[HIGH COURT OF AUSTRALIA.]

# THE KING

AGAINST

# THE DARLING ISLAND STEVEDORING AND LIGHTERAGE COMPANY LIMITED;

# EX PARTE HALLIDAY;

AND

# EX PARTE SULLIVAN.

H. C. OF A. 1938.

SYDNEY, *July* 26; *Sept.* 1.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ.

*Industrial Arbitration (Cth.)—Award—Waterside workers—Lead bars—Weight of loads—Undue strain upon employees—Determination by board of reference—Refusal by employees to obey instructions of employer — Prosecution — Reasonableness of instructions—Board's determination—Finality and conclusiveness.*

An award of the Commonwealth Court of Conciliation and Arbitration provided that any refusal to carry out the reasonable instructions of the employer as to the quantity or weight of cargo to be placed in slings should be deemed a breach of the award by the employee concerned; that any complaint that the weight or quantity of cargo being placed in slings was excessive and imposed undue strain on the employees should be investigated by the board of reference provided for by the award; that if any workmen engaged in the holds of ships or on wharves complained that through the insufficiency of the number of men engaged they were subject to undue strain the matter might be referred to the board; that the board of reference should hear, determine, or report upon all matters referred to it by the award and settle all disputes arising out of the award not involving interpretation of any clause; and that the decision of the majority of the members of the board, if recorded in writing, should be final unless disallowed by the court on appeal.

In November 1937 two members of the Waterside Workers' Federation were directed to place thirty-five bars of lead into slings, for the purpose of

H. C. OF A. 1938.

THE KING v. DARLING ISLAND STEVEDORING AND LIGHTERAGE CO. LTD.; EX PARTE HALLIDAY AND SULLIVAN.

loading them upon the s.s. *Westmoreland*, and refused. They were charged with committing a breach of the award by refusing to carry out the reasonable instructions of their employer's representative as to the quantity of cargo to be placed in slings. The magistrate who heard the charge held that the real question involved was that of undue strain, and that this question had been determined conclusively between the defendants and the employers by the board of reference set up under the award, and convicted the defendants. For many years it had been the practice to place thirty-five bars of lead into slings. On 2nd September 1937 the board of reference determined in respect of a complaint that there was an insufficiency of labour employed in loading the s.s. *Cambridge* that the employer's instructions to place thirty-five bars of lead in the slings were not imposing undue strain upon the men. A week after the refusal of the defendants to load the s.s. *Westmoreland* according to instructions, the board of reference determined in respect of a complaint made in relation to the loading of that ship that the employer's instructions to place thirty-five bars in the slings were not imposing undue strain upon the men.

*Held*, by *Latham* C.J., *Rich*, *Starke* and *Dixon* JJ. (*McTiernan* J. dissenting), that the defendants were rightly convicted.

ORDERS NISI for prohibition.

Upon informations, laid under sec. 44 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, by Darling Island Stevedoring and Lighterage Co. Ltd., Sydney Augustine Halliday and Thomas Sullivan, members of the Waterside Workers' Federation of Australia, an organization of employees subject to and bound to comply with an award made by the Commonwealth Court of Conciliation and Arbitration on 7th April 1936, and to which the informant was a party, were each charged that on 10th November 1937, at Pyrmont, Sydney, he did commit a breach of the award in that then being an employee of the informant he did refuse to carry out the reasonable instructions of his employer's representative as to the quantity of cargo to be placed in slings contrary to the award and the Act.

The applicants were employed by the informant in loading the s.s. *Westmoreland*, and were directed by the informant's representative to place thirty-five bars of lead into slings, but they insisted upon placing only thirty bars. Each bar weighed 90 lbs. The employees worked in pairs. The applicants did not work together as a pair; each had a different mate. Although it had been customary for at least ten years to place thirty-five bars of lead into a sling, the applicants refused to obey the instructions on

the ground that an undue strain was placed upon them. The award did not limit the quantity or weight of the cargo to be placed in slings or other appliances, nor did it expressly limit the weight of lead bars that were to be handled. But the award provided that " any refusal to carry out the reasonable instructions of the employer or his representative as to the quantity or weight of cargo to be placed in slings or other appliances . . . shall be deemed to be a breach of this award by the individual workman concerned."

The magistrate rejected medical evidence submitted on behalf of the applicants with the object of showing that the practice of placing thirty-five bars of lead into a sling involved undue strain.

The evidence showed that a complaint was made in relation to the loading of the s.s. *Cambridge* on 2nd September 1937, when the board of reference constituted under the award considered a claim by the applicants' union for extra men to unload bars of lead. The extra men were required because, it was stated, the loading of thirty-five bars to a sling involved undue strain. The board of reference examined the matter, and the decision of the board was against the contention of the union.

On 17th November 1937, that is, a week after the alleged offences had been committed, the union again complained to the board of reference, and, upon a further investigation, the board decided that the employer's instructions to place thirty-five bars into the slings should be carried out and did not impose undue strain upon the men.

The magistrate convicted the applicants, taking the view that the real question involved was a question whether the placing of thirty-five bars of lead into a sling involved undue strain, and that this question had been conclusively determined as between the parties by the board of reference. The applicants were ordered to pay the amount of their respective fines and the costs of the informant to the informant.

Each of the applicants obtained from *McTiernan* J. an order nisi by which it was ordered that the informant and the magistrate show cause why, on the various grounds therein stated, a writ of prohibition should not be issued directed to each of them to restrain them and each of them from further proceeding on or in respect of the adjudication or order made by the magistrate.

H. C. OF A. 1938.

THE KING v. DARLING ISLAND STEVEDORING AND LIGHTERAGE CO. LTD.; EX PARTE HALLIDAY AND SULLIVAN.

The orders nisi, which were made returnable before the Full Court of the High Court, were heard together.

Further facts and the relevant clauses of the award appear in the judgments hereunder.

*Evatt* K.C. (with him *Hidden*), for the applicant Halliday, and (with him *O'Toole*), for the applicant Sullivan. The decision of the board of reference was not, in the circumstances, a decision binding upon the magistrate. It was merely an interim decision based only upon the observation of a layman and arrived at without the benefit of medical evidence. The board has no power to make a retrospective determination which affects the circumstances as to whether or not there has been a breach of the award. Assuming that the constitution of the board of reference is within the powers of the legislature, the board can only deal with specific matters and ships, that is, specific disputes; it has no power to make a general rule applicable at all times to all ships throughout the Commonwealth (*Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (1)). A decision made in respect of a particular dispute and ship cannot, because of the difference in the surrounding circumstances, apply to any other dispute and ship. The doctrines of estoppel by judgment and *res judicata* and their application were dealt with in *O'Donel* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (2). The provisions in the award as to loading should be construed with due regard to reasonableness. When loading the bars the employees worked in pairs, therefore, if an offence was committed, it was committed by a pair of employees and not by one employee only. In those circumstances, to proceed against one only of the employees forming a pair, as here, is an invalid prosecution. There is not any individual offence shown; it is a joint offence; therefore there should have been a joint prosecution. Unless the decisions in *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Pty. Co. Ltd.* (3) and the *Builders' Labourers' Case* (4) are to be taken as implicit decisions that boards of reference may be set up, it is urged that

(1) (1935) 34 C.A.R. 345, at p. 346.
(2) (1938) 59 C.L.R. 744.
(3) (1913) 16 C.L.R. 245.
(4) (1914) 18 C.L.R. 224.

boards of reference are set up invalidly. Sec. 40A of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 is *ultra vires* of the legislature. If sec. 40A purports to empower a board of reference to make a general rule binding on all ships and employees, it is *ultra vires*; it would be acting in a judicial capacity.

