CO/1964/13

DECISION OF THE CERTIFICATION OFFICER ON A COMPLAINT MADE UNDER SECTION 103 OF THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

IN THE MATTER OF A COMPLAINT AGAINST THE NATIONAL UNION OF MINEWORKERS (YORKSHIRE AREA)

Date of first complaint	**4 March 1994**
Date of Decision	**19 May 1994**
Date reasons published	**27 May 1994**

DECISION

1. On 4 March 1994 I received a complaint from a member of the National Union of Mineworkers (Yorkshire Area) ("the union") alleging that in the ballot of members on the proposed transfer of engagements of the National Union of Mineworkers (Yorkshire Area) to the National Union of Mineworkers, those members who had left the industry by accepting voluntary redundancy would be given an opportunity to vote. Subsequent correspondence established that the complainant was making three complaints under section 103(l)(a) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the Act" or "the 1992 Act") as amended by the Trade Union Reform and Employment Rights Act 1993. The complaints were:-

   I that non-members had been allowed to vote in the ballot - contrary to section 100B;

II that members were subject to interference in the exercise of their vote - contrary to section 100C(3)(a); and

III that not all members were given the opportunity to vote - contrary to section 100B.

2. On the basis of the material before me and because I am required to give the parties an opportunity to be heard before I issue a declaration I held a formal hearing on 17 May 1994. The complainant was accompanied by a member of his branch. The union was represented by Mr M Ford of Counsel instructed by Messrs Christian Fisher. The General Secretary of the union, Mr K Homer, and the National President of the National Union of Mineworkers, Mr A Scargill were present throughout the hearing and gave evidence.

3. At the end of the hearing I reserved my decision. On 19 May, after careful consideration of the documents, evidence and arguments put to me I decided to dismiss the complaint that non-members were allowed to vote in the ballot and the complaint that members were subject to interference in the exercise of their vote. I upheld the complaint that not all members of the union were given the opportunity to vote. The parties were notified accordingly on the same day. I now set out my reasons for these decisions.

The Law

4. Under the 1992 Act when one union wishes, as in this case, to transfer its engagements to another it does so under statutory procedures over which I exercise an oversight. I can only register the transfer when I am satisfied that all of the requirements have been

correctly followed. The requirement at issue in this case is that a resolution approving the transfer is passed by a majority in a ballot carried out in accordance with certain statutory requirements ('the transfer ballot'). These provisions are extensive but there are just two at the heart of this complaint. These are:

(a) Section 100B:

> *"Entitlement to vote in the ballot shall be accorded equally to all members of the trade union",* and

(b) Section 100C(3):

> *"Every person who is entitled to vote in the ballot must -*
> *(a) be allowed to vote without interference or constraint ..."*

The Facts

5. The National Union of Mineworkers (Yorkshire Area) is a trade union in its own right as well as forming a constituent part of the National Union of Mineworkers. Following contacts between my office and the union's legal representatives I approved a Notice to Members and an Instrument of Transfer of Engagements on 7 February 1994. A ballot seeking approval of the transfer was carried out for the union, between 8 March and 18 March 1994, by Electoral Reform Ballot Services (ERBS), the official scrutineer.

6. The rules of the National Union of Mineworkers (Yorkshire Area) mentions five types of member. These are:

(a) Full Members. Those eligible for this include those employed in the coal- mining industry in GB; those employed in other energy undertakings or other undertakings specified by Conference; employees of the Union; members who become MPs or MEPs; (with permission and subject to paying full subscriptions)

all former members temporarily engaged in undertakings which the union does not organise; and unemployed members whose employment was terminated by the employer through redundancy or victimisation;

(b) Honorary Members;

(c) Limited Members. Those eligible for this category are "any person having been a Full Member of the union for not less than twelve months, upon ceasing to be eligible for Full Membership and whilst not engaged in any full- time employment in respect of which that person would be entitled to apply for membership of another TUC affiliated trade union, and whilst under the age of 60 years";

(d) Retired Members. This category includes former Full Members on reaching retirement age or retiring early on health grounds or under a Voluntary Early Retirement Scheme. Limited members on reaching 60 and spouses of deceased former full Retired or Limited Members are also eligible;

(e) Associate Members - admitted at the discretion of the Area Council.

