[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

PORTUS AND ANOTHER; EX PARTE FEDERATED CLERKS UNION OF AUSTRALIA.

1949.

MELBOURNE, Oct. 7, 10;

SYDNEY,

Nov. 22. Latham C.J.,

Rich, Dixon, McTiernan and Webb JJ.

H. C. OF A. Industrial Arbitration (Cth.)—Industrial dispute—Existence of inter-State dispute— Majority of employees concerned employed in one State; small number in another State-Organization of employees including as members "employees of any person or corporation employing persons at . . . salary . . . on behalf of" Commonwealth Government—Company incorporated under State law—All shares owned by Commonwealth—Whether organization representative of employees of company as being employed "on behalf of" Commonwealth-Commonwealth Conciliation and Arbitration Act 1904-1949 (No. 13 of 1904-No. 86 of 1949), s. 4.

The respondent Federation was an organization registered under the Commonwealth Conciliation and Arbitration Act 1904-1949. Its rules included as eligible for membership "persons employed at a salary rate in connection with air transport who are salaried officers of the Crown." The phrase "salaried officers of the Crown" was defined as including "employees of any . . . corporation employing persons at an annual salary rate on behalf of the Government of the Commonwealth." Q. Ltd. was a company, incorporated under the law of Queensland, which was engaged in air transport. All the shares in the company had been acquired by the Commonwealth, which caused the articles of association to be altered so that the sole right to appoint directors was vested in the Minister for Air. The Federation admitted to membership 102 persons employed by Q. Ltd., ninety-eight in New South Wales and four in Queensland; and it served on the company a log of demands as to the conditions of employment of such persons.

Held that, on the company's failure to accede to the demands in the log, an "industrial dispute" within the meaning of the definition in s. 4 of the Act existed between the Federation and the company. Within the meaning of the Federation's rules, Q. Ltd. was a corporation which employed the

persons concerned at an annual salary rate "on behalf of" the Common- H. C. of A. wealth Government; therefore, they were validly admitted to membership of the Federation, and it could properly represent them in an industrial dispute. The dispute extended beyond the limits of one State because employees in both New South Wales and Queensland were affected; it was immaterial that the number of employees in Queensland was small.

1949 THE KING v.PORTUS: EX PARTE FEDERATED

CLERKS

Union of AUSTRALIA.

Order Nisi for prohibition.

The Australian Transport Officers Federation (hereinafter called the Federation), an organization registered under the Commonwealth Conciliation and Arbitration Act 1904-1949, served on Qantas Empire Airways Ltd. (hereinafter called Qantas), a log of demands to which Qantas failed to accede. The industrial dispute alleged to arise from such failure came before Mr. J. H. Portus, a conciliation commissioner appointed under the Act. The Federated Clerks Union of Australia (hereinafter called the prosecutor) was also heard in the proceedings. It had served a log on Qantas, and it objected that there was no "industrial dispute" between the Federation and Qantas. The commissioner intimated his intention to hear the proceedings on the basis that there was such a dispute, and the prosecutor obtained from the High Court an order nisi for a writ to prohibit him from so doing. The Federation was joined as a respondent. The facts appear in the judgments hereunder.

P. D. Phillips K.C. (with him Simon Isaacs), for the prosecutor. There could not be any real industrial dispute between Qantas and the Federation as to the terms of employment of the employees in question; they were not eligible for membership of the Federation, because they were not-within the meaning of its constitution and rules—persons "employed at a salary rate in connection with air transport who are salaried officers of the Crown." Qantas is not "the Crown," and its officers therefore are not "officers of the Crown." That, in such circumstances, the Federation could not create a cognizable dispute on their behalf, because it did not lawfully represent them, is shown by R. v. Hibble; Ex parte Broken Hill Pty. Co. Ltd. (1). The provision in the Federation's rules to the effect that "salaried officers of the Crown shall mean employees of any . . . corporation employing persons . . . on behalf of the Government of the Commonwealth" does not take the matter any further. Qantas did not employ any persons "on behalf of "the Commonwealth. It is true that the Commonwealth at the relevant time had acquired all the shares in Qantas (see

