[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

GRAZIERS' ASSOCIATION OF NEW SOUTH WALES AND OTHERS;

Ex parte AUSTRALIAN WORKERS' UNION.

H. C. of A. 1956.

SYDNEY, *April* 10-12;

MELBOURNE, *June* 15.

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

Industrial Arbitration (Cth.)—Employers' organisations—Service of log of claims on union—Claim for minimum rates of pay and conditions in respect of non-unionist employees—Rejection of claim by union—Whether industrial dispute created—Authority of conciliation commissioner to make interim award— Prohibition—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*xxxv.*)—*Commonwealth Conciliation and Arbitration Act* 1904-1955 (*No.* 13 *of* 1904—*No.* 54 *of* 1955), *s.* 4.

A demand made upon a union of employees by certain employers' organisations that they should be bound in respect of employees not members of such union by terms as to minimum rates of pay and conditions cannot, simply on the ground that the union does not accede to it, result in a dispute giving rise to constitutional and statutory authority in a conciliation commissioner to make an award in respect of the terms claimed; for, the assent or dissent of the union is completely irrelevant to the thing demanded, namely the minimum which the employer is to be obliged to pay his employees who are not members of the union and the conditions of employment he is to afford them.

So *held* by *Dixon* C.J., *McTiernan*, *Webb*, *Fullagar* and *Kitto* JJ. (*Taylor* J. dissenting).

A union of employees does not represent persons who are not and do not become members. It represents those persons who are members from time to time, present and future members.

Essential basis of *Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (1925) 35 C.L.R. 528, explained by *Dixon* C.J., *McTiernan* and *Kitto* JJ.

Metal Trades Employers Association v. *Amalgamated Engineering Union* (1935) 54 C.L.R. 387, discussed and explained by *Dixon* C.J., *McTiernan*, *Fullagar* and *Kitto* JJ.

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PROHIBITION.

Upon application made on behalf of the Australian Workers' Union *Taylor* J., on 24th February 1946, granted an order nisi for a writ of prohibition directed to the Graziers' Association of New South Wales, the Graziers' Association of Riverina, the Graziers' Association of Victoria, the Pastoralists' Association of West Darling, the Pastoralists' Association of Western Australia Inc., the Tasmanian Farmers' Stockowners' and Orchardists' Association and John Hawdon Donovan Esquire, Conciliation Commissioner, to prohibit such respondents from proceeding further in two matters, No. 70 of 1955 and No. 703 of 1955 respectively, so far as they related to persons not members of the prosecutor then or thereafter to be employed by the respondent associations and from proceeding on an interim award made by the said conciliation commissioner on 26th January 1956 and varied on 16th February 1956 so far as it related to the terms and conditions of employment of the said persons. Matter No. 70 of 1955 arose out of the service of a log of claims on the prosecutor by the respondent associations, whilst No. 703 of 1955 arose out of the service of such a log on the respondent associations by the prosecutor. The grounds of the order nisi were that the said conciliation commissioner had no jurisdiction to make an award in relation to terms and conditions of employment of persons then or thereafter to be employed by members of the respondent associations other than of employees members of the prosecutor as no industrial dispute within the meaning of the *Conciliation and Arbitration Act* 1904-1955 existed at any relevant time between the prosecutor and the respondent associations as to the wages and conditions of employment of persons other than of members of the prosecutor.

Further facts appear in the judgments of the Court hereunder.

E. S. Miller Q.C. (with him *L. K. Murphy*), for the prosecutor. The conciliation commissioner had no jurisdiction to make an award binding the respondent employers to pay the same rates to non-members of the prosecutor union as to members of such union. The demand made by the employer organisations upon the prosecutor that there should be inserted in the award obligations binding the employers in respect of the payment of rates and observance of conditions in respect of the employment of non-unionists was a demand with which the prosecutor could neither comply nor fail to comply. It was a demand in which the prosecutor had no interest and its refusal to accede thereto cannot give rise to a dispute giving the conciliation commissioner jurisdiction to deal with the

matter. There was between the prosecutor and the respondent employer organisations no dispute as to non-unionists. A dispute has two aspects, first that one party has demanded of another that that other do refrain from doing something, and, secondly, that that other declines to accede to the demand. When this position obtains, there is then a dispute. This was not so in the present case. [He referred to *Metal Trades Employers Association* v. *Amalgamated Engineering Union* (1); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Kirsch* (2).] The principle of the *Metal Trades' Case* (3) as explained in *Kirsch's Case* (4) shows that to found the jurisdiction of the commissioner there must be an industrial dispute. There was a dispute as to what was to be paid to members of the prosecutor but no dispute as to payments to be made to non-members. [He referred to *R.* v. *Kelly*; *Ex parte State of Victoria* (5).] The effect of this award is to attempt to introduce to a large extent a common rule into the Commonwealth statute. The log served on the prosecutor by the employer organisations as to pay and conditions of employment by those organisations of non-unionists in a case where the union makes no demand or counter-demand as to that matter cannot be a proper demand because such demand is not one in relation to the operation of the union or of those whom it represents. [He referred to *Reg.* v. *Portus*; *Ex parte Australian Air Pilots' Association* (6).] There is here no dispute between the prosecutor and the respondent employer organisations as to the particular matter covered by the order nisi. The prosecutor's interest in prohibition rests on two bases, (1) if the assumption of jurisdiction is upheld then it means that the prosecutor is tied to an arbitration concerned with matters not within the dispute and (2) if it is upheld, it could inevitably be claimed that persons can gain the same benefits with respect to awards without being members of the organisation. The order nisi should be made absolute.

B. P. Macfarlan Q.C. (with him *W. S. Sheldon*), for the respondents other than the respondent conciliation commissioner. The dispute between the parties is one both as to its existence and as to the form of the award which is covered by the principle of the *Metal Trades' Case* (3) and also that of *Airline Pilots' Case* (7). Not only

(1) (1935) 54 C.L.R. 387, at pp. 402-404, 405, 406, 407, 408, 410, 411, 414, 416, 418, 419, 422, 423, 429, 432, 440, 441.
(2) (1938) 60 C.L.R. 507, at pp. 523, 524, 525, 526, 527, 528, 537, 538, 541, 542.
(3) (1935) 54 C.L.R. 387.
(4) (1938) 60 C.L.R. 507.
(5) (1950) 81 C.L.R. 64, at pp. 81, 82.
(6) (1953) 90 C.L.R. 320, at pp. 324, 328, 329, 330, 332, 333, 335.
(7) (1953) 90 C.L.R. 320.

