

**DECISION OF THE CERTIFICATION OFFICER ON AN APPLICATION MADE
UNDER SECTION 108A(1) OF THE TRADE UNION AND LABOUR
RELATIONS (CONSOLIDATION) ACT 1992**

MR G SAUNDERS

v

THE MUSICIANS' UNION

Date of Decision:

**14 June
2002**

DECISION

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

I make the following Declaration:

The Musicians’ Union breached paragraph 3 of rule XIX.C of its rules by failing to circulate all the Branches of the Union with the proposals of the Executive Committee to alter the rules of the Union before a ballot vote of the membership on the proposals was taken.

I make the following Enforcement Order:

The Musicians’ Union shall treat as void and ineffective the alteration of rules approved by a ballot, the result of which was declared on 31 January 2002. The Union shall continue to apply the rules that prevailed prior to that purported alteration, unless and until the rules of the Union are altered in accordance with rule XIX.C of its rules.

REASONS

1. The Applicant is a member of the Musicians' Union ("the Union" or "MU"). By an application dated 20 January 2002 the Applicant made a complaint against his union. The application alleges a breach of the rules relating to the balloting of members. This is a matter within the jurisdiction of the Certification Officer by virtue of section 108A(2)(c) of the 1992 Act. The alleged breach is that:-

The Musicians' Union carried out a rule change ballot without circulating the proposals of the Executive Council of the Union to all branches before the ballot vote of the membership on the proposals, in breach of union rule XIX section C paragraph 3.

2. I investigated this alleged breach in correspondence. As required by section 108B(2) of the 1992 Act, the parties were offered the opportunity of a formal hearing but both parties were content for the matter to be dealt with without such a hearing. This decision has therefore been reached on the basis of written representations made by the Applicant and the Union, together with such documents as were provided by them.

Findings of Fact

3. Having considered the representations made to me and the relevant documents I make the following findings of fact:-
4. At the Biennial Delegate Conference of the Union in July 2001 two resolutions were carried which proposed changes to the process of electing the General Secretary when rule changes were next to be considered. The Executive Committee ("the EC") agreed proposals to alter the rules at their meetings on 13-15 November and 12-13 December 2001. It was proposed that there be twelve alterations to the rules, falling into three groups. The first group of alterations concerned the position of the Chairperson, the second group concerned the process of electing the General Secretary and the remaining rule change concerned the disciplinary procedures.

5. On 20 December 2001 the EC issued a “Bulletin to Branches”, Bulletin No. 503. This bulletin referred to the motions carried at the Union’s Biennial Delegate Conference and informed members that the EC had devised proposals for alteration of the Union’s rules to address the conflict with current statutory requirements and take account of the Conference motions. The bulletin further informed the branches that the rule change ballot would be conducted in January 2002 and that a full explanation of the proposed amendments would be circulated to members with the ballot papers. The bulletin did not describe the proposed alterations to rule in any more detail.
6. On Thursday 10 January 2002 the voting papers were dispatched to members. The Applicant received his voting paper on Saturday 12 January. The completed voting papers had to be returned to reach the independent scrutineer by 31 January.
7. On the day the Applicant received the voting paper, he wrote to the independent scrutineer, Electoral Reform Services, complaining, amongst other things, that the ballot breached paragraph 3 of section C of rule XIX of the Union’s rules. This paragraph provides as follows:-

“In the case of a Rule change emanating from the EC all Branches will be circulated with the proposals of the EC before a ballot vote of the membership on the proposals is taken.”

On the following day the Applicant wrote to the Acting General Secretary of the Union, Mr Knight, enclosing a copy of his letter to Electoral Reform Services. On Monday 14 January the Applicant spoke with Mr Knight. The content of that conversation is in dispute but Mr Knight accepts that he told the Applicant that an option to be considered by the EC was that the ballot should be aborted.

8. On Thursday 17 January Mr Knight sent a memorandum to the members of the EC regarding the rule change ballot. I set out this memorandum in full:-

“IN CONFIDENCE

Dear Colleague

RULE CHANGE BALLOT

I regret to inform you that it has been drawn to my attention (on 14th January) that we have not conformed strictly to the Rule Book - specifically Rule XIX.C.3 - re circulating the Branches with the proposed Rule Changes prior to the ballot vote. Although in Bulletin to Branches 503 I gave details of the ballot I failed to attach the actual proposal document. I should point out that this was the first indication of this error from the circulation to some 200 recipients of the Bulletin distributed on 20th December 2001. I have today issued Branch Secretaries with the proposed changes (although I recognise that these are now in their possession having been circulated with the ballot paper).