*Spender* K.C. (with him *Curlewis*), for the informant respondent. Sec. 40A of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 is within the legislative powers of the Commonwealth (*Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Pty. Co. Ltd.* (1) ). The provisions of the award in this case are within the scope of sec. 40A. On the proper construction of the award all questions relating to overstrain and insufficiency of labour engaged are to be referred to the board of reference and the decision of that board is final and binding on the parties affected. Refusal to obey a reasonable instruction given in respect of matters in the award, is a breach of the award. The magistrate was bound to accept the two findings of the board of reference that instructions to load thirty-five bars were reasonable and did not impose an undue strain upon the employees. Not having been appealed from those findings of fact on the matter within the ambit of the dispute were final and conclusive. The refusal to work was a concerted action on the part of the employees.

*Evatt* K.C., in reply.

*Cur. adv. vult.*

Sept. 1.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal by way of statutory prohibition from the order of a stipendiary magistrate convicting Sidney Augustine Halliday of a breach of sec. 44 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 in that being a person bound by an award of the court he committed a breach of the award. There is a similar appeal in the case of Thomas Sullivan, who was convicted of the same offence. There is no substantial distinction between the facts of the two cases, the appeals in which were heard together. I propose to deal with Halliday's case as representing both cases.

(1) (1911) 12 C.L.R. 398, at pp. 445, 455, 461.

H. C. OF A. 1938. THE KING v. DARLING ISLAND STEVEDORING AND LIGHTERAGE CO. LTD.; EX PARTE HALLIDAY AND SULLIVAN. Latham C.J.

Sec. 44 of the Act provides that where any person bound by an award has committed any breach or non-observance of any term of the award a penalty may be imposed by certain courts or magistrates, including a stipendiary magistrate.

Halliday is a member of the Waterside Workers' Federation of Australia, which was bound by an award made on 7th April 1936 in a dispute to which the federation was a party. Halliday was therefore a person bound by the award (*Commonwealth Conciliation and Arbitration Act* 1904-1934, sec. 29 (*d*) ).

The precise charge was that Halliday committed a breach of a term of the award in that he refused to carry out the reasonable instructions of his employer's representative as to the quantity of cargo to be placed in slings, contrary to the said award. Clause 14 (*g*) of the award provides that " any refusal to carry out the reasonable instructions of the employer or his representative as to the quantity or weight of cargo to be placed in slings or other appliances . . . shall be deemed to be a breach of this award by the individual workmen concerned."

Halliday and an employee working with him were engaged on 10th November 1937 in loading the s.s. *Westmoreland* with bars of lead, which weighed 90 lbs. each. It was proved that the employer's representative directed Halliday and his mate to place thirty-five bars of lead in a sling. Halliday refused to place more than thirty bars in the sling. As already stated, the men worked in pairs, and a point was raised that Halliday did not refuse to comply with any order because the order given plainly related to the work to be done by two men, of whom Halliday was one, and not to work to be done by Halliday alone. It is clear, however, that the order was that Halliday and his companion should work together so as to place thirty-five bars in a sling and that Halliday refused to carry out the order. Therefore the refusal alleged in the complaint is established by evidence. The question which arises for determination is whether the order was a reasonable instruction within the meaning of the award.

The defence was that placing thirty-five bars each weighing 90 lbs. in the sling imposed undue strain upon the men working, that they should not be required to place more than thirty bars in

a sling, and that therefore the instruction was unreasonable. The contention was that the loading of thirty-five bars in an uninterrupted period involved overstrain, which would be avoided if only thirty bars were loaded at one time. If only the lesser number were loaded at a time the men would have a longer rest before being required to work again when the trolley returned with the empty sling. Evidence was given that for many years it had been the practice, in connection with ships loaded or unloaded by the complainant company, to place thirty-five bars in a sling. The defendant submitted medical evidence with the object of showing that the practice involved undue strain. This evidence was rejected and the magistrate convicted the defendant, taking the view that the real question involved was a question whether the placing of thirty-five bars of lead in a sling involved undue strain, and that this question had been conclusively determined as between the parties by a decision of the board of reference for which the award provides.

The award contains the following provisions:—Clause 14 (*g*):—"Nothing in this clause shall be deemed to authorize limitation of the quantity or weight of cargo to be placed in slings or other appliances. Any refusal to carry out the reasonable instructions of the employer or his representative as to the quantity or weight of cargo to be placed in slings or other appliances or any refusal to use such slings or other appliances as may be considered necessary by the employer or his representative or any refusal to carry out the reasonable instructions of the employer or his representative in any matter appertaining to the handling of cargo whether on a vessel or on shore shall be deemed to be a breach of this award by the individual workmen concerned and by the branch of the federation unless it can satisfy the court that it took proper steps to compel men to continue work as ordered." Clause 14 (*h*):—"The employer shall properly consider the circumstances of each job, and at the outset engage sufficient labour to ensure that employees shall not be subject to undue strain. If employees complain of overstrain or insufficiency of labour engaged, their complaint shall be investigated by the board of reference." Clause 14 (*j*):—"If at any time complaint is made by men employed on a job or by a federation representative that the weight or quantity of cargo being placed in slings or other appliances is excessive, and imposes

H. C. OF A. 1938.

THE KING v. DARLING ISLAND STEVEDORING AND LIGHTERAGE CO. LTD.; EX PARTE HALLIDAY AND SULLIVAN.

Latham C.J.

undue strain on men working in holds of ships or on shore, such complaint shall be investigated by the board of reference. If the board of reference is of opinion that definite limitations should be placed on weights or quantity of cargo to be placed in slings or other appliances, it shall so report to the court, and the court will thereupon consider whether such limitation should be incorporated in this award."

Clause 24 (*g*) provides that the functions of a board of reference shall be (*inter alia*): (1) " To hear, determine or report on all matters referred to it by this award for hearing, determination or report "; (5) " To settle all disputes arising out of this award not involving interpretation of any clause thereof."

Clause 24 (*h*) provides that either party may appeal to the court from any decision of the board of reference, and clause 24 (*i*) provides that until the appeal is heard the decision of the board on matters over which it has jurisdiction shall be acted on. Other clauses provide that officers of the union may make complaints and bring them before the board of reference or the court.

These clauses provide a means of obtaining a decision with respect to complaints by employees of undue strain arising from the quantity or weight of cargo ordered to be placed in slings.

When such a complaint is made the board must investigate the matter (clause 14 (*j*) ). The result of the investigation must be either that the complaint is found to be justified or that it is not found to be justified. In the former case the board may, if it thinks proper, report to the court that definite limitations should be placed on weights or quantity of cargo to be placed in slings. If it so reports, it is for the court to consider whether such limitation should be incorporated in the award (clause 14 (*j*) ). But the board may not decide so to report to the court. It may, after investigation, make some other decision. The board may decide that no undue strain is involved in placing a particular amount of cargo in a sling, or it may decide that an undue strain was involved in some particular circumstances but that it was not desirable to alter the general terms of the award by prescribing a " definite limitation." It is not necessary to determine in this case the effect of a decision of the latter description, because no such decision was made. In the present case it is submitted for the respondent that the

board did make a decision of the former description (i.e., that no undue strain was involved). Such a decision would be a decision upon a matter which the award authorizes and requires the board to investigate, and the decision would be subject to appeal to the court (clause 24 (*h*) ), and would be a decision to be " acted on " until an appeal was heard (clause 24 (*i*) ). Thus the decision would, in the absence of an appeal, bind the parties to the award. They would be under a duty, prescribed by the award, to act upon it.

