[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

PORTUS AND ANOTHER;

Ex parte AUSTRALIAN AIR PILOTS' ASSOCIATION.

H. C. of A. 1953.

Melbourne, *Sept.* 21, 22;

Sydney, *Dec.* 17.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Industrial Law (Cth.)—Conciliation and arbitration—Industrial dispute—Between employers—Airline operating industry—Log of claims served by one employer on organization of employees and on other employers—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*xxxv.*).

In a covering demand served with a log of claims, an airline company claimed that the wages and conditions, under which aircraft pilots of employers generally in " the airline operating industry " were working, should be altered and that the log should govern the wages and conditions of employment of all such employees throughout the Commonwealth, whether members of the registered organization of employees or not. The log was addressed to thirteen named employers, the registered organization of employees and all other pilots employed by the employer serving the log and the thirteen named employers. It was served only on the thirteen named employers and the registered organization of employees. In a clause in the log headed " area and incidence " it was stated that the log should be binding on the employer serving it and on the thirteen named employers in respect of their pilots whether members of an organization or not and on the registered organization of employees and on all the members thereof.

Held, by *Dixon* C.J., *Fullagar* and *Taylor* JJ. (*Webb* and *Kitto* JJ. dissenting), that an industrial dispute within s. 51 (xxxv.) of the Constitution cannot arise from a demand by one employer upon another employer, unconnected except by the fact that their businesses are of the same description, that the employer upon whom the demand is made shall pay a given wage to his employees or provide them with specified conditions.

Held further, by *Dixon* C.J., *Fullagar* and *Taylor* JJ., that the log was to be read as making a distributive demand upon each party served and was, accordingly, capable of giving rise to an industrial dispute between the employer serving it and the registered organization of employees in relation to employees of the said employer.

ORDER NISI for prohibition.

Qantas Empire Airways Ltd. served a log of claims, dated 4th September 1952, on Airlines (W.A.) Ltd., Ansett Airways Pty. Ltd., the Australian National Airlines Commission, Australian National Airways Pty. Ltd., British Commonwealth Pacific Airlines Ltd., Butler Air Transport Pty. Ltd., Connellan Airways Ltd., East-West Airlines Ltd., Guinea Airways Ltd., MacRobertson Miller Aviation Co. Pty. Ltd., Queensland Airlines Pty. Ltd., South Coast Airways Pty. Ltd. and Trans Oceanic Airways Ltd. (In Liquidation) all of which companies were employers of air pilots, and on the Australian Air Pilots' Association, a registered organization of employees under the provisions of the *Conciliation and Arbitration Act* 1904-1952.

The covering demand served with the log read as follows :—" To the employers set out in schedule ' A ' attached hereto and to the Australian Air Pilots' Association, a registered organization of employees, and to all members of such organization and to all other aircraft pilots employed by Qantas Empire Airways Ltd. and by the employers set out in schedule ' A ' hereto.

Qantas Empire Airways Ltd. claims that the wages and conditions of employment under which their aircraft pilots and aircraft pilots of employers generally in the airline operating industry are at present working should be altered and that the accompanying log should govern the wages and conditions of employment of all such employees throughout the Commonwealth of Australia, whether such employees are members of the Australian Air Pilots' Association or not.

It is claimed that any agreement or award based upon or arising out of the service of the accompanying log shall contain provisions for the reduction or modification of such rates and conditions or any of them in the event of any change of circumstances occurring during the currency of such agreement or award ; and that in the absence of agreement as to whether any such reductions or modifications shall be made, or as to what reductions or modifications shall be made, all claims relating thereto shall be decided by the Court of Conciliation and Arbitration.

Failing acceptance of the accompanying log within fourteen days of its service upon each employer named in schedule ' A ' attached hereto and upon the Australian Air Pilots' Association, it is intended to submit the same to the Court of Conciliation and Arbitration, to obtain an award of that court based on such log, in settlement of the industrial dispute in the industry to which such log relates."

H. C. OF A. 1953.

THE QUEEN v. PORTUS; EX PARTE AUSTRALIAN AIR PILOTS' ASSOCIATION.

Schedule "A" contained the names of the thirteen employers, which are set out above.