1949. THE KING PORTUS; EX PARTE FEDERATED CLERKS Union of AUSTRALIA.

H. C. OF A. Qantas Empire Airways Agreement Act 1946; Qantas Empire Airways Act 1948), but it was nothing more than a shareholder. Qantas continued to have an independent existence as a body incorporated under the law of Queensland; it was not an agency of the Commonwealth so as to make it possible in any real sense to say that its employees were employed "on behalf of" the Commonwealth. If the prosecutor's argument was not correct, the question would arise: How many shares does the Government have to own in order to make the company a Government concern? The Government's interest in a company may vary to a great degree, and it would be difficult to see where the line was to be drawn. A second ground of objection to the proceedings which it is sought to prohibit is that there is not here any real inter-State dispute. It appears that only four of the 102 employees to be affected are working outside New South Wales. This seems scarcely the sort of "inter-State" dispute contemplated by the Constitution. Surely there must be some limit to what can be done in creating a "paper" dispute merely by serving a log of demands. recognition of "paper" disputes should not be carried to the extent of dispensing with the need for showing that there is a real and genuine dispute extending beyond one State: See Hibble's Case (1): Caledonian Collieries Ltd. v. Australasian Coal and Shale Employees' Federation [No. 1] (2); McWilliam & Boyt on Commonwealth Conciliation and Industrial Arbitration Law, p. 12.

The respondent commissioner did not appear.

G. E. Barwick K.C. (with him J. J. McKeon), for the respondent Federation. As to the prosecutor's second argument, the question of the present number of employees in each State is irrelevant (Metal Trades Employers Association v. Amalgamated Engineering Union (3)). The dispute is not limited to the position as it stands at the moment. In the class of employment now concerned, employees move from State to State, and there could be a considerable and rapid increase in the number in Queensland. Moreover, the Federation has many members qualified to take employment with Qantas if it becomes available. The present Clerks' Award does not cover all the matters raised by our log. As to the first point, the question is simply as to the meaning of the Federation's rule. The inquiry is not whether the employer is the Crown or entitled to Crown immunity; or whether the employer is an

^{(1) (1921) 29} C.L.R., at p. 292. (2) (1930) 42 C.L.R. 527.

^{(3) (1935) 54} C.L.R. 387, at p. 402.

agent in the sense of having capacity to bind the Crown; or whether the employer derives its capacity from Federal Parliament or some other relevant Federal source. It is not possible in the circumstances to give the words "on behalf of "a strictly literal construction. The rule clearly contemplates employment by corporations which have an independent existence in the sense that they are not Crown agencies. The question is: Does employment by Qantas fairly come within the rule as employment by a corporation carrying on an activity on behalf of the Commonwealth? This should be answered in the affirmative.

H. C. of A.

1949.

THE KING

v.

PORTUS;

EX PARTE

FEDERATED

CLERKS

UNION OF

AUSTRALIA.

P. D. Phillips K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered:—

Nov. 22.

LATHAM C.J. Mr. J. H. Portus, a Conciliation Commissioner appointed under the Commonwealth Conciliation and Arbitration Act 1904-1949, proposes to make an award in an industrial dispute alleged by the Australasian Transport Officers' Federation, an organization registered under the Act, to exist between it and a company entitled Qantas Empire Airways Limited (hereafter referred to as Qantas). The Federation claims preference in employment for its members. The Federated Clerks' Union of Australia, another organization registered under the Act, has members whose interests would be affected if an award giving preference to the members of the Federation were made. Compulsory conferences were held in March and June 1949 at which representatives of Qantas and of the two organizations were present, and it was then contended for the Clerks' Union that the Conciliation Commissioner had no jurisdiction to make an award as sought by the Federation. The objections were overruled and the union now seeks a writ of prohibition to prevent the commissioner from making an award in the alleged dispute.