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is it competent for one of these parties to make a demand such as has here been made on the other, but it is competent for the commissioner in the settlement of the ensuing disagreement to make an award binding upon the parties to that disagreement, albeit in relation to persons, strangers to the dispute. The present dispute as to rates to be paid by employers bound by the award to persons not members of the prosecutor is a proper dispute for the purpose of the *Conciliation and Arbitration Act* 1904-1955. [He referred to *Metal Trades Employers Association* v. *Amalgamated Engineering Union* (1).] This case decides that a dispute may arise wherever a log is served or demand made in respect of an industrial matter and it is not necessary for the industrial relationship to be in existence between the union and the employer before the demand is made. Although neither the organisation of employees, nor its members, does anything in the industrial sense in the business of the employer making the demand, that circumstance is irrelevant if it is seen that the employer has an industrial interest so to make a demand upon the union, and the possibility that he may thereafter employ or be called upon to employ members of the union shows that he has an industrial interest to make the demand. [He referred to *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Kirsch* (2); *Metal Trades' Case* (3); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Australian Paper Mills Employees' Union* (4).] By reason of the circumstances here present the employers may demand of the union that the rates here in question shall be awarded to union and non-union members, because the union may agree or not agree, and in the latter case the resultant lack of accord may be settled by an award. As the claim in the union's log was for preference and that demand was not agreed to by the employers, the commissioner was justified in settling the resulting disputes by an award of the same pay to unionists and non-unionists employed by the employers party to the disputes. Power to do this is found in s. 42 of the *Conciliation and Arbitration Act* 1904-1955. [He referred to *Kirsch's Case* (5).] The award of preference by the commissioner takes away from the employers their right to have a uniform system of employees by employing non-union labour. Such award introduces an element of discord and an appropriate method of settling that demand is to provide for the payment of uniform rates. The nature of the demand in the union's log construed in the setting in

(1) (1935) 54 C.L.R., at pp. 393, 394.
(2) (1938) 60 C.L.R. 507, at pp. 537, 538.
(3) (1935) 54 C.L.R., at pp. 402, 403, 416, 417, 418.
(4) (1943) 67 C.L.R. 619.
(5) (1938) 60 C.L.R., at pp. 537, 538, 542, 543.

which it was made shows it to be a demand affecting the working conditions of non-unionists. It is thus proper to hold that an award could be made in respect of rates and conditions for non-unionists. If the claim in the log is to be construed as one for compulsory unionism it could still with the aid of s. 42 be settled by an award of preference and of equal rates or similar rates and conditions for non-union members of employers bound by the award. [On the first point argued he referred back to the *Metal Trades' Case* (1); *Portus' Case*, per *Kitto* J. (2).] Except in so far as the reference in the latter passage cited to the position of employer *vis-à-vis* employer is held by the majority judgments in the case to be erroneous, what is there stated is a correct statement of the law applicable to this case and is consistent with the passage cited from the former case. The order nisi should be discharged.

E. S. Miller Q.C., in reply.

There was no appearance on behalf of the respondent conciliation commissioner.

Cur. adv. vult.

June 15.

The following written judgments were delivered :—

DIXON C.J., MCTIERNAN AND KITTO JJ. A writ of prohibition is sought by the Australian Workers' Union, an organisation registered under the *Conciliation and Arbitration Act* 1904-1955, directed to a conciliation commissioner and to certain organisations of employers in the pastoral industry which also are registered under that Act. The purpose of the writ sought is to prohibit any further proceedings in certain matters before the commissioner, or upon an interim award he has made, in so far as the matters and the interim award relate to employees who are not members of the Australian Workers' Union.

The matters before the commissioner, although treated as two proceedings heard together, form one industrial dispute arising out of cross demands. The organisations of employers and some individual employers served upon the Australian Workers' Union a log of demands in December 1954 and in April and May 1955 the latter served upon a large number of employers another log of demands. Each log is concerned with minimum rates of pay and with conditions of employment.

It appears that the Australian Workers' Union sought and obtained an award under the *Industrial Arbitration Act* 1940-1954

(1) (1935) 54 C.L.R., at pp. 441, 442. (2) (1953) 90 C.L.R., at pp. 334, 335.

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(N.S.W.) prescribing minimum rates of pay and conditions of employment for employees in the pastoral industry in New South Wales. The union took steps to obtain a determination under the *Labour and Industry Act* 1953 (Vict.) for that State but apparently an order was made under s. 27 of the *Conciliation and Arbitration Act* 1904-1955 restraining the Victorian industrial authority from dealing with the matter. The State award applied to all employees in New South Wales, engaged in the work with which it dealt, entirely independently of membership of the Australian Workers' Union. In like manner a determination in Victoria would apply independently of membership of the Australian Workers' Union. This is the result of the provisions of the law of the two States in question. The log of demands delivered by and on behalf of the employers sought to secure the operation of minimum rates of pay below those prescribed by the New South Wales award. In the commissioner's interim award which it is sought partially to prohibit minimum rates of pay are prescribed which no doubt are lower than the rates of the New South Wales award. If neither the federal award already made *ad interim* nor any other award made in settlement of the dispute can extend to employees who are not members of the Australian Workers' Union employers would be bound to pay them the higher minimum rate prescribed under the law of the State. If, however, such a federal award extends to employees not members of the Australian Workers' Union then the employers would claim that, because of the paramountcy of federal law under s. 109 of the Constitution, it would exclude the application of the State award to such employees as well as to employees who are members of that body. To effect the purpose of creating an industrial dispute sufficiently wide in its ambit to enable the commissioner to make an award of the desired extent the employers included in the log by which they sought to secure the operation of lower minimum rates of pay a demand upon the Australian Workers' Union that the employers should be bound in respect of all employees whether members of the union or not. A demand was included that employees should be bound only when employed by employers so bound. The failure or refusal of the Australian Workers' Union to accede to the demand so framed is relied upon for the employers as creating a dispute by reason of which the conciliation commissioner obtained constitutional and statutory authority to determine by award what shall be the minimum rates of pay of employees who are not members of the union, if employed by the employers by or on behalf of whom the log was delivered. The exercise of that authority will, so it is claimed, destroy the operation of the instru-

ments by which another minimum rate has been fixed under State law.

