

**DECISIONS OF THE CERTIFICATION OFFICER ON AN APPLICATION  
MADE UNDER SECTION 55 AND SECTION 108A OF THE TRADE UNION  
AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992**

**MR S MACE**

v

**NATIONAL UNION OF MINEWORKERS**

**Date of Decisions:**

**30 June 2009**

**DECISIONS**

Upon application by Mr Mace (“the Claimant”) under section 55 and section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”).

- (i) I declare that on or around 6 May 2008 the National Union of Mineworkers (“the NUM” or “the Union”) breached rule 9.E of its rules by the NUM (Yorkshire Area) (“the Yorkshire Area”) carrying out the nomination procedure for its representative on the National Executive Committee (“the NEC”) of the Union otherwise than in accordance with rule 9.E.
- (ii) I refuse to make a declaration that on or around 6 May 2008 the NUM breached rule 9.E of its rules by allegedly denying the opportunity of the ‘Yorkshire Area Office Branch’ to meet and nominate a candidate in the election for the representative of the Yorkshire Area on the NEC.
- (iii) I declare that the Union breached section 46(1) of the 1992 Act by failing to secure that the person elected as the representative of the Yorkshire Area on the NEC in May 2008 held that position by virtue of an election satisfying the requirements of Chapter IV of the 1992 Act.
- (iv) I declare that the Union breached section 47(1) of the 1992 Act on or around 6 May 2008 by unreasonably excluding Mr Mace as a candidate in the election to be the representative of the Yorkshire Area on the NEC

**Enforcement Orders**

- (v) I order that the result of the election conducted by the Yorkshire Area of the Union in April/May 2008 for its representative on the NEC of the Union be set aside and that the candidate declared elected in that election shall forthwith cease to hold office.
- (vii) I further order that an election for the position on the NEC so vacated shall take place so that the result is declared no later than 4 September 2009. The

election shall be conducted so as to comply with Chapter IV of the 1992 Act and the rules of the Union (including the Standing Orders of the Yorkshire Area), save that the sentence in Standing Order 9 which provides that, “*At the close of nominations only those candidates will be eligible for election who have received the nominations of Branches, the total membership of which amounts to 30% or more of the total membership of the Area on the basis of the published figures*” is void and of no effect and is not to be applied. The Union is given leave to apply should it not be possible to meet the above deadline.

## REASONS

1. Mr Mace is a member of the National Union of Mineworkers (“the Union”, or “the NUM”). By a letter dated 16 May 2008, Mr Mace made allegations against his Union arising from the election of the representative of the Yorkshire Area to the NUM National Executive Committee. Five complaints were identified and confirmed by Mr Mace in the following terms:-

### **Complaint 1**

*“that on or around 6 May 2008 the National Union of Mineworkers (Yorkshire Area), an Area of the National Union of Mineworkers breached rule 9.E of the rules of the National Union of Mineworkers, by arranging a nomination procedure under National Union of Mineworkers (Yorkshire Area) standing order 9 in contravention of National Rule 9.E.”*

### **Complaint 2**

*“that on or around 6 May 2008 the National Union of Mineworkers (Yorkshire Area), an Area of the National Union of Mineworkers breached Rule 9.E of the rules of the National Union of Mineworkers, by undertaking a nomination procedure which prevented Mr Mace’s nomination by the National Union of Mineworkers (Yorkshire Area) Maltby Branch as a candidate for the representative member of the National Union of Mineworkers (Yorkshire Area) on the National Executive Committee.”*

### **Complaint 3**

*“that on or around 6 May 2008 the National Union of Mineworkers acted in breach of Rule 9.E of the rules of the National Union of Mineworkers, by denying the National Union of Mineworkers (Yorkshire Area) Area Office Branch the opportunity to meet and consider a nomination for election as a representative member for the Yorkshire Area on the National Union of Mineworkers National Executive Committee and also acted in contravention of National Rule 19E by preventing the NUM (Yorkshire Area) Office Branch to meet in accordance with the NUM (Yorkshire Area) decision on 22 March 2004.”*

### **Complaint 4**

*“that on or around 6 May 2008 the National Union of Mineworkers (Yorkshire Area), an Area of the National Union of Mineworkers breached section 46(1)(a) of the 1992 Act by arranging a nomination procedure for the post of the representative member of the National Union of Mineworkers (Yorkshire Area) on the National Executive Committee under National Union of Mineworkers (Yorkshire Area) standing order 9 in contravention of National Rule 9.E In support of this complaint the claimant also refers to subsections 2(a); 2(b); 5 and 6 of sections 46 of the 1992 Act.”*

### **Complaint 5**

*“that on or around 6 May 2008 the National Union of Mineworkers (Yorkshire Area), an Area of the National Union of Mineworkers breached section 47(1) of the 1992 Act by undertaking a nomination procedure which prevented Mr Mace’s nomination by the National Union of Mineworkers (Yorkshire Area) Maltby Branch as a candidate for the representative member of the National Union of Mineworkers (Yorkshire Area) on the National Executive Committee.”*

2. I investigated the alleged breaches in correspondence. A hearing took place on 21 May 2009. At the hearing, Mr Mace was represented by a friend, Mr W Capstick. Mr Mace attended but did not give evidence. The Union was represented by Mr N Carr of Raleys solicitors. Mr C Kitchen, Secretary of the NUM and Secretary of the Yorkshire Area, and Mr C Skidmore, Chairman of the Yorkshire Area, attended and gave evidence. They each provided a witness statement. Only Mr Kitchen was cross-examined. A 209 page bundle of papers was prepared for the hearing by my office containing documents submitted by the parties. At the hearing I gave the Claimant permission to adduce a further six documents which were added to the bundle. Both parties submitted written skeleton arguments.
3. At the hearing, I clarified with Mr Capstick the precise nature of the complaints brought by Mr Mace. He agreed that the first and second complaints, as they appear above, both alleged a breach of National Rule 9.E on the same grounds, namely that the nomination procedure used by the Yorkshire Area was that contained in Standing Order 9 of the Yorkshire Area and not National Rule 9.E. Accordingly, I determined that these two complaints should be considered together. Mr Capstick also stated that he was not pursuing the alleged breach of Rule 19.E in complaint 3 as a separate complaint. He was, however, relying on Rule 19.E as part of his argument that there was a breach of Rule 9.E.
4. This case is on the same facts and raises the same points of law as the case of **Scargill v NUM (D/26-30/09)**, which I heard in the three days immediately preceding the hearing of this case. Mr Capstick was a witness in the Scargill case and was present on the first two days of that hearing. Mr Carr represented the Union in the Scargill case and Mr Kitchen and Mr Skidmore gave evidence in it. The submissions that were made in this case were also made in the Scargill case. On the issue regarding the existence or not of the 'Yorkshire Area Office Branch', Mr Capstick stated expressly that Mr Mace would abide by my decision in the Scargill case, having regard to the volume of evidence adduced by Mr Scargill on that issue.
5. In the above circumstances, I considered at an early stage prior to these hearings whether to consolidate the two cases. I decided not to do so for two reasons. First, both parties actively opposed consolidation, stating that their particular case had nothing to do with that of the other person. Secondly, the preparation of the Scargill case for hearing was lengthy and complex. Mr Mace put his case simply and straightforwardly. It was my view that to have consolidated the cases would have made the Scargill case even more difficult to manage and would have risked overwhelming Mr Mace against his wishes. I therefore decided to hear the cases on succeeding days but separately.
6. I decided Mr Scargill's case before deciding that of Mr Mace and reached findings of fact and law in the Scargill case on all the issues that were raised by Mr Capstick in this case. I do not dissent from those findings in this case. Accordingly, I attach the decision of the Scargill case as an appendix hereto

and expressly incorporate its contents into this decision where appropriate to do so.

### **Findings of Fact**

7. Having considered the oral and documentary evidence and the submissions of the parties, I find the essential facts of Mr Mace's case to be as follows.
8. Rule 9.A of the Rules of the NUM provides that there shall be a National Executive Committee ("NEC") which will consist of, inter alia, representatives elected by Areas. Rule 9.E deals with nominations to the NEC and is central to the determination of this application. It provides as follows:

*9.E Branches shall be entitled to nominate members for election as representative members of their Area on the N.E.C and Area Executive Committees shall, when more than one nomination is submitted, arrange an election by individual ballot of the members taken on the principle of "the transferable vote" as defined in Section 41 of the Representation of the People Act 1918, and the name of the person so elected shall be communicated to the Secretary of the Union in time to be included on the Final Agenda of the relevant Biennial Conference.*

It is common ground that the Yorkshire Area no longer has an Area Executive Committee but an Area Council.

9. In 2008, there was an election for the Yorkshire Area representative on the NEC for the period 2008-2010. On 3 April 2008, Mr Kitchen, as Secretary of the Yorkshire Area, sent a circular to all relevant Branch Secretaries seeking nominations for this election. A copy of this circular was sent to the National President, Mr Lavery, for his information. The circular attached a copy of the Yorkshire Area Standing Order 9, which is also central to this matter. It provides as follows:

*9. Branches shall be entitled to nominate members for election as representative members of the Yorkshire Area on the NEC. Nominations shall be confined to a person who is a financial member and has been for at least 12 months immediately prior to nomination. At the close of nominations only those candidates will be eligible for election who have received the nominations of Branches, the total membership of which together amounts to 30% or more of the total membership of the Area on the basis of the published figures. The election of the NEC representatives shall be by vote of full financial members of the Area. The ballot shall be taken on the principle of the "transferable vote" as defined in Section 41 of the Representation of the People Act 1918.*

10. There were two nominations for this position. Mr Kitchen was nominated by the Kellingley branch and Mr Mace was nominated by the Maltby branch.
11. On 6 May 2008, Mr Kitchen wrote to the Branch Secretary of the Maltby branch, informing him that Mr Mace was unsuccessful "...as he did not receive 30% or more of the total membership of the Area on the basis of the published figures necessary...". Mr Kitchen was declared elected, to take up office from the end of the Biennial Delegate Conference on 20 July 2008.

## **The Relevant Statutory Provisions and Union Rules**

12. These are set out in the decision in **Scargill v NUM** contained in the appendix hereto.

## **Conclusions**

### **Complaints 1 and 2**

13. The central point made by Mr Capstick in these complaints was that the 30% rule contained in Yorkshire Area Standing Order 9 should not have been used to prevent the nomination of Mr Mace for the position of Yorkshire Area representative on the NEC in the elections held in April/May 2008. Mr Capstick submitted that the nomination procedure in Standing Order 9 was more restrictive than, and therefore in conflict with, National Rule 9.E. He argued that in these circumstances the 30% rule in Standing Order 9 was of no effect by virtue of National Rule 19.E and that the appropriate procedure that should have been used was that contained in Rule 9.E. Rule 19.E provides:

*19.E The Rules of each Area and Constituent Association shall be the Model Rules and any amendments thereto and any such amendment shall automatically become an amendment to the Rules of each Area and Constituent Association on the date of adoption of the amendment by Conference or such other date as Conference may determine. The current National Rules shall be deemed to be part of the Area Rules. Each Area or Constituent Association may have such other Rules in addition to the Model Rules as it may decide provided that no such Rules shall conflict with any National Rules or Model Rules or with the policy of the Union.*

14. For the reasons I gave in the case of **Scargill v NUM** (paragraphs 39 to 48), I uphold Mr Mace's complaint that the Union breached National Rule 9.E of its rules by the Yorkshire Area carrying out the nomination procedure for its representative on the NEC otherwise than in accordance with Rule 9.E.