Clause 14 of the log was, so far as is relevant, as follows:— (b) This log shall be binding on Qantas Empire Airways Ltd. and on the employers set out in schedule "A" hereto in respect of all their pilots, whether members of an organization or not, and shall be binding on the Australian Air Pilots' Association and on all members thereof.

The parties served having failed to accede to the demands contained in the log, the alleged dispute arising therefrom came on for hearing on 29th July 1953 before John Hereford Portus, Esq., a conciliation commissioner appointed under the provisions of the *Conciliation and Arbitration Act* 1904-1952, who found, notwithstanding submissions by counsel for the registered organization of employees, that it was open to him to find that an industrial dispute existed between Qantas Empire Airways Ltd. and the thirteen employers served and the registered organization of employees.

On 6th August 1953, on the application of the Australian Air Pilots' Association, as prosecutor, *Fullagar* J. granted an order nisi for a writ of prohibition directed to the above-named J. H. Portus and to Qantas Empire Airways Ltd. on the grounds: (1) That there was no industrial dispute in respect of which the conciliation commissioner could exercise jurisdiction. (2) That the claim dated 4th September 1952 made by Qantas Empire Airways Ltd. could not, having regard to its subject matter, be the foundation of an industrial dispute. (3) That the said claim, in so far as it related to the rates and conditions of employees of other employers than the claimant, did not relate to an industrial matter.

Gregory Gowans Q.C. (with him *Dermot Corson*), for the prosecutor. The log, in claiming to govern the relations between employers generally and employees generally in the industry, is in substance for a common rule. As such, it cannot give rise to an industrial dispute. [He referred to *Australian Boot Trade Employés' Federation* v. *Whybrow & Co.* (1); *R.* v. *Kelly*; *Ex parte Victoria* (2).] It cannot be read down. [He referred to *R.* v. *Findlay*; *Ex parte Victorian Chamber of Manufactures*, per *Latham* C.J. (3); per *Dixon* J. (4), per *Webb* J. (5).] Even if the log were read down it could not give rise to an industrial dispute with the named employers. An industrial dispute presupposes disagreement between people or

(1) (1910) 11 C.L.R. 311.
(2) (1950) 81 C.L.R. 64.
(3) (1950) 81 C.L.R. 537, at pp. 542, 543-544.
(4) (1950) 81 C.L.R., at pp. 549, 550.
(5) (1950) 81 C.L.R., at p. 553.

groups of people who stand in some industrial relation. The relation between competing employers is not an industrial one, but an economic one. That is not sufficient. [He referred to *R.* v. *Kelly*; *Ex parte Victoria* (1).] A claim by an employer upon an organization of employees that the employees of other specified employers should have their rates lowered or hours increased likewise depends on an economic and not an industrial interest. It is different from the industrial interest which employees have in maintaining the rates of pay of non-unionist employees. The principle of the *Metal Trades Employers Association* v. *Amalgamated Engineering Union* (2) has been stated in *R.* v. *Kelly*; *Ex parte Victoria* (1) as depending upon the interest of employees in conditions of other employees. That principle does not extend to a claim by an employer. Otherwise an employer could claim that no work should be done for a competitor. If the log cannot give rise to an industrial dispute with the named employers it cannot give rise to one with the organization of employees. On its face it is intended to bind all the parties to it or none. It does not make a distributive demand upon each party served, but merely one demand on all.

R. Ashburner Q.C. (with him *W. S. Sheldon*), for the respondent Qantas Empire Airways Ltd. The log does not make a claim for a common rule. On its true construction it seeks to bind only the thirteen named employers and their employees and the registered organization of employees. It does not matter that the dispute is between employers. The question is always whether the claimant has a real industrial concern or interest in making the claim. [He referred to *Long* v. *Chubbs Australian Co. Ltd.* (3); *Metal Trades Employers Association* v. *Amalgamated Engineering Union*, per *Rich* and *Evatt* JJ. (4).] The dispute is a dispute as to industrial matters within the meaning of s. 4 of the *Conciliation and Arbitration Act* 1904-1952. The possibility of employer-employer disputes has been recognized. [He referred to *Federated Municipal & Shire Council Employees' Union of Australia* v. *Melbourne Corporation*, per *Isaacs* and *Rich* JJ. (5); *Burwood Cinema Ltd.* v. *Australian Theatrical & Amusement Employees' Association*, per *Starke* J. (6). *Metal Trades Employers Association* v. *Amalgamated Engineering Union*, per *Latham* C.J. (7), per *McTiernan* J. (8) and *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Australian*