In our opinion the demand upon the Australian Workers' Union by the employers that they should be bound in respect of employees not members of that union by terms as to minimum rates of pay and conditions cannot, on the ground that the union does not accede to it, result in a dispute giving rise to such an authority in the conciliation commissioner. The reason is that the assent or dissent of the Australian Workers' Union is completely irrelevant to the thing demanded, namely the minimum which the employer is to be obliged to pay his employees who are not members of the Australian Workers' Union and the conditions of employment he is to afford them. It is a thing which that body cannot affect. If it assents to the demand the employers' position with reference to the subject of the demand is completely unchanged. So is the position of the employee who is not a member. So is that of the Australian Workers' Union itself. If it dissents from the demand, its dissent may disclose a contrariety of opinion, but the opinion is about nothing which the union or its members can do or forbear from doing. Whether it dissents or assents the employer remains as much or as little bound with respect to the minimum rates he pays to his employees who are not members and with respect to the conditions he gives them. The Australian Workers' Union as a registered organisation does not " represent " persons who are not and do not become members. They " represent " those who are members from time to time, present and future members. The essential basis of the decision in *Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (1), is to be found in two passages of the judgment of *Starke* J. " Such organizations, to my mind, ' represent and stand in the place of their members' and must, to be effective, have ' right and authority to act on their account ' " (2). " An organization registered under the *Arbitration Act* is not a mere agent of its members : it stands in their place, and acts on their account and is a representative of the class associated together in the organization " (3). But if the class which an organisation represented did not depend on membership, it would not matter. For it would still be true that the assent or dissent of the union had no bearing on the thing demanded.

The absurdity of the position may be illustrated from so much of the interim award made in purported settlement of the dispute as relates to minimum rates of pay. It incorporates the provisions of the old award of 1950 (4). If these provisions are read with the

(1) (1925) 35 C.L.R. 528.
(2) (1925) 35 C.L.R., at p. 549.
(3) (1925) 35 C.L.R., at p. 551.
(4) (1950) 68 C.A.R. 232-268.

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interim award as amended and corrected, it will be found that various clauses provide that "the minimum rates to be paid to employees for" (e.g. shearing) "shall be"—and the rates are set out. Then it is provided that the award shall be binding upon a number of employers who are named and upon each of the members of each of certain associations (registered organisations of employers) which are named, in the States of New South Wales, Victoria and Tasmania in respect of their employees whether members of the union or not. We are concerned only with its operation under the words "or not". By those words it purports to impose a duty upon the employers not to pay less than a stated minimum to employees not members of the organisation. To whom is this duty owed? Certainly not to such employees themselves. They are not parties to the dispute. They were enjoying a higher minimum and the very purpose of the provision is to destroy their rights to it. Is it owed to the organisation? The Australian Workers' Union certainly never sought it and if it be so it is a right given *in invitos*. It is a right in respect of which the organisation possesses no interest. The duty is in truth imposed upon the employers because they sought the restriction it involves. It is their demand that they should be bound. It has no purpose except to exclude the operation of State law and it can have no effect unless it be that.

The conciliation commissioner can have no authority to make an award unless the constitutional condition is fulfilled that there must be an industrial dispute extending beyond the limits of any one State. No doubt the course of judicial decision has made it possible to fulfil the condition by an artificial procedure for the production of an industrial disagreement. But although disagreement may amount to an industrial dispute the disagreement surely must be about what one or other of the parties to the dispute (or members of the class which one or other of them represents) is to do or not to do in some relevant respect. To treat a demand upon an organisation for a concurrence of opinion concerning a matter which it cannot affect as enough, if not conceded, to amount to an industrial dispute within s. 51 (xxxv.) is, in our opinion, to misunderstand what is meant by the doctrine that an industrial dispute may be constituted by a disagreement about industrial matters. That doctrine has no doubt been pushed very far but after all it has been done by refinements of logic. We fail to see how any refinement of the logical conception of an industrial dispute will bring within its range the failure or refusal of an organisation to say yes to a proposition made by employers that the minimum rates of

pay at which they may employ strangers to the organisation shall be of specified amounts. Had the Australian Workers' Union said yes to that part of the demand made upon that organisation the basis would have been wanting for the argument that an industrial dispute arose as to the minimum rates of non-members. No award could have been made with respect to the minimum rates for non-members and no agreement on that subject could have been lawfully certified under s. 37 of the Act so as to have the effect of an award. It would be a strange paradox if, although to agree in the demand gives the employers nothing, yet to refuse the demand were to give them the power of obtaining so much.

We are prepared to concede that a demand by an employers' organisation, or for that matter by employers, upon an organisation of employees that the minimum rates of wage be certain specified amounts may, if refused by the organisation of employees, give rise to an industrial dispute. No doubt the result cannot be reached except by what may be thought to be a strained interpretation of the demand. But it is not an unreal one. An organisation of employees may without resorting to external authority, take many industrial measures for the purpose of securing for its members rates of pay and on the other hand it may do much to ensure that its men do not insist on higher rates. It is not altogether unreal to treat such an employers' claim as amounting to a demand that the organisation will accept for its members the rates proposed as sufficient minimum rates and will influence its members to abide by them and will not resort to measures to raise them. On that footing the refusal of the demand may rationally be regarded as a basis for an industrial dispute. If it were simply a demand by an employer upon an individual employee that the minimum wage should be so much, it might be otherwise. For it is rather absurd for one man to demand of another that he pay that other not less than any given amount. An organisation of employees, however, occupies a very different position, one in which in relation to such a demand it has something positive to do and to refrain from doing. But such a thing stands apart altogether from a demand upon the organisation with respect to the rates payable to non-members. The very foundation is absent.

