APP. 52 ALJR 460.
Left at pp. 159/60. (1978) 2 NSWLR 88.

Followed. [1983] 2 NSWLR 340.

[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER FOR RAILWAYS (N.S.W.) APPELLANT; APPLICANT,

AND

McCULLOCH AND OTHERS . . . . RESPONDENTS. RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Consd. 47 (N.S.W.) S.R. 256
64 W.N. 51

H. C. OF A. 1946.

SYDNEY, *July* 31; *Aug.* 1.

MELBOURNE, *Aug.* 29.

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

Railways—Appeals Board—Jurisdiction—Officers—Promotion—War service—Reinstatement—Seniority—"Conditions not less favourable"—Re-establishment and Employment Act 1945 (*Cth.*) (*No.* 11 *of* 1945), *s.* 16—*Government Railways Act* 1912-1945 (*N.S.W.*) (*No.* 30 *of* 1912—*No.* 12 *of* 1945), *ss.* 76, 86.

The *Government Railways Act* 1912-1945 (N.S.W.), s. 76, provides that vacancies in any branch of the railway service shall be filled, if possible, by promotion of an officer next in rank and that such an officer may be passed over only after the written reasons of the head officer of the branch have been put before both the Commissioner and a promotions committee. Any officer who has been passed over has a right of appeal to an Appeals Board (s. 86).

The Commonwealth *Re-establishment and Employment Act* 1945 provides that any person who has completed a period of war service may apply for reinstatement to his former employer (s. 12) who shall make employment available in accordance with s. 16 (s. 16 (1)). Section 16 (3) (*a*) provides that employment shall be "in the occupation in which the applicant was employed immediately prior to the commencement of his period of war service and under conditions not less favourable to him than those which would have been applicable to him in that occupation if he had remained in the employment of the former employer, including any increase of remuneration to which he would have become entitled if he had remained in that employment."

T. was employed by the Commissioner of Railways (N.S.W.). In 1940, he was given leave to absent himself from his employment in order that he might serve with the Australian Imperial Force, at a time when, in order of seniority, he was junior to five officers and senior to C. While T. was in the Forces,

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C. was promoted to a position senior to the five officers, the provisions of s. 76 of the *Government Railways Act* 1912-1945 (N.S.W.) having been duly complied with. Later the other five officers were promoted to the same grade as C. In 1945, T. was discharged, and the Commissioner, purporting to act in pursuance of s. 16 of the *Re-establishment and Employment Act* 1945, reinstated him in the same grade as, but senior to, C. and consequently to the five officers, who appealed to the Appeals Board.

Held, by *Latham* C.J., *Dixon*, *McTiernan* and *Williams* JJ. that the *Re-establishment and Employment Act* applies not only to those members of the Forces whose employment by their former employer was brought completely to an end, but also to those who, whilst members of the Forces, had their employer's leave to be absent from his employment.

Held, also, by *Dixon*, *McTiernan* and *Williams* JJ. (*Latham* C.J. and *Starke* J. dissenting) that, under s. 16 (3) (*a*), it was the duty of the Commissioner to form an opinion as to what conditions would have applied to T. if he had remained in his employment, and that, in relation to seniority, this means that the Commissioner was under a duty to decide what would have been T.'s place in order of seniority if, instead of serving in the forces, T. had remained in his employment.

Held, therefore, by *Dixon*, *McTiernan* and *Williams* JJ. (*Latham* C.J. and *Starke* J. dissenting), that the Appeals Board constituted under the *Government Railways Act* 1912-1945 (N.S.W.) had no jurisdiction or authority to review or call in question any act done by the Commissioner towards reinstating T. pursuant to s. 16 of the *Re-establishment and Employment Act* 1945.

Decision of the Supreme Court of New South Wales (Full Court): *Ex parte The Commissioner for Railways*; *Re McCulloch*, (1946) 46 S.R. (N.S.W.) 254; 63 W.N. (N.S.W.) 99, by majority, reversed.

APPEAL from the Supreme Court of New South Wales.

The Commissioner for Railways (N.S.W.), a body corporate under s. 4 of the *Transport (Division of Functions) Act* 1932-1943 (N.S.W.) and the employer of 56,000 members of the railway service of New South Wales, applied to the Supreme Court of New South Wales for a common law writ of prohibition directed to John Edward McCulloch, Alexander Joseph McDonald and Robert Melrose Mathers, members of the Appeals Board constituted under the *Government Railways Act* 1912-1945 (N.S.W.), and Lewis John Henderson, George Edward Willcock, William Williams, Stanley Gordon MacPherson and Harry Arthur Simcoe-Fitzmaurice, officers employed in the Electrical Branch of the railway service under the control of the Chief Electrical Engineer subject to the Commissioner for Railways, to restrain them and each of them from further proceeding with the hearing of certain appeals by the respondent officers so far as they affected the reinstatement to and the seniority in the said Electrical Branch of one

Allan Victor Taylor upon the ground that the Appeals Board had no jurisdiction to hear them.

A circular bearing date 4th December 1939, issued by the Secretary for Railways, contained, *inter alia*, a paragraph as follows :—" On their return to duty such employees," that is, employees who were granted leave of absence for service " at home or abroad " with the Royal Australian Navy, the 2nd A.I.F., or the Royal Australian Air Force, " shall be promoted to the highest positions which have been attained during their absence by any employees who were junior to them at the time they commenced . . . service, provided they are suitable for such higher position or can qualify therefor within three months of their return to duty." In a circular issued by him on 22nd December 1944 to the Chief Electrical Engineer the secretary said, *inter alia*, " The rehabilitation of railway employees after service with the various arms of the Defence Forces is based on the principle that, subject to medical fitness, they shall be restored to the highest positions attained during their absence by any employees who were their juniors at the time of commencement of Defence Service, provided they are qualified for the higher positions or can qualify therefor within three months of the date of resuming duty."