(1) (1950) 81 C.L.R. 64.
(2) (1935) 54 C.L.R. 387.
(3) (1935) 53 C.L.R. 143.
(4) (1935) 54 C.L.R. 387, at p. 417.
(5) (1919) 26 C.L.R. 508, at p. 555.
(6) (1925) 35 C.L.R. 528, at p. 548.
(7) (1935) 54 C.L.R., at p. 403.
(8) (1935) 54 C.L.R., at p. 443.

H. C. OF A. 1953.

THE QUEEN v. PORTUS; EX PARTE AUSTRALIAN AIR PILOTS' ASSOCIATION.

Paper Mills Employees' Union, per *Rich* and *Williams* JJ. (1).] Even if no dispute could arise between the employers it could as between the employer serving the log and the registered organization of employees. The agreement or dissent by each party served with the log is not conditional on the agreement or dissent of any other party. The question whether a dispute exists should be considered separately with reference to each party served.

Gregory Gowans Q.C., in reply.

Cur. adv. vult.

Dec. 17.

The following written judgments were delivered :—

DIXON C.J. The proceeding before us is an order nisi for a writ of prohibition directed to a conciliation commissioner. The commissioner has found that an industrial dispute exists between the respondent Qantas Empire Airways Ltd. and the prosecutor, the Australian Air Pilots' Association, which is an organization of employees registered under the *Conciliation and Arbitration Act* 1904-1952, and some thirteen airlines companies, which like the respondent company are employers. He proposes to proceed with the hearing and determination of the industrial dispute, and the prosecutor association seeks a writ of prohibition to prohibit him from doing so. The supposed dispute arises from the delivery of a log of claims by the respondent company to the Air Pilots' Association and to the thirteen airlines companies. The prosecutor association maintains that the delivery of the log could not, and did not, bring about an industrial dispute to which the authority of the conciliation commissioner attached. It could not do so having regard to the demand or demands made and the bodies upon which they were made. The log in fact is an attempt upon the part of an employer to create an industrial dispute between himself on the one side and on the other side an organization of employees and a number of employers engaged in the same kind of business as himself as to the rates of pay and the conditions upon which employees, whether members of an organization or not, shall be employed by the employer delivering the log and by the employers to whom it is delivered. The language of the demand goes even further, because it is not limited to employers to whom the log is delivered but claims that the wages and conditions under which aircraft pilots of employers generally in what is called the "airline operating industry" are working should be altered and that the log should govern the wages and conditions of employment of all

(1) (1943) 67 C.L.R. 619, at p. 631.

such employees throughout the Commonwealth whether members of the organization or not. But for all that appears no practical difference may exist between the thirteen employers enumerated and the concerns covered by the expression " employers generally." According to the covering demand, the log was addressed to the employers enumerated, the organization and all other pilots employed by the respondent company and by the companies enumerated. But although the log was thus addressed to employees it was not served upon them or any of them. It was served upon the thirteen employers and the prosecutor association of employees. In a clause of the log headed " area and incidence " it is stated that the log shall be binding on the respondent company and on the employers enumerated in respect of their pilots whether members of an organization or not and on the prosecutor association and on all the members thereof.

From the foregoing it will be seen that as a demand upon employers, that is, the thirteen enumerated airline companies, its purpose was to require that they should afford to all their employees (that is, independently of their membership of the prosecutor association) the rates of pay and the conditions proposed. As a demand upon the association it could only mean that the association was required to accept those rates and conditions. The rates of pay are demanded as minimum rates of remuneration and it may be supposed that the conditions are demanded as those which shall exclusively govern the rights and liabilities of the employer and employees upon the subjects with which they deal. But that is not expressly stated. If a demand upon an employee that he shall accept a rate of pay as a minimum wage is interpreted as meaning that the employer requests that the employee individually shall agree that he, the employer, shall not pay him less than the specified rate, it does not appear to make much sense. But when such a demand is addressed to an organization of employees no doubt it may be given a real significance, one arising from the position occupied by organizations of employees in collective bargaining. Probably it is to be regarded as a request that the organization shall concur in the sufficiency of the rate for the purpose of any obligation not to pay his employees less than a minimum rate imposed upon the employer either by agreement between him and the organization or by external authority at the instance of the organization. The log now in question may perhaps be thus understood in so far as it is a demand upon the prosecutor association. In so far as it is a demand upon the thirteen employers its significance can hardly be that. Indeed it appears simply to

H. C. OF A. 1953.

THE QUEEN v. PORTUS; EX PARTE AUSTRALIAN AIR PILOTS' ASSOCIATION.