An industrial dispute must exist as an antecedent fact, before the authority of the conciliation commissioner or the Arbitration Court to determine it by award can arise. Yet, somewhat inconsistently with this principle, the log of the employers in the present case is framed as a demand for an award consisting of specified terms and conditions. An award is one thing that the assent of the Australian

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Workers' Union to the log could not give the employers. Apparently such logs have been understood as demands that the organisations to whom they are delivered should afford the substantial terms and conditions which should otherwise, in the view of the claimant, go into an award. But whether this benevolent interpretation is justified or not, the form of such logs illustrates the basal misconceptions that exist of the function of a log of demands in the creation of an industrial dispute to which the constitutional power will attach. Perhaps the attempt to create a dispute with respect to the minimum rates of pay of non-unionists is a product of the misconception.

To our minds there is no analogy to the present case in the *Metal Trades Employers Association* v. *Amalgamated Engineering Union* (1). The demand founding the industrial dispute which formed the subject of that decision was made by an organisation of employees upon employers. The demand related definitely and exclusively to what those employers should do and should not do. They were required to pay non-unionists whom they employed, or took into their employ, the minimum rates prescribed. No such question arose or could arise as forms the crux of the present case.

Important as the decision in the *Metal Trades' Case* (1) is it really involves no more than two points. First it was decided that it was no objection that the non-unionists were not parties to the dispute and as to this we think that the Court was agreed. Second, it was decided that in the case of employers who did not employ and never had employed members of the claimant organisation the demand might still create a dispute. It was upon this point that the dissent occurred, the ground of the dissent being the insufficiency of the industrial relation between such employers and the organisation. The principle upon which the decision rests has been restated by the Court in *R.* v. *Kelly*; *Ex parte State of Victoria* (2).

For the foregoing reasons we are of opinion that no dispute arose from the employers' log in respect of employees who are not members of the Australian Workers' Union.

It was suggested that the interim award might be supported as warranted by the nature of the claims made in the log delivered by the Australian Workers' Union. That log scrupulously confined its claims to pay and conditions for members of the organisation. But it contained a claim for preference to unionists and in fact the interim award provides for preference. It was suggested that the inclusion of non-members among those to whom the minimum rates

(1) (1935) 54 C.L.R. 387.

(2) (1950) 81 C.L.R. 64, at p. 82.

of pay and the conditions were to apply might be justified as ancillary to the grant of preference.

The answer is twofold. In the first place it is impossible to treat such a far-reaching substantive provision as that extending the award to strangers to the Australian Workers' Union as a subsidiary thing which is justified as auxiliary or ancillary to or consequential upon preference to unionists. In the second place it was precisely for the opposite reason that the provision was made. Preference was awarded as something calculated to support the provision that the minimum rates of pay prescribed should govern employees who are not members of the organisation.

The objection was not specifically taken that the Australian Workers' Union had no interest as prosecutor in so much of the interim award, or the proceedings before the conciliation commissioner, as relates to employees who are not members of that body, although the point was referred to during the argument. Of the reality of the prosecutor's reasons for seeking prohibition there can be little doubt but assuming that they do not amount to a legal interest, nevertheless it has of course a *locus standi* as a stranger to apply as prosecutor.

The discretion of the Court to refuse the remedy may be greater when the application is by a stranger to the proceedings in respect of which the writ is sought (see note (c), p. 116, vol. II of *Halsbury, Laws of England*, 3rd ed.), but the case is not one where the discretion should be exercised by refusing the remedy. Many interests are affected and the authority of the interim award and of the conciliation commissioner should not be left undecided.

In our opinion the order nisi for a writ of prohibition should be made absolute.

WEBB J. I would make absolute the order nisi for prohibition for the reasons given by the Chief Justice, *McTiernan* and *Kitto* JJ., but desire to add a few words.

In my opinion prohibition would not lie if the conciliation commissioner had jurisdiction to include in his award the same terms of employment for both unionists and non-unionists, even if it appeared from his reasons for his award that he had provided the same terms for both for an invalid reason. The validity of the terms would be determined simply by considering the ambit of the dispute arising from the employers' association's rejection of the claim and whether those terms could validly have been awarded in settlement of the dispute, without regard to the reasons given by the commissioner for awarding them. His error would not have deprived him

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of jurisdiction, and a writ of prohibition does not issue unless a court is acting without or in excess of its jurisdiction: *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Kirsch* (1) per *Starke* J. But I think the commissioner did not have that jurisdiction. It is true that in *Kirsch's Case* (2) *Dixon* J. (as he then was) expressed the view that a claim for compulsory unionism might be settled by an award of the same pay and conditions for non-unionists and unionists alike, when the purpose of the claim would be to safeguard wages and conditions. It is also true that the union's claim in this case, in cl. 7A, was really for compulsory unionism. That clause reads, omitting immaterial parts: "Preference of employment shall be given to financial members of the Australian Workers' Union, or to persons who give the employer an undertaking in writing to make application to become a financial member . . . within seven days. No person who is not a financial member . . . shall continue or be continued in employment under the award unless he makes application to become a financial member . . . within seven days . . . . No person shall continue or be continued in employment for more than seven days after the employer has been notified by an official of the . . . union that such person has ceased to be a financial member . . .". However in *R.* v. *Findlay*; *Ex parte Victorian Chamber of Manufactures* (3), this Court held that compulsory unionism was not an "industrial matter" as defined in s. 4 of the *Conciliation and Arbitration Act* (Cth.), and so that a claim for compulsory unionism could not give rise to an industrial dispute capable of being settled by an award under the Act. Meanwhile there has been no attempt at an amendment of s. 4 or s. 56 that is material on this point. But assuming that cl. 7A was a valid claim so far as it was, or could be read as, confined to preference to unionists in the sense intended by s. 56 of the Act, still the sole purpose of preference is to safeguard employment for unionists. Unlike compulsory unionism it has not, as I understand its implications, the further purpose of safeguarding wages and conditions. If non-unionists are employed where unionists are not available, preference has no bearing on the terms of their employment. If, contrary to my understanding, preference has both purposes there is no ground for prohibition because the commissioner has awarded both preference for unionists and the same terms of employment for unionists and non-unionists: each was then within the ambit of the dispute arising from the rejection of the claim by the employers' association and so both have been validly awarded.

(1) (1938) 60 C.L.R. 507, at p. 528.
(2) (1938) 60 C.L.R., at pp. 539, 540.
(3) (1950) 81 C.L.R. 537.