On 24th June 1940 Taylor, an Assistant Engineer Class 3 in the Electrical Branch, was given leave by the Commissioner to serve in the Australian Imperial Force. Prior to the granting of the leave, Taylor was junior to the respondent officers and senior to one Louis Cole who was also employed as an Assistant Engineer in the Electrical Branch. No one of the respondent officers or Cole was at any time a " member of the Forces " within the meaning of those words as defined in s. 4 of the *Re-establishment and Employment Act* 1945. Cole, on 11th January 1943, was promoted to a position in the Electrical Branch senior to the respondent officers, the head of that Branch having advised the Commissioner in writing under s. 76 (1) of the *Government Railways Act* that the respondent officers, other than Williams who declined the promotion, should be passed over. On different dates on and between 1st January 1943 and 5th October 1943 each of the respondent officers was promoted to the position of Assistant Engineer Class 1, junior to Cole, and each was dealt with by the Commissioner and the Chief Electrical Engineer, as head of the Electrical Branch, under s. 76 of the *Government Railways Act*.

In an affidavit the staff officer employed in the Electrical Branch deposed that Taylor returned from war service and was reinstated as Assistant Engineer Class 3 on 29th October 1945 " pending consultation about his acceptance or rejection of positions available so that his reinstatement would be under conditions not less favourable

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to him than those which would have been applicable to him if he had remained in the employment of the " Commissioner " during the period of his war service and he having chosen the position of Assistant Engineer Class 1 was placed therein by way of reinstatement on " 26th November 1945 " in the same grade but senior to . . . Cole as he was before his period of war service . . . Taylor was not promoted nor was his reinstatement made under s. 76 of the *Government Railways Act* 1912-1945. In connection with the reinstatement of . . . Taylor the Chief Electrical Engineer as head of the said Electrical Branch gave no advice to the " Commissioner " that the " respondent officers " or any other officer should be passed over ". All the officers concerned were employed by the Commissioner under an award of the Commonwealth Court of Conciliation and Arbitration.

Section 12 (1) of the *Re-establishment and Employment Act* 1945 provides that " any person who has completed a period of war service may apply to his former employer for reinstatement in employment." Section 16, so far as material, provides : " (1) Where an application has been made under this Division and is still in force, the former employer shall make employment available to the applicant in accordance with this section . . . (3) The employment to be made available under this section shall be employment—(*a*) in the occupation in which the applicant was employed immediately prior to the commencement of his period of war service and under conditions not less favourable to him than those which would have been applicable to him in that occupation if he had remained in the employment of the former employer, including any increase of remuneration to which he would have become entitled if he had remained in that employment."

The *Government Railways Act* 1912-1941 (N.S.W.), as amended by the *Transport (Administration) Act* 1943 (N.S.W.), by s. 76 provides, so far as material, as follows :—" (1) When any vacancy occurs in any branch of the railway service . . . it shall be filled, if possible, by the promotion of some officer next in rank, position, or grade, to the vacant office ; and no such officer shall be passed over unless the head of his branch, in writing, so advises the Commissioner. (2) Where the head of the branch so advises the Commissioner he shall set out his reasons for such advice together with the name and position of seniority of any officer in his branch who in his opinion should be passed over. The Commissioner shall refer the proposal as to the filling of the vacancy to a promotions committee constituted under this Act. The promotions committee shall inquire into the claims to the promotion in question of all officers proposed to be passed over and shall report to the head of the branch its opinion

thereon. The head of the branch shall forward such report together with any recommendation he sees fit to make to the Commissioner . . . ." Section 86 provides that where a decision has been made by the Commissioner to promote an officer, any officer in the branch who has been passed over may appeal to the Appeals Board. By s. 93 (1) decisions of the Appeals Board are made final and conclusive.

The Supreme Court held that the Appeals Board had jurisdiction to determine the rights of the respondent officers as between them and the Commissioner, taking into account the extent to which, if at all, those rights had been affected by the *Re-establishment and Employment Act* 1945 (*Ex parte The Commissioner for Railways*; *Re McCulloch* (1)).

From that decision the Commissioner, by special leave granted on the condition that he pay the costs of the appeal in any event, appealed to the High Court.

Fuller K.C. (with him *Curlewis*), for the appellant. The right of appeal to the Appeals Board constituted under the *Government Railways Act* 1912-1945 is a right which, under that Act as amended by s. 4 (*a*) of the *Transport* (*Administration*) *Act* 1943, can only be exercised when employees have been "passed over." The words "passed over" have acquired during a period of over fifty years a specific meaning in Railways Acts. The jurisdiction of the Appeals Board is limited to railway officers who have been passed over. The respondent officers have not in fact been passed over. The undisputed evidence shows that the re-employment or reinstatement of Taylor was not a promotion made under s. 76 of the *Government Railways Act*; it was made in accordance with the provisions of s. 16 (3) (*a*) of the *Re-establishment and Employment Act* 1945. Under s. 16 (3) (*a*) the Commissioner was bound to re-employ Taylor under conditions not less favourable than those which would have been applicable to him in his occupation if he had remained in his employment. The *Re-establishment and Employment Act* places the onus of re-employment upon the employer; not upon any tribunal which may be set up by State authority. Only an employer can be prosecuted under s. 18 of that Act. As used in the *Government Railways Acts*, commencing with s. 65 of the *Government Railways Act* 1888, the words "passed over" mean that an officer is passed over only on the advice in writing of the head of his branch. The provisions of s. 86 of the *Government Railways Act*, as inserted by s. 4 (*f*)