### **Complaint 3**

15. Mr Capstick submitted that there was a branch of the Yorkshire Area known as the 'Yorkshire Area Office Branch' which had been excluded by the Union from the nomination process for the position of Area Representative on the NEC in the elections of April/May 2008 in breach of Rule 9.E.
16. For the reasons I gave in the decision of **Scargill v NUM** (paragraphs 21 to 35), I find as a fact that there was no such entity as the 'Yorkshire Area Office Branch' constituted within the rules of the Union in 2008. Accordingly, I dismiss the complaint that the Union breached Rule 9.E of its rules by allegedly denying the members of the 'Yorkshire Area Office Branch' an opportunity to meet and nominate a candidate in the election for the representative of the Yorkshire Area on the NEC in April/May 2008.

#### **Complaint 4**

17. It is more logical to reverse the order in which I consider complaints 4 and 5. I shall firstly consider the breach of section 47(1) of the 1992 Act. Section 47(1) provides as follows:

**47 Candidates**

*(1) No member of the Trade Union shall be unreasonably excluded from standing as a candidate.*

18. Mr Capstick submitted that Mr Mace had been unreasonably excluded from standing as a candidate in the election for the Yorkshire Area Representative on the NEC in April/May 2008 on the grounds that the Union had applied to him the 30% rule in Yorkshire Area Standing Order 9 which was unreasonable.
19. For the reasons I gave in the decision of **Scargill v NUM** (paragraphs 54 to 64), I find that Mr Mace was unreasonably excluded from standing as a candidate in the said election in breach of section 47(1) of the 1992 Act.

#### **Complaint 5**

20. I now consider the alleged breach of section 46(1)(a) of the 1992 Act, which provides as follows:

**46 Duty to hold elections for certain positions**

*(1) A Trade Union shall secure –*

*(a) that every person who holds a position in the Union to which this Chapter applies does so by virtue of having been elected to it at an election satisfying the requirements of this Chapter ...”*

21. It was common ground that if I found there to be a breach of section 47(1) of the 1992 Act it would follow that there had been a breach of section 46(1). Accordingly, I find that the Union breached section 46(1) by failing to secure that the person elected as the representative of the Yorkshire Area on the NEC in May 2008 held that position by virtue of an election satisfying the requirements of Chapter IV of the 1992 Act.

#### **Enforcement Orders**

22. When I make a declaration I am required by section 108B(3) of the 1992 Act, in respect of a breach of rule, and by section 55(5)(A) in respect of a breach of statute, to make an enforcement order unless I consider that to do so would be inappropriate and, in the case of a breach of statute, I must specify the period within which the Union is to comply with the requirements of the order.
23. On the facts of this case, I find that it is appropriate that I make an enforcement order as Mr Mace was wrongly excluded from standing in the election in April/May 2008. It is not necessary or appropriate that I consider his prospects of success in that election. It is sufficient that he has been wrongly deprived of a chance of succeeding. The enforcement orders I make

are in similar terms to those I made in the case of **Scargill v NUM**, namely:

- 23.1 I order that the result of the election for the Yorkshire Area Representative on the NEC in April/May 2008 be set aside and that the candidate declared elected in that election shall forthwith cease to hold office.
  
- 23.2 I further order that an election for the position on the NEC so vacated shall take place so that the result is declared no later than 4 September 2009. The election shall be conducted so as to comply with Chapter IV of the 1992 Act and the rules of the Union (including the Standing Orders of the Yorkshire Area), save that the sentence in Standing Order 9 which provides that, "*At the close of nominations only those candidates will be eligible for election who have received the nominations of Branches, the total membership of which amounts to 30% or more of the total membership of the Area on the basis of the published figures*" is void and of no effect and is not to be applied. The Union is given leave to apply should it not be possible to meet the above deadline.

**David Cockburn**  
**The Certification Officer**

## Appendix

D/26-30/09

### DECISIONS OF THE CERTIFICATION OFFICER ON AN APPLICATION MADE UNDER SECTION 55 AND SECTION 108A OF THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

MR A SCARGILL

v

NATIONAL UNION OF MINEWORKERS

**Date of Decisions:**

**29 June 2009**

#### DECISIONS

Upon application by Mr Scargill (“the Claimant”) under section 55(1) and section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”).

- (i) I declare that the National Union of Mineworkers (“the NUM” or “the Union”) breached rule 9.E of its rules by carrying out elections for the two positions as representatives of the National Union of Mineworkers (Yorkshire Area) (“the Yorkshire Area”) to the National Executive Committee (“the NEC”) of the NUM in April/May and July/August 2008 in accordance with Standing Order 9 of the Yorkshire Area and not in accordance with Rule 9.E.
- (ii) I refuse to make a declaration that the Union acted in breach of its rules or in breach of the 1992 Act by allegedly excluding the ‘Yorkshire Area Office Branch’ from participating in the nomination procedure for the said elections held in April/May and July/August 2008.
- (iii) I declare that the Union breached section 46(1) of the 1992 Act by failing to secure that those elected as representatives to the NEC from the Yorkshire Area in 2008 held their positions by virtue of having been elected to them at elections satisfying the requirement of Chapter IV of the 1992 Act.
- (iv) I declare that the Union breached section 47(1) of the 1992 Act in the said elections in April/May and July/August 2008 by unreasonably excluding Mr Mace as a candidate in the elections
- (v) I refuse to make a declaration that the Union breached section 50(1) of the 1992 Act in its conduct of the said elections in April/May and July/August



2008 by allegedly failing to accord equally to all members the entitlement to vote.

#### Enforcement Orders

- (vi) I order that the results of the elections of the Yorkshire Area of the Union for the position of representative on the NEC which were held in April/May and July/August 2008 be set aside and that the candidates declared elected in those elections shall forthwith cease to hold office.
- (vii) I further order that elections for the two positions on the NEC so vacated shall take place so that the results are declared no later than 4 September 2009. The election shall be conducted so as to comply with Chapter IV of the 1992 Act and the rules of the Union (including the Standing Orders of the Yorkshire Area), save that the sentence in Standing Order 9 which provides that, “*At the close of nominations only those candidates will be eligible for election who have received the nominations of Branches, the total membership of which amounts to 30% or more of the total membership of the Area on the basis of the published figures*” is void and of no effect and is not to be applied. The Union is given leave to apply should it not be possible to meet the above deadline.

#### REASONS

24. Mr Scargill is a member and Honorary President of the National Union of Mineworkers (“the Union” or “the NUM”). By a letter dated 2 May 2008, Mr Scargill made allegations against his Union arising from the election conducted in April/May 2008 for the Yorkshire Area representative member to the Union’s NEC. Subsequently, Mr Scargill made similar allegations arising from a further election conducted in July/August 2008 for a second Yorkshire Area representative member to the Union’s NEC.
25. Mr Scargill made four complaints against his Union, each of which named three respondents and raised numerous causes of action. I held a Case Management Hearing on 17 February 2009 to more clearly identify the relevant parties and the issues to be determined. I set out below paragraphs three to twelve of the Case Management Summary.

#### “CASE MANAGEMENT HEARING

##### Preliminary Matters

3. The applications against Mr Kitchen as the Secretary of the NUM (Yorkshire Area) and the NUM (Yorkshire Area) are withdrawn and the case is to proceed against the NUM only, on the basis that the NUM is accountable for the actions of its Areas and its Area Secretaries.

##### The Complaints

4. **Complaint 1**, as submitted by Mr Scargill, is in the following terms:

*“On or around 14 April – 1 May 2008, the National Union of Mineworkers (Yorkshire Area), an Area of the National Union of Mineworkers, and its Area Secretary acted in breach of National Rule 9.E and National Rule 19.E of the Rules of the National Union of Mineworkers by refusing to conduct the nomination procedure for the election of the NUM (Yorkshire Area) representative member of the NUM National Executive Committee in accordance with National Rule 9.E and instead conducted a nomination procedure in accordance with the NUM (Yorkshire Area) Standing Order 9. The National Union of Mineworkers and the National Union of Mineworkers (Yorkshire Area) and the Yorkshire Area Secretary by their actions also acted in breach of the Trade Union and Labour Relations (Consolidation) Act 1992, Section 46, subsection (1)(a) and (b), subsection (2)(a) and (b), subsection (3), subsection (5) and subsection (6). Section 47, subsection (1) and Section 50, subsection (1) ”*

5. This complaint contains four causes of action and gives rise to a number of issues that fall to be determined. Following discussion, the matters to be determined at the full Hearing were agreed as follows: -

5.1 Breach of Rule. It is alleged that the Union acted in breach of National Rule 9E by failing to conduct the nomination procedure for the election of the NUM (Yorkshire Area) representative member of the National NUM National Executive Committee (“NEC”) in April 2008 in accordance with National Rule 9E and instead conducted a nomination procedure in accordance with NUM (Yorkshire Area) Standing Order 9. The issues to which this complaint gives rise are:-

5.1.1 Is Standing Order 9 an additional Rule within the meaning of National Rule 19E?;

5.1.2 Does Standing Order 9 conflict with any National Rules, or Model Rules, or policy of the Union as prohibited by National Rule 19E?;

5.1.3 Is Standing Order 9 a valid rule of the NUM (Yorkshire Area), having regard to the method by which it was adopted? Mr Scargill asserts that it was not adopted in accordance with the rules at the time it emerged, namely when the NUM (Yorkshire Area) transferred its engagements to the National NUM in 1994.

5.2 Breach of Statute (section 46(1)). It is alleged that the Union breached section 46(1) of the 1992 Act in that Mr Kitchen, the person elected as the NUM (Yorkshire Area) representative on the NUM NEC in or around April 2008, allegedly does not hold that position by having been elected to it at an election satisfying the requirements of Chapter IV of the 1992 Act. It is alleged that Mr Kitchen’s election failed to satisfy the requirements of the 1992 Act as the Union breached section 47(1), regarding the unreasonable exclusion of candidates, and section 50(1), regarding the entitlement to vote.

5.3 Breach of Statute (section 47(1)). It is alleged that the Union breached section 47(1) of the 1992 Act by the NUM (Yorkshire Area) conducting the election for its representative member on the NUM NEC on the basis of its Standing Order 9, whereby candidates were restricted to those who received the nominations of Branches, the total membership of which together amounts to 30% or more of the total membership of the Area on the basis of published figures. Mr Scargill alleges that to restrict eligible candidates in this way is unreasonable. The Union contends that restriction is reasonable.

5.4 Breach of Statute (section 50(1)). It is alleged that the Union breached section 50(1) of the 1992 Act by not allowing members of the Yorkshire Area Office Branch to vote in the nomination process for the position of Yorkshire Area representative in the NUM NEC. Mr Scargill accepts that members of the Yorkshire Area Office Branch would have been allowed to vote in a contested

election, if one had taken place, but contends that section 50(1) requires all members to have an equal entitlement to vote in the nomination process as well as in any subsequent contested election.

6. **Complaint 2**, as submitted by Mr Scargill, is in the following terms:

*“On or around 14 April – 1 May 2008, the National Union of Mineworkers (Yorkshire Area), an Area of the National Union of Mineworkers, and its Area Secretary acted in breach of National Rule 9.E and National Rule 19.E of the Rules of the National Union of Mineworkers by excluding the NUM (Yorkshire Area) Office Branch and its members from participating in the nomination procedure for the election of a representative member of the NUM (Yorkshire Area) on the NUM National Executive Committee 2008-2010. The National Union of Mineworkers and the National Union of Mineworkers (Yorkshire Area) and the Yorkshire Area Secretary by their actions also acted in breach of the Trade Union and Labour Relations (Consolidation) Act 1992, Section 46, subsection (1)(a) and (b), subsection (2)(a) and (b), subsection (3), subsection (5) and subsection (6). Section 47, subsection (1) and Section 50, subsection (1) ”*

7. This complaint also contains four causes of action and gives rise to a number of issues that fall to be determined. Following discussion, the matters to be determined at the full Hearing were agreed as follows: -

7.1 Breach of Rule. It is alleged that the Union acted in breach of National Rule 9E by excluding the NUM (Yorkshire Area Office Branch) and its members from participating in the nomination procedure for the election of a representative member of the NUM (Yorkshire Area) on the NUM NEC in or around April 2008. The Union denies the alleged breach on the basis that at the time of this election there was no Yorkshire Area Office Branch in existence. The issue to be determined at the full hearing therefore is whether at the time of this election there existed, under the constitution of the NUM and the NUM (Yorkshire Area), a Yorkshire Area Office Branch which had the right to nominate members for election to the NEC in accordance with National Rule 9E and/or Yorkshire Area Standing Order 9.