If an employee bound by the award is prosecuted for refusing to obey a reasonable instruction as to the quantity or weight of cargo to be placed in slings, it is for the court to determine, upon proper evidence, whether the instruction was reasonable or not. If the only challenge to the reasonableness of the instruction were that obedience to the instruction would have involved an undue strain and the board of reference had not decided that question, it would be necessary to consider whether, upon the true interpretation of the award, it was intended that all such questions of undue strain should be investigated by the board and not by any court. This latter question does not arise in the present case if the board has decided this question of undue strain. If the board has decided that question, the decision of the board binds the parties—it must, until appeal, be " acted on." Thus, if the board has decided that loading thirty-five bars of lead at a time does not involve undue strain, that decision is (subject to appeal to the Arbitration Court) conclusive as between the parties. It is therefore necessary to consider whether the board has decided this question. In this case the only challenge to the reasonableness of the instruction given depends upon a contention as to undue strain. If this objection fails the instruction must be held to have been reasonable.

The contention that the loading of thirty-five bars in a sling imposed undue strain came before the board of reference established under the award on two occasions. The evidence shows that a complaint was made in relation to the s.s. *Cambridge* on 2nd September 1937, when the board considered a claim by the union for extra men to unload lead bars. The extra men were required because, it was said, the loading of thirty-five bars to a sling involved undue strain. This was a complaint made through the representative of

H. C. OF A. 1938.

THE KING v. DARLING ISLAND STEVEDORING AND LIGHTERAGE CO. LTD.; EX PARTE HALLIDAY AND SULLIVAN.

Latham C.J.

the men to the foreman under clause 14 (*k*), which deals with complaints as to undue strain claimed to be due to insufficiency of the number of men engaged. The board of reference examined the matter and the decision of the board was against the contention of the union. The decision was expressed by the chairman in these words: "The work is not more unduly strenuous than hitherto, . . . no attempt was made by the employers in the loading of this ship to unduly harass the men, and I therefore decide that there is no claim."

This decision therefore rejected the contention that the loading of thirty-five bars of lead involved undue strain. The decision was given on 2nd September 1937.

The alleged offence was committed on 10th November 1937, when Halliday was ordered to load thirty-five bars in a sling and he refused. Again the union took the matter to the board of reference, and it was considered on 17th November 1937. The whole matter was discussed and the decision already reached in connection with the s.s. *Cambridge* was affirmed or repeated. The chairman in stating his decision said:—"I repeat that the work I saw being done and the manner in which it was being done, was not work which I could possibly say was causing undue strain. . . . In the meantime the employer's instruction that thirty-five bars should be placed on each trolley should be carried out. The board by a majority so decides."

The board of reference has therefore on two occasions, one before the alleged offence and one after the alleged offence, determined that no undue strain was involved in placing thirty-five bars in a sling. The earlier decision was reached in relation to the s.s. *Cambridge*, and no appeal from that decision was made.

It therefore bound the parties and was binding on 10th November, when the alleged offence was committed. It has been argued that the decision related only to the s.s. *Cambridge*, but a perusal of the transcript of the proceedings before the board of reference shows that the decision was a decision on the general question as to whether the loading of thirty-five bars in a sling made excessive demands upon the men. One of the employers' representatives on the board

sought to confine the inquiry to the particular case of the s.s. *Cambridge*, saying: "The matter before the board is whether the men doing that work yesterday were subjected to undue strain, anything else is a side issue." But the reply of one of the employees' representatives was: "I was talking about the nature of the work in general." In the discussion between members of the board reference was made to a number of ships and to the number of bars loaded in slings in each case. The contention for the union was not based upon any special circumstances peculiar to the s.s. *Cambridge*. It was a contention that the loading of as many as thirty-five bars in a sling necessarily and in itself involved undue strain. When the board met to inquire into the same complaint with respect to the s.s. *Westmoreland* the chairman opened the proceedings by referring to "the conclusions arrived at with respect to the s.s. *Cambridge*." He said that he was "still of the opinion that without special loading statistics proving that greater effort is being asked of the men now than heretofore, that thirty-five bars per trolley is not such as to cause undue strain." This restatement of the rule laid down on the occasion of the controversy with respect to the s.s. *Cambridge* was not challenged by any member of the board; and, in my opinion, it correctly stated what had been decided on the former occasion. Thus, at the time of the prosecution there was a decision of the board that the loading of thirty-five bars in a sling did not involve undue strain. A decision of the board of reference should be looked at from a practical point of view in relation to the purposes of the award. It is, I think, clearly intended that the board of reference should give general decisions which should bind the parties until set aside upon appeal, and not that the board should merely decide particular cases which have arisen in the past for the purpose of determining whether or not undue strain had been involved in a particular order in relation to a particular loading or unloading from a particular ship, but without laying down any rules for future conduct. The requirement that the decision should be acted on shows that it is intended that the board should lay down such rules by its decisions.

The *Commonwealth Conciliation and Arbitration Act* authorizes the court to confer such a power upon a board of reference. Sec.

H. C. OF A. 1938.

THE KING v. DARLING ISLAND STEVEDORING AND LIGHTERAGE CO. LTD.; EX PARTE HALLIDAY AND SULLIVAN.

Latham C.J.

40A (*b*) authorizes the court to assign to a board of reference "the function of allowing, approving, fixing, determining or dealing with, in the manner and subject to the conditions specified in the award or order, any matters or things which under the award or order may require from time to time to be allowed, approved, fixed, determined, or dealt with by the board or which may affect the amicable relations of the parties with reference to the award." This provision authorizes the inclusion in the award of the clauses providing for a board of reference and its functions. Counsel for the appellant asserted that sec. 40A (*b*) was invalid, but no argument was submitted in support of the assertion. The provision cannot be said to be obviously invalid upon its face, and a statutory provision should be regarded as valid until the contrary appears. If the only decision of the board in the present case had been a decision given after the occurrence of the events upon which a prosecution was founded there would perhaps be room for argument as to whether the decision was judicial or arbitral in character. But a decision which, in my opinion, prescribed a relevant general rule binding upon the parties (subject to approval) was given before the alleged offence was committed. Accordingly this question does not, in my view, arise in the present case.

It might well be that in some cases other questions than that of undue strain would arise which would affect the reasonableness of an instruction. There are all kinds of matters (time, place and other circumstances) which, as well as questions of undue strain, might affect the reasonableness of an instruction. All these matters are left to be determined by the magistrate upon such evidence as the parties may properly submit.

It may be pointed out that the view contended for by the appellant would deprive the provisions of the award relating to questions of undue strain of all practical significance. The board of reference would be confined to an investigation of particular orders which had been actually given in particular cases. The board would therefore necessarily act after the event in every case, and its decisions would not be binding upon the parties in relation to any future controversy that might arise upon the same subject but on a different occasion. The decisions would, upon the view presented by the appellant,

have no effect at all. They could not be accepted as effective retrospective determinations in relation to particular orders given, because to give such an effect to them would, it is said, deprive the court of jurisdiction to decide in all respects whether an instruction was reasonable. Nor would the decisions have any operation in the future, because they would be decisions given in respect of, and applying only to, past particular cases. The decisions would, therefore, have no effect at all in determining any rights or obligations of the parties. The view which I have taken of the relevant clauses in the award gives a real and reasonable effect to the decisions of the board of reference.