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of the *Transport (Administration) Act* 1943, only apply where a decision has been made under s. 76, as amended. An appeal under s. 86 is limited to an appointment or a decision in accordance with the provisions of sub-ss. (1) and (2) of s. 76. In effect s. 86 operates as a curb on the Commissioner's discretion under those sub-sections. Section 86 was not framed to meet a case where, as here, a " member of the Forces " is re-employed, or where the Commissioner does not act under s. 76. If in addition to the Reinstatement Committee constituted under the *Re-establishment and Employment Act* the Appeals Board also has jurisdiction it would be quite possible for the Committee and the Appeals Board to arrive at different conclusions in respect of the same matter. The words " conditions not less favourable " in s. 16 (3) (*a*) refer not merely to wages and working conditions, they refer also to seniority rights which the ex-" member of the Forces " would have had had he " remained in the employment " of his employer. That interpretation is in accord with the spirit and intendment of the Act which, obviously, was enacted to secure to the ex-" member of the Forces " the best possible conditions. The conditions applicable to the occupation include the policy enunciated and the instructions given from time to time by the Commissioner, e.g. as expressed in the relevant departmental circulars. Review by the Appeals Board of the Commissioner's discretion under the *Re-establishment and Employment Act* would create an intolerable position in the management of the railway service. That Act places a liability upon the employer and it is inconsistent with that liability to have a current scheme of State legislation which permits an Appeals Board to control the situation. The Appeals Board has no jurisdiction in the case of any ex-" member of the Forces " who applies to be reinstated ; it only has jurisdiction to deal with decisions under s. 76 of the *Government Railways Act.*

Lewis (Solicitor), for the respondent members of the Appeals Board.

Barwick K.C. (with him *J. J. McKeon*), for the respondent officers. It is an important fact that Taylor was given leave of absence and never left the employment of the Commissioner, so that any question of reinstating him never arose. The Commissioner was not Taylor's " former employer " within the meaning of those words as used in s. 12 of the *Re-establishment and Employment Act.* As there used those words do not refer to a person who remains an employer. Upon the termination of the leave, that is upon his return from war

service, Taylor resumed duty in the employment of the Commissioner with all his rights. His rights were preserved either under the contract of employment or under the relevant industrial award. He therefore resumed duty under " conditions not less favourable " within the meaning of s. 16 (3) (*a*). Section 12 (1) is directed to persons who left their employment for war service and who desire to be reinstated. The words " if he had remained in the employment " in s. 16 (3) (*a*) presupposes that the ex-" member of the Forces " has gone out of the employment; that the employment has been terminated. Those words do not apply to a person who in fact did remain in the employment, that is to say, was absent from his employment with leave. The conditions of employment of such a person were not interrupted by his absence so that upon resuming duty he did so " under conditions not less favourable." Upon resuming duty Taylor came within the ordinary scope of the *Government Railways Act* and the conditions of the relevant industrial award. The requirements of the *Re-establishment and Employment Act* were satisfied, for the purposes of s. 18, when Taylor was reinstated in October 1945 to the position of Assistant Engineer Class 3. There cannot be a promotion until there is a vacancy. The vacancy for an Assistant Engineer Class 1 occurred subsequently to the reinstatement of Taylor, therefore upon his appointment to that vacant position he was not reinstated but was in fact promoted. The words " conditions not less favourable " in s. 16 (3) (*a*) do not mean all the rights and privileges and chances for rights of promotion that Taylor would have had and the actual promotion he would have obtained. The provisions of s. 16 (3) (*b*) only apply if the former occupation is not available. Taylor's former position was available and in fact he was reinstated in it. Section 16 (3) (*b*) was not called into operation at all. There is no question in this case that it was not practicable or was not reasonable for the former employer to employ the ex-" member of the Forces " in his former occupation and on " conditions not less favourable." There was no disagreement between Taylor and the Commissioner as to that occupation or as to the conditions. The Reinstatement Committee and the Appeals Board cannot come into conflict with each other. If during the period of his war service Taylor had remained in the employment of the Commissioner and had been appointed to the position to which Cole was appointed the respondent officers would have had the right to challenge his appointment. It is a condition of Taylor's employment that he could be promoted to a position senior to that held by the respondent officers only if the head of the branch advised that they should be passed over. The Commissioner was

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not so advised. It was always a condition of Taylor's employment that any decision by the Commissioner as to his, Taylor's, promotion would be subject to appeal and it was a further condition that that appeal should be final. If under the *Re-establishment and Employment Act* the conditions of employment include the question of seniority then that question is one of fact for consideration by the Appeals Board. Even if the conditions of employment include rules relating to seniority as rules it does not mean that the Commissioner must put Taylor into that position in which he would have been had he remained in the employment and the conditions of his employment remained unaltered. The relevant provisions of the *Re-establishment and Employment Act* and the *Government Railways Act* 1912-1945 are not inconsistent. Section 76 of the *Government Railways Act* 1912-1945 is not the source of the Commissioner's power to promote an employee. Section 16 (3) (*a*) does not involve consideration of hypothetical promotions.

Fuller K.C., in reply. The Commissioner acted under s. 16 (3) (*a*) of the *Re-establishment and Employment Act* and not under s. 76 of the *Government Railways Act* 1912-1945. Under s. 16 (3) (*a*) an ex-" member of the Forces " is entitled to return to the position to which he would probably have been promoted if he had remained in the Commissioner's employment and there had not been a war. His relative seniority in the Commissioner's employment must be preserved notwithstanding his absence on war service.

Cur. adv. vult.

Aug. 29.