There are two objections to jurisdiction upon which the union relies. One objection is that there is no inter-State dispute between the Federation and Qantas. The Federation has a large number of members but of these only ninety-eight in New South Wales and four in Queensland are employees of Qantas. It is therefore said that there cannot be a real inter-State dispute between the Federation and Qantas. The dispute, however, is as to the terms upon which Qantas may employ persons in any State in which Qantas carries on operations. In fact Qantas operates in the States of

1949. THE KING v. PORTUS: EX PARTE FEDERATED CLERKS UNION OF AUSTRALIA. Latham C.J.

H. C. OF A. New South Wales, Victoria and Queensland. The dispute exists in New South Wales and Queensland. It may justly be said that the extension of the dispute from New South Wales into Queensland is small and almost minimal in character. But both the Federation and Qantas exist in New South Wales and in Queensland and there is a dispute between them in each State, that dispute being the same dispute. It should be remembered that the Federation speaks on behalf of future as well as present members. This Court would soon find itself in grave difficulties if it were to hold that the jurisdiction of the Arbitration Court depended, not merely upon the extension of an industrial dispute from one State to another State, but also upon the size of the dispute in each or some particular State. I venture to repeat what I said in the case of Metal Trades Employers Association v. Amalgamated Engineering Union (1):-"The fact that the Arbitration Court or this Court may consider an industrial claim to be unimportant or trifling or unwise has no bearing upon the actual content of the dispute or upon the jurisdiction of the Arbitration Court to deal with that claim in an award. The Arbitration Court may, because it considers that a claim, though actually made, is not important or really significant, decline to include in an award any provision with respect to it. But if, for reasons satisfactory to the Arbitration Court, such a claim is granted in the award, there can, in my opinion, be no valid objection, upon the ground of jurisdiction, to the Arbitration Court making such an award. The award in such a case would deal directly with an actual part of the dispute."

The second objection is based upon the contention that the present members of the Federation who are employed by Qantas are ineligible for membership so that the Federation cannot represent them in respect of any industrial dispute. It is contended on behalf of the Clerks' Union that employees of Qantas are ineligible for membership of the Federation. Such a person can be eligible only if he is a salaried officer of the Crown within the meaning of the rules. It is contended that employees of Qantas are not and cannot be such officers. If the persons who are now de facto members of the Federation are ineligible for membership and if no employees of Qantas can ever be eligible for membership of the Federation, then, it is contended, there is not and cannot be an

industrial dispute between the Federation and Qantas.

The Federation represents all its members and may make demands and create disputes on behalf of any section of its members, actual or potential, even if no members are at the time employed by an

^{(1) (1935) 54} C.L.R. 387, at p. 410.

employer against whom an award was sought. In R. v. President of the Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild of Australasia; Ex parte Holyman & Sons (1) it was held that in order that there should be an inter-State dispute it was necessary that there should be a dispute between particular employers and particular employees in each of two or more States, those employees being members of the organization which alleged that a dispute existed. Further, in R. v. Hibble; Ex parte Broken Hill Pty. Co. Ltd. (2) it was held that "the only capacity and power possessed by an organization . . . is to put forward claims on behalf of persons who have become members pursuant to its rules." But Holyman's Case (1) was overruled in Burwood Cinema Ltd. v. Australian Theatrical & Amusement Employees' Association (3) where it was held that an industrial dispute might be created by a demand by an organization upon employers even though those employers did not employ any of the members of the organization. Hibble's Case (2) is no longer decisive upon this question so far as it arises if at all upon the factual circumstances now existing. fact (if it is the fact) that Qantas does not employ any members of the Federation at the time when the alleged dispute was asserted to exist does not make it impossible for a dispute between the Federation and Qantas to exist.

But if the conditions of eligibility for membership of the Federation are such that no employee of Qantas can ever be a member of the Federation pursuant to its rules, the question requires further consideration. If this should be the case there could not at any time be an industrial dispute between the Federation and Qantas because no question could ever arise as to industrial matters between Qantas and any members, present or future, of the Federation. It is therefore necessary to consider the conditions of eligibility of membership of the Federation. The Clerks' Union contends that the constitution of the Federation is expressed in such terms that no employee of Qantas can possibly lawfully be a member of the Federation.

This is, in my opinion, a question with which the Commonwealth Court of Conciliation and Arbitration is especially qualified to deal, and it should not be determined in this Court unless the law permits and the interests of justice necessitate a decision upon the matter by this Court. If a registered organization is found to be admitting as members persons who are ineligible, means for the correction of the situation are provided by the Arbitration Act. In this case an

H. C. of A. 1949. THE KING PORTUS; EX PARTE FEDERATED

AUSTRALIA. Latham C.J.

CLERKS Union of

^{(1) (1914) 18} C.L.R. 273.