FULLAGAR J. This is the return of an order nisi for a writ of prohibition. The order nisi was made at the instance of the Australian Workers' Union (which I will call the union), an organisation of employees in the pastoral industry registered under the *Conciliation and Arbitration Act* (Cth.). It is directed to Mr. J. H. Donovan, a conciliation commissioner, and to the Graziers' Association of New South Wales and certain other associations, which are organisations of employers in the pastoral industry registered under the Act. The commissioner on 26th January 1956 made an interim award in what were treated as two industrial disputes and designated respectively No. 70 of 1955 and No. 703 of 1955. This award was varied on 24th February 1956. Its validity, so far as it relates to the terms and conditions of employment of persons who are not members of the union, is challenged on the ground that no industrial dispute with respect to that subject matter existed or exists between the union and the respondents.

Dispute No. 70 of 1955 arose out of the service of a "log" of claims made by the respondent employers' organisations and a number of named individual employers. This log was served on the union in December 1954 with an accompanying letter. It was not served on any other body or person. It was drawn up, in accordance with a practice which has become common, in the form of a proposed award, and cl. 5 thereof provided that the award should be binding upon the respondent employers' organisations and the members thereof and the named individual employers "in respect of all employees whether members of the union or not". The reply of the union to the letter accompanying this log was that "the Australian Workers' Union will not agree to the rates terms and conditions set out in" the log.

Dispute No. 703 of 1955 arose out of the service of a log of claims made by the union. This log was served in April and May 1955 on some two thousand employers in the pastoral industry. It was accompanied by a letter which demanded acceptance within twenty-one days of the claims contained in the log. This log also was drawn in the form of a proposed award. Clause 3 defined the term "employee" as meaning "a financial member of the Australian Workers' Union", and it defined the term "employer" as meaning and including the respondent employers' organisations and a number of named individual employers in the pastoral industry. Clause 5 provided that the employers bound by the award should be those comprised in the definition of "employer" in cl. 3, but that such employers should be bound only so far as they employed members of the union in any of the States of New South Wales, Victoria,

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South Australia, Western Australia and Tasmania. Clause 7A, which is misleadingly headed " Locality ", required that " Preference of employment shall be given to financial members of the Australian Workers' Union, or to persons who give the employer an undertaking in writing to make application to become a financial member of the Australian Workers' Union within seven days of accepting employment ". No reply was received by the union to the letter accompanying this log either within the period of twenty-one days or (so far as appears) at all. The service of this log must clearly be regarded as part of the union's reply to the employers' log, and it is important to note that the union's log by cl. 5 expressly excluded non-unionists from its scope. The union was declining to interest itself in the conditions of employment of non-unionists.

The two disputes came on for hearing together before Mr. Donovan. His interim award, made on 26th January 1956 and varied on 24th February 1956, provided for a general reduction in the rates of pay of " employees " of 5 per cent. It provided by cl. 5 that it should be binding upon the Australian Workers' Union and its members and upon the respondent employers' organisations and their members and upon a number of named individual employers. So far, of course, there is no objection on the ground of want of jurisdiction. But it also provided by cl. 5 that it should be binding upon members of the respondent employers' organisations and the named individual employers " (a) in the States of New South Wales, Victoria and Tasmania, in respect of their employees whether members of the union or not, and (b) in the States of South Australia and Western Australia in respect only of their employees who are members of the union ". Clause 7 provided :—" Subject to the provisions of the *Re-establishment and Employment Act* 1945, as between members of the Australian Workers' Union and other persons offering or desiring service or employment at the same time, preference shall be given to such members, other things being equal." This provision was to apply only in New South Wales, Victoria and Tasmania. It is in so far as the award purports to bind employers in respect of employees who are not members of the union that the jurisdiction to make it is challenged.

In including in his interim award the provision now challenged, Mr. Donovan in effect acceded to the claim made by the employers' log of December 1954 with regard to the scope of the proposed award, although no claim had ever been made by the union with regard to the " rates terms and conditions " on which persons who were not members of the union were to be employed. Before examining the question of law raised by the challenge, it will be

convenient to consider the practical reasons for the inclusion of that claim in the employers' log. Those reasons appear from what was said by Mr. Donovan on 26th January 1956, when he made his original interim award.

The pre-existing federal award in the pastoral industry governed only the employment of members of the union. It had not, of course, the force of a " common rule ". A number of employees in the industry are not members of the union. The union had taken action in New South Wales and Victoria to obtain awards from State tribunals. Those tribunals, not being limited by s. 51 (xxxv.) of the Constitution, could make awards having the effect of a common rule. Such awards could not, by reason of s. 109 of the Constitution, operate within the field covered by the federal award, but they could operate in relation to all employees not covered by the federal award—that is to say, in relation to all employees who were not members of the union. An employer bound by the federal award would thus be likely, as Mr. Donovan observed, to find himself " in the position of having unionists and non-unionists, employed on the same property and doing the same work, subject to differing rates of pay and working conditions, because the unionists are under the federal award and the non-unionists are under a State award ". If (as is no doubt the case, though I do not think it actually appears) the rates of pay under the State award were higher than those under the federal award, the practical result would most probably be that the employer would have to pay the higher rates to both unionists and non-unionists, although, so far as the federal award was concerned, he was at liberty to pay the lower rates. Because differences between the federal award and State awards would in any case cause embarrassment to employers, Mr. Donovan thought it right to extend the scope of the federal award so as to cover employees who were not members of the union. The purpose of the employers' organisations in asking for the provision in question was, no doubt, by making the federal award applicable to the employment of all employees in the industry, whether members of the union or not, to deprive State awards of all effect by force of s. 109 of the Constitution : cf. *H. V. McKay Pty. Ltd.* v. *Hunt* (1). It is not clear to me that that result would actually follow, because State awards give rights to individual non-unionists, whereas a federal award, to which they would not be parties, could not give such rights. But, however this may be, there is no doubt that the purpose was to achieve that result. The provision in cl. 7 for preference to unionists was made by the commissioner consequentially upon the

(1) (1926) 38 C.L.R. 308.

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extension of the award to cover the terms of employment of non-unionists.