The following written judgments were delivered :—

LATHAM C.J. Appeal from an order of the Supreme Court discharging an order nisi for a writ of prohibition. The application for the writ was made by the Commissioner for Railways, who is a body corporate under the *Transport (Division of Functions) Act* 1932-1943, s. 4, and is the employer of the 56,000 members of the New South Wales railway service: See *Government Railways Act* 1912-1945, s. 70. The respondents to the proceedings are the members of an Appeals Board constituted under that Act (s. 87) and five railway officers. These railway officers are appellants against the promotion of one A. V. Taylor, a returned member of the Forces in proceedings before the Appeals Board. Taylor, who was an Assistant Engineer, Class 3, in the Electrical Branch of the Railways, was granted leave by the Railway Commissioner to serve in the Australian Imperial Forces. When he was granted such leave he was junior to

the five other officers, but senior to one Louis Cole. While Taylor was on war service in 1943 Cole was promoted to the position of Assistant Engineer, Class 1, and became senior to the five other officers. These five officers were also appointed in 1943 Assistant Engineers, Class 1. When Taylor returned in 1945 he was first employed as Assistant Engineer, Class 3, and was subsequently appointed Assistant Engineer, Class 1, with seniority over Cole and over the five other officers, to whom he had been junior. The five officers have appealed to the Appeals Board against being "passed over" by Taylor. The Commissioner contends that he was bound to appoint Taylor to a position which preserved his seniority over Cole because the Commonwealth *Re-establishment and Employment Act* 1945, s. 16 (3) binds him to re-employ Taylor under conditions not less favourable than those which would have been applicable to him in his occupation if he had remained in his employment. It is contended for the Commissioner that the provisions of the State law applying to promotions and appeals are inconsistent with the Federal statute, which therefore prevails over such provisions—Commonwealth Constitution, s. 109. If this contention is correct the Appeals Board has no jurisdiction to deal with the appeals against the promotion of Taylor, and the Commissioner asks for a writ of prohibition to prevent the Board and the five officers from proceeding in the appeals.

The *Government Railways Act*, s. 76, provides that when any vacancy occurs in any branch of the railway service not open for competitive examination it shall be filled, if possible, by the promotion of some officer next in rank, position, or grade, to the vacant office, and that no such officer shall be passed over unless the head of his branch, in writing, so advises the Commissioner. Section 76 (2), as enacted by the *Transport (Administration) Act* 1943, s. 4 (*a*), provides that where the head of the branch so advises the Commissioner he shall set out his reasons, together with the name and position of seniority of any officer who in his opinion should be passed over. The Commissioner is then required to refer the proposal as to the filling of the vacancy to a promotions committee, which inquires into the claims of all officers proposed to be passed over, and reports to the head of the branch, who then reports to the Commissioner. If then the Commissioner decides to fill the vacancy by passing over any officer, s. 86, as enacted by the *Transport (Administration) Act* 1943, s. 4 (*f*), gives to such officer a right of appeal to the Appeals Board. Section 93 provides that every decision of the Appeals Board is to be final and conclusive.

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Taylor was promoted without any advice from the head of the branch under s. 76 (1) and without any reference to a promotions committee under s. 76 (2).

It is submitted for the Commissioner that the Appeals Board has no jurisdiction in any case where, as in the present case, the Commissioner is (as it is contended) obeying the Federal Act. It has been strongly pressed upon the Court that, unless this is the true position, the Commissioner will find himself in a difficult and, indeed, an impossible position. He will be bound as an employer by the Federal Act to reinstate an employee in accordance with the Act, and may be convicted of an offence if he does not comply with that Act. If, on the other hand, the Appeals Board still has jurisdiction, the Appeals Board may take a different view of the rights of an officer from that which has commended itself to the Commissioner, and he will be bound, according to the State statute, by the decision of the Appeals Board. The Supreme Court discharged the rule nisi and in the reasons for judgment of the court the learned Chief Justice said: "Whatever the Board may decide as between the Commissioner and the five" (respondents), "the Commissioner must still give Taylor everything to which the Commonwealth statute entitles him, making up his mind as best he can, what that is, and incurring liability to a penalty of £100 if he fails to do so" (1). This does not leave the Commissioner in a very happy position.

The Commonwealth *Re-establishment and Employment Act* 1945, after defining "war service" in s. 4, provides in s. 12 that any person who has completed a period of war service may apply to his former employer for reinstatement in employment. Section 16 (1) provides that where such an application is made and is still in force, the "former employer" shall make employment available to the applicant in accordance with the section. It was argued for the respondents that the Commissioner of Railways was not a "former" employer of Taylor, because Taylor had been given leave, so that he was at all times during his war service still in the employment of the Commissioner, with the result, it is argued, that s. 16 had no application to Taylor. But "former employer" is specially defined in s. 10 as meaning an employer by whom the person in question was employed for not less than twenty-eight days out of the fifty days immediately preceding the date upon which he volunteered for war service or received a notice requiring him to perform war service. It has been assumed throughout the proceedings that Taylor was employed by the Commissioner for the period stated, so that the

(1) (1946) 46 S.R. (N.S.W.) 254, at p 256; 63 W.N. 99, at p. 100.

Commissioner was a " former employer " within the meaning of the Act, even though Taylor was given leave of absence.

Section 16 (3) (*a*) is as follows :—" The employment to be made available under this section shall be employment—(*a*) in the occupation in which the applicant was employed immediately prior to the commencement of his period of war service and under conditions not less favourable to him than those which would have been applicable to him in that occupation if he had remained in the employment of the former employer, including any increase of remuneration to which he would have become entitled if he had remained in that employment."

Paragraph (*b*) of this subsection provides for cases where it is not practicable or reasonable for the former employer " to employ the applicant " in the same occupation and " on those terms and conditions," allows an agreement as to employment between the applicant and the former employer, and authorizes a Reinstatement Committee, in the event of disagreement, to determine " terms and conditions " upon which the applicant is to be employed.

Salaried professional officers of the railway service of New South Wales are employed under certain conditions contained in (1) State statutes, (2) an award of the Commonwealth Court of Conciliation and Arbitration, which adopts an award of the New South Wales Government Railways (Officers) Conciliation Committee as varied, and (3) any relevant Federal statute. It has not been argued that the Commonwealth Parliament does not possess authority under the defence power (Commonwealth Constitution, s. 51 (vi.)) to legislate for the reinstatement of members of the military forces who are State railway servants.