^{(2) (1921) 29} C.L.R. 290.

^{(3) (1925) 35} C.L.R. 528.

1949. THE KING PORTUS; EX PARTE FEDERATED CLERKS Union of AUSTRALIA.

Latham C.J.

H. C. of A. application was made to the commissioner to submit to the Arbitration Court under s. 16 (2) of the Act the questions which now arise. But the commissioner exercised the discretion given to him under the section by refusing to take advantage of it. Section 16 (2) is a provision the full utilization of which would often make prohibition proceedings in this Court unnecessary. If the commissioner had referred the question whether he had jurisdiction under the Act to the Arbitration Court this Court would not at this stage have considered the application for a prohibition.

The Federation was originally entitled "The Federation of Salaried Officers of Railways Commissioners," and the conditions of eligibility prescribed by rule 2 limited the membership to persons who were officers other than professional officers "employed at an annual salary by the Railways Commissioners of the States and the commissioner for Road Transport and Tramways in New South Wales and the Board of Land and Works, Railway Construction Branch, Victoria." It was required that the persons should be officers having duties of supervision. "Professional officer" was In 1943 the rule was amended and it assumed its present form. At the same time the name of the organization was changed to the Australasian Transport Officers' Federation. The relevant amendment added the following class of persons to those eligible for membership—" persons employed at a salary rate in connection with Air Transport who are salaried officers of the Crown." The rule also provided as follows: -- "Salaried Officers of the Crown shall mean: Employees of any person or corporation employing persons at an annual salary rate on behalf of the Government of the Commonwealth or any of the States."

Qantas is a public company incorporated in Queensland. Commonwealth Government is registered as holder of all the shares except seven, and those seven shares are held by nominees of the Government (see Qantas Empire Airways Agreement Act 1946 and Qantas Empire Airways Act 1948). The articles of association of the company provide that the Commonwealth Minister of State for Civil Aviation shall have the sole right to appoint the directors of the company and substitutes for them and to appoint successors Accordingly the Commonwealth Government has complete control of the company.

The company, however, is a distinct person from its shareholders. The shareholders are not liable to creditors for the debts of the company. The shareholders do not own the property of the company: see Aron Salomon v. Salomon & Co. (1) and Macaura v. Northern Assurance Co. (1). Persons employed by the company are not therefore employed by all or by any of the shareholders.

It is evident that the definition of "salaried officers of the Crown" was intended to define persons who were not actually public servants, but who had some degree of association with the Crown, though the Crown was not their employer from a legal point of view. If it had been intended to limit the membership to public servants in the case of air transport officers, it would have been easy to provide that membership of the Public Service of the Commonwealth or of a State should be a condition of eligibility. But it is clear that the intention was to include persons who, though employed by, and being the employees of, a person or a corporation (not being the Crown itself), could nevertheless be said to be employed by that person or corporation in some sense on behalf of the Crown.

The words "on behalf of the Crown" therefore should not be so interpreted as to produce what plainly would be the unintended result of including public servants and no others. The expression "on behalf of the Crown" is not an expression which has a strict legal meaning. An agent who acts on behalf of a principal can, within the limits of his authority, bind the principal by employing a person on his behalf so that that person becomes the employee of the principal. But the words "on behalf of the Crown" in the rules of the organization evidently mean something less than "as agent for the Crown" in the legal sense.

A corporation created by Parliament for the purposes of performing a function on behalf of the Government (such as a railway commissioner who is made a corporation sole) may be said to employ persons on behalf of the Crown—though only in the sense that the corporation represents the interests of the Crown in relation to the activities of the corporation. But can the same be said of a public company the relation of the Government to which is that the Government is a shareholder? The fact that the Government owned some shares while other persons owned other shares would not show either that the employees of the company were employed on behalf of the Crown or that they were employed on behalf of the other shareholders. But where the Crown holds all the shares the company is really carrying on its business solely in the interests of the Crown in the same way and to the same extent as in the case of the other authorities mentioned in rule 2. The substance of the matter is the same, whether the corporation is a specially created body or a company formed under a Companies Act. In my opinion the company may fairly be said in such a case to be acting on behalf

H. C. of A.

1949.

THE KING

v.

PORTUS;

EX PARTE

FEDERATED

CLERKS

UNION OF

AUSTRALIA.