I conclude by stating what perhaps is obvious—that the union has a right of appeal to the court from any decision of the board of reference upon a question of undue strain in loading or unloading, and that this particular matter could, if the union had so desired, have been dealt with by the Court of Arbitration itself.

In my opinion the appeal should be dismissed in each case.

RICH J. On the true construction of the waterside workers' award of 7th April 1936 I do not think that the question whether a direction given by an employer which is in accordance with a hitherto prevailing practice imposes excessive strain upon the workers was intended to be decided by the police court under colour of considering whether it is a reasonable command. Such a question appears plainly to have been regarded as one confided to the decision of the board of reference especially established for that among other purposes. Clause 14 (*g*) of the award has for its object the prevention of an attempt to obtain changes in the quantities or weights of cargo placed in slings by refusal to handle cargo pursuant to instructions. Sub-clause *j* makes it clear that if there is any complaint of undue strain through excessive quantity or weight it shall be investigated by an industrial body, viz., the board of reference. It is true that in sub-clause *g* the common expression " reasonable instruction " or direction is used in defining the orders which must be obeyed. But, in my opinion, this cannot authorize the course of drawing the question specifically entrusted to the decision of the board into the arena of litigation under the pretext of considering

H. C. OF A. 1938.

THE KING v. DARLING ISLAND STEVEDORING AND LIGHTERAGE CO. LTD.; EX PARTE HALLIDAY AND SULLIVAN.

whether an order is reasonable notwithstanding that it accords with the practice prevailing in the industry. This view means that the decision of the police court was right, whatever may be the status of the two decisions given by the board, and whether the medical evidence would have been admissible on a question of reasonableness if it were not for the considerations I have mentioned.

The appeals should be dismissed.

STARKE J. Orders nisi for statutory prohibitions on the part of S. A. Halliday and Thomas Sullivan, which were heard together.

This is a mode of appeal according to the law of the State of New South Wales. Each of the appellants was charged on complaint that on 10th November 1937 he did commit a breach of a term of an award of the Commonwealth Court of Conciliation and Arbitration in that being an employee of the Darling Island Stevedoring and Lighterage Co. Ltd. he refused to carry out the reasonable instructions of the employer's representative as to the quantity of cargo to be placed in slings, contrary to the award and the *Commonwealth Conciliation and Arbitration Act*.

The appellants were employed in loading the s.s. *Westmoreland* and were directed to place thirty-five bars of lead into slings, but they insisted upon placing only thirty bars. Although it had been customary for some years to put thirty-five bars of lead into a sling the appellants, apparently under the direction of the officers of their union, refused to obey the instructions on the ground that an undue strain was imposed upon them. The award did not limit the quantity or weight of cargo to be placed in slings or other appliances, nor did it expressly limit the weight of lead bars that were to be handled. But the award provided that any refusal to carry out the reasonable instructions of the employer or his representative as to the quantity or weight of cargo to be placed in slings or other appliances or any refusal to use such slings or other appliances as may be considered necessary by the employer or his representative or any refusal to carry out the reasonable instructions of the employer or his representative in any manner pertaining to the handling of cargo whether on a vessel or on shore should be deemed a breach of the award by the individual workman concerned. It was for a breach of this

term of the award that the appellants were prosecuted under the *Commonwealth Conciliation and Arbitration Act* 1904-1934. They were convicted and fined by a stipendiary magistrate. Hence these appeals.

But the magistrate did not consider whether the instructions given to the appellants were reasonable or not. Under the *Commonwealth Conciliation and Arbitration Act*, sec. 40A, authority is given to the Arbitration Court to appoint boards of reference, to assign to such boards the function of allowing, approving, fixing, determining or dealing with in the manner and subject to the conditions specified in the award any matters or things which under the award may require from time to time to be allowed, approved, fixed, determined or dealt with by the board or which may affect the amicable relations of the parties with reference to the award. A board of reference is provided for under the award and its functions are, *inter alia*, to hear and determine or report on all matters referred by the award for hearing, determination or report and to settle all disputes arising out of the award not involving interpretation of any clause thereof. The decision of a majority of the members if recorded in writing is final unless disallowed by the Arbitration Court on appeal.

The award prescribes that the employers shall properly consider the circumstances of each job and at the outset engage sufficient labour to ensure that the employees shall not be subject to undue strain. If employees complain of overstrain their complaint shall be investigated by the board. The award by another provision also prescribes that if at any time complaint is made by men employed on a job or by their representatives that the weight or quantity of cargo being placed in slings is excessive and imposes an undue strain on men working in holds of ships or on shore such complaints shall be investigated by the board. The same clause prescribes that if the board is of opinion that definite limitations should be placed on the weight or quantity of cargo being placed in slings it shall so report to the court and the court shall thereupon consider whether such limitations should be incorporated in the award.

Another clause of the award prescribes that if any workmen engaged in the holds of ships or on wharves complain that through

H. C. OF A. 1938.

THE KING v. DARLING ISLAND STEVEDORING AND LIGHTERAGE CO. LTD.; EX PARTE HALLIDAY AND SULLIVAN.

Starke J.

the insufficiency of the number of men engaged they are subject to undue strain they may complain to the foreman in charge of the job.

The clause goes on to provide that the employers and the workmen's representatives shall confer, and, if possible, arrive at a settlement, failing which the matter is referred to the board. Until the matter is determined by the board work shall continue as directed by the board. But if the board decide that sufficient men are not employed then the extra number must at once be employed and up to the time of their employment the wages they would have earned if engaged at the beginning of the job plus ten per cent shall be divided amongst the men who actually did the work.

The award is not easy of interpretation. But its provisions must be considered in different aspects; one in which no complaint has been made to the board and the other in which a complaint has been made to the board and has been investigated and decided. In the former case a court of law, whether the proceedings before it be civil or penal, must examine the matter for itself and determine whether the instruction given by the employer be or be not reasonable. It is a question of fact having regard to all the circumstances and falls for decision accordingly. But if workmen complain that the cargo being placed in slings or the number of men engaged upon the job imposes an undue strain upon them then the board must investigate the matter. Investigation without decision would be useless and consequently it is a reasonable implication of the award that it is to hear and determine the complaint and settle any dispute arising out of the award that does not involve its interpretation. Its decision relates and must be confined to a matter of fact that does not involve any interpretation of the award. It does not determine the rights or obligations of the parties whether in civil or penal proceedings except perhaps as to the number of men who should be employed and the distribution of their wages. The determination of the board is final for all purposes whether in legal proceedings or otherwise and consequently of the fact that undue strain, the subject matter of the complaint, has or has not been imposed upon the men. But the board may do more: it may report to the court its opinion that a definite limitation should be placed upon the weight or quantity of cargo that should be placed

in slings. Further, if the complaint be that the strain is due to an insufficiency of labour and the board so decides, then extra labour must be employed and the board may direct compensation in the manner required by the award to the men who did the work.