It was argued for the Commissioner that in promoting Taylor he exercised a power conferred upon him by Federal law and, accordingly, did not act under s. 76 of the *Government Railways Act*, that upon the true construction of s. 76 the right of appeal to the Appeals Board and the power of the Appeals Board to act depended upon the Commissioner acting under s. 76 after advice from the head of the branch and reference to a promotions committee, and that the Appeals Board for this reason had no jurisdiction in the case of Taylor. In my opinion, this argument so far as it depends upon the construction of the State statute should not be accepted. It would reduce to a nullity the power of the Appeals Board in cases of irregularity in procedure. The facts that there had been no advice from the head of the branch and no report from a promotions committee, so far from excluding the power of the Appeals Board to hear

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an appeal, would be good grounds under the State Act for the Appeals Board allowing an appeal when made to it.

The substantial question is whether the provisions of the State statute are inconsistent with the Federal statute, in which case the latter would prevail. Does the Federal statute exclude the operation of the State system of promotions and require the Commissioner to determine at his own risk, irrespective of that State law, what amounts to reinstatement in accordance with the provisions of the Federal statute? If the Federal statute, instead of excluding the provisions of State law as to promotions, includes those provisions, the suggested difficulties of the Commissioner would disappear. He could adopt such policy as he thought proper in relation to promotions, and the responsibility of rejecting that policy would rest upon the Appeals Board, if the Board differed from the opinion of the Commissioner in any particular case.

Before the Federal Act had been passed the Secretary for Railways on 4th December 1939 made an announcement relating to leave of absence for service with the Australian Defence Forces, which contained the statement—"On their return to duty, such employees" (that is, employees granted such leave) "shall be promoted to the highest positions which have been attained during their absence by any employees who were junior to them at the time they commenced training or service, provided they are suitable for such higher position or can qualify therefor within three months of their return to duty."

A similar statement was published by the Secretary for Railways on 22nd December 1944. It is argued that these statements accurately express the obligations of employers under the Federal Act.

The argument for the Commissioner depends upon the fact that the applicable award provides as a condition of Taylor's employment that officers shall be graded in different classes by the Commissioner, and that "promotions from class to class shall be in order of seniority, provided the senior officer is suitable for the higher grade position." This right of promotion, prima facie in order of seniority, was a very important right which Taylor had when he enlisted. The Commissioner was of opinion that if Taylor had remained in the service he would have received promotion and that s. 16 (3) (*a*) requires that he should be promoted to a position in which his seniority in relation to Cole and all other officers will be preserved.

In my opinion, this argument selects one condition of employment and ignores other equally applicable conditions of employment. It emphasizes the undoubted importance of seniority and assumes

that seniority is a " condition " of employment which is " applicable " to the officer. But I find myself unable to agree that the preservation of seniority as between particular employees is a condition of employment of each of these employees. It was not a condition of the employment of Taylor that he should be senior to Cole or to any other officer. The conditions of his employment were that he should perform certain duties subject to relevant laws and awards. These conditions included, by reason of the award, a condition that prima-facie promotion went by seniority, but subject to suitability and to appeal by other officers. It is, in my opinion, a mistake to select part of one condition of employment, namely seniority, from the award, and to ignore other equally real and relevant conditions of employment contained in State legislation. There is no suggestion that the State legislation is inconsistent with the Federal award.

The conditions under which Taylor was employed include the State law which, with other provisions affecting the rights of officers, requires that vacancies shall be filled, if possible, by promotions in the order of seniority and that no officer shall be passed over unless the head of the branch so advises the Commissioner, with provisions for reference to a report from a promotions committee and for appeal to an Appeals Board. All of these provisions are conditions of the employment of Taylor. There is no more reason, in my opinion, for striking out the condition " subject to appeal " than for striking out the condition " provided the officer is suitable for the higher grade position " or any other condition of his employment; all the conditions must be taken together, and when they are ascertained they apply to the reinstated officer.

The contrary view is that an officer is entitled to receive any promotion which it is believed he would have received if he had remained in the service. But what the section requires is reinstatement under " conditions " not less favourable than those which would have been applicable if he had remained in his employment. The " conditions " which would have been applicable must be " those terms and conditions " which are referred to in par. (*b*) of s. 16 (3), and those must be the terms and conditions upon which he was employed. This is shown by the words of par. *b*, which applies when it is not practicable or reasonable for the former employer " to employ the applicant on those terms and conditions."

It may be pointed out that s. 16 (3) (*a*) does provide for a specific advancement for an employee after reinstatement by providing that the employee shall be entitled to " any increase of remuneration to which he would have become entitled if he had remained in the employment." This is a provision which directs that war service

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be taken into account for this purpose as if it had been a period of employment and secures the result that in respect of all automatic increases of salary, that is, increases determined merely by the effluxion of time, the employee shall not lose by his war service. This particular provision for improving the position of employees would have been unnecessary if the preceding provisions relating to conditions not less favourable meant that an employee was entitled upon return from war service to receive such improvements in the terms of his employment as he probably would have obtained if he had remained in the service.

Where a competition arises between several applicants for reinstatement and it is not reasonably practicable for the employer to make employment available to all of the applicants, s. 16 (4) applies. In this case preference is given, not to the applicant who is senior to other applicants, but to the applicant with the longest service with the employer. If s. 16 (3) gave the rights of seniority which it is now suggested it confers, sub-s. 4 would not have been enacted, because the employee with the highest seniority would have been preferred under sub-s. (3) to an employee who was junior to him, though he had greater length of service, and the position contemplated by this sub-section could never arise. A similar problem is dealt with in the same way under sub-s. (5) of the section, where again the principle of "first to come last to go," and not that of seniority in grade, is applied.