Latham C.J.

1949. THE KING v. PORTUS; EX PARTE FEDERATED CLERKS UNION OF AUSTRALIA.

H. C. OF A. of the Crown in a commercial and industrial sense, though not in the strictly legal sense in which such an expression would be used in the law of agency. I am therefore of opinion that the objections to the jurisdiction of the commissioner fail and that the order nisi should be discharged.

> RICH J. I cannot usefully add anything to what has been stated in the judgments of my colleagues and I agree that the order nisi should be discharged.

> The prosecutor, which is an industrial organization, DIXON J. seeks a writ of prohibition directed to a Conciliation Commissioner prohibiting him from determining by award or order an industrial dispute alleged to exist between another industrial organization and Qantas Empire Airways Ltd. The second organization is the Australasian Transport Officers' Federation. The alleged industrial dispute is the result of the delivery by the Federation of a log of demands upon Qantas Empire Airways Ltd. and the refusal or failure of that company to accede to the demands. prosecutor denies that an industrial dispute extending beyond the limits of a State was thus created. The chief ground for the denial is that the constitution of the Federation is such that no-one in the employment of the company could be a member of the Federation. If no-one in the service of the company would be eligible for membership of the organization, the organization could not represent or stand in the place of the relevant class of employees for the purpose of making demands.

> The Federation was formed as an organization of such salaried officers of the railways of the States as have supervision over other employees or are employed in administrative work. It was limited to officers employed at an annual salary by the Railways Commissioners of the States, the Commissioner of Road Transport and Tramways in New South Wales and the Railway Construction Branch of the Board of Land and Works in Victoria. But by an amendment the class eligible was extended to persons employed at a salary rate in connection with air transport who are salaried officers of the Crown, an expression that was defined. officers of the Crown" was defined to mean "Employees of any person or corporation employing persons at an annual salary rate on behalf of the Government of the Commonwealth or any of the States." The log of demands covers persons employed by the company at annual salary rates in connection with air transport and there are persons so employed who are de facto members of the Federation. But the prosecutor says that the company does not

employ any one "on behalf of the Government of the Commonwealth or any of the States" and therefore that none of its employees is eligible de jure to be members of the Federation. The prosecutor says that consequently, for the purpose of the log of demands, the Federation cannot be considered to represent them or any class who might become employees of the company. The Federation denies this and says that, though incorporated as a trading company, the relation of Qantas Empire Airways Ltd. with the Commonwealth is such that, within the meaning of the constitution of the Federation, the employees of that company are employed "on behalf of the Government of the Commonwealth."

The company is incorporated in Queensland under The Companies Act of that State. A large number of shares in the company was held by British Overseas Airways Corporation. These shares were acquired by the Commonwealth in pursuance of the Qantas Empire Airways Agreement Act 1946, a statute passed by the Federal Parliament for the purpose of authorizing the purchase of the shares and appropriating the money to pay for them. All the remaining shares in the company were acquired by the Commonwealth under an agreement confirmed by the Qantas Empire Airways Act 1948. In a preamble that Act recites the earlier statute and the purchase of shares thereunder. It also recites the acquisition of the remaining shares, the desirability of the Commonwealth subscribing to issues of capital and of the Parliament approving the purchase of the The operative provisions of the Act approve remaining shares. accordingly the purchase, approve the subscription of further capital and appropriate as the price of the shares purchased a sum of £4,550,000 and for subscription to further issues a sum of £2,000,000. The Commonwealth thus became the owner of all the shares in the Company. Doubtless to prevent the reduction of the number of members below the requirement of the company law a few single shares were placed in the names of nominees. As the owner of all the shares, the Commonwealth caused the articles of association of the company to be altered so that the sole right to appoint the directors was vested in the Minister for Air. former directors went out of office. The directors appointed by the Minister were given by the articles varying terms of office, subject to removal by the Minister for inability, inefficiency or misbehaviour. The Minister was authorized to fix the remuneration of the directors.

The question is whether in these circumstances the relation of the company to the Commonwealth is such as to satisfy the expression in the constitution of the Federation "on behalf of the Government of the Commonwealth." In no small degree the answer depends upon the meaning of the expression in the context in which it

H. C. of A.

1949.

THE KING
v.