7.2 Breach of Statute – sections 46(1), 47(1) and 50(1) of the 1992 Act. The Claimant accepted that these were identical allegations to those raised in his first complaint and did not require to be addressed a second time.

8. **Complaint 3**, as submitted by Mr Scargill, is in the following terms:

*“From 22 March 2004 to date, the NUM (Yorkshire Area), an Area of the National Union of Mineworkers, and its Area Secretary have acted and continue to act in breach of an NUM (Yorkshire Area) Annual General Meeting decision 22 March 2004 and in breach of National Rules 6.L, 6.N, 6.O, 8.E, 8.F, 8.I, 8.J, 8.K, 8.L, 8.M, 9.B, 9.D, 9.E, 9.F, 9.H(i), 9.I(ii), 12.B, 14.C, 15.C, 16.A(ii), 18.F, 18.G, 19.A, 19.B, 19.E, 19.F, 19.G, 19.H, 19.I, 20.B, 21.A, 21.B, 21.D(i), 21.D(ii), 28.A(i), 28.A(ii), 28.C, 30, 31.A, 31.D, 31.E, 31.F, 31.G, 31.J, 31.K(iii), 31.K(iv), 31.O, 32.C, 32.E, 32.F, 32.L, 32.M, and Model rules 4, 5(a), 8, 9, 11, 16 and 17 by refusing to implement the NUM (Yorkshire Area) Annual General Meeting decision.*

*The decision by the NUM (Yorkshire Area) AGM on 22 March 2004 was adopted on the basis of Leading Counsel’s Advice which had been accepted by the NUM National Executive Committee on 16 February 2004. The NUM (Yorkshire Area) AGM stipulated that the Yorkshire Area Office Branch continued to exist in line with Yorkshire Area Standing Orders and the National Rules of the Union. The National Union of Mineworkers and the National Union of Mineworkers*

*(Yorkshire Area) and the Yorkshire Area Secretary by their actions also acted in breach of the Trade Union and Labour Relations (Consolidation) Act 1992, Section 50, subsection (1) and Section 108A, subsection (2) (d) and subsection (8).”*

9. This complaint was withdrawn by consent on the basis that its purpose was to secure a determination of the issue as to whether the Yorkshire Area Office Branch continues to exist under the constitution of the NUM and the NUM (Yorkshire Area). It was agreed by both parties that this is the central issue which will be determined in Complaint 2.

10. **Complaint 4**, as submitted by Mr Scargill, is in the following terms:

*“On or around 28 July 2008– 27 August 2008, the National Union of Mineworkers (Yorkshire Area), an Area of the National Union of Mineworkers, and its Area Secretary acted in breach of National Rule 9.E and National Rule 19.E of the Rules of the National Union of Mineworkers by refusing to conduct the nomination procedure for the election of the NUM (Yorkshire Area) representative member of the NUM National Executive Committee in accordance with National Rule 9.E and instead conducted a nomination procedure in accordance with the NUM (Yorkshire Area) Standing Order 9. The National Union of Mineworkers and the National Union of Mineworkers (Yorkshire Area) and the Yorkshire Area Secretary by their actions also acted in breach of the Trade Union and Labour Relations (Consolidation) Act 1992, Section 46, subsection (1)(a) and (b), subsection (2)(a) and (b), subsection (3), subsection (5) and subsection (6). Section 47, subsection (1) and Section 50, subsection (1) ”*

11. The Claimant stated that this complaint raises identical allegations and issues as Complaint 1. The difference between the two complaints being that the first complaint relates to nominations and an election in or around April 2008. The second complaint relates to nominations and an election in or around July 2008. In or around June 2008, the Annual Conference of the NUM agreed to the NUM (Yorkshire Area) having an additional seat on its NEC and nominations were called by the NUM (Yorkshire Area) for an election to fill this additional seat in July 2008. The parties agreed that the outcome of Complaint 1 would determine the outcome of this complaint.

12. The Hearing on 18 to 20 May 2009 will determine the causes of action and issues as set out above, as identified and agreed by the parties at the Case Management Hearing. No other causes of action or issues will be advanced at the full Hearing or considered without an explanation as to why they were not raised at the Case Management Hearing and without leave of the Certification Officer.”

26. I investigated the alleged breaches in correspondence. A hearing took place on 18-20 May 2009. At the hearing, Mr Scargill represented himself. Mr Scargill presented written witness statements for himself, Mr Capstick, Mr Appleyard and Mr West. Mr Scargill and Mr Capstick were present at the hearing and were cross-examined. The Union was represented by Mr N Carr of Raleys solicitors. Mr Carr presented written witness statements for Mr Kitchen, Mr Skidmore, Mr Gaskell, Mr Stubbs, Mr Lowe and Mr Douglass. All the Union’s witnesses were present and were cross-examined. The Union’s lead witnesses were Mr Skidmore, the Chairman of the Yorkshire Area, and Mr Kitchen, the Secretary of the Yorkshire Area and of the National Union. A bundle of documents in excess of 530 pages was prepared by my office containing documents which the parties considered relevant. At the hearing, I granted Mr Scargill permission to add two further letters to this bundle. There was a second bundle of 174 pages containing the Rules and Standing Orders of the Union which were considered relevant by the parties. Both parties submitted lengthy skeleton arguments. Mr

Scargill had exhibited numerous additional documents to his skeleton argument which I admitted as bundle three. On the second day of the hearing Mr Scargill sought leave to adduce further documents which I admitted and added to bundle three. In addition, Mr Scargill submitted six legal authorities and the Union submitted seven. Mr Scargill also submitted a chronology, as required at the Case Management hearing, but this was of little assistance as it was not agreed by the parties, was not expressed in non-contentious terms, as ordered, and was not in date order.

### **Findings of Fact**

27. Having considered the oral and documentary evidence and the submissions of the parties I find the facts to be as follows:-

### **Background**

28. Mr Scargill has been a member of NUM since 1953 since he began work at Wooley Colliery, Yorkshire. He has held a number of lay and full-time positions at all levels in the Union. In 1972, he was elected as the full-time Yorkshire Area Compensation Agent and as a Yorkshire Area representative on the NEC of the NUM. In 1973, he was elected as the President of the Yorkshire Area. In 1982, he took up office as the elected National President of the NUM, which post he held until his retirement on 31 July 2002. During this time he also chaired meetings of the Yorkshire Area. He is currently the Honorary President of the NUM and works as a consultant for the NUM (Yorkshire Area) Trust Fund.
29. The structure and the constitution of the NUM are not straightforward. Its rules have given rise to a number of constitutional uncertainties over the years. These have not been assisted by assertions that various rules have ‘slipped’ into the rulebook from time to time, allegedly through printing or drafting errors, without having gone through the correct constitutional processes. Mr Scargill described these as “not a new occurrence” and Mr Kitchen commented that he remained unsure what are the authoritative rules.
30. For present purposes, it is sufficient to note that the NUM was originally composed of a national union and a number of individual area unions, each of which was a union in its own right. The National Union of Mineworkers (Yorkshire Area) was one such union. It had its own rule book and an existence separate from, whilst being constitutionally linked to, the NUM. In 1994, the Yorkshire Area transferred its engagements to the NUM and lost its separate legal status. Nevertheless, the Yorkshire Area retained a distinct identity as a component part of the NUM.
31. Upon transferring its engagements to the NUM, the Yorkshire Area no longer had its own rulebook. Its members were then bound by the rules of the NUM and the Standing Orders of the Yorkshire Area. Rule 19.E of the rules of the NUM provides as follows:

*19.E The Rules of each Area and Constituent Association shall be the Model Rules and any amendments thereto and any such amendment shall automatically become an amendment to the Rules of each Area and Constituent Association on the date of adoption of the amendment by Conference or such other date as Conference may determine. The current National Rules shall be deemed to be part of the Area Rules. Each Area or Constituent Association may have such other Rules in addition to the Model Rules as it may decide provided that no such Rules shall conflict with any National Rules or Model Rules or with the policy of the Union.*

32. I was referred to a number of different versions of the rules of the NUM and the Standing Orders of the Yorkshire Area. It was, however, agreed that the relevant rules for the purposes of this application were the NUM rules of April 2008, (subject to one amendment at the Biennial Delegate Conference in July 2008, which increased the representation of the Yorkshire Area on the NEC from one to two members) and the Yorkshire Area Standing Orders of 2002.
33. The facts of this application do not lend themselves to the usual chronological exposition. Accordingly, I will deal firstly with the facts which relate to the central dispute and then with those which relate to the disputes regarding the transfer of engagements in 1994 and the existence or otherwise of the 'Yorkshire Area Office Branch' since, at least, 1972.

### **The central dispute**

34. Rule 9.A of the rules of the NUM provides that there shall be an NEC which will consist, inter alia, of representatives elected by Areas. Rule 9.E deals with nominations and is central to the determination of this application. It provides as follows:

*9.E Branches shall be entitled to nominate members for election as representative members of their Area on the N.E.C and Area Executive Committees shall, when more than one nomination is submitted, arrange an election by individual ballot of the members taken on the principle of "the transferable vote" as defined in Section 41 of the Representation of the People Act 1918, and the name of the person so elected shall be communicated to the Secretary of the Union in time to be included on the Final Agenda of the relevant Biennial Conference.*

It is common ground that the Yorkshire Area no longer has an Area Executive Committee but an Area Council.

35. In 2008, there was to be an election for the Yorkshire Area representative on the NEC for the period 2008-2010. On 3 April 2008, Mr Kitchen, as Secretary of the Yorkshire Area, sent a circular to all relevant Branch Secretaries seeking nominations for this election. A copy of this circular was also sent to the National President, Mr Lavery, for his information. The circular attached a copy of Yorkshire Area Standing Order 9, which is also central to this matter. It provides as follows:

***Election of National Executive Committee Representatives***

*9. Branches shall be entitled to nominate members for election as representative members of Yorkshire Area on the NEC. Nominations shall be confined to a person who is a financial member and has been for at least 12 months immediately prior to nomination. At the close of nominations only those*

*candidates will be eligible for election who have received the nominations of Branches, the total membership of which together amounts to 30% or more of the total membership of the Area on the basis of the published figures. The election of the NEC representatives shall be by vote of full financial members of the Area. The ballot shall be taken on the principle of the “transferable vote” as defined in Section 41 of the Representation of the People Act 1918.*

36. There were two nominations for this position. Mr Kitchen was nominated by the Kellingley branch and Mr Mace was nominated by the Maltby branch.
37. On 6 May 2008, Mr Kitchen wrote to the Branch Secretary of the Maltby branch, informing him that Mr Mace had been unsuccessful “*as he did not receive 30% or more of the total membership of the Area on the basis of the published figures necessary*”. Mr Kitchen was declared elected, to take up his position from the end of the Biennial Delegate Conference (“BDC”) on 20 July 2008.
38. At the BDC of the NUM in July 2008, it was decided that the Yorkshire Area should have a second representative on the NEC. Accordingly, on 28 July, Mr Kitchen sent a similar circular to relevant branches, with a copy to the National President, inviting nominations. There were again two nominations. Mr Hadfield was nominated by the Kellingley branch and the Hatfield Main branch and Mr Mace by the Maltby branch. The minutes of the Yorkshire Area Council of 27 August 2008 record that Mr Mace did not achieve the 30% required under Yorkshire Area Standing Orders and Mr Hadfield was declared elected.
39. Mr Scargill complains that the exclusion of Mr Mace from these elections constituted both a breach of rule and a breach of statute. In summary, the alleged breaches in respect of the elections in April/May and July/August 2008 are as follows:
  - 16.1 Breach of rule  
Mr Scargill submitted that the 30% rule contained in Standing Order 9 of the Yorkshire Area should not have been applied as it is in conflict with rule 9.E of the National Rules and therefore in breach of Rule 19.E of the National Rules.
  - 16.2 Breach of rule  
Mr Scargill submitted that Standing Order 9 should also not have been applied as it is not a binding rule, having been ‘slipped into’ the Standing Orders at or about the time of the transfer of engagements in 1994, without having been approved in a constitutionally recognised manner.
  - 16.3 Breach of rule  
Mr Scargill submitted that, in any event, there had been a breach of both Standing Order 9 and rule 9.E by having excluded from the nomination process a group of members which he alleged constituted a branch, namely the ‘Yorkshire Area Office Branch’. The Union denies the existence of any such branch.