Full members pay a subscription of £3.34 a week; Limited members pay £1.67; Retired members pay nothing.

7. At the end of December 1993 the unions membership consisted of:

8,109 Full Financial Members

2,556	Limited Members
58,582	Retired Members and widows
1,269	Others

8. For the election ERBS issued 7,260 ballot papers, and 2,897 votes were cast in favour of the transfer terms set out in the instrument with 374 voting against. An application for registration of the instrument of transfer was received by me on 30 March 1994 and I provisionally agreed a registration date of 10 May - six weeks later in accordance with section 103(2) of the Act - provided that no complaint was outstanding on that date. As the complaint was not determined by 10 May I notified the parties that registration would be delayed. Against that background I shall consider each of the complaints in turn.

COMPLAINT I Non-members were allowed to vote

9. It was alleged by the complainant that Yorkshire Area members at particular pits who had accepted voluntary redundancy were issued with ballot papers for the transfer ballot. The complainant named several pits including Bentley and Frinkley which had closed with substantial voluntary redundancies in the months before the ballot but whose employees had been given a vote in the ballot. He further quoted a ruling of the National Union of Mineworkers' National Executive to the effect that "Members who have accepted in writing or verbally voluntary redundancy cannot be full members of the Union but are of course entitled to limited membership". He argued that on that basis as soon as anyone accepted voluntary redundancy they ceased to be entitled to full membership but nevertheless those at the named pits had been afforded a vote.

10. Against this the union argued that they had done their best to confine voting to members. In consultation with ERBS they had selected 4 December 1993 as the date to which the relevant register for the ballot would relate. They had identified from that register as best they could those, and only those, who were paid up full members and had sent them ballot papers. The union conceded that this meant that some who accepted voluntary redundancy between 4 December 1993 and the ballot in March 1994 were sent papers. However they argued that because such people were paid for 13 weeks in lieu of notice they were eligible for membership until the 13 weeks elapsed. Under "check-off" the employer used to deduct 13 weeks subscriptions and pay these to the union. Since check-off was ended by British Coal it was up to the individual member to maintain his or her subscription. The union asserted that most did maintain their subs; the complainant's witness asserted that of the hundreds he knew who had taken voluntary redundancy he knew of none who had paid subscriptions thereafter.

11. The union further argued that ft was very difficult to be certain at any moment who had or had not paid subscriptions and that it was their practice to assume that members remained in the union for 13 weeks after voluntary redundancy.

12. I found the evidence on both sides of this issue unsatisfactory. The complainant gave no evidence on the names or even numbers concerned. He did name one individual but that turned out to be a special case where there was a dispute about the person's status in the union and method of paying subscriptions. On the other hand the union stated explicitly that their systems would yield no hard facts on the proportion of mineworkers who actually paid 13 weeks subscription on volunteering for redundancy.

13. I accept that in the context of an industry going through immense change, it was clearly sensible in this case for the union to agree a cut-off date in respect of its membership list in order to identify the voting constituency for the transfer ballot. The union in consultation with ERBS settled on those in membership at 4 December 1993 in relation to the ballot in March 1994. I heard that the membership records are computerised and are regularly brought up to date. Given that fact it would have been better if a cut-off date nearer the balloting period had been decided upon in order that the vote would give as current a reflection of the union's membership as possible. Moreover these are exactly the circumstances in which it might be wise to remind those receiving ballot papers that only current members can vote.

14. Having considered all of these facts and views I do not believe it would be safe to reach a conclusion on the evidence before me that non-members were afforded a vote in this ballot. I therefore dismiss the first complaint.