Dixon C.J.

require them to pay not less than the minimum rates and to provide the specified conditions of employment. No doubt logs of demands are prepared as nothing but instruments opening the way to arbitral tribunals. When they are so conceived by those who prepare them it is easy to understand that their true design should be forgotten and that they should be framed as claims for provisions in awards rather than as requests that the party to whom they are addressed should actually do this and that in the practical pursuit of daily affairs. In *Caledonian Collieries Ltd.* v. *Australian Coal & Shale Employees' Federation* [*No.* 2] (1) reference is made to " the confusion which attends a jurisdiction which can be exercised when, and only when, an inter-State dispute exists, but when it does arise enables the arbitrator in some measure to regulate industry. The two-State dispute must exist between the parties antecedently to the award or agreement which composes it, and the dispute must arise out of their disagreement about the manner in which they shall regulate their own industrial relations. Experience has shown that the desire for an award regulating industrial relations has been the cause of the creation and extension of industrial disputes which the Arbitration Court exists to prevent and settle " (2). Confusion of this kind must beset the preparation of logs to be delivered by employers. For the greater part of such a log is inevitably concerned with conditions to be performed by the employer himself and not by the members of the organization of employees upon which the log is served. A log delivered by one employer to other employers is a new conception. When the claimant employer formulates minimum rates and industrial conditions for the other employers to comply with it might be from a desire that the other employers should not give their employees less and so run their businesses at lower labour costs or from a desire that the other employers should not give employees more and so draw labour away and pursue a course tending to put up labour costs in the industry. It would depend on the prevailing conditions of business and employment at the time. But whatever the purpose of serving the log might be, it seems quite clear that an industrial dispute within s. 51 (xxxv.) of the Constitution cannot arise from a demand by one employer upon another employer, unconnected except by the fact that their businesses are of the same description, a demand that the employer upon whom it is made shall pay a given wage to his employees or provide them with specified conditions.

The two employers stand in no industrial relation one to another. The fact that they compete with one another for business or that

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

(2) (1930) 42 C.L.R., at p. 580.

they compete with one another for labour establishes no industrial relation between them. "It is . . . well established that to constitute an industrial dispute there must be disagreement between people or groups of people who stand in some industrial relation upon some matter which affects or arises out of the relationship. Such a disagreement may cause a strike, a lock-out, and disturbance and dislocation of industry; but these are the consequences of the industrial dispute, and not the industrial dispute itself, which lies in the disagreement. It is only because this meaning of the words 'industrial dispute' was adopted that the Court of Conciliation and Arbitration has been able to exercise the function of prescribing rates of wages and conditions of employment at the instance of organizations which have done little more than formulate and deliver logs of demands with which employers have not complied": *Caledonian Collieries Ltd.* v. *Australian Coal & Shale Employees' Federation* [*No.* 1] (1).

The conception expressed by the words "disagreement between groups of people who stand in some industrial relation upon some matter which affects or arises out of the relationship" is capable of a very flexible application. Thus the interest which an organization of employees possesses in the establishment or maintenance of industrial conditions for its members places it in sufficient relation with employers who might, but do not, employ them to enable the organization as representing that group to dispute with the employers concerning their right to employ persons on less favourable terms: cf. per curiam *R.* v. *Kelly*; *Ex parte Victoria* (2) with reference to the *Metal Trades Employers Association* v. *Amalgamated Engineering Union* (3). But what industrial interest has one trader or entrepreneur in the wages or conditions which a rival trader or entrepreneur pays or affords to his employees? If one wool grower complains to another that he is providing accommodation for shearers of too high a standard and demands but in vain that he lower it, does that amount to an industrial dispute between the two wool growers? If one manufacturer's labour costs enable him to undersell his rival whose labour costs are higher, can the latter by demanding that the former (1) pay higher wages or (2) employ more labour, create an industrial dispute between them? If one enterprise provides more amenities for its employees than another, can it demand of the other that it provide its work people with similar amenities and on a failure or refusal to comply submit the question to a conciliation commissioner as an industrial dispute?