Section 17 provides that persons who are reinstated shall be deemed to have had continuous employment for the purpose of determining their rights in respect of annual leave, sick leave, long service leave, or pay in lieu thereof, and superannuation or pension. Here again is a provision which gives rights which might have accrued, and normally would have accrued, if the applicant had actually remained in the service. The effect of s. 17 is that war service is not to produce the result that an employee is any worse off in respect of annual leave &c. than if he had remained in the service, but there is no such express provision anywhere in the Act that an employee is not to be worse off in respect of actual promotion to another position than he would have been if he had remained in the service.

In my opinion, the Federal Act, s. 16 (3) (*a*), does not alter or purport to alter the conditions upon which persons are employed by their employers. It entitles a person qualified under the Act to be replaced in employment under conditions not less favourable than those which would have applied to him if he had remained in the employment, that is, conditions as determined by the terms of his

contract with his employer, of any applicable law and of any applicable award. The Act does not provide, certainly not expressly, and (in my opinion) not by implication, that employers have to speculate as to which of a number of employees and, where there have been several successive enlistments of employees with near seniorities with various consequential promotions, how many of them in turn, would have attained to a higher position, and to deal with them all upon the basis that if they had all remained in his employment they would all have reached that position.

Thus, in my opinion, the Federal Act leaves in operation the machinery of the Appeals Board just as it leaves in operation other conditions of service fixed by applicable awards and by the *Government Railways Act* and other State legislation. Upon this view, it is not necessary for me to consider whether it is really possible for either the Commissioner or a court to determine with certainty that if an officer had remained in the service he would have been promoted to a particular position. In the present case, he *might* have been promoted, but only if the head of his branch had advised promotion, if the promotions committee had reported on the proposed promotion, if the Commissioner had then promoted him, and if no other officer had successfully appealed against the promotion. It is only if all these questions were resolved in favour of the officer that he *would* have been promoted. But if, as I think is the case, the conditions of employment of Taylor remain as determined by State law, this question does not arise.

In my opinion, when Taylor was reinstated in the position of Assistant Engineer, Class 3, with any increases in pay provided for in s. 16 (3) (*a*) and the benefits provided for in s. 17, he received his rights under the Act. As it is still one of the conditions of his employment that his promotion is subject to appeal in accordance with the State Act, the Appeals Board has, in my opinion, jurisdiction to hear and determine the appeals of the five officers who are respondents. The Commissioner will not be placed in any legal difficulties upon this view of the law, because it is based upon the opinion that the Federal Act not only recognizes but actually requires the continuance of the conditions of employment prescribed by State legislation and by applicable awards.

In my opinion, the appeal should be dismissed.

STARKE J. Appeal from the Supreme Court of New South Wales in Full Court discharging a rule nisi for a common law writ of prohibition.

The question is whether the Federal *Re-establishment and Employment Act* 1945 deprives the Appeals Board constituted under the

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Government Railways Act 1912-1945 of the State of New South Wales of jurisdiction to hear and determine certain appeals of railways officers who allege that they have been " passed over " contrary to the provisions of the State Act. If the State law is inconsistent with the Federal law then the Federal law prevails and the State law is to the extent of the inconsistency invalid (Constitution, s. 109).

By s. 86 of the State Act (inserted by Act No. 23 of 1943, s. 4) it is provided : " Where a decision has been made by the Commissioner to promote an officer to fill any vacancy in any branch of the railway service and such officer is not the officer next in rank, position, or grade, any officer in the branch who has been passed over may appeal to the Appeals Board " constituted under the Act. That section gives a general right of appeal to officers complaining that they have been " passed over." The authority of the Board is to hear and determine whether they have been rightly " passed over " and to make such order thereon as the Board thinks fit (cf. *Russell* v. *Bates* (1)).

In the present case, several officers complained that one Taylor, a former employee in the railways, who had rendered war service, had been promoted by the Commissioner for Railways over their heads or in other words that they had been " passed over."

The Federal law, the *Re-establishment and Employment Act* 1945, provides, in substance, that any person who had completed a period of war service might apply to his former employer for reinstatement in employment and that the employer should make available to him employment in the occupation in which the applicant was employed immediately prior to the commencement of his period of war service and under conditions not less favourable to him than those which would have been applicable to him in that occupation if he had remained in the employment of the former employer, including any increase of remuneration to which he would have become entitled if he had remained in that employment ; or, if the applicant and the former employer agree, or, in the event of disagreement, if a Reinstatement Committee appointed under the Act, determines that it is not practicable or is not reasonable for the former employer to employ the applicant in that occupation and on those terms and conditions, then in an occupation and upon terms and conditions agreed upon or in the event of disagreement, in an occupation and upon terms and conditions which the Committee determines to be reasonable and practicable.

The constitutional validity of this Act in relation to State employees and Railways officers was not challenged in this case, but I desire to reserve my opinion upon that question in case it ever arises.

(1) (1927) 40 C.L.R. 209, at pp. 213, 214.

Again it was not contended that a writ of prohibition, according to the course of the common law, was not an appropriate remedy in this case (See *R.* v. *Electricity Commissioners*; *Ex parte London Electricity Joint Committee Co.* (1920) *Ltd.* (1)). But I express no opinion upon the point.

The object of the *Re-establishment and Employment Act* is to reinstate former employees, who have rendered war service, in their former occupations so far as practicable and reasonable and under not less favourable conditions. The terms and conditions upon which Taylor was formerly employed depend upon the State law and must be found within the framework of that law. The *Government Railways Act* did not give him any right of promotion. All it provided was that vacancies should be filled if possible by the promotion of some officer next in rank, position, or grade to the vacant office and that any officer who had been "passed over" might appeal to the Appeals Board constituted under the Act.

The *Re-establishment and Employment Act* does not confer any power or authority upon the Commissioner for Railways to pass over any officers senior in rank to Taylor and to promote him over those officers. That Act only entitles persons who have rendered war service to be reinstated in their former positions under conditions not less favourable. But, if such persons are promoted and other officers higher in rank "passed over," then resort must be had to the State law which gives a right of appeal to the Appeals Board.