COMPLAINT II Members were subject to interference in the exercise of their vote

15. The were two strands to this complaint. First it was alleged that an open letter sent to members by the National President and National Vice-President and advocating a 'yes' vote constituted interference in the ballot process in that it was circulated with the balloting material and that it did not accurately state the position. In the second strand it was alleged that a threat of disciplinary action against anyone campaigning against the transfer constituted interference or constraint in voting.

The Open Letter

16. The open letter to members was addressed to every Yorkshire Miner. It was put out over the names of Arthur Scargill (National President) and Frank Cave (National Vice-president). It explained that those concerned would receive a ballot paper on 8th March relating to the Transfer of Engagements to the National Union. It set out the benefits of merger in terms of allowing a modem efficient service with big administrative savings. It concluded with the following four paragraphs.

> *"There are elements in our own organisation who oppose the Transfer of Engagements and have taken to circulating lies as to what it would mean in relation to Yorkshire Area funds - lies which have been spread by the media which is opposed to our Union.*
>
> *All Yorkshire Area monies and assets would be deposited in a special Yorkshire Area Trust. This means protection for Yorkshire Area's money and assets. It means protection for Yorkshire members both past and present. The Trust Fund could not be used for any other N.U.M. area.*
>
> *Our forefathers fought to create one National Union in order to best represent and protect all mineworkers, their families and communities. The Yorkshire Area has constantly campaigned for that policy.*
>
> ***We urge you to vote "YES" in the forthcoming ballot and turn the hopes and dreams of our forefathers for one National Union of Mineworkers into reality".***

17. The complainant objected to this letter on several grounds:

(a) it should not have been circulated with the ballot papers;

(b) it did not provide a balanced view of the arguments against the transfer;

(c) it was false in at least two respects first, the statement that "the Trust Fund would not be used or any other NUM Area" contradicted the position described in the

Notice to members (which as required by statute I had approved). Secondly the statement that "The Area Executive Committee and Area Council fully support the proposed Transfer of Engagements" was inconsistent with the consistent opposition of his branch and others represented on those bodies.

18. Before the hearing it was agreed by the parties that this letter had not been included with the ballot paper but would have arrived at, or about, the same time as that ballot paper. Had it been included in the same envelope it would have fallen foul of section 100C(5) which specifies those documents which may be included with the voting paper. It was not, so it did not infringe that provision. The possibility of the letter along with (a), (b) and (c) in paragraph 17 infringing the "without interference" test remains to be considered.

19. The question of what constitutes interference with the entitlement to vote has been examined in several previous complaints to the Certification Officer. In the case of Paul v National and Local Government Officers' Association (D/14/86)/[1987] IRLR 43, the then Certification Officer observed:-

> *"In the past my predecessors as Certification Officer have decided, and I agree, that the right to allow a person to vote without interference or constraint is intended to exclude such conduct as would intimidate or put a member in fear of voting, or amount to physical interference".*

20. This interpretation has been repeated in a number of other decisions by the Certification Officer of the time, for example most recently by me in December 1993 in the matter of a complaint against the British Association of Colliery Management (CO 1964/12). I remain of the view that this is the valid test and would therefore need to be convinced of

the particular circumstances in this complaint before departing from the established view of my Office.

21. The allegations at (a) and (b) in paragraph 17 clearly fall far short of interference on this test. The two allegations of false statements at (c) raise a different issue. This has also come up on more than one occasion before the Certification Officer. In the complaint of G Clare against the Eagle Star Staff Association (CO/1964/3) one of my predecessors having made the point about intimidation reflected above went on to say:-

> *"Further a statement made to persuade members to vote one way rather than another does not in my view amount to an "interference or constraint" merely because it is exaggerated, misleading or inaccurate. I do not rule out the possibility that in some circumstances a blatant untruth or a seriously misleading statement could amount to an 'interference or constraint' under the Act for instance if it affects members' freedom to vote or their freedom to vote as they please".*

22. While not being wholly happy with the limitation implied by the words following 'for instance' I am generally in agreement with this view. It would take a most blatant lie or seriously misleading statement to constitute interference or constraint with voting. How do the two allegations at (c) para 17 stand up to that test?