(1) (1930) 42 C.L.R. 527, at pp. 552, 553.
(2) (1950) 81 C.L.R. 64, at p. 82.
(3) (1935) 54 C.L.R. 387.

H. C. OF A. 1953. THE QUEEN v. PORTUS; EX PARTE AUSTRALIAN AIR PILOTS' ASSOCIATION. Dixon C.J.

These questions answer themselves. The interest, whether it be considered common or diverging, on which the demands are based is not industrial. It is beside the point that the demand refers to the industrial relations between the employer to whom it is addressed and his employees. There is not such a relation, indeed there is no relation at all subsisting between the two employers. They are competitors in business: not actual or potential co-operators in the performance of productive or other industrial work. The disagreement is not one between parties whose accord is required or expected if industry is to be carried on regularly and without impediment or disturbance.

The demand made by the respondent company's log of claims against the thirteen employers therefore lacks the foundation which would give the failure of the employers to agree in it with the respondent the character of an industrial dispute. So far, if at all, as the log can be construed as a demand upon the prosecutor organization not to permit or to prevent its members accepting or continuing employment with any of the thirteen other employers except on the terms contained in the log, it is for analogous reasons incapable of supplying the foundation of an industrial dispute. The absence of industrial interest or industrial relation with reference to the thirteen airlines companies on the part of the respondent company leaves it without any basis for raising a dispute with the prosecutor association upon the terms and conditions upon which its members serve the thirteen companies.

So far as the log makes demands upon the prosecutor association with reference to the rates of pay and conditions upon which its members are employed by the respondent company there is no reason why an industrial dispute should not arise out of the failure to comply with the demands, unless the log is not to be understood as applying distributively to each of the parties upon which the demand is made and is to be understood as applying only collectively to all of them together.

The prosecutor association maintains that the log is not to be read as making a distributive demand upon each party served for the minimum rates and conditions set out in the claims. What the log seeks to do, says the prosecutor, is to impose on the entire industry described as the "airline operating industry" a uniform obligation to observe the same set of terms and conditions with respect to the employment of aircraft pilots. In other words it is an attempt to embrace the whole industry under one industrial regulation and has no other rationale; it was never intended, and cannot be applied, as a series of demands upon each party to whom

it is directed independently of the others. That it was intended to embrace the whole industry under one industrial regulation with respect to air pilots appears quite certain. The claim is expressed to be for the wages and conditions of aircraft pilots of employers generally in the airline-operating industry. Further it is described as a claim that the log should govern wages and conditions of employment of all such employees throughout the Commonwealth whether members of the prosecutor association or not. But it is one thing to say that it is a claim that all in the industry should be obliged to conform and another to deny that it is also capable of application to each independently. To deny this means that the prosecutor association would not understand the log as claiming that its members should be employed by the respondent company delivering the log at the rates and on the conditions it specifies whether or not any other employer agreed or was bound to do so. It that were so and the log is to be understood as either applying to all the employers or not at all, then the impossibility of raising by means of the log an industrial dispute with the thirteen other employers upon whom it was served would leave it without any operation in the case of employees of the respondent company, members of the prosecutor association. There is indeed much in the language of the demand covering the log of claims which would support a conclusion that it was sought to bind all or none. If such language were employed in some instrument of a different kind, for example in a contract, it might be right to give it that effect. But the very purpose and nature of a demand to adopt a log of rates of pay and conditions of employment is against such an interpretation. Its purpose is to evoke agreement or dissent from each party to which it is addressed in relation to his operations or to the operations of those whom he represents. If it is addressed to an employer he may agree, dissent or fail to agree. In case of his dissent or constructive dissent he may become a disputant, but whether he agree or not the course taken in respect of the log can affect him only in reference to his own operations and employees. If it is addressed to an organization of employers or of employees again the agreement or dissent of the organization must be that of the organization considered as a separate legal person and the result can affect only the group it represents, namely its present and future members. It is not impossible, of course, that the claim and therefore the agreement of dissent may be all conditional on the contingency of all others in the industry becoming bound by the log. But it would be very unpractical. If some agreed and others dissented what would be the area of the dispute, and would

H. C. OF A. 1953.

THE QUEEN v. PORTUS; EX PARTE AUSTRALIAN AIR PILOTS' ASSOCIATION.