In my judgment, there is no inconsistency between the Federal and State law in the present case for the obligation imposed by the *Re-establishment and Employment Act* is based upon and operates within the framework of the State law.

The result is that this appeal should be dismissed.

Dixon J. I am unable to accept the contention that Division I. of Part II. of the *Re-establishment and Employment Act* 1945 has no application to members of the Forces who, when they volunteered for war service or received notice requiring the performance of war service, did not suffer a complete loss of their employment but left their civil work under some form of suspension from the duties of their employment. The definition of "former employer" in s. 10 (1) is capable of covering an employer who suspended the employment of an employee who left his duties for war service as well as an employer by whom it was brought completely to an end. The word "reinstatement" in, for example, s. 12 (1) is not less appropriate to cases where the employment was suspended during war service than to

(1) (1924) 1 K.B. 171, at p. 205.

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cases where it meant the resignation or discharge of the employee. The word " employment " is indefinite and flexible and a man serving in the Army on leave of absence from his civil employment may, when he resumes his civilian duties, be said to be reinstated in his employment.

In the New South Wales Department of Railways what was called leave of absence for service at home or abroad with the 2nd A.I.F., the R.A.A.F. or the R.A.N. was granted to employees of six months' standing. Many governmental departments and agencies and many private employers pursued an analogous course with their employees going upon war service, and it would be surprising if the legislation dealing with reinstatement in employment did not include them in its operation. There are, it is true, some incongruities of expression, but the main provisions of Division I. of Part II. are framed in wide general terms and in the policy plainly appearing upon the face of the Act there is nothing which warrants the exclusion from its operation of servicemen whose employment has been suspended and not definitively ended.

The Commissioner for Railways has accepted this view. In the present case he has taken measures which he thinks necessary to restore one A. V. Taylor, pursuant to s. 16, to the occupation in which he was employed before his war service began, under conditions not less favourable to him than those which would have been applicable to him in that occupation if he had remained in the employment of the Commissioner, including any increase of remuneration to which he would have become entitled if he had remained in that employment.

At the time he joined the A.I.F. Taylor was an assistant engineer in the Electrical Branch of the Department. He ranked in seniority behind the five respondents, who were also assistant engineers, and in front of one Cole. During his absence, Cole was advanced to the position of Assistant Engineer Class 1 over the heads of the five respondents who were passed over. Since that was done, they, too, have been promoted Assistant Engineers Class 1, but, in seniority, they are now behind Cole.

The Commissioner took the view that to reinstate Taylor under conditions not less favourable to him than those which would have been applicable to him, had he remained in the employment of the Commissioner, it was necessary to place Taylor ahead of Cole in a position of Assistant Engineer Class 1. Accordingly, after a provisional period of recall to duty, which I cannot think altered the legal character of what followed, the Commissioner reinstated Taylor

as an Assistant Engineer Class 1 with seniority to Cole and, therefore, to the five respondents. The latter objected and, treating it as a decision of the Commissioner to promote an officer not next in rank to fill a vacancy and so as falling within s. 86 of the *Government Railways Act* 1912-1945 of New South Wales, they appealed under that provision to the Appeals Board established under s. 87.

The Commissioner seeks to prohibit the Appeals Board from proceeding with the appeals as relating to a matter outside the purposes of the Board and one placed within his exclusive responsibility by the Federal enactment.

The effect of the State legislation and the State award is to make promotion within any branch of the railway service a thing to which the officer next in rank, position or grade has a presumptive claim. Seniority, as it is often though imprecisely called, does not give a right to promotion to fill a vacancy. But seniority is protected from being unfairly passed over by certain provisions designed to secure proper consideration of its claims upon the vacancy, provisions giving to an officer passed over by the Commissioner an appeal from his decision to the Appeals Board. The Board is evidently intended to form a judgment as an independent body upon the question whether the interests of the service and the merits outweigh the presumption in favour of seniority.

In this situation a question which lies at the root of this case is whether the order in which the serviceman ranks in the service, that is his order of seniority, is one of the " conditions " included in the expression, occurring in s. 16 (3) (*a*) of the *Re-establishment and Employment Act* 1945, " conditions not less favourable to him than those which would have been applicable to him in that occupation if he had remained in the employment ". In my opinion, it is a condition of his employment and, therefore, falls within that expression. It is properly described as a condition because, as an examination of the State statute and the award shows, his claims to promotion have a prima-facie foundation in his relative rank for the time being and the purpose of arranging the service or branch in order of seniority is to affect the rights of the individual. But to say that seniority or rank in the service or branch falls within the word " conditions " in the expression quoted does not mean that the serviceman is entitled to be reinstated exactly in that place in the order of ranking which he occupied when he left his employment to join the Forces. The sub-section does not require his reinstatement under the conditions which were applicable to him at that date. It does not attempt to fix conditions as at a past date and direct

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that they shall, if not maintained, be restored. In a matter of such continual and inevitable change, that would have been impossible and it would not have been fair to servicemen. What the sub-section requires is an ascertainment of the conditions which would have been applicable to him if he had remained in the employment and his reinstatement under such conditions. That, of course, means an hypothesis. Some authority must form an opinion of what conditions would apply to the serviceman had he remained. When that process is applied to rank or seniority, it means that someone must decide what would have been his place in the order of seniority if, instead of serving, he had remained in his employment. The Commissioner has formed the conclusion in the case of Taylor that he would have been ahead of Cole and that the relative order would have been that now resulting.

The question is whether the review of such a decision of the Commissioner is within the competence of the Appeals Board. On the whole, I think that we should hold that it is not, and for two reasons.