23. Firstly, the sentence that "the Trust Fund would not be used for any other NUM area" contrasts with the statement in the notice to members that "The Trust will come to an end when all other Constituent Associations of the NUM have transferred their engagements to the NUM. at which point property in the Trust will be held by the Trustees of the NUM on the same terms as other property of the NUM" (my emphasis). Questioned about this contrast Mr Scargill explained the background to the phrase in his Open letter but neither

he nor the union's Counsel could go beyond saying that the full position was in the notice to members sent with the ballot papers. In my judgement the Open letter fell short of giving the full truth and could have been misleading but did not constitute a blatant lie sufficient to amount to 'interference or constraint' on voting within the meaning of the relevant section.

24. Secondly the union argued that the phrase "fully supports" in the Open letter was consistent with some opposition. Had there been no opposition they would have said "unanimous". I am inclined to agree with that view and certainly any element of misleading that might be involved does not constitute 'interference or constraint'.

Threat of Disciplinary Action

25. The complainant alleged that Yorkshire Area members were threatened with disciplinary action by the union if they were to speak out against the proposed merger in any way. In support of this allegation evidence was given that Mr J Walsh, an Area Agent and Assistant General Secretary was already being disciplined allegedly for campaigning against the merger.

26. The Area General Secretary gave evidence to the effect that he personally had raised the complaint against Mr Walsh for failing to carry out his instructions and for failing to adhere to Area Council and Area Executive policy once it had been arrived at. It was put to me that the actions of officials are governed by rule and that Rules of the National Union explicitly state that decisions of the Area Executive are binding.

27. It was established in evidence that the action against Mr Walsh had been initiated after the ballot had taken place. Also, I am satisfied that it was the policy of the Area Executive to support the principle of the proposed transfer and I accept that it is the convention to require collective responsibility among a trade union's officers. Moreover no evidence was given of any other member either being disciplined or being threatened with disciplinary action for opposing the transfer of engagements.

28. In the circumstances I find no evidence that threats of disciplinary action were used to intimidate or otherwise interfere or constrain members in voting on the transfer resolution.

COMPLAINT III Not all members entitled to vote were given the opportunity to do so

Background and argument

29. In his letter to me of 13 April the complainant said "I consider that Limited Members who have taken redundancy but have then taken Limited Membership are showing commitment to and financial support of this Union and should therefore have been allowed a ballot paper in the vote. I also wish to point out that there are more than enough of them to reverse the published ballot result". I took this as a clear complaint that not all members who were entitled to vote were given the opportunity to do so and my office put the issue to the union.

30. On 29 April the union's solicitors wrote to me essentially accepting that limited members had not been accorded a vote but arguing as follows:-

> *"The union introduced limited members as a category of membership when the number of members in the industry started to decline due to widespread redundancies. A limited member is not eligible to vote or hold*

office in the union but is entitled to seek the assistance of the union in obtaining compensation for injury, I'll health, disabilities or death arising out of or connected with that limited member's former employment whilst having been in full membership of the union. Limited members do not pay full contributions, cannot vote under the union rule book and do not participate in the union save to a minimal extent (Rule 4(1)). The provisions in the union rule book that limited members have no vote were passed unanimously by the Area Council after a recommendation to that effect had been passed unanimously at the Area Executive on the 30th January 1989. [The complainant] was a member of the Area Executive on the 30th January 1989 and voted for the provision.