Dixon C.J.

the condition cover any variation of the precise terms of the log by the conciliation commissioner or by agreement with other parties?

When the demand is considered in the light of its purpose the proper conclusion seems to be that it was meant to operate distributively and would be so understood by the recipients.

The result is that it is capable of giving rise to an industrial dispute as between the respondent company and the prosecutor association. No question has been raised before us of the genuineness of the demand or of the reality of any of the claims nor of the possibility or impossibility, capacity or incapacity, of any individual claim as the subject matter of a dispute. What is before us is the competence of the whole demand to found an industrial dispute.

The foregoing reasons show that an industrial dispute may exist limited to the respondent company and the prosecutor association as to employees of the respondent company but not otherwise.

The order nisi should be made absolute prohibiting the conciliation commissioner from further proceeding or dealing with the alleged industrial dispute except in so far as it exists between the respondent company and the prosecutor in relation to employees of the respondent company.

The respondent company should pay the costs of the prosecutor.

WEBB J. I think it was open to the respondent conciliation commissioner to hold as he did that the claim of the respondent company was not for a common rule and invalid on that account. It is true that in a memorandum accompanying the log of claims the respondent company described the claims as being for wages and conditions of employment of aircraft pilots of "employers generally". But the log itself claims that it should become binding on the employers whom it names. The commissioner was, I think, justified in taking the log as expressing the purpose of the claimant as to the scope of the claims in this and other respects.

Objection to the jurisdiction of the commissioner was taken by the prosecutor without putting any facts before him, and before he had an opportunity of discharging his duty under s. 14 of the *Conciliation and Arbitration Act* 1904-1952 and regs. 17, 18 and 19. If I understand this attitude of the prosecutor before the commissioner, it was because the objection to his jurisdiction was based on the ground that the dispute was one indivisible dispute and such as could not be found to be an industrial dispute within the meaning of the Act, or indeed of the Commonwealth Constitution. I think however it was open to the commissioner to find there was an industrial dispute limited to the extent of the service of the claims.

I can see no reason why an employer, whatever may be his motive or purpose in so doing, cannot validly make demands on other employers in the same industry, at all events if they have the legal power to concede demands of the kind and the demands actually made are in respect of industrial matters as defined by s. 4 of the *Conciliation and Arbitration Act* 1904-1952. There is nothing before this Court to indicate that the employers have not the legal power to concede the claims in the log. The motive or purpose of the claimant in making them may be economic, e.g., the protection of the business of the claimant in competition with the other employers; but, in the absence of express provision to the contrary in the Act, I do not see why that should invalidate the claim, even if the claimant should frankly acknowledge that the wages and conditions of employment sought to be imposed are not an end in themselves, that they are not sought for their own sake, but only to assist the claimant in competition with the other employers. Whatever may be the motive or purpose of the claimant, if such a claim is rejected by the other employers an industrial dispute arises and there is jurisdiction to make an award on compliance with prescribed conditions. Even an abuse of a statute does not necessarily give rise to invalidity. However, in proper cases the Arbitration Court or a conciliation commissioner may see fit to exercise the powers conferred by s. 40 (*d*) of the Act by refusing to make an award. Abuses of the Act may to a large extent, if not entirely, be prevented under that section. But this application involves no such abuse.

Although I am not aware of any case in which it was necessary to decide whether an employer and employer industrial dispute can exist, powerful former members of this Court have in their judgments expressed the view that there can be such a dispute. After stating that industrial disputes occur in relation to operations in which capital and labour are contributed in co-operation, *Isaacs* and *Rich* JJ. added that industrial disputes included disputes between employers and employers: *Federated Municipal & Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (1). In *Burwood Cinema Ltd.* v. *Australian Theatrical & Amusement Employees' Association* (2), *Starke* J. said that an industrial dispute is constituted, both historically and in point of fact, "perhaps between employers themselves." In *Metal Trades Employers Association* v. *Amalgamated Engineering Union* (3), *McTiernan* J. also took the view that there could be an industrial dispute between employers and employers. In *R.* v. *Commonwealth Court of Con-*

(1) (1919) 26 C.L.R. 508, at p. 555.
(2) (1925) 35 C.L.R. 528 at, p. 548.
(3) (1935) 54 C.L.R. 387, at p. 443.