I believe there is an interpretation by some members that XIX.C.3 affords Branches an opportunity to hold consultative meetings. I regard this as incorrect on the basis that, if this was the intention, the Rule would be akin to XIX.C.4, which includes guidance on the timescale for example.

Other points that have been made are that we have not complied with members' wishes regarding 'block voting' and also that the EC expressed an opinion on the voting paper. Both these points I refute - they are not Rules and the issue was debated fully at the GPSC meeting.

I have written to solicitors Russell Jones & Walker, and to the Independent Scrutineer. I did consider recommending to you that the ballot should be declared void and run again, either now or later in the autumn. The latter would mean operating with imperfect Rules concerning the position of the Chair (which we wish to avoid) and running the General Secretary election under the old system which would mean, probably, that any new election procedure asked for by Conference would not be available until 2007.

I realise that extra expense to run the ballot again now (circa £15,000) is necessary to comply strictly with Rule XIX.C.3, although that does not actually achieve very much, if anything, but technically we are in breach and should seek to remedy this, and avoid prolonging the situation.

However, a challenge in the Certification Office would almost without doubt find us in breach of the Rules. Any direction after that would be down to the Certification Officer - he may let the ballot stand, given there is no material impact. If a challenge happened, it would be dealt with in about 8-12 weeks, which would then give the EC the chance to arrange for the General Secretary nomination meetings and the subsequent ballot if required, in the knowledge of which Rule to run it under. In any event we have time to consider carefully the next move.

It has been pointed out that going into the CO's office again may reflect badly in the press, this can be countered by the possibly worse image of a re-ballot in the near future in the eyes of members.

I propose, therefore:

1. If we are challenged in the CO's office, to admit the breach and put forward the case that no actual harm has been caused. We would request a prompt Hearing if necessary.
2. The EC to debate the merits of running the General Secretary election under the old or new Rules (depending on the outcome of the Rule change ballot and the possible direction from the CO's office), which would be broadly within the timetable we have planned.

3. Advertise the vacancy in the March Musician as planned, but without details of the timescale.
4. Draw up the General Secretary Job Description and Skills Profile as planned.

I would be grateful if you would indicate your approval of this course of action on the attached slip and return it to me by 23rd January 2002 (fax 020 7582 9805, or advance notice by telephone or email would be helpful).

Yours sincerely

Andy Knight
Deputy General Secretary

9. At the foot of the memorandum was a tear off slip headed "*Executive Committee Consultative Ballot*". Members of the EC were invited to indicate whether they supported the proposed actions. Whilst no documentary evidence relating to the result of this consultative ballot has been placed before me, the subsequent actions of the Union strongly suggest that a majority of members of the EC indicated their approval of the proposals.
10. On the same day, 17 January 2002, Mr Knight sent a memorandum to all Branch Secretaries in which he states,

"It has been drawn to my attention by two members that I should have furnished you with the actual proposals prior to the ballot. Unfortunately I did not do so. Therefore, I enclose the Rule Change proposals as required by rule XIX.C.3. The Executive Committee will have to decide if not sending out the Rule Change proposals prior to the ballot was a serious breach and if the ballot needs to be re-run (at a cost of £15,000). This will depend largely on whether or not the matter is reported to the Certification Officer. I am sorry that we have to start the New Year like this, but it is possible that we may have to re-run the ballot - even if there is little or no effect on the outcome."
11. On 20 January 2002 the Applicant complained to my Office that , amongst other things, the Union was in breach of rule XIX.C.3 in sending out a ballot paper without providing all branches with the proposals beforehand.