In the present case it was proved that the men employed on the s.s. *Cambridge* complained that owing to the insufficiency of men engaged in loading bars they were subject to undue strain. On 2nd September 1937 the board of reference decided this complaint against the men. The complaint was directed to an insufficiency of labour in loading thirty-five bars to the sling. But the present case relates to the loading of the s.s. *Westmoreland* on 10th November 1937. The men complained that placing thirty-five bars of lead in slings imposed an undue strain upon them. The board of reference investigated the matter and on 17th November 1937 resolved that the employer's instructions to place thirty-five bars in the slings should be carried out and were not imposing undue strain upon the men. The complaint in the s.s. *Cambridge* case was not identical with that in the case of the s.s. *Westmoreland*. The decision, however, of the board in the s.s. *Westmoreland* case relates to the precise instructions given to the appellants in this case and resolves that the instructions imposed no undue strain upon the men. But it is argued that the decision of the board, though sought by the men, is not binding upon them in these proceedings in which they are charged with refusing to carry out the reasonable instructions of the employer's representatives. It was said that the provisions of sec. 40A of the *Commonwealth Conciliation and Arbitration Act* authorizing the appointment of boards of reference were beyond the constitutional powers of the Commonwealth. No reasons were adduced to this court in support of the assertion and it will be time enough to consider it when a considered argument is addressed to this court by counsel under a due sense of his responsibility.

But next it was suggested that no decision of the board upon a complaint of undue strain could be effective in these proceedings unless it were given before the refusal of the men to act upon the employer's instruction. The provisions of sec. 40A of the Act allow the court to assign to the board the function of approving, determining or dealing with any matter or things under the award which

H. C. OF A. 1938.

THE KING v. DARLING ISLAND STEVEDORING AND LIGHTERAGE CO. LTD.; EX PARTE HALLIDAY AND SULLIVAN.

Starke J.

may require from time to time to be approved, determined or dealt with. Clearly a complaint of overstrain might be such a matter. Then if the award be looked at it authorizes the board to direct more men to be employed, and that the wages they would have earned if engaged at the beginning of the job shall, plus ten per cent, be divided amongst the men who did the work. The earlier provisions in the award that if the men complain of overstrain then their complaint shall be investigated by the board relate as well to complaints in respect of past acts or instructions as to proposed acts or instructions. It is a matter of fact that is remitted to the board for investigation and determination. The function of making such a determination of fact is not, in my opinion, the exercise of the judicial power of the Commonwealth. The determination is, in its nature, evidentiary. It does not judicially determine that the instructions given by the employer in this case were reasonable or unreasonable. It is simply a finding of fact by a tribunal chosen by the men that loading the bars as instructed placed no undue strain upon them. And, unless disallowed by the Arbitration Court, it is final and conclusive against the men and establishes as a matter of evidence or proof in this case that the instructions given to them by the employer were reasonable.

In my opinion the decision of the magistrate was right and the appeals should be dismissed. If the magistrate had investigated the reasonableness of the instruction for himself I do not suppose the result would have been different. The long usage in the matter indicates that the action of the employees was dictated rather by economic reasons than by any undue strain imposed upon them.

The appeals should be dismissed.

DIXON J. These are two appeals from orders of a court of summary jurisdiction imposing penalties under sec. 44 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 for breaches of an award.

The appeals are brought under sec. 39 (2) (*b*) of the *Judiciary Act* 1903-1937 and sec. IV., rule 1, of the Appeal Rules. Appeals of this nature fall under the ordinary appellate power of the court and are to be determined upon the same grounds and in the same manner as

other full appeals. They are appeals upon fact as well as law and are, in effect, by way of rehearing (*Bell* v. *Stewart* (1); *Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (2); *Dunlop Perdriau Rubber Co. Ltd.* v. *Federated Rubber Workers' Union of Australia* (3); *R.* v. *Hush*; *Ex parte Devanny* (4)).

The award said to have been disobeyed is that governing the employment of waterside workers, and the breaches alleged were that the appellants, being employed by the respondent, refused to carry out the reasonable instructions given on behalf of the respondent as to the quantity of cargo to be placed in slings. The men were loading ingots of lead into a ship called the s.s. *Westmoreland* on 10th November 1937 and refused to place more than thirty at a time in the ship's slings. It appears that for many years before September 1937 it had been customary to make up slings of thirty-five similar ingots. The work, however, is said to be regarded with disfavour by waterside workers and about that time a stand was taken by them, or some of them, for a reduction of the number of ingots to thirty, or perhaps for the increase of the number of men in a gang engaged in loading lead. A ship called the s.s. *Cambridge* was taking lead on board on 1st September 1937 and gangs of six men refused to place in the slings more than thirty ingots at a time. A board of reference was summoned pursuant to a provision contained in the award. It attended at the wharf and, upon the following day, deliberated and gave its decision. According to the record of its proceedings, the chairman said that the matter for the board's consideration was a claim by the Waterside Workers' Federation for extra men to handle the lead bars at the wharf where the s.s. *Cambridge* was loading. The chairman decided against this claim, stating it to be his opinion that the work was "not more unduly strenuous than hitherto", and that no attempt had been made by the employers in loading the ship unduly to harass the men. A board of reference is composed of an equal number of representatives of employers and of employees and an independent chairman, but, owing to the absence of an employers' representative from the meeting, the chairman's decision meant, strictly, that there was an equal division of opinion.

(1) (1920) 28 C.L.R. 419, at p. 424.
(2) (1931) 46 C.L.R. 73, at pp. 85, 87, 107.
(3) (1931) 46 C.L.R. 329, at p. 338.
(4) (1932) 48 C.L.R. 487, at pp. 506, 507.

H. C. OF A. 1938.

THE KING v. DARLING ISLAND STEVEDORING AND LIGHTERAGE CO. LTD.; EX PARTE HALLIDAY AND SULLIVAN.

Dixon J.

The award provides that if workmen complain that through insufficiency of the number of men engaged they are subject to undue strain and the matter is not settled, it shall be referred to a board of reference; and that, pending the decision of the board, the men shall go on working as the employer directs. The board may, if it gives its decision before the job is finished, require that additional men shall be put on, and, in any case, if it decides that the number was insufficient, the men who were actually engaged are to receive for the work they have done a proportion of the wages which would have been payable to the additional men, had they been put on in the first instance, increased by a further ten per cent. It would seem that the board of reference summoned for the ship *Cambridge* conceived itself to be dealing with a claim under this provision. Notwithstanding the result of the reference over the s.s. *Cambridge*, a gang of six, of which the appellants were members, refused to load more than thirty ingots at a time into slings for the s.s. *Westmoreland*. Another board of reference was summoned and five days later at the conclusion of a meeting where all were present and the matter was again discussed, the chairman gave, so to speak, an interim direction or determination that the employers' instructions to handle thirty-five bars of lead at a time should be complied with and deferred his final decision for future cargoes until further materials were furnished. Needless to say, there was an equal division between employers' and employees' representatives as such. This determination or direction of the board of reference summoned for the s.s. *Westmoreland*, or of its chairman, if the direction be regarded as his, appears to me to be irrelevant to the proceedings against the appellants. It took place after their alleged offence was completed. A board of reference cannot be armed with authority to determine a question belonging to the judicial power of the Commonwealth, as, for instance, whether an offence or breach of an award was committed (See the *Builders' Labourers' Case* (1) and the *Tramways Case* [*No.* 2] (2)). And it cannot, I think, be authorized conclusively to determine *ex post facto* that a given fact or matter of fact forming an ingredient in an offence occurred or existed. There

(1) (1914) 18 C.L.R., at pp. 236, 252, 257, 272.