You will recall that we attempted to raise with you the question of who would be entitled to vote on the postal ballot prior to it taking place. You told us you were unable to advise on this but sent us a copy of the NACODS decision a copy of which we attach. Based on this advised (sic) as the union's solicitors, that limited members are not members of the union entitled to vote in the ballot. As you know Section 100(B) means that a complaint can be made if non members are given a vote, just as a complaint can be made if members are not given a vote. The union relied on its legal advice, following your ruling in the NACODS decision".

31. This complaint stands or falls by whether or not Limited Members of the National Union of Mineworkers (Yorkshire Area) are 'members' of the union and therefore entitled to vote under section 100B. The 1992 Act nowhere gives a definition of member, but before the present complaint was made I had been required to rule in the matter of a separate complaint against the Yorkshire Area, by a Limited member of the same branch as the complainant in this case, as to whether or not a Limited member was a member within the meaning of section 54(2) of the 1992 Act and therefore able to bring a complaint about the election or otherwise of his union's executive. On 17 March I ruled that he was but did not publish my full reasons for that until 29th April, by which time I had heard and determined the substantive complaint. Because of the significant overlap between this complaint and that I have previously dealt with, which also involved consideration of the

NACODS decision in respect of retired members, I need to quote at length from my written reasons in the earlier case. In that decision I said:-

> *"Before considering the substance of this case I have to decide what is meant by "member" in the 1992 Act. This is the first time my office has had to consider the question since the coming into force of that Act.*
>
> *To determine this question I must first look to the 1992 Act. That Act does not however expressly define the meaning of "member".*
>
> *Another possible source of definition is a union's rule book. However I do not think that the fact that a person falls within a category described as members in a union rule book will always mean that they are to be treated as a member for the purposes of the Act, although it is evidence that the union considers those persons to be "members". Equally the fact that someone is described otherwise than a member in a union rule book is not conclusive. If this were not the case a union might, by careful drafting of the rule book exclude individuals who are really members, from being treated as members under the Act.*
>
> *In order to determine the meaning of member I must look elsewhere. My starting point is to consider the basis of the nature of the organisation of which membership is being claimed. A trade union, is defined by section 1 of the 1992 Act. For present purposes the relevant provisions are that a trade union is:-*
>
> *"an organisation (whether temporary or permanent);*
>
> *(a) which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers' associations; or ..."*
>
> *It is of note that the 1992 Act envisages that a union can include in its constitution persons other than workers provided the majority of the composition of the union are workers. "Worker" is defined by section 296 as meaning:-*
>
> *"an individual who works, or normally works or seeks to work*
>
> *(a) under a contract of employment; or*
>
> *(b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or*

(c) in employment under or for the purposes of a government department (otherwise than as a member the naval, military or air forces for the crown) insofar as such employment does not fall within paragraph (a) or (b) above."

At the very least, in order to satisfy the definition of trade union, the majority of a union's composition must be individuals who work, normally work, or seek to work. They have combined for purposes which include the regulation of relations between workers and employers in a particular of sector or sectors of employment. It seems to me, therefore that workers as defined in the 1992 Act who participate in a union must be treated as members for the purpose of that Act.

I am confirmed in this view by the way that the 1992 Act allows on occasions for members to be excluded from certain requirements of the 1992 Act. A good example of this can be found in section 50 (which is relevant to elections for executive members and specified national officers). Section 50(2) permits a union, under its rules, to exclude from voting 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.

Sub-section 3 farther permits a trade union to restrict entitlement to vote to members who fall within particular classes. In my judgement these provisions demonstrate that Parliament contemplated member to include unemployed members, members in arrears with subscriptions, apprentices, trainees, students and new members even where they are not described by the rule book as "full" members. Otherwise there would be no need for section 50(2).

On this construction if a subscriber to the union - however described in the rule book - satisfies either the definition of a worker or falls into one of the categories of members who can be excluded from voting - he or she is without doubt a member of the union for the purposes of the Act.

