passage is this:

> "If bush mills and timber yards are really not distinct industries, but only different and well-recognized branches or departments of the same industry, I cannot see why the award should not include both bush mills and timber

(1) (1909) 8 C.L.R. 419, at pp. 435, 436. (2) (1929) 8 C.L.R. 465, at p. 518.
(3) (1909) 8 C.L.R., at p. 518.

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yards, notwithstanding that in the particular timber yards in West Australia no member of the claimant organization was actually employed at the moment of the dispute, because some of them might at any time be employed there."

The second passage deals with the absence of bush mills in South Australia and the timber yards in Victoria. In reference to these, *Isaacs* J. said:

"If in fact these are mere adjuncts of the same trade—mere alternative or additional methods of carrying on the same industry to which any employer may resort at any instant without changing his vocation, the absence of a bush mill in a particular business or the non-employment of a member of the union in a bush mill or a timber yard is a mere temporary incident, and does not prevent unity of dispute as to the general terms of the employment in the industry taken as a whole and as understood by those engaged in it."

The application of the two passages to cases like the present is obvious. They illustrate the position that (*a*) the absence in one State of existing membership of an organization does not, as a matter of law, preclude the coming into existence in that State of an inter-State dispute (*Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (1); *Amalgamated Engineering Union* v. *Metal Trades Employers' Association* (2)); (*b*) the fact that in one State the members are concerned rather with the question of hours than wages whereas in another they are concerned rather with the question of wages than hours does not prevent "unity of dispute" in both States as to the question both of hours and wages.

In such cases the facts suggested would be material on the genuineness of the inter-State dispute, but could not be regarded as necessarily preventing its coming into existence as a genuine single dispute extending beyond the limits of one State.

In truth, the question of the existence of an industrial dispute extending beyond the limits of one State should be determined by one positive rather than by many negative principles. Was the demand upon the respondents in two or more States genuine, or was it a sham or pretended demand? It need not be shown that, in making the demand, the demandants were ready to enforce it by strike or lock-out. If, after considering all the circumstances, it is determined that the demands were genuinely made in the interests of an organization or its members, and they have not been acceded

(1) (1925) 35 C.L.R. 528. (2) (1935) 53 C.L.R. 658.

to, then, so long as the geographical limits of one State are exceeded, there is a dispute extending beyond the limits of one State.

I apply the above principles to the present case. It is clear that, from an organizational point of view, the applicant union was disturbed by the danger of a drift of membership in New South Wales, and desired to prevent such drift. But I think that, at the time when the log finally propounded was considered and adopted, it undoubtedly represented the then desires not only of the organization itself but also of the members both in New South Wales and Victoria. Meetings were held in both States and, whether they were formally called or not, they evidenced the opinion of the members of the organization, particularly those who were working or might be called upon to work on the motor buses.

The fact that, before the registered rules of the organization were amended so as to cover bus-workers, Judge *Drake-Brockman* was persuaded to hold that the dispute arising from the refusal of the old log of 1926 already covered bus-workers seems to me of no significance on the present application, although I fail to see how an organization could validly make demands in relation to bus-workers at a time when its constitution did not cover them. But the present demands were made in 1937, after the alteration of the rules, and at a time when the organization was legally equipped both on its own behalf and on behalf of its members who were then or who were subsequently engaged as bus-workers, to make demand as to the wages and conditions of bus-workers.

Mr. *Stanley Lewis* also argued that the Federal executive of the organization, which prepared and made the present demands was not then authorized by the rules. In my opinion, the argument must be rejected. Under rule 11 (*f*) it is provided:

> "When the Australian Council is not in session the Executive shall exercise all or any of the powers and functions of the Australian Council, but shall not act contrary to any resolution of the Australian Council, and shall not rescind, alter, vary, or revoke any resolution or direction of the Australian Council. Otherwise all acts of the Australian Executive shall have full force and effect unless disallowed by the Australian Council or by ballot of the members."