16.4 Breach of statute

Mr Scargill submitted that the exclusion of Mr Mace from both elections was a breach of section 47(1) of the 1992 Act, being an unreasonable exclusion of him from standing as a candidate.

16.5 Breach of statute

Mr Scargill submitted that the exclusion of the 'Yorkshire Area Office Branch' from the nomination procedure was a breach of section 50(1) of the 1992 Act in that the Union had thereby not accorded equally to all members of the Union the entitlement to vote.

16.6 Breach of statute

Mr Scargill submitted that by having conducted an election in breach of sections 47(1) and 50(1) the Union had not secured that Mr Kitchen and Mr Hadfield had been elected to their positions at an election satisfying the requirements of Chapter IV of the 1992 Act and was therefore in breach of section 46(1).

40. In order for me to determine the issues set out in paragraph 16.2, 16.3 and 16.5 above it is necessary that I find certain relevant facts concerning (a) the origins of Standing Order 9 and (b) the existence or otherwise of the 'Yorkshire Area Office Branch'.

### **The Origins of Yorkshire Area Standing Order 9**

41. In 1992, the Yorkshire Area of the NUM was a separate union but with constitutional links to the National NUM. At that time there was no equivalent to Standing Order 9 in its rules. In a case brought by a Mr Mouncey in 1992, the then Certification Officer found that the Yorkshire Area must comply with the statutory requirement of using postal voting for certain elections. Separately, in 1993, negotiations were proceeding for a transfer of engagements of the Yorkshire Area to the NUM. A set of draft Standing Orders was prepared, which also did not contain an equivalent to Standing Order 9. In March 1994, the members of the Yorkshire Area voted on and approved the terms of the Instrument of Transfer. However, an issue arose as to whether Limited Members (a class of membership with limited rights of participation) had been wrongly excluded from the ballot. Following his decision in **Millward v NUM (Yorkshire Area)**, the then Certification Officer refused to register the transfer as he considered that Limited Members should have been permitted to vote in the ballot. This decision was reversed by the EAT on appeal in November 1994 ((1995)IRLR 411). Nevertheless, before then, the Yorkshire Area had re-balloted, including the Limited Members, and the result was still in favour of the transfer. Curiously, in June 1994, the Yorkshire Area held a special rules revision conference and amended its rules, even though they were soon to cease to have effect. It was said that this was necessary as a result of the Mouncey decision. Amongst the changes that were made was the introduction in rule 15 of a rule similar to Standing Order 9, which required members nominated for



the position of Area Representative on the NEC to have 20% support. The Certification Officer registered the Instrument of Transfer on 17 August 1994, whereupon the Yorkshire Area ceased to exist as a separate union. It became part of the NUM on the terms of the Instrument of Transfer. On the evidence before me, the implementation of the Instrument of Transfer did not result in the incorporation of a rule similar to Standing Order 9. Nevertheless, there is evidence that by November 1994, Standing Orders were handed to delegates which contained an equivalent to Standing Order 9. It would appear, therefore, that in late 1994 an equivalent to Standing Order 9 was included in the written version of the Standing Orders of the Yorkshire Area but that it had no constitutional basis.

42. I must, however, determine the position in 2008 and, to do that, I must consider custom and practice in the Yorkshire Area since 1994 and any subsequent rules revision conferences. As to custom and practice, I note that Standing Order 9 has been applied consistently in the biennial elections since 1994. In 1995, one nominee, Mr Bolderson, was excluded for not having received 20% support. In 1997, three nominees, Messrs Douglass, Seabrooke and Ward, were similarly excluded. In 1999, all the nominees were elected unopposed. In 2001, two nominees, Mr Douglass and Mr Skidmore, were similarly excluded. In 2003, no elections were held. In 2004 and 2006, the nominees were elected unopposed but the letter seeking nominations referred expressly to the need to satisfy Standing Order 9, which had been amended in 2002 to require 30% support. In 2008, Mr Mace was excluded for not having received 30% support. As to the constitutional revisions of Standing Order 9 since 1994, there was an unsuccessful attempt at revision in 2000 and a successful revision in 2002. In 2002, there was a general revision of the rules of the NUM to take into account, amongst other things, of the retirement of Mr Scargill. There was also an amendment of Yorkshire Area Standing Orders at the annual meeting of the Yorkshire Area Council chaired by Mr Scargill on 17 June 2002. The Standing Orders dated 17 June 2002 were ratified at a meeting of the Yorkshire Area Council on 2 September 2002. These clearly introduced Standing Order 9 in its current form, with the exclusion of nominees without 30% support.
43. Accordingly, on the basis of both custom and practice and the 2002 revision of the Standing Orders, I find that Standing Order 9 was a valid and binding rule of the Yorkshire Area in 2008, subject to any alleged contravention of rule 19.E (for which, see paragraphs 39-48 below).

#### **Yorkshire Area Office Branch**

44. The Union contends that even though there may have been a 'Yorkshire Area Office Branch' at some time in the distant past, it fell into disuse at an unknown date and certainly did not exist in 2008. The Union maintains that, as a consequence, it was under no obligation in 2008 to seek nominations for the election of Yorkshire Area representatives on the NEC from this non-existent branch. In support of this position, it argued that the issue of whether there was a 'Yorkshire Area Office Branch' did not surface until 2003, following the retirement of Mr Scargill, and that before then it was not an issue that the so-called 'Yorkshire Area Office Branch' could not nominate potential candidates

for the NEC. Members not in a properly constituted branch could and did obtain a branch nomination elsewhere and secure election.

45. In Mr Scargill's submission, the 'Yorkshire Area Office Branch' has existed since the formation of the NUM in 1944. He maintains that he has been a member of it since he was first elected to a full time position in 1972. He argues for the existence of the 'Yorkshire Area Office Branch' on two levels; constitutionally and historically. On a constitutional level, he maintains that all members of the Union must be a member of a branch and that it is not possible under the rules for a group of members to be held outside the branch structure. He supports this argument by reference, in particular, to Model Rule 4, by which claims for damages at common law are to be made through a member's branch; to Rule 30, by which the first stage of the grievance procedure is to the branch; and to Rule 31.D(i), by which the National Disciplinary Committee shall have power to consider a complaint that a member has ceased to be a member of a branch and potentially impose a penalty of suspension or expulsion. In his statement, Mr Scargill lists 25 rules and Model Rules which he asserts require every member to be a member of a branch. These are all rules in which the word 'branch' appears. On an historical level, Mr Scargill has assiduously provided documents going back to 1972 in which there is a reference to 'Area Office'. These are mainly in connection with elections or ballots. In elections, the name of the candidate normally appears alongside the name of his or her branch and, for some candidates, the words 'Area Office' occupies this position. In ballots, the result of each branch is recorded in a 'schedule', usually under a heading of 'Branch'. Such schedules also include the result of the members from 'Area Office' under the same heading. Further, the Union grants benefits to members from time to time and publishes the fact in the minutes of the relevant meeting. Within such minutes, the persons' branch appears alongside his or her name and, for some members, the words 'Area Office' occupies this space. However, this historical paper trail largely ends in 1994.
46. Mr Scargill also refers to a number of events as evidence of the existence of the 'Yorkshire Area Office Branch':
  - 23.1. Minutes which purport to be those of the 'Yorkshire Area Office Branch' of 13 March, 8 May, 10 July and 13 November 2003.
  - 23.2. A letter from Mr Eyre of Raleys solicitors, of 24 March 2003, in which, amongst other things, he expresses surprise that there appeared to be a dispute regarding the existence of the 'Yorkshire Area Office Branch'.
  - 23.3. A memo from the Union's Head of Finance, Mrs Riley, of 23 July 2003, in which she states that a staff member asked Mr Stubbs and Mr Kemp if, having been elected to full-time positions, they wished to continue being members of their colliery branches or wished to transfer to the Area Office branch. The memo records them as having requested to transfer to the 'Yorkshire Area Office Branch' from 1 June 2002.

- 23.4. The legal opinions obtained by the Union from Mr Hendy QC, of October 2003, and Mr Langstaff QC, of November 2003. The Union did not waive privilege over these opinions and they were accordingly not in evidence. Nevertheless, Mr Scargill frequently alluded to the opinion of Mr Langstaff QC being in his favour. Further, in a letter of 1 April 2008, which was in evidence, Mr Scargill informed Mr Lavery that it was Mr Langstaff's opinion that "*there had been an Area Office Branch in Yorkshire for many years but it had not been administered in accordance with the rules of the Union but emphasised that it could be activated in accordance with the rules*". I ignore all references to these opinions. I have not seen them. I do not know what material was placed before counsel. I do not know why a second opinion was required. I do not know what, if any, words of caution were contained in them. Above all, privilege was not waived.
- 23.5. The minutes of the Annual General Meeting ("AGM") of the Yorkshire Area of 22 March 2004, in which the Secretary, Mr Kemp, is recorded as having informed the meeting "*that the Area Office Branch will continue in line with Yorkshire Area Standing Orders and the National Rules of the Union ... Area Office membership will be scrutinised and a full report given at a future council meeting.*" The minute continues, "*The Secretary emphasised the need for a full review of the Area Office Branch and in particular full members who were assigned to the Area Office Branch who no longer work at working collieries.*"
- 23.6. The minutes of the Council meeting of the Yorkshire Area of 22 November 1999, which record the closure of the Barnsley Road Transport Branch and the transfer of its membership to 'the Yorkshire Area Branch'. Mr Scargill maintained that when branches were closed, mainly following the closure of collieries, the membership was transferred to the 'Yorkshire Area Office Branch'.
47. Mr Carr, for the Union, maintained that what has been called the 'Area Office Branch' is not a branch within the meaning of the rules. In his words, it was not "a fully constituted branch" but, in effect, a register of members. Evidence was given that in practice branches are workplace or unit based, whichever is appropriate so as to represent the interests of working miners and ancillary working occupations. Mr Kitchen stated that many of those elected to full-time positions within the Union left their workplace branches as they felt that there might be a conflict of interest if they were required to advance views which were contrary to the interests of the members of their former branches. Such officials retained their rights as full members but, for administrative purposes, appeared on the 'Area Office' register. Others, like Mr Kitchen, remained a member of their colliery branches. From time to time, other types of members were put into the 'Area Office'. Contractors have sometimes been employed in the industry to carry out specific projects, such as the development of the Selby coalfield. They became members of the Union for the duration of their work in the industry and were put into the 'Area Office'. Also, when collieries and their associated branches closed any remaining members may be put into the 'Area Office'. Such members retained all the rights of individual members. They are

entitled to stand and vote in all relevant elections and ballots. They are entitled to all the benefits of membership, which they access through the area officials rather than through their branch. The only activity from which they are excluded are the activities restricted to fully constituted branches, namely the nomination of candidates, the election of a delegate to Area Council and the forwarding of resolutions for consideration by Area Council. However, as area officials are present at all Area Council meetings, they are in practice the link between the 'Area Office' membership and Council. Mr Kitchen maintained that the 'Area Office' membership could make personal injury claims. They could raise grievances and they did have a voice on Area Council.