H. C. OF A. 1953.

THE QUEEN v. PORTUS; EX PARTE AUSTRALIAN AIR PILOTS' ASSOCIATION.

Webb J.

ciliation and Arbitration; *Ex parte Australian Paper Mills Employees' Union* (1), *Rich* and *Williams* JJ. said that a dispute that affects the relations of employees and employees is an industrial dispute.

None of their Honours said anything in the cases referred to, or in other cases as far as I am aware, to suggest that in expressing these views they had in mind a kind of relationship between employers and employers that does not or cannot exist here. The cause that gives rise to disputes between employers is always the same as that which brings about the disputes between employees, namely, the desire to secure, or maintain, or increase a share of the proceeds of those products or services the production or provision of which for human consumption or use constitutes the industry. And it is always the same cause that promotes the unquestioned industrial disputes between employees and employers. Why action to give effect to this desire can bring about an industrial dispute in the one case but not in the other cases I am unable to see. I could understand the distinction if the activities of the employees alone give an industry its claim to be regarded as such. But we speak of employers as industrialists; and it seems to me that it is proper to refer to a dispute among industrialists about wages or other conditions of employment as an industrial dispute. If it be said that such a dispute was not contemplated when s. 51 (xxxv.) of the Constitution was enacted it is as true to say that only industrial disturbances beyond the capacity of any one State to cope with them were contemplated; and that disputes brought about by a simple demand and its rejection were not; certainly not disputes initiated by a body given statutory authority for the very purpose of assisting in the prevention or settlement of inter-State industrial disputes. But we are not invited to review the decisions of this Court in which the broader view of the meaning of the term "industrial disputes" in s. 51 (xxxv.) has been taken, on the ground that the term "industrial disputes" has in those decisions been the subject of expansion and not of interpretation, and that to hold now that "industrial disputes" include employer and employer disputes would be to further expand the term; or on any other ground.

I would discharge the order nisi for prohibition.

FULLAGAR J. In this case I have had the advantage of reading the judgment prepared by the Chief Justice, and I find it sufficient to say that I agree with it.

(1) (1943) 67 C.L.R., 619 at p. 631.

KITTO J. I regret that there should be difference of opinion in this case, but I find myself unable to agree in the view which is taken by the majority of the Court. I shall state my reasons as briefly as I can, for elaboration would serve no useful purpose.

The basis of fact upon which the question before us has to be considered appears to be as follows :—(a) a three-cornered dispute exists in the airline-operating industry and extends beyond the limits of any one State ; (b) the disputants are an employer Qantas Empire Airways Ltd., a union of employees the Australian Air Pilots' Association, and thirteen employers other than Qantas ; (c) the dispute arose by the making of a demand by Qantas upon the union and the other employers, and the failure by the union and those employers to concede the demand ; (d) the subject of the dispute is the question whether the provisions contained in a certain log served by Qantas on the other disputants shall be made binding upon the union and its members and upon all fourteen employers, as prescribing the rates of pay and conditions of employment to be observed by the employers as minimum requirements in respect of all their pilots whether members of the union or not. Some questions as to the true meaning of the relevant documents were debated during the hearing, but I do not propose to deal with them in detail. It is enough to say that the foregoing states the position as I believe it to be.

The substantial question in the case is whether such a dispute, brought about, as I have said, by the non-acceptance of a demand made by one employer in an industry upon a union of employees in that industry and other employers therein, can be an industrial dispute within the meaning of the *Conciliation and Arbitration Act* 1904-1952. It falls, clearly enough, within the literal terms of the definition provided in s. 4 of that Act, for it is a dispute, extending beyond the limits of any one State, as to matters which satisfy the definition of " industrial matters ", being matters not only pertaining to the relations of employers and employees but also being within several of the specific heads which the definition contains. But a dispute cannot be an industrial dispute to which the Act on its true construction applies, unless it is of the kind to which s. 51 (xxxv.) of the Constitution refers. The answer to the question before us must therefore depend upon the limiting effect to be given to the word " industrial ", as it is used in the Constitution in association with " disputes ".