From the point of view of the records of the Arbitration Court it is no doubt convenient to regard the two logs as giving rise, on rejection or non-acceptance, to two industrial disputes, but the correct view seems to be that there is only one dispute: see *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.* (1). I do not think, however, that anything turns on this. The jurisdiction of the commissioner to make an award with respect to the rates of pay and conditions of work of employees who are not members of the union depends on the prior existence of an industrial dispute between the union and the employers' organisations with respect to that subject matter, and the contention of the union is that what was done by or on behalf of the employers in this case did not result in the creation of a dispute with respect to that subject matter. In attempting to analyse this contention it will tend to simplicity if we treat the employers' "claims" as concerned only with rates of pay.

The argument was put by saying that a dispute can only be created between two parties as a consequence of the one party demanding that the other shall do, or refrain from doing, some specified thing. If the other party refuses or neglects to comply with that demand, then a dispute arises. If an organisation of employees demands that employers shall pay specified minimum rates of pay to employees, it is demanding that the employers shall do something, and, if the employers refuse, or fail to accept, that demand, then there is a dispute between the organisation on the one side and the employers on the other side. The organisation may (as the union did by its log in the present case) have claimed the minimum rates of pay only for its own members. Or it may (as the Amalgamated Engineering Union did in the *Metal Trades' Case* (2)) have claimed that those rates be paid to all employees, whether members of the organisation or not. In the latter case the dispute which arises is not, *qua* non-unionists, a dispute between employers and non-unionists. It is merely, as in the former case, a dispute between employers and the organisation, though the subject matter includes rates payable to non-unionists. All this, it is said, is quite intelligible, but, when we come to consider what purports to be a demand by employers against the organisation with regard to the minimum rates payable to non-unionists, the position, it is said, is wholly different. Such a "demand" does not require the organ-

(1) (1931) 45 C.L.R. 409, at pp. 422, 423, 426, 448.

(2) (1935) 54 C.L.R. 387.

isation or its members to do or refrain from doing anything. Here we have the employers addressing an organisation, which does not represent non-unionists, and saying :—" We demand that we be bound, as between ourselves and you, the organisation, to pay such and such minimum rates of pay, to all our non-unionist employees in the industry." The organisation may answer by saying :—" We have no objection whatever to your paying to non-unionists the rates of pay which you mention, or any other rates of pay." It might go on to add : " If we proposed to concern ourselves with non-unionists, we might be disposed to demand that you pay higher rates to non-unionists than those which you mention. As it is, we do not propose to concern ourselves with the rates of pay of non-unionists." How can it be said that such an interchange of communications creates an industrial dispute ?

The difficulty of the question thus raised is occasioned in general by the highly artificial nature of the system in which it arises, and in particular by four factors in the situation. The first of these is the theory of the so-called " paper dispute "—the view that a " dispute " within the meaning of s. 51 (xxxv.) can be created by formal demand and refusal, and that such formal demand and refusal are enough to attract the arbitral jurisdiction of a tribunal set up by the Commonwealth. (See per *Dixon* J. in the *Metal Trades' Case* (1)). The second is the consequential practice of framing a demand—or " log ", as it is called—in the form of an " award ". From one point of view this may be convenient, but it tends to disguise the true character of what is being done. The third is the decision in the *Metal Trades' Case* (2). And the fourth is the peculiar position of " organisations " in the system.

Starke J. in the *Metal Trades' Case* (2) said :—" My opinion is, as it always has been, that the Commonwealth Court of Conciliation and Arbitration has no power under its Act to regulate the rights and duties of an employer towards persons who are neither parties to a dispute nor members of an organization at the time of the dispute or subsequently " (3). If this view had prevailed, it would have been hopeless for the respondents in the present case to maintain that a dispute had arisen, in the settlement of which Mr. Donovan had jurisdiction to prescribe rates to be paid to employees who were not members of the union. The view of *Starke* J., however, did not prevail in the *Metal Trades' Case* (2), and the decision in the *Metal Trades' Case* (2) has been accepted in *Kirsch's Case* (4) and by

(1) (1935) 54 C.L.R., at p. 428.
(2) (1935) 54 C.L.R. 387.
(3) (1935) 54 C.L.R., at p. 423.
(4) (1938) 60 C.L.R. 507.

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the Full Bench of this Court in *R.* v. *Kelly*; *Ex parte State of Victoria* (1). It thus becomes important to see what the *Metal Trades' Case* (2) really decided. In *R.* v. *Kelly*; *Ex parte State of Victoria* (1) the Court adopted the statement of *Dixon* J. in *Kirsch's Case* (3) as to the effect of that decision. *Dixon* J. there said :— "The principle upon which the decision rests is that the interest which an organization of employees possesses in the establishment or maintenance of industrial conditions for its members gives a foundation for an attempt on its part to prevent employers employing anyone on less favourable terms. As a result an industrial dispute may be raised by it with employers employing none of its members and an award may be made binding such employers and regulating the terms and conditions upon which they may employ unionists or non-unionists" (4). This is a carefully worded and very important passage, and its acceptance by the Full Bench in *R.* v. *Kelly*; *Ex parte State of Victoria* (1) means that the *Metal Trades' Case* (2) cannot be taken to have decided more than is thus expressed.

Taking their stand, however, on the *Metal Trades' Case* (2), the respondents, while conceding that jurisdiction over the subject matter depends on a pre-existing "dispute" with respect to that subject matter, seek to justify the challenged part of Mr. Donovan's award by the following process of reasoning. They say :—"So far as the subject matter is concerned, the *Metal Trades' Case* (2) shows that the rates of pay of non-unionists may be the subject of a dispute between a union registered as an organization on the one hand and employers or an organization of employers on the other hand. And, so far as the existence of a dispute about that subject matter is concerned, a dispute was created when we made a demand on the union relating to that subject matter and the union refused it or at least did not accept it. True it is that in the *Metal Trades' Case* (2) the demand was made by the union and was refused or not accepted by the employers, whereas here the demand was made by the employers and was refused or not accepted by the union. But that can make no difference, for it must be taken as well settled that a dispute may be initiated as well by the making of a demand on behalf of employers as by the making of a demand on behalf of employees."