48. The Union gave evidence that the references in the documentation between 1972 and about 1994 to 'Area Office' are not conclusive of the existence of a fully constituted 'Area Office' branch in that period. Mr Carr submitted that such references are more consistent with it being a register of those members who were not in any branch. He stated that such members were entitled to vote and that accordingly, when any election results were declared, their votes had to be recorded under some heading. The term 'Area Office' was just a convenient description for this purpose, even though the column in which it appeared was headed "branch". Similarly, when members stood for office it was customary to put their branch against their names. Mr Carr pointed out that when area officials stood for office, it was also customary to put their job titles, such as area agent, compensation agent, vice-president etc, against their names. He commented that it was not suggested that there was an 'area agent branch, or 'a compensation agent branch'. Mr Carr further commented that 'Area Office' was only used in this context when the candidate was a staff member at the 'Area Office' as opposed to an elected official.
49. Mr Kitchen stated that there is nothing in the rules of the National Union or the Yorkshire Area that requires any individual member to be allocated to a branch. Mr Carr referred to national rule 5.F(1) which provides that "*Every member of the Union shall be allocated by the NEC to an appropriate Area ...*" and to rule 18.A which provides that "*The members of the Union shall for the purpose of administration be organised into divisions of the Union to be known as "Areas" ...*". He noted that there is no similar reference to a member being allocated to a branch. As to branches, Mr Kitchen referred to rule 19.A which provides that "*Areas shall have such Area Councils ... Area Officials ... and there shall be such Branches in each Area, with such Branch Committees and Branch Officers as may be prescribed by the regulations applicable thereto*". As to the Standing Orders of the Yorkshire Area, Mr Carr referred to Standing Order 16(a) which provides that "*The Area shall be divided into as many Branches as may be deemed expedient. The Area Council shall supervise and co-ordinate the action of all the Branches in the Area in accordance with the Standing Orders and policy of the Area ...*". He submitted that the rules could have required that members belong to a branch but they do not do so. They refer only to members being allocated to an Area.
50. The Union argued that to be a branch under the rules requires the approval of Area Council and that it must have certain characteristics which are set out in the rules. Mr Carr submitted that there is no minute recording the establishment

of a 'Yorkshire Area Office Branch' and that the alleged branch has none of the required characteristics. In their evidence, Mr Kitchen and Mr Skidmore referred to the fact that the so-called 'Yorkshire Area Office Branch' has no president, secretary or treasurer (Standing Order 16(C)); that it made no returns to Area Office recording its membership or expenditure (Standing Order 18); that it had no branch delegate (Standing Order 20); or branch committee (Standing Order 21); that it did not hold monthly general meetings (Standing Order 21(d)); and that it did not have its own local fund (Standing Order 23(a)). Further, the so called 'Area Office Branch' did not receive 8% of the weekly contributions made by members of the branch as required by National Rule 6.N. Mr Carr also submitted that there was no reference to it in the area directory which lists branches, nor in the Union diary.

51. The Union also relied upon the fact that in 1996, the Yorkshire Area had created four Area Office Branches, also known as surgery branches. Mr Kitchen explained that because of the decline in the size of the mining industry since the 1980s, the Union has a very significant number of retired members who had worked in collieries that had been closed and also members who had left the industry over the years because of incapacity. The majority of those members no longer paid their full Union subscriptions and had therefore ceased to be full financial members, but had nevertheless retained Union membership. They were once known as limited members, but are now called life members. Prior to 1996, volunteers assisted such non-working members, who were not members of any branch, with access to the Union's legal services, applications for welfare benefits etc. These volunteers gave their assistance in so-called surgeries. At a meeting of the Yorkshire Area Council on 22 April 1996, it was noted that this system was not functioning as it should, mainly because the surgeries were not NUM branches with proper access to the Union at area level. A difficult issue arose as to whether such branches should have any voting rights and the matter was deferred. At the next meeting of the Area Council on 20 May 1996, it is minuted, "*It was agreed to set up four new area branches in South Yorkshire, North Yorkshire, Barnsley and Doncaster (without voting rights) in order to cater for members who no longer have a branch*". However, these so called 'Area Office Branches' continued to operate as surgeries. They had no members assigned to them and had none of the characteristics of a branch described above. The Yorkshire Area appointed an individual to each of these so-called branches as its nominal secretary who would organise the welfare services in that particular geographical area. That person would also attend Area Council and was known as the Secretary/Delegate. I find that these surgery branches never operated as, and were never, branches of the Union. They were a more formal way of providing the assistance required by retired mineworkers, limited members and those with incapacities, especially given the increase in the number of personal injury cases under various government schemes. In my judgment, the reference to them as branches reflects a loose but convenient use of the term 'branch', which is not without significance.
52. The decision I must make is not whether such a branch should exist but whether one actually existed in 2008. No matter what the position was in the years immediately after 1944, I have seen no evidence which persuades me that an organisation which operated as a branch under the Rules and Standing Orders of

the Union has existed under the name 'Yorkshire Area Office Branch'. Mr Scargill has been assiduous in the presentation of documents which contain any reference to 'Area Office' but there is a conspicuous absence of any documents which record the normal operation of a branch. There are no branch minutes (other than the four minutes in 2003 - see paragraph 30), no record of branch elections, no branch accounts, no branch stationery, no branch stamp. Mr Scargill explained that he thought the previous Branch Secretary, now deceased, had burned all his records. I find this explanation unconvincing. Even if some records were destroyed, I find that others would have continued to exist and that Mr Scargill, who claims membership of this branch from 1972, would have or would have had access to some of them if they had ever been created. I accept the evidence of the Union that the so called 'Yorkshire Area Office Branch' was no more than a register of those members who did not have a branch, originally because it consisted of officials and staff members, and later for historical reasons, as it proved convenient to have a holding category but without branch status. The references in the documents to 'Area Office' in the period between 1972 and about 1994 are all consistent with the 'Area Office' being used as a register of members, including the transfer of members from the Barnsley Road Transport branch.

53. The issue of the existence of the 'Yorkshire Area Office Branch' arose in 2003, following Mr Scargill's retirement in 2002. There were four meetings in 2003 which purported to be meetings of that branch. Mr Scargill chaired the first three meetings and gave apologies to the last. Mr Stubbs, the area agent at the time, attended the first meeting and argued with Mr Scargill that there was no such thing as a 'Yorkshire Area Office Branch'. The minutes of these meetings are not on branch headed paper. There was no prior authorisation by Area Council. There was no election of officials. In my judgment these meetings were not regular meetings of an extant branch but an attempt to further an argument that such a branch existed.
54. The Area Council meeting of 24 March 2003 records the receipt of correspondence from branches questioning the existence of a 'Yorkshire Area Office Branch'. That meeting agreed to seek a meeting with the Certification Officer and obtain an opinion from counsel to clarify the situation and, in particular, to clarify if limited members could vote in Yorkshire Area elections. It appears that these two issues were considered to be linked. There were a considerable number of limited members and the issue of their voting rights was an important one. There was no meeting with the Certification Officer. As stated in paragraph 23.4, two opinions were obtained by the Union from different Leading Counsel in October and November 2003, for which privilege was not waived and to which I give no weight.
55. At the AGM of the Yorkshire Area in March 2004, the then secretary, Mr Kemp, informed the meeting that "*The area office branch would continue in line with Yorkshire Area Standing Orders and the National Rules of the Union*". He emphasised the need for a full review of the Area Office branch. He also noted that limited members would no longer be allowed to vote in the Yorkshire Area. This appeared to take some of the steam out of the issue of the existence of the 'Yorkshire Area Office Branch' as there was subsequently no full review.

I find that Mr Kemp's statement to the AGM was not a decision of that AGM to establish or re-establish an Area Office Branch. There is no record of a vote being taken. It was nothing more than Mr Kemp's view that the status quo would continue, but that begs the question as to what was the status quo?

56. As a prelude to obtaining counsel's opinion, a short statement was obtained from the Head of Finance on 23 July 2003, in which she reported that both Mr Stubbs and Mr Kemp had requested to be transferred to the 'Yorkshire Area Office Branch' from 1 June 2002, upon being elected to full-time office. In his evidence, Mr Stubbs contested the accuracy of this note saying that he made no such request and did not consider himself to be a member of any 'Area Office Branch'. Be that as it may, I see no inconsistency in newly-elected officials wishing to appear on the Area Office register of members, as stated in paragraph 24 above. In this context, I attribute no significant weight to the use by the Head of Finance of the expression "area office branch".
57. I find that a semantic examination of each occasion upon which the word 'branch' has been used in the documentation is far from conclusive that the members to which reference was being made were members of a branch within the meaning of the rules. This is best demonstrated by the so-called surgery branches. I find that the Union has used the word 'branch' loosely and no particular significance can be attributed to the use of this word in general correspondence.
58. Mr Scargill has referred me to the many rules which refer to branches. He relies particularly on the references that appear in the context of personal injury cases, grievance and discipline. There is no doubt that the rules envisage all members being allocated to a branch but there is no express rule to that effect. The rules merely state that members shall be allocated to an Area and that an Area shall be divided into as many branches as the Area considers expedient. These rules must be seen in context, particularly against the situation in which many collieries and branches have been closed and yet many former miners have wished to retain their links with the Union, through limited membership, some for the purposes of personal injury claims. This gave rise to groups of members with different interests, in particular working miners for whom the Union was founded, and others. Working miners were in the main allocated to branches and played a full part in the Union's democracy. Many former miners were deliberately excluded from much of the Union's democracy for obvious reasons. It is against this background that the surgery branches were established, which I find were not branches within the meaning of the rules. It is also against this background that the so-called 'Yorkshire Area Office Branch' evolved pragmatically as a register of members. I find that this situation prevailed, both before and after Mr Scargill's retirement. It is not for me to determine in this case whether all members must be members of a branch and, if so, order that a branch be set up for those not now in a branch. I must determine if there was a 'Yorkshire Area Office Branch', constituted within the rules of the Union, in 2008. Having considered the evidence and submissions on this point, I find as fact that in 2008 there was no branch in the Yorkshire Area known as the 'Yorkshire Area Office Branch'.

## **The Relevant Statutory Provisions**

59. The provisions of the 1992 Act which are relevant for the purpose of this application are as follows:-

### **CHAPTER IV ELECTIONS FOR CERTAIN POSITIONS**

#### *Duty to hold elections*

#### **a. Duty to hold elections for certain positions**

##### *(1) A trade union shall secure –*

- (a) that every person who holds a position in the union to which this Chapter applies does so by virtue of having been elected to it at an election satisfying the requirements of this Chapter, and*
- (b) that no person continues to hold such a position for more than five years without being re-elected at such an election.*

##### *(2) The positions to which this Chapter applies (subject as mentioned below) are -*

- (a) member of the executive,*
- (b) any position by virtue of which a person is a member of the executive,*
- (c) president, and*
- (d) general secretary;*

*(3) In this Chapter "member of the executive" includes any person who, under the rules or practice of the union, may attend and speak at some or all of the meetings of the executive, otherwise than for the purpose of providing the committee with factual information or with technical or professional advice with respect to matters taken into account by the executive in carrying out its functions.*

##### *(4) This Chapter does not apply to the position of president or general secretary if the holder of that position -*

- (a) is not, in respect of that position, either a voting member of the executive or an employee of the union,*
- (b) holds that position for a period which under the rules of the union cannot end more than 13 months after he took it up, and*
- (c) has not held either position at any time in the period of twelve months ending with the day before he took up that position.*

*(5) In subsection (4) a "voting member of the executive" means a person entitled in his own right to attend meetings of the executive and to vote on matters on which votes are taken by the executive (whether or not he is entitled to attend all such meetings or to vote on all such matters or in all circumstances).*

*(5B) The "requirements of this Chapter" referred to in subsection (1) and (5A) are those set out in section 47-52 below.*

*(6) The provisions of this Chapter apply notwithstanding anything in the rules or practice of the union; and the terms and conditions on which a person is employed by the union shall be disregarded in so far as they would prevent the union from complying with the provisions of this Chapter.*

#### **Requirements to be satisfied with respect to elections**

##### **47 Candidates**

- (1) No member of the trade union shall be unreasonably excluded from standing as a candidate.*
- (2) No candidate shall be required, directly or indirectly, to be a member of a political party.*



(3) A member of a trade union shall not be taken to be unreasonably excluded from standing as a candidate if he is excluded on the ground that he belongs to a class of which all the members are excluded by the rules of the union.