PORTUS;
EX PARTE
FEDERATED
CLERKS
UNION OF
AUSTRALIA.

Dixon J.

1949. THE KING v. PORTUS; EX PARTE FEDERATED CLERKS Union of AUSTRALIA.

Dixon J.

H. C. OF A. occurs. As a shareholder, even the sole beneficial shareholder, the Commonwealth has no property legal or equitable in the assets of the company nor is the Commonwealth a principal acting by the company as its agent. But plainly the rule of the Federation when it uses the words "on behalf of" is not contemplating the legal relation of principal and agent. The language as well as the context and subject matter shows that. For the rule speaks of the employees of the person or corporation who employs persons on behalf of the Commonwealth. The person or corporation is the employer, the principal in the contract of service. The employer is not the Crown or Government. The expression "on behalf of" is used in a wider sense. It means for the purposes of, as an instrument of, or for the benefit and in the interest of, the Commonwealth. The reference to the Railways Commissioners and other bodies of the States shows that what is in mind is a corporation set up and used by the Government as an authority in which the undertaking is vested. Perhaps the possibility was not foreseen of a company registered under the Companies Acts and controlled by Government by means of the share capital. But I think that the arrangements adopted and the use made of Qantas Empire Airways Ltd. bring the case within the meaning of the constitution of the Federation. It does so because of the combined effect of three considerations. Firstly the two Acts of the Federal Parliament operate as legislative declarations or indications of intention that the company shall be "owned" by the Government which shall furnish the capital for the undertaking by subscribing to further Secondly because the Government does hold all the capital. Thirdly because by making the directors the nominees of the Minister an effective control of the undertaking by the Government of the Commonwealth is established. The result is that by a use of the machinery of the company law made under the sanction of Federal statute substantially the same practical result is produced as if a statutory authority were set up. The difference is in form and in the further fact that the form is such that the Executive Government is left in a position to dispose of the shares or some of them or to issue further shares to strangers without the intervention of the legislature. Unless and until such a course is adopted, the difference does not seem to me to be enough to take the case out of the category which the constitution of the Federation describes. The words "on behalf of" aim at a relation with the Commonwealth in which the corporate employer is an agency or instrument of the Commonwealth acting in the public interest and that I think the company has become.

A second ground was taken in support of the contention that there was no industrial dispute extending beyond the limits of one State. It was that the number of employees of Qantas Empire Airways Ltd., being members of the Federation, stationed outside New South Wales was so insignificant that the inter-Stateness of the dispute was "unreal." The time has gone by when the unreality of paper disputes formed a subject of inquiry or consideration and at this date it would be "unreal" to attempt to insist on a quantitative standard of disputants across the border as a condition of the extension of a dispute beyond a State. The number in this case is small but it is not so small as to be obviously impotent industrially.

In my opinion the order nisi should be discharged.

McTiernan J. In my opinion the material before the Court shows that there was an industrial dispute extending beyond the limits of one State between the workers employed by Qantas Empire Airways Ltd., who were members of the respondent organization, on the one hand and that company on the other hand. dispute arose when the company did not accede to the demand made upon it for an alteration of the rates and conditions upon which the company employed its workers. The demand was made by the organization as the representative of its members employed by the company. There were four of its members in Queensland and ninety-eight in New South Wales, for whom these altered rates and conditions were demanded. These members were employed by the company. The dispute arose between the company and all these workers. A dispute in the ordinary sense may exist if there is only one disputant on either side. One may be sufficient on the employers' side to make an industrial dispute. A minimum number on the workers' side is not necessary to make an industrial dispute with an employer. It is not the number of workers in each State who are parties to an industrial dispute which gives it the character of a dispute extending beyond the limits of a State. The fact that only four workers in Queensland appear to be parties to the present industrial dispute does not permit of the inference that the dispute does not extend beyond the limits of New South Wales. In the absence of any evidence proving that these workers are not parties to the dispute the above-mentioned fact indeed permits the very inference which the applicant says it denies, namely, that the industrial dispute falls within Federal jurisdiction.

The question whether an industrial dispute arose depends upon the authority of the respondent industrial organization to represent any workers employed by the company. It is argued that these

H. C. of A.

1949.

THE KING

v.