Before me, it was explained on behalf of the complainant that he was effectively an unemployed member who could obtain employment in the industry if work were available. This was not disputed by the union. If he gained employment in a qualifying sector (.....) he would again become a "full" member. It was accepted that when he reaches his retirement

age he will automatically (under the rules of the union) be entitled to become a retired member.

In these circumstances I am satisfied that the complainant despite being described by the rule book as "a limited member" meets the test set out above. He thus falls within the definition of member used by the 1992 Act and, in such circumstances must be treated as a member of the union for the purposes of that Act".

I went on to say -

"The definition of the trade union explained above does envisage that it may also comprise a minority of people who are not workers. It follows that persons comprising a trade union who are not workers will sometimes be members. It is not necessary in this case for me to decide the extent to which persons who are not workers (or otherwise are to be treated as a member of a trade union by construing section 50) should be regarded as members but it might be helpful if I made some observations on the point.

It seems to me that there are extremes of "membership". There are those members who clearly are members (.....) within the meaning of the Act. There may be others. Some people described as members will have no history of working in the industry or trade in question, pay no subscription and receive no benefits. They may be unable to stand for office or speak at union meetings and may only have an association with the union following an invitation to become an "honorary" or "associate" member. It seems to me in such circumstances their interest in the union, determined by examining any rights they have in, and any duties they owe to the union is of such a "de minimus" nature that they should not be treated as members for the purposes of the Act. Between these two extremes however will full individuals who have a tangible interest in the union. Whether or not they are to be treated as members of the union for any of the purposes of the Act will depend on the extent of their interest in the affairs of the union and this is determined by considering the cluster of rights and duties relevant to their relationship with the union".

32. In the present case in addition to the points quoted in paragraph 30 at the hearing the union gave evidence about the history of Limited membership. Initially such members paid no contributions and were in the union solely to participate in the National Union of Mineworkers Industrial Accident and Fatality Scheme. Contributions were introduced

when the position changed as a result of an increase in industrial deafness and personal injury claims. The rule book was revised to this effect in 1985 on the understanding that Limited Members would not be involved in any of the voting processes of the union. It needs to be noted however, that since then major change has taken place in the coalmining industry. Mr Scargill in his evidence accepted that limited membership was today used predominantly by members of the union who were redundant under one of the voluntary schemes. I also note from the documentation before me an advertisement which appeared in a recent edition of the Yorkshire Miner which invited former full members to become Limited members and keep their links with the union. I am satisfied that limited membership is predominantly made up of persons who are in effect unemployed members of the union. They remain eligible to return to full membership if they return to work.

33. The union also argued insofar as my previous decision had been based on Limited members paying a higher subscription to the Yorkshire Area than did full members, it was based on an error. It was true that part of the subscription of full members was forwarded to the National Union but under the rules a similar share of Limited Members' subscriptions should also have been forwarded and the arrears due from the Yorkshire Area were now being collected.

34. The union farther argued that, under their rules. Limited Members have minimal rights to participate in the affairs of the union and essentially are making a contractual bargain in return for certain membership benefits. It was put to me that their position is analogous to retired members (Yorkshire Area) Rules 4(l)(iii) and (iv)) and that as retired

membership could be accorded to wives of deceased members, it would clearly not be correct to consider either Limited or Retired members as members in the statutory sense.

35. Having argued that my finding in the previous case was in error, the union farther argued that if I did not accept their counter arguments to the effect that Limited members were not members for any purpose in the 1992 Act, I should distinguish between members for different purposes in the Act. They put it to me that I might take the view, as a matter of public policy, that a very loose definition of member might be applied when considering who can bring a complaint but that a tighter definition might be in order when considering who should vote on a matter affecting the union's whole future.