But a rule which provides for such a class to be determined by reference to whom the union chooses to exclude shall be disregarded.

#### **50 Entitlement to vote**

(1) Subject to the provisions of this section, entitlement to vote shall be accorded equally to all members of the trade union.

(2) The rules of the union may exclude entitlement to vote in the case of all members belonging to one of the following classes, or to a class falling within one of the following-

- (a) members who are not in employment;
- (b) members who are in arrears in respect of any subscription or contribution due to the union;
- (c) members who are apprentices, trainees or students or new members of the union.

(3) The rules of the union may restrict entitlement to vote to members who fall within -

- (a) a class determined by reference to a trade or occupation,
- (b) a class determined by reference to a geographical area, or
- (c) a class which is by virtue of the rules of the union treated as a separate section within the union,

or to members who fall within a class determined by reference to any combination of the factors mentioned in paragraphs (a), (b) and (c).

The reference in paragraph (c) to a section of a trade union includes a part of the union which is itself a trade union.

(4) Entitlement may not be restricted in accordance with subsection (3) if the effect is that any member of the union is denied entitlement to vote at all elections held for the purposes of this Chapter otherwise than by virtue of belonging to a class excluded in accordance with subsection (2).

#### **Section 54 Remedy for failure to comply with requirements: general**

(1) The remedy for a failure on the part of a trade union to comply with the requirements of this Chapter is by way of application under section 55 (to the Certification Officer) or section 56 (to the court)

(2) An application under those sections may be made –

- (a) by a person who is a member of the trade union (provided, where the election has been held, he was also a member at the time when it was held), or
  - (b) by a person who is or was a candidate at the election;
- and the references in those sections to a person having a sufficient interest are to such a person.

#### **Section 55 Application to Certification Officer**

(1) A person having a sufficient interest (see section 54(2)) who claims that a trade union has failed to comply with any of the requirements of this Chapter may apply to the Certification Officer for a declaration to that effect.

(5A) Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or both of the following requirements -

- (a) to secure the holding of an election in accordance with the order;
- (b) to take such steps to remedy the declared failure as may be specified in the order;
- (c) to abstain from such acts as may be so specified with a view to securing that a failure of the same or a similar kind does not occur in future.

*The Certification Officer shall in an order imposing any such requirement as is mentioned in paragraph (a) or (b) specify the period within which the union is to comply with the requirements of the order.*

*(5B) Where the Certification Officer makes an order requiring the union to hold a fresh election, he shall (unless he considers that it would be inappropriate to do so in the particular circumstances of the case) require the election to be conducted in accordance with the requirements of this Chapter and such other provisions as may be made by the order.*

**Section 108A Right to apply to Certification Officer**

*(1) A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in subsection (2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) to (7).*

*(2) The matters are -*

- (a) the appointment or election of a person to, or the removal of a person from, any office*
- (b) - (e)*

**Section 108B Declarations and orders**

*(1) The Certification Officer may refuse to accept an application under section 108A unless he is satisfied that the applicant has taken all reasonable steps to resolve the claim by the use of any internal complaints procedure of the union.*

*(3) Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or both of the following requirements -*

- (a) to take such steps to remedy the breach, or withdraw the threat of a breach, as maybe specified in the order;*
- (b) to abstain from such acts as may be so specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future.*

*(4) The Certification Officer shall in an order imposing any such requirement as is mentioned in subsection (3)(a) specify the period within which the union is to comply with the requirement.*

**The Relevant Union Rules**

60. The Rules of the Union which are relevant for the purpose of this application are as follows:-

**NATIONAL RULES**

**Rule 5.F Membership in Areas**

*(i) Every member of the Union shall be allocated by the N.E.C. to an appropriate Area and any member may be re-allocated by the N.E.C at any time from one Area to another.*

**Rule 9. National Executive Committee**

9.A. The National Executive Committee (“N.E.C”) shall consist of:

- (i) The President.*
- (ii) The Vice-President.*
- (iii) The Secretary.*
- (vi) Representative members who shall be elected by Areas consisting of more than 29 members from amongst the members thereof to hold office until the conclusion of the next Biennial Conference at which all representative members (whenever elected) will retire.*
- (v) One representative of and elected by the Miners’ Parliamentary Group who*

*shall not be entitled to vote.*

*9.D No member shall be eligible for nomination to the N.E.C unless he or she has been a full financial member of the Union for at least 12 months immediately prior to such nomination.*

*9.E Branches shall be entitled to nominate members for election as representative members of their Area on the N.E.C and Area Executive Committees shall, when more than one nomination is submitted, arrange an election by individual ballot of the members taken on the principle of “the transferable vote” as defined in Section 41 of the Representation of the People Act 1918, and the name of the person so elected shall be communicated to the Secretary of the Union in time to be included on the Final Agenda of the relevant Biennial Conference.*

**Rule 18. Areas**

*18.A The members of the Union shall for the purpose of administration be organised into divisions of the Union to be known as “Areas” listed in Schedule One hereto as amended from time to time.*

*18.F Each Area and each Constituent Association, its Officials and Executive Committees shall comply with the Rules of the Union so far as those Rules are applicable.*

*18.G Each Area and each Constituent Association shall adopt and comply with the Model Rules and any amendments thereto. Each Area which has transferred its engagements to the Union shall adopt Standing Orders, which shall be the Model Rules (and which shall be included in the term “Model Rules” in these Rules) except to the extent approved by the NEC.*

**Rule 19. Government of Areas**

*19.A Areas shall have such Area Councils and/or Area Executive Committees (which are in these Rules called “Area Executive Committees”) and Area Officials/Agents, and there shall be such Branches in each Area, with such Branch Committees and Branch Officers as may be prescribed by the regulations applicable thereto. Those Areas which have transferred their engagements to the Union shall in addition participate in the National Delegate Meetings in accordance with Rule 8. The administration of any existing funds or contributions collected by an Area in accordance with Rule 6.O for the purpose of provident, welfare or other purpose shall be controlled by the Area who shall have autonomy over such funds.*

*19.B All Area Councils/Area Executive Committees, Area Officials/Agents, Branch Committees and Branch Officers shall be subject in all respects to the authority of the Union and shall comply at all times with the directions of the N.E.C and of Conference. The N.E.C shall be responsible for unifying the procedures that deal with all matters in all the Areas.*

*19.C The Area Officials/Agents and each Area Council/Area Executive Committee shall be responsible to the N.E.C. for:*

*(ii) The establishment and maintenance of the Branches within their Area*

*19.E The Rules of each Area and Constituent Association shall be the Model Rules and any amendments thereto and any such amendment shall automatically become an amendment to the Rules of each Area and Constituent Association on the date of adoption of the amendment by Conference or such other date as Conference may determine. The current National Rules shall be deemed to be part of the Area Rules. Each Area or Constituent Association may have such other Rules in addition to the Model Rules as it may decide provided that no such Rules shall conflict with any National Rules or Model Rules or with the policy of the Union.*

19.G A Branch in an Area shall (subject to the overriding authority of the N.E.C.) exercise such functions as may be delegated to it by the relevant Area Council/Area Executive Committee or as provided in the Regulations of the Branch and of the Area. Each Branch shall have complete control and autonomy in respect of the expenditure or administration of its existing funds and of that part of the weekly contributions of its members allowed to the Branch by Rule 6.N.

**Rule 28. Rules**

28.B On any question as to which Rules (including the Model Rules) or Area Rules do not provide, or on any suggested conflict between Area Rules and these Rules (including the Model Rules), or on any question of interpretation of these Rules (including the Model Rules), the matter shall be referred to the National President who shall make a ruling which shall be final and binding subject to an appeal to the N.E.C. and thence to Conference.

**YORKSHIRE AREA STANDING ORDERS**

**Election of National Executive Committee Representatives**

9. Branches shall be entitled to nominate members for election as representative members of the Yorkshire Area on the NEC. Nominations shall be confined to a person who is a financial member and has been for at least 12 months immediately prior to nomination. At the close of nominations only those candidates will be eligible for election who have received the nominations of Branches, the total membership of which together amounts to 30% or more of the total membership of the Area on the basis of the published figures. The election of the NEC representatives shall be by vote of full financial members of the Area. The ballot shall be taken on the principle of the "transferable vote" as defined in Section 41 of the Representation of the People Act 1918.

**Branches**

16(a). The Area shall be divided into as many Branches as may be deemed expedient. The Area Council shall supervise and co-ordinate the action of all the Branches in the Area in accordance with the Standing Orders and policy of the Area, and each Branch shall exercise such functions as may be delegated to it by the Area Council. Each Branch shall comply with these Standing Orders and the directions of the Area Council and the National Executive Committee.

**Standing Orders**

32(a). These Standing Orders shall be for the government of the Area. Any new Standing Order or alteration, amendment or rescission of any existing Standing Order shall only be made by the Area Council at their Annual Meeting which shall be held normally in March each year, or at an Emergency Council Meeting. No alteration, amendment or rescission shall be permitted which is a contravention of any Rule of Rules made by the National Union. Any amendment, alteration or rescission to these Standing Orders must emanate from a Branch General Meeting or upon recommendation from the Area Officials and/or the Area Council and be submitted in writing to the Area Secretary not later than the 1<sup>st</sup> February preceding the Annual Meeting. A Special Meeting may be called at any time by the Area Secretary to consider an amendment, alteration or rescission submitted by the Area Officials and/or Area Council, such amendment, alteration or rescission shall be circulated to Branches prior to being considered at a Special Meeting of the Area Council.

32(d). On any question as to which the National Rules (including the Model Rules) do not provide, or any suggested conflict between these Standing Orders and the National Rules (including the Model Rules), or on a question of interpretation of the National Rules (including the Model Rules) the matter shall be considered by the National Chairman who shall make a ruling which shall be final and binding subject to an appeal to the NEC and thence to Conference.

## Conclusions

61. The issues to be determined in this complaint were identified and agreed at the Case Management Hearing in the terms set out at paragraph 2 of these Reasons and as summarised at paragraph 16. There are three issues of breach of rule and three issues of breach of statute.

### Breach of rule (first issue)

62. The first issue is whether the requirement in Standing Order 9 of the Yorkshire Area is in conflict with rule 9.E of the National Rules and therefore in breach of rule 19.E of the National Rules. The only sentence of Standing Order 9 about which Mr Scargill complains is as follows: “*At the close of nominations only those candidates will be eligible for election who have received the nominations of Branches, the total membership of which amounts to 30% or more of the total membership of the Area on the basis of the published figures.*” I shall refer to this as “the 30% rule”.