I do not think that the real answer to this argument is provided by saying simply that a dispute can only be initiated by one party demanding that the other shall do, or refrain from doing, some specified thing. If this were literally true, it seems to me that a

(1) (1950) 81 C.L.R. 64.
(2) (1935) 54 C.L.R. 387.
(3) (1938) 60 C.L.R. 507.
(4) (1938) 60 C.L.R., at pp. 537, 538.

dispute could never be initiated by the service of a log on behalf of employers, and I would regard such a view as untenable. Such a log does not require a union, on which it is served, to do, or abstain from doing, anything. Yet I would think it clear that on its rejection by the union, whether or not the rejection were accompanied or followed by the service of a " counter-log ", a dispute arose. I am nevertheless of opinion that a " paper dispute " about rates of pay is not created unless and until a position is reached in which employees are in effect demanding rates which employers are not willing to concede. The position requires analysis.

We may leave out of account for the moment cases in which a question arises as to rates to be paid to non-unionists. When a union serves a log on employers it is saying :—" We demand that you pay to our members the minimum rates which we mention." These will be higher than the current rates. If the employers reject this demand, they are saying :—" We will not pay those rates ", and a " dispute " comes into existence. The union has made an express demand for higher rates than the employers are prepared to pay. When employers serve a log on a union, they are not making a demand in the same sense. They are saying : " We propose that the minimum rates payable shall be those which we mention ". These will be lower than the current rates. If this proposal is rejected, a dispute comes into existence unless, of course, the employers withdraw their proposal. But it comes into existence because, and only because, the union is really demanding higher rates than the employers are prepared to pay. The demand is implicit in the mere rejection of the employers' proposal.

In the examples taken above it is assumed that the rates of pay of members of the union only are in question. In such a case the union acts in substance as the representative of its members, and its position is conditioned by that fact. Because of that fact, when it receives the employers' log, it cannot avoid the creation of a dispute except by acceptance of the employers' proposals. If it says " we don't care what you do ", that must be construed as an acceptance. If it maintains silence, that must be construed, after the lapse of a fixed time or a reasonable time for replying, as a rejection. The union's primary reason for existence as a registered organisation is to represent its members and protect their interests. A proposal addressed to it affecting the rates of pay of its members is meaningless except as a proposal addressed to its members. The union cannot remain neutral. It must either accept or reject.

Its position with regard to persons who are not members is entirely different. It does not represent such persons, whether they are

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employed in the relevant industry or in any other industry, in any way or for any purpose. It may form the opinion that the interests of its members require that employers in the industry with which it is concerned shall not employ non-unionists at lower rates than are paid to its members. In that event it may address a demand to employers that they shall not employ non-unionists at lower rates. If that demand is refused, a dispute arises, which may be settled by award under the Act. But it cannot be forced into the position of making such a demand. It is perfectly entitled, if employers make to it a proposal relating to the rates of pay of non-members, to take up a position of neutrality, and, if it does, no dispute arises. If employers make such a proposal to it, a " dispute " *may* follow, but it can only follow if the union's response is : " No : we demand that you pay to non-unionists higher rates than you propose," and the employers refuse to pay those higher rates. It arises then not because the union has refused a demand by the employers, but because the employers have refused a demand by the union. If the union says : " We don't care what you do about it ", no inference of acceptance can be drawn. If it maintains complete silence, no inference of rejection can be drawn. The reason is that the subject matter of the proposal made is no concern of the union unless the union chooses to concern itself with it. It cannot be compelled to concern itself with it, and the only relevant way in which it can concern itself with it is by making a demand with regard to it. What the respondents in this case have tried to do is to force the union into a dispute on a matter with which the union is entitled to refuse to concern itself. For the reasons which I have given this cannot, in my opinion, be done. The union has not chosen to make any claim or demand on employers with respect to non-unionist employees, and, unless and until it does so, no " dispute " can exist with respect to that subject matter.

The matter may be approached from another point of view. Of the four factors, which I have mentioned as tending to obscure the real position in this case, the most deceptive is, I think, the practice of framing a " log " of claims in the form of a proposed " award ". The practice is natural enough. It is founded on an assimilation of the process of industrial arbitration to the process of an action in an ordinary court of law. But, because the two processes are fundamentally different in nature, the assimilation is necessarily imperfect, and what we really have is an attempt to do two radically different things *uno ictu*. The " log " is conceived as doing, so to speak, double duty : it is to perform the functions *both* of a letter of demand

before action *and* of a declaration or statement of claim in an action which has been commenced. Logically, of course, this cannot be done, because the refusal of a demand is a condition precedent to the actual jurisdiction of the " court " to entertain the " action " at all. The demand, refusal of which creates a " dispute " and gives to the appointed tribunal authority to " settle " it, is one thing. The invocation of the jurisdiction by the claiming of an award is an entirely different, and logically subsequent, thing. It may be that in the generality of cases no harm is done by framing the " log " in the form of an award. But it does disguise the essential fact that a dispute about an " industrial matter " *must* exist *before* there is any right to claim an award, and a dispute does not exist unless and until there is genuine disagreement about an industrial matter. This tendency to disguise the reality of the situation is well illustrated by the present case. Here what the employers wanted when they made their demand with respect to non-unionists, and the only thing they wanted, was an award: only a federal award could have given them what they desired—the supersession of State awards. The only real disagreement between the parties, if any can be said to have existed, lay in this, that the employers wanted, and the union did not want, the rates of pay of non-unionists to be governed by a federal award. And that is not a disagreement about an " industrial matter ". In order that Mr. Donovan should have jurisdiction to make an award, it was necessary that there should be a dispute anterior to, and capable of being expressed independently of, any invocation of his jurisdiction to make an award. But in truth the employers' *real* demand in this case could not have been expressed otherwise than in the terms of an award or by reference to the making of an award.

I should mention in conclusion an alternative argument presented by Mr. *Macfarlan* for the respondents. The argument was that the provisions of the interim award extending the application of the old award, as varied, to non-unionists was a matter which came within the jurisdiction of the commissioner as a matter incidental to his dealing with the claim for preference to unionists contained in cl. 7A of the union's log. The simple answer to this seems to me to be that Mr. Donovan did not so treat the matter. On the contrary, his award in relation to cl. 7A of the union's log was consequential upon his decision to extend the award so as to cover non-unionists.