(2) (1914) 19 C.L.R. 43, at pp. 82, 135, 163.

is no provision making the board's opinion admissible as evidentiary of any matters to which it is directed. In any case, the board's decision on that occasion appears to amount only to an *ad interim* direction. I think, therefore, that the proceedings of the board of reference summoned in relation to the s.s. *Westmoreland* should be disregarded for the purpose of deciding whether the charge against the appellants was substantiated.

The charge was based on a provision of the award saying specifically that a refusal to carry out the reasonable instructions of the employer or his representative as to the quantity or weight of cargo to be placed in slings should be deemed a breach of the award by the individual workmen concerned.

Another provision directs that, if a complaint is made that the weight or quantity of cargo being placed in slings is excessive and imposes undue strain on men, the complaint shall be investigated by a board of reference. If the board thinks that " definite limitations " should be put on the quantity or weight of cargo to be placed in slings, it is so to report to the court, which will then consider whether the limitations will be introduced into the award. No doubt the board's power is not confined to making such a report, a course regarded apparently as appropriate for cases where a rigid limitation of general or widespread application seems necessary or desirable.

It is evident that the plan upon which these provisions proceed is to require that work shall go on in accordance with the employers' directions notwithstanding an objection to the quantity or weight placed in a sling and that the objection shall be dealt with by a readily accessible tribunal. But the award could not safely, or, at all events, fairly impose upon the employees an obligation to obey all instructions given by employers with reference to the quantity or weight to be included in a sling whatever their character. Some qualification or restriction was necessary. Naturally enough the award adopted the standard or test by which the common law determines the lawfulness of a command or direction given by a master to a servant. If a command relates to the subject matter of the employment and involves no illegality, the obligation of the servant to obey it depends at common law upon its being reasonable. In other words, the lawful commands of an employer which an employee

H. C. OF A. 1938.

THE KING v. DARLING ISLAND STEVEDORING AND LIGHTERAGE CO. LTD.; EX PARTE HALLIDAY AND SULLIVAN.

Dixon J.

must obey are those which fall within the scope of the contract of service and are reasonable. Accordingly, when the award was framed, the expression "reasonable instructions" was adopted in describing the employees' duty to obey. But what is reasonable is not to be determined, so to speak, *in vacuo*. The nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument, in this case an award, governing the relationship, supply considerations by which the determination of what is reasonable must be controlled. When an employee objects that an order, if fulfilled, would expose him to risk, he must establish a case of substantial danger outside the contemplation of the contract of service (*Bouzourou* v. *Ottoman Bank* (1); *Ottoman Bank* v. *Chakarian* (2)).

In the present case the objection was to a direction to continue a practice which had prevailed for many years. The ground of the objection was that the practice imposed an undue strain and the instrument governing the employment contained a special method of dealing with complaints of that class. Further, I think that the failure of the board of reference to give effect to the claim made in connection with the loading of the s.s. *Cambridge* was a relevant evidentiary circumstance proper to be considered upon the question whether the subsequent order of the employers was a reasonable instruction. An order given in the light of the board's refusal to interfere with the practice could not be held so unreasonable as to justify disobedience, unless the circumstances were very exceptional. These are all matters which, in my opinion, make it impossible to hold that the instruction to place thirty-five bars of lead in the sling was unreasonable. Unfortunately, the magistrate held that the later decision of the board of reference called together in consequence of objection in the loading of the s.s. *Westmoreland* was admissible and conclusive, in my opinion, quite erroneously. He also rejected medical evidence of the effect produced on a man who lifted so many bars in quick succession. In strictness I think that this evidence was not inadmissible. Before it was rejected much of the medical testimony offered was given, and we know its general

(1) (1930) A.C. 271, at pp. 275-277. (2) (1930) A.C. 277, at pp. 282, 283.

character. As the magistrate gave no finding for himself on the question of reasonableness and rejected evidence in strictness relevant to that question, the appellants have a prima facie ground of appeal. But I think that, upon a proper understanding of the award, a finding that the instruction was unreasonable could not be sustained. The rejected medical opinion could have made no difference in the result. It could not do so because it provides considerations which under the terms of the award should primarily be addressed to a board of reference, and because medical disapproval could not overcome the effect, upon such a question, of the fact that the instruction followed a long-standing practice, a practice, moreover, supported by the result of the previous reference to a board.

In exercising an appellate jurisdiction which, in effect, enables us on the materials before us to determine for ourselves the question of the reasonableness of the instruction, I think the appeals should be dismissed.

McTIERNAN J. Each appellant was proceeded against under sec. 44 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 for a penalty for committing a breach of a term of the waterside workers' award. In this award there is a provision that any refusal to carry out the reasonable instructions of the employer or his representative as to the quantity of cargo to be placed in slings or other appliances shall be deemed to be a breach of this award by the individual worker concerned. Both appellants, who are waterside workers, were at all material times bound by the above-mentioned award, and it was clearly proved that each of them was instructed by a representative of the respondent, who was their employer, to put thirty-five bars of lead per sling into the slings which the respondent was using on 10th November to load the s.s. *Westmoreland* at Jones' Wharf, Pyrmont, and that each refused to do so, stating that he would not lift more than thirty bars into each sling. It is the refusal of the workers to carry out the reasonable instructions of his employer that is deemed to be a breach of the award. The only issue fought in each case is whether the instructions which the appellants refused to carry out were reasonable. Reasonable means " reasonable in all the circumstances of the case "

H. C. OF A. 1938.

THE KING v. DARLING ISLAND STEVEDORING AND LIGHTERAGE CO. LTD.; EX PARTE HALLIDAY AND SULLIVAN.

McTiernan J.

(Cf. *Opera House Investment Pty. Ltd.* v. *Devon Buildings Pty. Ltd.* (1), per *Latham* C.J. (2) and per *Starke* J. (3) ). There is no presumption that the instructions were reasonable, and it is not apparent on their face that they have this essential quality. The issue that the instructions were reasonable must be proved to the satisfaction of the court. The magistrate came to a conclusion adverse to the appellants on this issue, and imposed a penalty in each case. In these appeals, which are brought against the findings of the magistrate, the court may decide questions of fact and law.

On the relevant occasion men working in pairs were loading the s.s. *Westmoreland*. They were lifting bars of lead with their hands on to trolleys. The bars weighed 90 lbs. each and were stacked in heaps of fifty, each heap being ten bars high. The bars were two feet long, four inches wide and four inches deep. The respondent's supervisor said :—" One man took one bar and placed it on the trolley where a sling was in position . . . The trolley was drawn to the ship's side by a motor. The men make up the sling. The tow motor drives the motor and this draws the trolley from the stack to the ship. Then the sling is hooked on." It appears that the men who were doing this work were instructed to " make up " each sling with thirty-five bars in the time they were taking to " make up " the sling with thirty bars. This witness said that the conditions under which this kind of cargo is loaded differ at different wharves, that " some companies load thirty bars to the sling," and that the men have " a breather waiting for the tow motor to come there for the trolley " ; and he and the respondent's foreman said that for a period of five years to September 1937 the respondent's rule was to load thirty-five bars to each trolley, and that on 10th November the conditions under which the work was being done were the same as those which had existed during that time. The respondent's manager also deposed that the practice for ten years prior to September 1937 was for two men to put thirty-five bars in each sling. It appears that the practice was interrupted by the decision which the men made about that time not to stack more than thirty bars on to each sling. The respondent's foreman stevedore said that he knew that men

(1) (1936) 55 C.L.R. 110. (2) (1936) 55 C.L.R., at p. 116.
(3) (1936) 55 C.L.R., at p. 117.

had been injured "through lead toppling on them," although the injured would not be numerous, and that he had heard of one or two cases of men collapsing from exhaustion in lifting bars of lead of the kind in question into slings. The respondent's manager, however, said that he had not heard of any accident in loading or unloading lead, and that "if the sling is properly made up and properly slung, there is no danger."