63. Rule 9.E of the National Rules provides as follows:

*Branches shall be entitled to nominate members for election as representative members of their Area on the N.E.C and Area Executive Committees shall, when more than one nomination is submitted, arrange an election by individual ballot of the members taken on the principle of “the transferable vote” as defined in Section 41 of the Representation of the People Act 1918, and the name of the person so elected shall be communicated to the Secretary of the Union in time to be included on the Final Agenda of the relevant Biennial Conference.*

Rule 19.E of the National Rules provides as follows:

*The Rules of each Area and Constituent Association shall be the Model Rules and any amendments thereto and any such amendment shall automatically become an amendment to the Rules of each Area and Constituent Association on the date of adoption of the amendment by Conference or such other date as Conference may determine. The current National Rules shall be deemed to be part of the Area Rules. Each Area of Constituent Association may have such other Rules in addition to the Model Rules as it may decide provided that no such Rules shall conflict with any National Rules or Model Rules or with the policy of the Union.*

64. Mr Scargill submitted that, by National Rule 9.E, all branches are entitled to nominate members for election to the NEC, which means that once a member has been nominated by a branch, his or her name must appear on the ballot paper, unless there is a further restriction in the National Rules. He argued that Mr Mace had been nominated by the Maltby branch in the NEC elections in both April/May and July/August 2008 and that he was declared ineligible on both occasions by virtue of the 30% rule in Yorkshire Area Standing Order 9. Mr Scargill submitted that, by imposing this further requirement on eligibility, Standing Order 9 was in conflict with rule 9.E. He argued that this restriction on the right to nominate was not only in conflict with the rules but also the policy of the Union. As to the policy of the Union, he referred to a special delegate conference in 1989 which had rejected a similar 20% rule in relation to the NEC elections, whilst accepting such a rule in relation to the election of national and

area officials. He further argued that the High Court had accepted in 1985 that the election procedure for the NEC must be in accordance with rule 9.E

65. Mr Carr, for the Union, submitted that it is clear from National Rule 19.E that an Area, as well as being governed by the National Rules and Model Rules, is permitted to have additional rules as long as they satisfy the restriction in rule 19.E. He argued that the 30% rule was such an additional rule and that it was not in conflict with rule 9.E as it did not place any barrier on the branch's ability to nominate members for election. Mr Carr maintained that rule 9.E entitles a branch to nominate a member and that, on the facts of this case, the Maltby branch did nominate Mr Mace. He argued that Standing Order 9 only has effect after the nomination process has been completed to determine if a nominated person is eligible to be put forward for the actual election. Mr Carr also maintained that Standing Order 9 was not in conflict with the policy of the Union. He argued that the fundamental purpose of the Union is to represent working miners and there is nothing wrong in principle with requiring a potential candidate to demonstrate a certain level of support from amongst branches representing working miners. He also pointed out that the National Union itself has a requirement to achieve a level of support prior to the election of certain officials. He argued that Mr Kitchen, as Secretary of the National Union, could speak as to its policy and that, in a letter of 6 May 2008, Mr Lavery, the National President, did not see any difficulty or conflict in the operation of Standing Order 9. He relied particularly on Mr Lavery's letter as, by National Rule 28.B and Yorkshire Area Standing Order 32(d), his ruling is final and binding on any issue regarding any conflict between Area rules/Standing Orders and the National Rules, subject to an appeal to the NEC and then conference.
66. Rule 19.E provides, in effect, that any area Standing Order must not conflict with any National Rule, Model Rule or policy of the Union. It was not directly contended that Standing Order 9 conflicted with the Model Rules. As to the policy of the Union, it is not for me to determine what is the policy of the Union in the absence of clear evidence. I find that there is no clear evidence before me as to the policy of the Union with regard to the 30% rule. I reject Mr Scargill's contention that the decision of a Special Delegate Conference in 1989 is clear evidence of the policy of the Union in 2008. On the other hand, there are some indications that the 30% rule is at least not inimical to the Union's policy. These can be found in Mr Lavery's letter of 6 May 2008, in which he appears to support the application of Standing Order 9, the similar restrictions contained in the rules relating to the election of National President and Area Officials (rules 15.C, 21.A and 21.B) and Mr Carr's general submission that the NEC should primarily represent the interests of working miners. For these reasons, I do not find that Standing Order 9 is in conflict with any clearly stated policy of the Union. On the other hand, I reject the Union's argument that Mr Lavery's letter of 6 May 2008 constituted a ruling by him under National Rule 28.B or Yorkshire Area Standing Order 32(d). The letter itself is not clearly expressed as such a ruling and Mr Kitchen stated in evidence that its main purpose was to address the issue of a possible extension of the nomination period. Further, Mr Kitchen stated that Mr Lavery's ruling on this matter was contained in an email which is not now available and not in evidence. Further, Mr Lavery was not

called as a witness by either party. In these circumstances, the only weight I give to Mr Lavery's letter of 6 May is that it does not express any view that Standing Order 9 should not be applied, as might be expected if he was of that opinion.

67. In order to determine whether Standing Order 9 conflicts with National Rule 9.E, I must first determine the meaning of Rule 9.E. The relevant part of Rule 9.E provides:

*“Branches shall be entitled to nominate members for election as representative members of their Area on the NEC and Area Executive Committees shall, when more than one nomination is submitted, arrange an election by individual ballot of the members ...”*

68. I derived some limited assistance to the interpretation of rule 9.E from **Wise v USDAW (1996) IRLR 609**. In that case, Mr Justice Chadwick, sitting in the High Court, had to determine the meaning of not dissimilar words in the context of a decision by the Executive Council of USDAW to impose an eligibility requirement in an election for its General Secretary. That requirement was that the member nominated must have received not less than 25 branch nominations. The USDAW rule to be interpreted was rule 11 section 1. The relevant part of this rule provides *“... all branches shall have the right to make nominations”*. Chadwick J held:

*“56. With those considerations in mind, I return to the question; what is meant by the provision “all branches shall have the right to make nominations?” In my view, two matters are clear. First of all, it is the intention of these rules that nomination for election should be made by a branch rather than by any individual member or group of members. Secondly, it is clear that any branch may make a nomination and that the right to nominate is not confined to particular branches or particular combinations of branches. But is it to be held that that is all that the sentence in rule 11 section 1 is intended to mean? In my view, so restrictive an interpretation would not accord with the ordinary understanding of the language used.*

*57. I do not accept that the readership to which this rule is addressed would understand, from the words used, that although their branch was entitled to make a nomination for election, that nomination would not be effected unless combined with the nominations of an unspecified number of other branches; such number to be decided from time to time by the Executive Council. I think that a member of this Union reading these rules would understand that each branch could make a nomination and that that nomination would then be voted upon in an election. Accordingly, and as a matter of construction, I hold that the rules provide that a candidate who secures the nomination of a single branch is eligible for election to the office of General Secretary; and that the members of the Union have the right to have the name of that candidate put before them on a ballot without the need for any further threshold.*

*58. In reaching that decision, I do not rely on the custom and practice of the Union. I am not satisfied from the evidence that there has been a custom and practice in relation to rule 11 section 1 which precedes the adoption of the current rules in 1993. However, I am satisfied from the evidence that the practice of requiring only a single branch nomination is a practice of longstanding in this Union. Accordingly, I am satisfied that in reaching the decision that I do, as a matter of construction, I am not violating any established custom and practice which has developed over the years in this Union.”*

I am conscious of the limited value to be placed on the interpretation of the rules of other Unions in a different context. It is nevertheless instructive that the High Court has found that similar words are capable of bearing the meaning that nomination should have the consequence of the nominee's name appearing on the ballot paper without the need for any further threshold.

69. It might be argued that the major distinction between the present case and the USDAW case is that, in the present case, there has been a custom and practice of imposing a restriction between nomination and appearing on the ballot paper. In my judgment, however, such a custom and practice in the Yorkshire Area cannot affect the meaning to be given to a National Rule, which is binding on all twelve of its Areas. The custom and practice arises out of the operation of Yorkshire Area Standing Order 9 and is not a relevant consideration in the interpretation of National Rule 9.E. The issue remains whether Standing Order 9 conflicts with rule 9.E, correctly interpreted.
70. In my judgment, the Union's argument that rule 9.E allows for a two-stage process to becoming a candidate places too much reliance on the initial words of the rule "*Branches shall be entitled to nominate members ...*". Mr Carr argued that branches were entitled to nominate, that the Maltby branch nominated Mr Mace and that there was therefore no breach of rule 9.E. However, rule 9.E goes on to deal expressly with the situation "*where more than one nomination is submitted*". It provides that in these circumstances the Area Executive Committee (now the Area Council) "*shall arrange an election by individual ballot*". I find that this requirement precludes any intermediate step between nomination and appearing on the ballot paper as a candidate. My conclusion is supported by the fact that the National Rules provide a requirement to obtain 30% support in respect of elections as National President and Area Agent/Officials but have not done so in the case of elections as NEC representative. This is a significant indication that the omission of the 30% rule from rule 9.E was deliberate and that, properly interpreted, this rule precludes any intermediate step between nomination and appearing on the ballot paper in elections to the NEC.
71. Yorkshire Area Standing Order 9 clearly imposes an intermediate step between nomination and appearing on the ballot paper. It is therefore in conflict with National Rule 9.E. Accordingly, as National Rule 19.E only permits an Area to have Standing Orders which do not conflict with the National Rules, I find that the sentence of Yorkshire Area Standing Order 9 which imposes the 30% requirement is void and of no effect.

#### **Breach of rule (second issue)**

72. Mr Scargill submitted that Yorkshire Area Standing Order 9 was never a binding rule in any event as it was 'slipped into' the Standing Orders at or about the time of the transfer of engagements in 1994, without ever having been approved in a constitutionally recognised manner.



73. I have dealt with this issue as a finding of fact at paragraphs 18 to 20 above. Were it not for my finding that Standing Order 9 contravenes National Rule 19.E, I would have found that Standing Order 9 was a valid and binding rule of the Yorkshire Area in 2008.

**Breach of rule (third issue)**

74. Mr Scargill submitted that there was in any event a breach of both Standing Order 9 and National Rule 9.E by having excluded from the nomination process the ‘Yorkshire Area Office Branch’.
75. I have dealt with this issue as a finding of fact at paragraphs 21 to 35 above. I find that there was no branch of the Union known as the ‘Yorkshire Area Office Branch’ in existence in 2008, and that accordingly it could not have been excluded from the nomination process in breach of rule.

**Breach of statute**

76. Mr Scargill alleges breaches of sections 46(1), 47(1) and 50(1) of the 1992 Act. The logical order of dealing with these complaints is section 47(1), section 50(1) and then section 46(1).

**Breach of statute (section 47(1))**

77. Section 47(1) of the 1992 Act provides as follows:

*(1) No member of the trade union shall be unreasonably excluded from standing as a candidate.*

78. Mr Scargill submitted that a nominee, Mr Mace, had been unreasonably excluded from standing as a candidate in the elections to be a representative on the NEC in both April/May and July/August 2008. He maintained that Mr Mace’s exclusion was unreasonable on a number of grounds. First, he argued that his exclusion was based on Yorkshire Area Standing Order 9, which was an invalid rule, having been unconstitutionally ‘slipped in’ and also in conflict with National Rule 9.E. He maintained that the nomination process should have been conducted in accordance with National Rule 9.E. Secondly, he argued that by excluding the ‘Yorkshire Area Office Branch’ from the nomination process, the Union had effectively denied the right of 7-9% of members of the Yorkshire Area to participate in that process. Thirdly, he argued that the operation of the 30% rule in the Yorkshire Area was unreasonable even if the Union could exclude the ‘Yorkshire Area Office Branch’ from the nomination process. He stated that the Maltby branch, which had nominated Mr Mace had 29% of the membership of the Area but that this figure raises to 31% if the members of the ‘Yorkshire Area Office Branch’, who were excluded from the nomination process, were also to be excluded from the calculation of what constitutes 30%. Mr Scargill argued that this would be a more reasonable application of the 30% rule. Fourthly, he stated that in 1985, the High Court had decided that the nomination procedure must be in accordance with rule 9.E. Dealing with this latter point, I found this passing reference to a decision of the High Court to be

of no assistance. No transcript of the judgment was produced and its main effect appears to have been that the Union must carry out its NEC elections in accordance with the relevant statutory provisions and those rules of the Union which are compatible with those statutory provisions.