PORTUS;

EX PARTE

FEDERATED

CLERKS

UNION OF

AUSTRALIA.

Dixon J.

1949. THE KING PORTUS; EX PARTE FEDERATED CLERKS Union of AUSTRALIA. McTiernan J.

H. C. OF A. workers are not eligible to be members of the organization and therefore it has no authority to represent them. The amended rule of the organization under which they become members has been quoted. It provides that any person is eligible for membership who is a salaried officer of the Crown and is employed at a salary rate in connection with air transport. The rule defines salaried officers of the Crown to mean "Employees of any person or corporation employing persons at an annual salary rate on behalf of the Government of the Commonwealth or any of the States." The Constitution and relation of Qantas Empire Airways Ltd. to the Government of the Commonwealth have already been explained.

The Parliament has not expressly said that this corporation should act "on behalf of" the Crown. Denning L.J. said in Tamlin v. Hannaford (1): "In the absence of any such express provision the proper inference in the case at any rate of a commercial corporation is that it acts on its own behalf even though it is controlled by a Government department." But in this case we are not concerned with the interpretation of an Act of Parliament or with the question whether a corporation has the immunities of an agent of the Crown. The rules of the respondent organization are not artificially drafted and are not concerned with distinguishing between persons or corporations who are and are not agents of the Crown. The words "on behalf of" are not used in a limited sense to mean "as agent." In these rules these words are used in the sense of "in the interests of." The words are capable of describing the relationship between Qantas Empire Airways as an operator of air transport and the Government of the Commonwealth. company was incorporated in the ordinary way with a share capital subscribed by shareholders. But the Commonwealth Government has purchased all the shares but seven and these seven are held by nominees for the Government and it has the sole right to appoint directors. The enterprise conducted by this company is under public ownership, that is Government ownership. The employees of the company are its servants, not the servants of the Government, but they are employed in the interests of the They stand in this general relationship to the Government. Government just as truly as would the employees of a corporation created by statute to conduct a publicly-owned transportation service. The employees of this company employed at an annual salary rate are accordingly eligible for membership of the respondent organization. Consequently it had authority to make demands for those employees upon the company and to represent them before the Conciliation Commissioner. The order nisi should be discharged.

Webb J. I think that the rule nisi should be discharged.

Until 1943 Rule 2 of the Rules and Regulations of the respondent Federation was confined to certain State Railway employees, that is to say to Crown employees in the true sense. In every State the railways, including construction work, have been controlled by corporations created by Parliament for the purpose. But in 1943 the rule was amended to include certain "salaried officers of the Crown," which expression was defined to mean "Employees of every person or corporation employing persons at an annual salary rate on behalf of the Government of the Commonwealth or any of the States." The question arises whether this definition is wide enough to cover employees of Qantas Empire Airways Ltd. with which the respondent Federation claims to have an inter-State industrial dispute. All the shares in Qantas are now owned by the Commonwealth Government and its directors are appointed and removed by a Commonwealth Minister who also fixes their remuneration. In other words Qantas is carrying on an activity on behalf of the Commonwealth Government to the same extent that the railways are being carried on for the State Government by corporations created by Parliament for the purpose. The difference is that Qantas is not a Crown corporation but an ordinary company and so its employees are not Crown employees. However I think that, without doing violence to the language, they may for the purpose of this union rule be regarded as being employed on behalf of the Commonwealth Government.

As to whether there is evidence of a real inter-State dispute between the respondent Federation and Qantas, there is, in addition to the considerations mentioned by the Chief Justice as indicating the existence of a real inter-State dispute, the fact—not contested—that employees in the air transport industry move from State to State and so their numbers may vary from time to time in the different States. Although there were only four employees in Queensland who were members of the respondent Federation when this matter was before the conciliation commissioner there were ninety-eight in New South Wales and a probability that the number in Queensland would increase by transfer from New South Wales.

Order nisi discharged with costs.

Solicitors for the prosecutor: C. Jollie Smith & Co., Sydney, by J. M. Lazarus.

Solicitors for the respondent Federation: G. W. L. Charker & Co., Sydney, by P. H. Kearney.

H. C. of A.

1949.

THE KING

v.

PORTUS;

EX PARTE

FEDERATED

CLERKS

UNION OF

AUSTRALIA.

E. F. H.