36. That essentially is the background and argument against which I have to take my decision about whether Limited Members should have been given a vote in the transfer ballot. Before going on to give my decision and reasons one other matter should be mentioned. It will be seen in paras 7 and 8 that 7,260 ballot papers were issued but that the union had 8,109 Full Financial or Industrial members. This might suggest that perhaps 930 members who, on the union's own definition of who should vote, would have a right to a ballot paper were not sent one. The union's explanation of this at the hearing was that the 8,109 figure related to everyone who had paid in subscription during the year to December 1993 whilst the 7,260 figure related to those in membership at 4 December 1993. Unfortunately this explanation does not square with the way the figures were conveyed to us during the course of the transfer process when they were clearly described as "membership at 31 December 1992". There may be a perfectly satisfactory explanation of this discrepancy eg. the 4 December figure had been checked (after 31 December) to

remove those whose subscriptions were out of date, so although still puzzled by it I shall not take any farther note of it.

Reasons for my view that Limited Members should have been given an opportunity to vote

37. In my view Limited Members of the NUM (Yorkshire Area) are members of the union for the purposes of section 100B of the 1992 Act and should have been given the opportunity to vote which they were denied.

38. In my decision quoted in paragraph 31 above I determined that Limited Members were members because they were 'workers' within the meaning of the Act who paid subscriptions to the union. In the present case the union did not challenge that view but concentrated on showing that on the tests of association with the central activities of the union Limited members, like retired members, fell short of the required degree of association. This line of argument misses the key point behind my previous decision namely that Limited members are members for the purposes of the 1992 Act because they subscribe to the union, satisfy the definition of workers which is central to the concept of a trade union in that Act and are akin to unemployed members. As I indicated at the time, in that decision it was not necessary for me to decide the extent to which persons who are not workers (or otherwise to be treated as a member of a trade union by construing section 50) should be regarded as members. Similar considerations apply in this case and the degree of association or cluster of rights and duties are irrelevant. The 'worker' and section 50 test determine who clearly fall into the core of members of the union. The rights and duties approach was only put forward as a way of considering the position of people like honorary members who did not clearly fall into this core.

39. Similar considerations apply to the argument about different meanings of membership for different purposes in the Act (paragraph 35). I accept that outside the core it might be arguable that different tests of membership could be applied for different purposes but that is not the case here; Limited Members satisfy the 'core' test.

40. It is for these reasons that I make the declaration asked for. Namely that:

> *"In the ballot of members of the National Union of Mineworkers (Yorkshire Area) for approval of a resolution proposing the transfer of its engagements to the National Union of Mineworkers, not all members of the Yorkshire Area were given an opportunity to vote as required by section 100B of the "Trade Union and Labour Relations (Consolidation) Act 1992"*

41. For completeness I should add that even on the cluster of rights and duties test advocated by the union I would have found Limited members to be members for the purpose of the transfer ballot.

Remedies

42. Section 103(3) of the 1992 Act states:

> *"If the Certification Officer, after giving the complainant and the trade union an opportunity of being heard, finds the complaint to be justified*
>
> *(a) he shall make a declaration to that effect, and*
>
> *(b) he may make an order specifying the steps which must be taken before he will entertain any application to register the instrument of amalgamation or transfer;*
>
> *and where he makes such an order, he shall not entertain any application to register the instrument unless he is satisfied that the steps specified in the order have been taken.*
>
> *An order under this subsection may be varied by the Certification Officer by a further order".*

43. Against the possibility that I found any of the complaints justified and therefore made a declaration I asked the parties to address me at the hearing on the subject of remedies.

44. The complainant asked me to order a re-run of the ballot with freedom to use the media to publicise their views against the transfer.

45. The union said they had no objection to the opponents of the transfer publicising their views via the media. That in any case is not a matter for me. They did though argue strongly that I should use my discretion and not specify the need for a fresh ballot.