79. Mr Carr, for the Union, argued that the exclusion of Mr Mace from standing as a candidate in the elections in question was reasonable. He did not seek to rely upon the potential defence in section 47(3) of the 1992 Act. Mr Carr submitted that the issue was whether Yorkshire Area Standing Order 9 amounted to an unreasonable exclusion. He referred to a number of cases in which it had been found not unreasonable to require candidates to demonstrate an appropriate minimum level of support, usually by securing a specific number of branch nominations. He referred to **Curry v PCS (D/35-36/05)**; **Paul v NALGO (1987) IRLR 43**; **Ecclestone v NUJ (1999) IRLR 166**; and **Stokes v GMB (2004) EAT/749/03**. Mr Carr argued that the 30% rule did not prevent any member of the Yorkshire Area from seeking nomination, even though those on the Area Office register would need to obtain nomination from a fully constituted branch.
80. I have already found that Yorkshire Area Standing Order 9 is in breach of National Rule 19.E, by being in conflict with National Rule 9.E. The offending words of Standing Order 9 are therefore void and of no effect. The Union cannot therefore rely upon Standing Order 9 to establish the reasonableness of the exclusion of Mr Mace from standing as a candidate in the elections in question. However, the reasonableness of a member's exclusion from standing as a candidate is to be judged at large. The fact that the exclusion is or is not contained in the rules of the Union may be a factor in deciding upon its reasonableness but it is not conclusive.
81. I accept Mr Carr's submission, supported by previous cases, that there is nothing intrinsically unreasonable in requiring a candidate to demonstrate an appropriate minimum level of support. However, whether any particular requirement is unreasonable will depend upon the facts of each case.
82. On the facts of this case, the exclusion that has been applied is as follows:

*"At the close of nominations only those candidates will be eligible for election who have received the nominations of Branches, the total membership of which together amounts to 30% or more of the total membership of the Area on the basis of the published figures."*

This restriction on being a candidate must be considered as a whole against the factual background to which it was applied. It does, however, invite a consideration of whether 30% is an appropriate figure and of whether the method whereby that percentage is calculated is reasonable. First, it is necessary to state the factual background.

83. Mr Scargill's witness statement refers to the time in 1988 when a 20% rule was being considered as a requirement to stand as National President or National Secretary. He referred to an opinion from Leading Counsel in 1988 that such a move was possible, taking into account that the Union then had 90,847

members and a large number of branches. In 1989, a Special National Delegate Conference amended the rules to introduce a 20% requirement in respect of National and Area Officials/Agents but rejected the proposal to extend this to elections to the NEC. The present rules contain a 30% rule for National President (rule 15.C) and Area Officials/Agents (rule 21.A). They even contain a 50% rule in the event of there being more than six nominees in an election for Area Officials/ Agents (rule 21.B).

84. The elections in question in the Yorkshire Area were based on the membership figures in the Yorkshire Area in December 2007. These figures were prepared by the Union’s Finance Department in the following form:

**NUM MEMBERSHIP – YORKSHIRE AREA**

**MONTH DECEMBER 2007**

<b>BRANCH</b>	<b>FULL MEMBERS</b>	<b>LIMITED MEMBERS</b>
AREA OFFICE	56	227
KELLINGLEY	436	11
MALTBY	239	5
HATFIELD	83	2
DAWMILL	7	
WELBECK	3	
THORESBY	5	1
<b>TOTAL</b>	829	246

These figures require some explanation. As found above, the inclusion of ‘Area Office’ under the heading “branch” is not conclusive of there being a ‘Yorkshire Area Office Branch’. It is consistent with the loose use by the Union of the term “branch” and the administrative need to maintain a register of members who are not in a rule book branch. Dawmill is a colliery in Leicestershire and not a branch in the Yorkshire Area. Similarly, Welbeck and Thoresby are collieries in Nottinghamshire. Evidence was given that some members who lived in the Yorkshire Area went to work at these collieries but chose to remain members of the Yorkshire Area. Mr Scargill argued that these 15 members should appear as members of the Area Office, boosting its full financial membership from 56 to 71. In any event, the members at these three collieries did not participate in the nomination process in question but were entitled to vote in the subsequent election. In 2007, the membership paying into the general fund of the National Union, according to the Annual Return submitted to the Certification Office, was 1,618.

85. In the elections in both April/May and July/August 2008, Mr Mace was nominated by the Maltby branch. In the April/May election, Mr Kitchen was nominated by the Kellingley branch and in the July/August election Mr Hadfield was nominated by the Kellingley and Hatfield branches. It is evident from the above figures that only the Kellingley branch had 30% or more of the total membership of the Area. It had 52.6%. Maltby had 28.8% and Hatfield had 10%. Accordingly, a candidate from the Maltby or Hatfield branch had to obtain a nomination from at least one other branch in addition to his or her own.

86. I find that a 30% rule is potentially reasonable where the number of members, the number of branches and the method of calculation is such as to make it reasonably practicable for any member to appear on the ballot paper. Although 30% is a high percentage, the facts of the particular case may make such an exclusion reasonable. On the facts of this case, however, with the Yorkshire Area having only 829 members, three branches and an uneven distribution of members, I find that members at the Maltby and Hatfield collieries were so disadvantaged by the 30% rule that it operated unreasonably against any of them who wished to stand as a candidate. In my judgment, on these grounds alone, the exclusion of Mr Mace from standing as a candidate in the elections in April/May and July/August 2008 was unreasonable and in breach of section 47(1) of the 1992 Act.
87. In addition, however, the method of calculating the 30% was a further difficulty faced by Mr Mace in overcoming the threshold. As stated above, the rules envisage all members belonging to a branch. If this had in fact been the case, the total membership of the Area would be the same as the total membership of the branches. As it was, the total full financial membership of the Area was 71 more than that of the branches from which potential candidates could seek a nomination. In a larger union, this figure may not have any consequence but, on the facts of this case, the votes of 71 members could have had a significant effect on the nomination process. If the 71 members were in one of, or distributed between, the established branches or in a branch of their own, the outcome of the nomination process could have been different. On the other hand, if the 71 members were to be excluded from the nomination process, it is arguable that it was unreasonable to count them as part of the total membership of the Area. If they had not been counted as part of the total membership of the Area, the Maltby branch would have had 31% of the relevant membership and Mr Mace's name would have appeared on the ballot paper. This gives support to my conclusion that Mr Mace was unreasonably excluded from standing as a candidate in the elections in April/May and July/August 2008 in breach of section 47(1) of the 1992 Act.

### **Breach of statute (section 50(1))**

88. Section 50(1) and (3) of the 1992 Act provide as follows:

#### **50 Entitlement to vote**

*(1) Subject to the provisions of this section, entitlement to vote shall be accorded equally to all members of the trade union.*

*(3) The rules of the union may restrict entitlement to vote to members who fall within -*

- (a) a class determined by reference to a trade or occupation,*
- (b) a class determined by reference to a geographical area, or*
- (c) a class which is by virtue of the rules of the union treated as a separate section within the union,*

*or to members who fall within a class determined by reference to any combination of the factors mentioned in paragraphs (a), (b) and (c).*

*The reference in paragraph (c) to a section of a trade union includes a part of the union which is itself a trade union.*

89. Mr Scargill submitted that members of the so-called ‘Yorkshire Area Office Branch’ were denied the entitlement to nominate candidates in the two elections in 2008 for the Yorkshire Area representative on the NEC. He argued that entitlement to vote had therefore not been accorded equally to all members of the Union in breach of section 50(1) of the 1992 Act.
90. Mr Carr, for the Union, submitted that section 50 of the 1992 Act applies only to the casting of votes for eligible candidates in an election and not to the nomination process, prior to any such election. He emphasised that, had there been a contested election, all members on the Area Office register would have been entitled to vote. He also argued that, even if his primary submission was wrong, the Union was entitled under section 50(3)(c) “*to restrict entitlement to vote to members who fall within a class which is by virtue of the rules of the Union, treated as a separate section within the union*”. Mr Carr submitted that the Union may therefore decide, for example, to deny voting rights to members of branches that are not “*fully constituted*”, or, indeed, under the statute, to deny such rights to members of a particular branch.
91. In my judgment, section 50(1) of the 1992 Act applies only to the act of voting in an election which a Union is required to conduct by section 46. I accept Mr Carr’s primary submission in this regard and find Mr Scargill’s contention that section 50(1) also applies to the nomination process to be unsustainable on the language of Chapter IV. However, I reject Mr Carr’s alternative submission based on section 50(3)(c) on the grounds that the so-called ‘Yorkshire Area Office Branch’ was not treated as a separate section within the Union by virtue of the rules of the Union. The rules envisage all members being allocated to a branch. They do not envisage a group of members outside the branch structure, identified only by being contained on an area register to which there is no reference in the rules of the Union.
92. For the above reasons I reject Mr Scargill’s complaint that the Union acted in breach of section 50(1) of the 1992 Act by allegedly failing to accord equally to all members the entitlement to vote.

**Breach of statute (section 46(1))**

93. Section 46(1) of the 1992 Act provides as follows:
- (1) A trade union shall secure –*
- (a) that every person who holds a position in the union to which this Chapter applies does so by virtue of having been elected to it at an election satisfying the requirements of this Chapter, and*
- (b) that no person continues to hold such a position for more than five years without being re-elected at such an election.*
94. It is common ground that if the Union breached section 47(1) and/or section 50(1) of the 1992 Act the persons so elected to the NEC would be holding their positions on the NEC by virtue of having been elected to them at elections which did not satisfy the requirements of Chapter IV. I have found that the Union breached section 47(1) by unreasonably excluding Mr Mace from

standing as a candidate in both elections to the NEC in April/May and July/August 2008. Accordingly, I find that, by doing so, the Union also breached section 46(1) of the 1992 Act.

### **Enforcement Orders**

95. When I make a declaration I am required by section 108B(3) of the 1992 Act, in respect of a breach of rule, and section 55(5A), in respect of a breach of statute, to make an enforcement order unless I consider that to do so would be inappropriate and, in the case of a breach of statute, I must specify the period within which the Union is to comply with the requirements of the order.

96. On the facts of this case, I find that it is appropriate that I make an enforcement order. Mr Mace was wrongly excluded from standing as a candidate in the NEC elections in April/May and July/August 2008. It is not necessary or appropriate that I consider his prospects of success in those elections. It is sufficient that he has been wrongly deprived of a chance of succeeding. The enforcement orders that I make are:

73.1 I order that the results of the elections of the Yorkshire Area of the Union for the position of representative on the NEC which were held in April/May and July/August 2008 be set aside and that the candidates declared elected in those elections shall forthwith cease to hold office.

73.2 I further order that elections for the two positions on the NEC so vacated shall take place so that the results are declared no later than 4 September 2009. The election shall be conducted so as to comply with Chapter IV of the 1992 Act and the rules of the Union (including the Standing Orders of the Yorkshire Area), save that the sentence in Standing Order 9 which provides that, "*At the close of nominations only those candidates will be eligible for election who have received the nominations of Branches, the total membership of which amounts to 30% or more of the total membership of the Area on the basis of the published figures*" is void and of no effect and is not to be applied. The Union is given leave to apply should it not be possible to meet the above deadline.

### **Observation**

97. I have found as a fact that there was no branch of the Yorkshire Area known as the 'Yorkshire Area Office Branch' in 2008. I have also commented that the rules of the Union envisage all members being in a branch. The Union has been aware of a problem in this regard since at least 2003, shortly after Mr Scargill retired. Although there may be many practical difficulties in balancing the interests of those currently working in the mining industry and those who are not, the Union may wish to address the issue of those members not currently in a rule book branch at the earliest opportunity.

**David Cockburn**  
**The Certification Officer**