This is a summary of the evidence called in chief, and it proved prima facie that the manner of loading demanded by the employer which the appellants refused to observe was prima facie reasonable, the strength of the case in favour of its reasonableness being its conformity with the past usage in the loading of the respondent's ships.

In defence the appellants led evidence to show that lifting as many as thirty-five bars of the weight and size of those which they were loading into each sling imposed an undue strain on them and was injurious to their health and dangerous. Proof of this contention would rebut the prima facie proof of the reasonableness of the employer's instructions, for it could not be said that the manner of loading in question, although sanctioned by usage, was reasonable if it caused injury to the men's health and exhausted their strength to such a degree that they could not make up safe loads of thirty-five bars to a sling. In proof of this contention the first witness called was the vigilance officer of the appellants' union, but, upon objection being taken to his evidence, the magistrate ruled that the board of reference prescribed by the award was "the proper tribunal to determine the question of undue strain between the workers and the employers." The witness was allowed, however, to give evidence based on his personal experience. He said that it was unduly strenuous to load thirty-five bars to the sling and that in doing so the men became exhausted and could not make up the slings in a safe way. The appellant Halliday, an experienced waterside worker, said that it was dangerous to put thirty-five bars of lead into each sling because a man could not sustain the effort necessary to lift that number into each sling without becoming so tired that he could not safely stack the load in the sling. The age of this witness was fifty-nine years. It was seven years since he last had handled lead and

H. C. OF A. 1938.

THE KING v. DARLING ISLAND STEVEDORING AND LIGHTERAGE CO. LTD.; EX PARTE HALLIDAY AND SULLIVAN.

McTiernan J.

on that occasion he had jammed his fingers. He said: "I know my strength would not allow me to do more than thirty." Two members of the Waterside Workers' Federation gave evidence based on their own personal experience. One of these, a witness Wills, said:—"I have been employed by the company" (the respondent) "loading lead from time to time. I know the method of loading. Recently I have loaded thirty-five bars on to one truck. With a load of thirty one gets a compact load, six bars by five bars. It will keep in position better than a thirty-five load. To lift thirty-five one has another tier. The extra load and height make the load more liable to fall over. Then there is a risk of injury to one of the two men loading—I have had a broken finger once through loading thirty-five bars. When putting one bar down the top one on the next tier came over and nipped the finger and broke it. Some tiers are firm, some are not. The higher the tiers the more the risk of falling. There is no bind and no tie in them. On some trucks the foundation is all right; others are not so good. The trucks are used whilst they will go. The beds of the trucks vary a good deal. This has an effect on the load at the top. By the time I get my share of thirty bars into the truck the tow motor is there to take it away. It takes me all my time to do thirty. My arms, back and wind are gone when I put the top on. It is not usual to get a breather. If one gets a fast-working ship it lessens the time between slings. The spells that I have had on lead have been of short duration. Were I asked to load thirty-five to a truck right through the tow motor would be waiting whilst the last of the load went on. There would be no spell whatever." The other member of the same union had loaded lead from time to time. This witness said:—"I have loaded thirty-five bars to a sling. The last time was twelve months ago. A thirty-five bar load is not safe. The sling does not jam in lots of cases. The men loading on the wharf—it is dangerous to their legs and hands, for the bars fall off the truck onto the wharf. It is dangerous because of the extra five. There are six tiers to the truck. They won't lay flush or jam. When you put the extra tier in then the others get bent and the load is more liable to fall. There is more room without the extra tier. I have broken my toe. I have

jammed my fingers. I had five tiers seven long and when I placed the last bar on the tier collapsed. The tiers are loaded differently by different men. A load six by five is compact, reasonable and safe. A thirty load is safer than a thirty-five bar load. The physical effect of lifting thirty-five bars is too much for any man." The appellant Halliday was examined by Dr. August Lyle Buchanan, who is a Bachelor of Medicine and a Master of Surgery of the Sydney University, a Fellow of the Royal Colleges of Surgeons of London and Edinburgh, and a Fellow of the Royal Australian College of Surgeons For the purposes of such examination the appellant lifted ingots of lead in the doctor's surgery under conditions which would provide the same degree of strain on him as that which would be produced by loading the bars of lead into the s.s. *Westmoreland* on the relevant occasion. Dr. Buchanan gave the following evidence :—" Before the test I examined the man especially his heart and his blood pressure and his pulse. I tested his heart at intervals after the test was completed until it returned approximately to normal. Halliday's test started at 1.31 minutes 30 seconds and finished at 1.33 p.m. Halliday proved to have a regular heart on examination before the test with a standing resting pulse of 88 per minute. The apex beat and blood pressure were normal, but he had numerous extra systoles. The test finished at 1.33 p.m. Thirty seconds later, 1.33.30, his pulse was fast and hard to count. As far as I could judge it was 126 to the minute. One minute later, at 1.34.30, it was more regular and easier to count and I made 132 to the minute. At 1.35.30 it had fallen to 112. At 1.37 it had fallen to 92. This was a little above normal but close to it. At 1.39 p.m. it was 86. His pulse after the test took 6 minutes to return completely to normal and four minutes to return approximately to normal. I noted that he had some pyrrhœa. His heart condition returned to normal in six minutes. It should return in two minutes. This case took four minutes to be approximately normal and six minutes to be absolutely normal. This was after he lifted the bar fifteen times. I got him to manipulate the bar a further time. I did not give him a continuous lift of seventeen or eighteen bars."

The evidence of this witness was at this stage interrupted by an objection as to its admissibility. The magistrate gave the following

H. C. OF A. 1938.

THE KING v. DARLING ISLAND STEVEDORING AND LIGHTERAGE CO. LTD.; EX PARTE HALLIDAY AND SULLIVAN.

McTiernan J.

ruling on the objection :—" I follow Mr. *Spender's* submission that the evidence is not relevant to the issue. I exclude the evidence." Successful objections were taken to the following questions asked on behalf of the respondents :—" In Halliday's case is it dangerous to his health if he were asked to continuously load bars of lead of the size, shape and weight that you saw him loading, seventeen bars of lead without a break ? " " Will you say, doctor, that such a task (to load more than fifteen bars continuously) would or would not impose undue strain on Halliday ? "

If the inference were one for the court to draw, I should draw the inference from all the evidence that the appellants were instructed to observe a manner of loading which imposed an undue strain upon them. And nothing appears in the evidence to show any circumstances which made it reasonable on the relevant occasion that the appellants should imperil their health and safety.

But the case made in reply was that the question whether the respondent had instructed the appellants to follow a method of loading which imposed an undue strain upon the workers was settled adversely to their contention by two pronouncements of the board of reference which were put in evidence, and the effect of which, it was said, was to remove this question from the arena of judicial determination.