46. In the union's view even if all three complaints had been found justified there would be no case for me to order a re-run. The union had acted in good faith throughout, they had in vain sought advice from my Office on the interpretation of the term member, they had sought and followed legal advice on that term, neither the complainant nor any other member had used the union's internal procedures to challenge what the union was doing but the complainant and his branch were using these procedures to trip the union on a technical issue and so frustrate the transfer to which they were opposed. In British Railways Board v National Union of Railwaymen [1989 ICR 678] Lord Donaldson referred to "trifling errors which should not be allowed to form a basis for invalidating the ballot" and the union suggested that I should treat any technical failure on their part in this spirit. Moreover a re- ballot would cost the union a great deal and to order it in the circumstances would be an unjust exercise of my discretion.

47. I do not wish to question the union's good faith on this matter. They did seek advice from my Office and they accept they were not given it. As I said in the introduction to my 1993 Annual Report:

> *"The Office receives many enquiries and requests for guidance from trade unions, employers' associations and their members. Often we can help but there are constraints on the advice that can be given. It is for example inappropriate to give guidance on or prior approval to (unless the law requires it) a specific course of action in those areas where complaints can be made to me by an individual member. Where a complaint is made I have to investigate it and decide it completely impartially on the facts of the case and in the light of the representations made by the parties concerned. I and my staff have to avoid giving advice which might seem in any way to prejudice that impartiality. That said the Office is happy to assist where it can and guidance booklets (.....) are also produced".*

48. I should add moreover that their requests for advice, both in writing and on the telephone related entirely to "retired members" - of whom the union has considerably more than it does of Limited members. This would also explain why my office sent the union the NACODS decision, which found that in the circumstances of that case retired members were correctly excluded from a transfer ballot. Of course other sources of assistance are available and Harvey on Industrial Relations at paragraphs M2074 and 2075 cites cases suggesting that members temporarily out of benefit have a right to vote in merger ballots and says that the same would presumably be true of most other sorts of limited membership such as unemployed members, students, apprentices, trainees and new members.

49. I do not know if the legal advice the union sought covered on both Limited and Retired members. I was offered privileged access to the advice given. I refused because it was not

to be available to the complainant but I suggested Counsel for the Union would draw on it in his submissions to me.

50. In reaching the view that a new ballot is called for I have ignored my uncertainties and disquiet about a number of other matters referred to in these complaints. The total number of Limited Members, who by law should have been afforded a vote in this ballot but were not, is equivalent to some 20-25 per cent of those who were afforded a vote. The scale of that omission even if it came about through accident or a genuinely held different view of the statutory requirements cannot be ignored. Lord Donaldson in the case referred to was dealing with trifling errors having trifling consequences. In this case whatever view is taken of the nature or scale of the error its consequences were not trifling.

51. It is for these reasons that having made the declaration in paragraph 40 that I made the following order which along with the declaration was conveyed to the two unions on 19 May 1994.

> *"I shall not entertain an application for registration of the instrument of transfer in this matter until a fresh ballot of the National Union of Mineworkers (Yorkshire Area) members which includes Limited members, and which approves the proposal, has been conducted".*

52. Finally it might be helpful if I add a few words on 'retired members' and their rights in transfer ballots. This issue was not argued before me and it would have been wrong for me to include any mention of them in the order, nor can I make a definitive ruling. However the following observations based on information which became available in two extensive hearings on the issue of Limited membership may be helpful.

53. Retired members are generally unlikely to satisfy the test for core membership so the issue would turn around the degree of association with the Union. In the case of the National Union of Mineworkers (Yorkshire Area) retired members have rights to services similar to those afforded to Limited members. Also as with Limited members the union rules provide them with no right to vote. However retired members can be distinguished from Limited members in three important respects:-

retired members pay no subscription;

there is no provision for the generality of Retired members ever to become full members;

many retired members (eg. spouses of former members may) never have worked in the industry or been full members.

54. Against that background it seems to me that it is unlikely to be established that retired members of the National Union of Mineworkers (Yorkshire Area) should be regarded as members for the purposes of a transfer ballot.

E G WHYBREW
Certification Officer
27 May 1994