Viewed as a matter of State law, the Board was established for the solution of an entirely different problem. Its purpose is to give impartial reconsideration to a discretionary judgment on the part of the Commissioner concerning the efficiency, suitability and qualifications of persons as affecting the prima-facie claims given by seniority. The reinstatement of a serviceman under conditions not less favourable is an entirely different matter arising out of quite independent considerations and out of a situation not in the contemplation of the legislation setting up the Appeals Board.

Viewed as a matter of Federal law, the responsibility is placed solely on the Commissioner. He is the employer and he is liable if the provisions of s. 16 are not complied with. If the Appeals Board intercepted his directions and gave a decision which on the actual facts involved a failure to comply with s. 16, it would not suffice as a justification for the Commissioner if he obeyed it. In truth it would be void. If, therefore, State law did assume to include this question in what the Appeals Board should decide, then a question under s. 109 of the Constitution would arise. For there would be an inconsistency in a requirement by State law that the Commissioner should comply with the decision as conclusive upon him, an inconsistency with the Federal law directing that at his peril he shall reinstate the serviceman under the conditions it describes. It must be remembered that the Appeals Board is an outside body, not forming part of the Commissioner's establishment. Nor is it in its full

sense a judicial tribunal giving a conclusive judgment, subject to appeal, on the relative rights of all the parties arising under the legal system, a tribunal administering State and Federal laws.

I think, therefore, that the Appeals Board has no authority in the matter.

No arguments have been advanced against the use of prohibition as an appropriate remedy.

I would allow the appeal and make the rule nisi absolute.

The order granting special leave provides for the costs of the appeal in this Court. But I think that in the special circumstances the Commissioner ought not to have his costs in the Supreme Court.

McTIERNAN J. In my opinion, this appeal should be allowed.

These proceedings arise out of the return of a railway officer, A. V. Taylor, to the railway service upon his discharge from the Army. He had been granted leave of absence during the period he was in the Army. He was qualified as an applicant under s. 12 of the *Re-establishment and Employment Act* 1945, and it appears from the definition of " former employer " and the evidence that, as regards Taylor, the Commissioner held this statutory relationship. A person qualified under s. 12 may apply to " his former employer " for " re-establishment in employment." In my opinion, this section covers an application made by a person who was on leave of absence from his employment during his period of war service, to be brought back to a proper position in the employment. It was, therefore, the Commissioner's duty to make employment available to Taylor in accordance with s. 16 of the above-mentioned Act. In order to perform this duty, it was necessary for the Commissioner to place Taylor in the occupation in which he was immediately prior to the commencement of his period of war service and under conditions not less favourable to Taylor than those which would have become applicable to him in that occupation if he had remained in the Commissioner's employment, that is to say, if he had remained there instead of serving in the Forces. The Commissioner, intending to perform this statutory duty, gave Taylor the position of Assistant Engineer, 1st Class. When Taylor enlisted in the Australian Imperial Forces he was Assistant Engineer, Class 3, and junior to the five railway officers opposing the Commissioner's application in these proceedings for a writ of common law prohibition. They appealed to the Appeals Board constituted under s. 87 of the *Government Railways Act* 1912-1945 against what the Commissioner has done by way of reinstating Taylor, because its effect is to make him senior in standing in the railway service to each

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of them. The writ of prohibition is sought to restrain the Board from proceeding to hear and determine the appeals on the ground that the Board has no jurisdiction to review the Commissioner's action in favour of Taylor.

Section 76 of the *Government Railways Act* 1912-1945 prohibits promotions involving the passing over of officers unless the conditions mentioned in the section are observed ; and s. 4 (*f*) of the *Transport (Administration) Act* 1943 (which inserts a new s. 86 in the *Government Railways Act* 1912) provides that where the Commissioner has made a decision to promote an officer, any other officer who has been passed over may appeal to the Appeals Board. Upon such an appeal the Board may overrule the Commissioner's decision if it thinks fit to do so. The subject matter of the Board's jurisdiction is a decision made in the exercise of the Commissioner's discretion, such as it is under the above-mentioned State Acts, to make promotions in the railway service. The placing of Taylor in the position of Assistant Engineer, Class 1 was not an exercise of such discretion. The power of the Commissioner to place him in that position is a necessary incident of the duty imposed upon the Commissioner by s. 16 of the Federal Act. It is true that Taylor has been put above the officers who appealed to the Board. But it is also true that this result is not brought about by any decision to promote him made by the Commissioner in the exercise of his discretion in the matter of promotion. Upon the true construction of the provisions of the State law from which the Appeals Board derives its jurisdiction, I think that it has no jurisdiction to review or call in question any act whereby the Commissioner intends to perform his duty under s. 16 of the Federal Act. If the contrary were right, those provisions would be open to attack under s. 109 of the Constitution and upon other grounds.

In the view that the Appeals Board has no jurisdiction to adjudicate upon the question whether it was right or wrong for the Commissioner to reinstate Taylor by advancing him in the service, it is not necessary to decide the meaning of the word " conditions " in s. 16 (3) (*a*) of the *Re-establishment and Employment Act.* But as the question was much discussed in argument I add my opinion on it. The word, according to its ordinary meaning, is capable of including such matters as grade, rank and standing in the employment. Having regard to purposes of the Act, I think that the word should not be narrowed in construction to refer only to such matters as remuneration, hours of employment and holidays, but should be given the widest application that the ordinary meaning of the word allows.

It has been assumed that prohibition goes to the Appeals Board and there has been no argument on this matter.

WILLIAMS J. I have read and substantially agree with the judgment of *Dixon* J. I would allow the appeal and make the rule nisi absolute.

Appeal allowed. Order of Supreme Court set aside. Rule nisi made absolute. Appellant to pay costs of respondents in High Court.

Solicitor for the appellant, *Fred. W. Bretnall*, Solicitor for Railways (N.S.W.).

Solicitor for the respondent members of the Appeals Board, *F. P. McRae*, Crown Solicitor for New South Wales.

Solicitors for the respondent officers, *G. W. L. Charker & Co.*

J. B.