There has been no decision of this Court holding that a dispute in which the only disputants are employers can be an industrial dispute in the constitutional sense, though dicta have suggested

H. C. OF A. 1953.

THE QUEEN v. PORTUS; EX PARTE AUSTRALIAN AIR PILOTS' ASSOCIATION.

Kitto J.

the possibility. The difficulty which these dicta leave unresolved may be described as the difficulty of imagining a case in which the relation existing between employers, the nexus which the industry provides between them, could be described as one of co-operation, using that word in the sense it bears when one speaks of the co-operation between management and labour, or of labour and labour, in producing the goods or services which the industry exists to produce. I should think that, consistently with usage already long-established when the Constitution was framed, a dispute cannot be called an industrial dispute unless, not only does it bear in point of subject-matter upon the working together of management and labour in an industry, but the labour side of the industry is represented by one or more of the contending parties in it.

The parties to the dispute under consideration here, which admittedly concerns matters germane to the co-operation of labour and management in the airline-operating industry, include an organization of employees in that industry, the organization being found in opposition to one, if not to more, of a group of employers. The dispute, it seems to me, is not appropriately described as a dispute between one employer and his competitors in the industry. It is a dispute in which all fourteen employers and a union of employees are embroiled, as to what shall be the tariff of minimum wages and conditions of employment, to be binding upon the fourteen employers in relation to all their employees and upon the union and its members.

If the union had chosen to serve the selfsame log upon the fourteen employers, demanding that they agree to become bound by its terms as prescribing minimum standards in respect of all their employees whether members of the union or not, and the employers had resisted the demand, it would be conceded on all hands that an industrial dispute had arisen. Likewise, if the fourteen employers had jointly made a similar demand on the union, and the union had rejected the demand or failed to concede it, I suppose again there would be general agreement that an industrial dispute existed. It could hardly matter that the employers had anticipated a demand by the union, instead of waiting to receive a log from it and then serving a counter-log. The disputants would be the same, and the subject of their disagreement would be the same.

I have not been able to see what difference it makes that the employers do not see eye to eye with one another on the subject and therefore have not acted in unison. When just such a log as they might have joined in serving on the union is served by one of them on the union and the others, and the union and the employers

served with the log expressly or tacitly reject it, you still have the same disputants, though differently grouped, and you still have the same subject of disagreement. We are here dealing with a constitutional power which, I should have thought, is concerned with all inter-State disputes over industrial matters, if they intrude into the concord of management and labour; and where such a dispute exists I am afraid I do not appreciate why it matters, for our present purpose, who started the argument, or who affirms and who denies.

Of course, you have here some people in disagreement with each other (the employers) who are rivals and not co-operators in the industry; and if their disagreement *inter se* is dissected out and considered by itself as a thing apart from the general dispute, it must be acknowledged to be a dispute which is not industrial. But I am not aware of any legal or practical reason why we should decline to see the dispute as it is, and see it whole.

Here we have fourteen employers and a union of employees with a log of wage rates and conditions of employment in front of them, and we find dissension existing amongst them as to whether the minimum requirements to be prescribed for regulating the employment of labour in the establishments of the employers shall be those which are set out in the log. To deny that in these circumstances there is an industrial dispute in the relevant sense is to attribute to the concept a narrowness and rigidity which, if I may say so with the greatest respect, seems to me out of keeping with the practical nature of the subject.

In my opinion the order nisi should be discharged.

TAYLOR J. I am in full agreement with the reasons of the Chief Justice and concur in the order proposed by him.

Order absolute for writ of prohibition prohibiting the respondent conciliation commissioner from further proceeding or dealing with the alleged industrial dispute except in so far as it exists between the respondent company and the prosecutor in relation to the employees of the respondent company. Respondent company to pay the costs of the prosecutor.

Solicitors for the prosecutor, *Pearce & Webster*.

Solicitors for the respondent, Qantas Empire Airways Ltd., *Dawson, Waldron, Edwards & Nicholls*, Sydney, by *Moule, Hamilton & Derham*, Melbourne.

R. D. B.