I next turn to rule 23, which gives power to the council of the organization to submit an industrial dispute to the Commonwealth Conciliation and Arbitration Court. I quite agree that this does not expressly confer upon the council any power to make demands

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or conduct industrial disputes generally; but it is a very strong inference from rule 23 that the council has such power. If so, rule 11 (*f*) gives the executive a similar power. The wide powers of the executive in relation to disputes is also evidenced by the following provision in rule 23 :—

> "A branch shall not enter into any industrial dispute or strike without the consent of the Australian executive. If the executive shall endorse action on the part of the branch, the executive shall conduct all negotiations and arrange the matters in connection with such industrial dispute or strike, and shall arrange for the financial assistance of the branch relating thereto."

Two minor points were also taken. Under rule 15, in cases of "necessity," there is power to dispense with an actual gathering of the members of the executive and a decision may be reached by postal communication. This was done, but it is suggested that the "necessity" of the occasion is to be determined by the court and not by the executive members or the officials. I do not accept this view. I consider that the executive members were themselves the judges of the "necessity" of proceeding to a decision in the absence of an actual meeting, and that their decision in favour of pressing the log of demands shows that the executive was in favour of proceeding to an immediate decision. The second suggestion was that the log referred to in the ballot-paper did not necessarily refer to the log subsequently presented. But the letter accompanying the ballot-paper makes it quite plain that the log referred to the present log, and that no other log was ever contemplated, still less in existence.

Even if there had been some formal defect in the procedure adopted by the organization, I think that it is certain that, as the officials of the organization were and are unanimous in pressing the present demands, such defect would be immediately cured; therefore I would be justified in now holding that at the time of the refusal of the *de facto* demands an inter-State dispute of the character sufficiently described in Judge *Drake-Brockman's* order of reference was "threatened, or impending or probable"—a phrase which is used in sec. 21AA, and which emphasizes the constitutional power of the court to prevent disputes as well as to settle them. But, as it is, I find that, at the time of the order of reference, the industrial dispute therein described actually existed as an inter-State dispute, both respondents having failed to comply with the demands of the log.

Mr. *Stanley Lewis* finally contended that inasmuch as the Commonwealth statute would prevent the Arbitration Court from making an award in the terms of clause 45 of the log, dealing with the setting up of a board of reference to settle incidental disputes, this court was precluded from holding that the industrial dispute, if otherwise genuine and existing, extends to the subject matter of clause 45. I shall assume that Mr. *Lewis* is right in his contention that, as drafted, the demand in clause 45 could not be embodied in an award of the court. None the less I hold that the existing dispute covered and included the clause 45 demand, and that this court is not concerned to inquire whether the Act precludes the arbitrator from awarding in terms of clause 45. An analogous case would be a demand for preference to unionists. In *Anthony Hordern & Sons Ltd.* v. *Amalgamated Clothing and Allied Trades Union of Australia* (1), it was held that the Act precluded the Arbitration Court from granting unionists more than a limited degree of preference. But the log of demands had included a wider degree of preference. In other words, the decision assumes, in my opinion rightly, that there was a genuine dispute as to the preference described in the log notwithstanding that the statute prevented the arbitrator from making an award in the terms of the log.

It is obvious that this decision does not prevent Mr. *Stanley Lewis*' client from contending that, if the arbitrator makes an award in terms of clause 45, he will be acting in excess of jurisdiction. For the above reasons, I answer the question asked in the summons in the affirmative. There will be no order as to the costs of the summons.

Question answered in the affirmative. No order as to costs.

Solicitor for the applicant, *Frank Brennan & Co.*, Melbourne, by *Lamaro & McGrath.*

Solicitor for the respondent commissioner, *F. W. Bretnall*, Solicitor for Transport.

Solicitor for the respondent board, *Moule, Hamilton & Derham*, Melbourne.

Solicitor for the Motor Omnibus Employees' Association, *W. Lieberman.*

J. B.

(1) (1932) 47 C.L.R. 1.