The order nisi for prohibition should, in my opinion, be made absolute.

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TAYLOR J. I have arrived at a conclusion which is contrary to that of the other members of the Court and I propose to state briefly the reasons which have led me to that conclusion.

The principle upon which the *Metal Trades' Case* (*The Metal Trades Employers Association* v. *Amalgamated Engineering Union* (1)) was decided has been restated in a compendious form in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Kirsch* (2) and *R.* v. *Kelly*; *Ex parte State of Victoria* (3). In the former case *Dixon* J. (as he then was) said: "The principle upon which the decision rests is that the interest which an organization of employees possesses in the establishment or maintenance of industrial conditions for its members gives a foundation for an attempt on its part to prevent employers employing anyone on less favourable terms. As a result an industrial dispute may be raised by it with employers employing none of its members and an award may be made binding such employers and regulating the terms and conditions upon which they may employ unionists or non-unionists" (4). This passage was adopted by the Court in 1950 in *R.* v. *Kelly*; *Ex parte State of Victoria* (3) to define the underlying principle. It was, of course, always clear that a dispute between an organisation of employers and an organisation of employees concerning matters of the description specified in the definition of "industrial matters" in s. 4 of the *Conciliation and Arbitration Act* 1904-1955 did not necessarily constitute an industrial dispute. Section 4 defines "industrial dispute" to mean "a dispute . . . as to industrial matters which extends beyond the limits of any one State" and "industrial matters" means "all matters pertaining to the relations of employers and employees and, without limiting the generality of the foregoing", includes a great number of specified matters. But a dispute, or disagreement, between parties having no industrial interest whatever in the subject matter of the dispute can never constitute an industrial dispute in the sense in which that expression is used in the Act. Indeed it is impossible for an industrial dispute of the character requisite to invoke the jurisdiction of the Arbitration Court to arise unless *each* party to it has such an interest. To exclude the notion that each party must have such an interest would produce a completely artificial conception of what an industrial dispute is for the purpose of the Act is to make provision for the determination of such disputes by agreements or awards and there is no scope for such processes except in the case of industrial disputes which arise between parties who, to put it broadly, stand

(1) (1935) 54 C.L.R. 387.
(2) (1938) 60 C.L.R. 507.
(3) (1950) 81 C.L.R. 64.
(4) (1938) 60 C.L.R., at pp. 537, 538.

in an industrial relationship to one another and which in some measure affect that relationship. Now I understand the *Metal Trades' Case* (1) to decide that an organisation of employees has a sufficient industrial interest to raise a dispute with an organisation of employers in the industry with which the former is concerned with respect to the rates of wages which should be paid and the conditions of employment which should be observed by such employers. That is to say, it has a sufficient industrial interest in the question to dispute with such an organisation of employers the rates of pay and conditions of employment which should be prescribed by agreement or award to regulate the employment not only of its own members but, also, the employment of non-unionists. But if, as I think, an industrial dispute can arise only when both or all parties to a dispute have such an interest the decision must also mean that such an organisation of employers has a sufficient industrial interest to agree upon or to dispute these matters with a union of employees. It is, I should think, clear that if the employers' organisation concerned in the *Metal Trades' Case* (1) had acceded to the union's log of claims agreement might have been reached and steps taken pursuant to s. 24 of the Act as it then stood. (See now s. 37.) Such an agreement would not, of course, have been binding upon non-unionists but it would have created an obligation on the part of the employers' organisation to the union of employees to observe the specified rates and conditions when employing non-unionists. But the argument of the prosecutor in this case asserts that a log of claims served by an organisation of employers in an industry upon the union concerned in that industry which demands that specified rates and conditions should regulate the employment of both unionists and non-unionists can never lead to an industrial dispute with respect to the rates and conditions which should regulate the employment of non-unionists. For my part I confess that I am unable to see that the situation is any different from that which arises when a log of a similar character is served by a union of employees upon an organisation of employees in the same industry. The parties have the same industrial interest; if they agree they will agree on precisely the same things and if they fail to agree the dispute will be of precisely the same character. In any case where a union has such an interest and seeks to create obligations of this character and the attempt is resisted there will, upon the authorities referred to, be an industrial dispute, that is to say a dispute as to an industrial matter in which each disputant has a legitimate interest. Those interests, it seems to me, remain unchanged when the dispute

(1) (1935) 54 C.L.R. 387.

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is originated by the service of a log containing claims of a similar character upon a union of employees and in either case there is room for agreement between them or, failing agreement, the making of an appropriate award.

Upon the facts of the case the correct conclusion is, in my opinion, that the respondent's logs were wholly rejected by the prosecutor. They were delivered to the prosecutor together with covering letters which intimated that the employers' organisations claimed " that persons now or hereafter to be employed in or in connection with the pastoral industry by the members of the said organisations whether members of the Australian Workers' Union or not shall for all work done by them . . . be paid the respective rates applicable to the respective classes of labour set out in schedule ' A ' hereto . . . and be employed upon the terms and conditions set out in the said schedule." By these letters the prosecutor was requested to say by a specified date whether it " agrees on its own behalf and on behalf of its members . . . to the terms of this demand." Schedule A was, as has already been mentioned, in the form of a draft award and cl. 5 (b) was in the following terms : " This award shall be binding on employers in respect of employees whether members of the union or not." Thereafter the draft award contained provisions for the regulation in great detail of the conditions upon which the members of the employers' organisations might employ labour. The respective replies to the covering letters referred to mentioned the requests made by those letters and informed the respondents that the " Australian Workers' Union will not agree to the rates, terms and conditions set out in the above-mentioned schedule." I do not understand this reply to mean that the union was not interested in the terms and conditions which should regulate the employment of non-unionists or that it neither wished to agree or dispute with the respondents on these matters ; it was in my view a total rejection of the logs and gave rise to an industrial dispute. This being so I am of the opinion that the order nisi should be discharged.

Order absolute with costs including costs of the order nisi to be paid by the respondent organisations.

Solicitors for the prosecutor, *J. J. Carroll, Cecil O'Dea & Co.*

Solicitors for the respondents other than the respondent conciliation commissioner, *Dawson, Waldron, Edwards & Nicholls.*

R. A. H.