The first pronouncement was made on 2nd September when in the words of the chairman of the board it was called together " for the purpose of investigating a claim by the Waterside Workers' Federation for extra men to handle the lead bars at No. 21 Wharf, Jones Bay." The ship in question was the s.s. *Cambridge*. The pronouncement was as follows : " I am of the opinion that the work is not more unduly strenuous than hitherto, that no attempt was made by the employers in the loading of this ship to unduly harass the men, and I therefore decide that there is no claim." The second pronouncement was made subsequent to breach of the award alleged to have been committed by the appellants. The pronouncement was expressed to have been made on the " vexed question of loading lead bars s.s. *Westmoreland*," and in the course of making the pronouncement the chairman of the board said :—" On this matter on 2nd September I inspected very closely the loading

of lead bars and I gave a decision then. I have since inspected the loading of lead bars of the same weight, viz., approximately 90 lbs, ex s.s. *Westmoreland*. My careful observations at that inspection force me to rely on the same conclusions arrived at with respect to the s.s. *Cambridge*. It did not appear to me that the employers were calling for greater effort and speed for this ship, consequently my decision that thirty-five bars per trolley does not cause undue strain still stands. I am still of the opinion that, without special loading statistics proving that greater effort is being asked of the men now than heretofore, thirty-five bars per trolley is not such as to cause undue strain. . . . It is a difficult matter. I say quite frankly here that at the rate I saw the men working I could not reasonably say that it was causing them undue strain. They had quite a lot of rest period. I observed it very closely. The only difficulty I had was this, if a man were called upon to work very long hours on this job then there may be undue strain, but as it is if he only worked in the ordinary daily hours or perhaps up to ten o'clock at night, then, with the rest periods I observed, I cannot possibly say that there was undue strain. . . . I see no reason why it should not be stood over for any medical evidence that can be brought before the board. . . . This is a vexed question which will have to be investigated in some way. I would like to have before me the figures for the loading of the respective ships with this cargo, so as to inform my own mind whether or not the employers are endeavouring to increase the tonnage per hour loaded, but I repeat that the work I saw being done and the manner in which it was being done, was not work which I could possibly say was causing undue strain. As soon as the medical report is available I would be pleased to receive a copy. So that the claim of the union may be fully investigated I want the employers' representatives to submit particulars of tons per gang per hour or per ship of all consignments of lead bars since 1st January 1937. When these particulars are available they can be discussed as to future cargoes. In the meantime the employers' instructions that thirty-five bars be placed on each trolley should be carried out. The board by a majority so decides."

H. C. OF A. 1938. THE KING v. DARLING ISLAND STEVEDORING AND LIGHTERAGE CO. LTD.; EX PARTE HALLIDAY AND SULLIVAN. McTiernan J.

The first pronouncement was given on a complaint that the employer did not engage a sufficient number of men to load the s.s. *Cambridge*. The award treats such a complaint as a matter separate from a complaint that any given instructions as to handling cargo impose undue strain on the men concerned. But whether the board's pronouncement was irrelevant or inadmissible for this or any other reason, it is clear from its terms that it does not deal with the specific issue in the present cases, namely, whether the appellants would have suffered undue strain in carrying out the employer's instructions to load thirty-five bars per sling, having regard to the time allowed for loading each sling, the duration of rests, and all the circumstances governing the loading of the s.s. *Westmoreland*. It says that by requiring the s.s. *Cambridge* to be loaded at the rate of thirty-five bars per sling the employer did not make the work more unduly strenuous than it was hitherto. But this is not an affirmation that the work is not unduly strenuous. It is a declaration that the manner of doing the work conforms to some practice without saying whether the practice is productive of undue strain. The board, it is true, added that no attempt was made by the employer in the loading of the s.s. *Cambridge* "to unduly harass the men." But, again, this statement, while acquitting the employers of any harsh application of an existing practice, passes by the question whether the practice subjects the men "to undue strain." It follows that the case in reply, so far as it depends upon that pronouncement of the board, is not advanced by the evidence that the conditions governing the loading of the s.s. *Cambridge* and the s.s. *Westmoreland* were similar.

It is doubtful, moreover, whether this pronouncement of the board is a valid decision of the board. The award provides by clause 24 (*d*) that: "Subject to sub-clause (*a*) hereof three members shall form a quorum, and the decision of the majority of members present, if recorded in writing, shall be final, unless disallowed by the court on appeal by a party affected." It appears from the copy of the proceedings that the board on this occasion was constituted by six persons, two of whom represented the employers, three the members of the union, and the chairman. But it does not appear on the face of the proceedings, nor is there any proof *aliunde*, that a majority

of the members present reached a decision. That which was tendered as a decision of the board appears in the record of the proceedings as the opinion of the chairman only and not of a majority of members present.

In the case of the later pronouncement of the board, which, indeed, is stated to be that of a majority, the question arises whether it can have any retrospective effect in settling the controversy about undue strain. But it does not appear to me necessary to pursue this objection because the pronouncement is expressed in terms which preclude it from being accepted as a settlement of the issue of undue strain. Sufficient citation has been made from this pronouncement of the board to show that it does not profess to be a final settlement of the question whether lifting thirty-five bars of lead into each sling during the loading of a ship causes undue strain to the men engaged. This question is expressly left over pending the consideration of medical evidence and further information about the rate of loading ships. It is a reasonable hypothesis that upon the consideration of the additional material the board may condemn the practice of loading thirty-five bars to a sling under any conditions or permit it only under specified conditions of loading relating to matters such as rate or speed of loading and duration and frequency of rests.

The reasonableness of instructions given by an employer to a worker may turn upon questions other than those which by the award are placed within the competence of the board of reference. The court before which a complaint is brought for disobedience to the instructions would have to decide such a question for itself, and, in my opinion, it is also for the court to decide a question going to the reasonableness of the instructions which is within the competence of the board of reference but on which it has not made an admissible and relevant pronouncement. It is not the intention of the award to limit the cases in which a worker should be deemed to have committed a breach of the award by refusing to carry out his employer's instructions, to cases in which the board of reference has passed upon a question within its competence going to the reasonableness of such instructions and has determined them to be reasonable. Where the board of reference has made no definitive

H. C. OF A. 1938.

THE KING v. DARLING ISLAND STEVEDORING AND LIGHTERAGE CO. LTD.; EX PARTE HALLIDAY AND SULLIVAN.

McTiernan J.

statement on such a question, the court must decide for itself on evidence of all the relevant circumstances before it can determine whether a breach of the award has been committed by a worker charged with disobedience to the reasonable instructions of his employer. In the present cases there is no definitive statement by the board, whereby the court could adjudge that the appellants on the relevant occasion would not have been subjected to undue strain in carrying out the employer's instructions. Accordingly, the whole of the evidence adduced on behalf of the appellants must be taken into consideration to determine whether the instructions which they disobeyed were reasonable. This evidence included that of Dr. Buchanan. What was heard of his evidence was declared by the magistrate inadmissible, and further evidence from him was rejected. In my opinion not only the evidence which he gave but also the evidence (as the questions which were disallowed would indicate) which he was proposing to give was relevant and admissible upon the question of undue strain. The rejection of this evidence resulted in a mistrial and would be a sufficient ground upon which to set aside the magistrate's order imposing the penalties on the appellants. But, in any case, having regard to the weight of the evidence adduced on their behalf, I am not satisfied that the employer's instructions were proved to be reasonable.

Both appeals depend upon the same considerations and, in my opinion, should be allowed and the orders nisi made absolute.

*Appeals dismissed with costs.*

Solicitor for the applicants, *Aidan J. Devereux.*

Solicitors for the respondent, *Nicholls & Hicks.*

J. B.