12. On 31 January 2002 Electoral Reform Services reported on the voting in the ballot. Each of the proposed twelve alterations of rule was approved. Almost 31,000 voting papers were distributed of which 5,430 valid papers were returned. A separate count was conducted for each proposed rule alteration. The majorities in favour of the various alterations ranged from 2,857 to 5,174.
13. In a Bulletin to Branches in February 2002, Bulletin No. 505, the members were informed of the ballot result and that the EC, at its meeting in February 2002 had authorised implementation of the changes of rule with effect from 12 February. The bulletin further informed members that at the EC in February the appointment of the Executive Committee Chair and Vice-Chairs had been conducted in accordance with the altered rules and that the election procedure for General Secretary would be progressed in accordance with the new rules with a ballot being conducted, if required, between 8th and 20th July 2002.

The Relevant Statutory Provisions

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

“108A.-(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) ...
 - (b) ...
 - (c) the balloting of members on any issue other than industrial action;
 - (d) ...
 - (e) ... ”

15. Section 108B(2) of the 1992 Act empowers me to make such enquiries as I think fit and, after giving the applicant and the union an opportunity to be heard, to make or refuse to make the declarations asked for. I am required, whether I make or refuse the declaration sought, to give reasons for my decision in writing.

16. Section 108B(3) of the 1992 Act requires that where I make a declaration I shall also, unless I consider that to do so would be inappropriate, make an enforcement order requiring, inter alia, the union to take such steps to remedy the breach as may be specified in the order.

The Union Rules

17. Rule XIX section C, under the heading Election Procedures, Ballot Voting and Alteration of Rules, provides that:

- “1. These Rules may be altered by a ballot vote of the members.*
- 2. No proposal to alter the Rules shall be submitted to the vote of the members unless it is either made by the EC or supported by at least two thirds of the Union’s Branches.*
- 3. In the case of a Rule change emanating from the EC all Branches will be circulated with the proposals of the EC before a ballot vote of the membership on the proposals is taken.*
- 4. In the case of a Rule change emanating from a Branch at a specially summoned meeting called for the purpose, the proposal, if passed, should be forwarded to the EC. Provided that the EC considers the wording to be satisfactory and that the proposals do not necessitate further alteration of the Rules which are not included in the proposal, the EC shall circulate to every Branch the Rule change proposal. The Branch making the proposal may include the reasons for making such a proposal and the EC has the right to produce a statement giving its own views. Following a period of three months from the date on which the proposals were circulated to the Branches, if the proposal is supported by a majority of two thirds of all the Union’s Branches, the EC shall arrange for a ballot vote of the membership upon those proposals. The EC shall have the right to provide a statement giving its views on the proposals included with the ballot paper.”*

A Brief Summary of the Submissions

18. The Applicant submitted that not only was there a clear breach of rule XIX.C.3 but that the Union had conceded that there had been such a breach. Further, the Applicant seeks an order that the ballot be re-run. In his letter to my Office of 2 April 2002 the Applicant states, *“If no order is made to re-run the ballot properly then members will have suffered a great injustice and the consequences will be a matter of far reaching effect ...”*. He goes on to comment about the consequences in respect of the alteration of rule dealing with the Union’s internal disciplinary process.

19. In its letter to my Office of 18 March 2002 the Union states, “*The MU concedes that the proposals of the Executive Committee were not circulated to Branches before a ballot vote of the membership was commenced; they were however circulated before a ballot vote was completed. The MU concede there was a breach of Rule XIX.C.3.*”. It is the Union’s contention, however, that I should not make an enforcement order. In support of that contention the Union points to a number of factors. It points to the fact that in December 2001 branches had received an announcement of the intended ballot in Bulletin 503, which had been issued to nearly 200 members comprising Branch Secretaries, Branch Chairpersons, Health and Safety Representatives, Orchestral Stewards and members of the EC. The Union notes that not one of these recipients, including the Applicant (who is Chairperson of the Union’s Bournemouth Branch), contacted the Union to ask for a copy of the actual rule amendments. The Union further asserts that, upon being alerted by the Applicant and others to its failure to circulate the proposed rule amendments, Mr Knight mitigated this failure by circulating the proposals to all Branch Secretaries on 17 January 2002. In addition, the Union submit that the following factors should be taken into account; the vote of the members was overwhelmingly in favour of the amendment; the 17.5% turnout in this ballot was higher than the 15.2% turnout in the rule change ballot in 1996 and higher than the 12.9% turnout in 1993; the additional cost of re-running the ballot will be approximately £15,000 and members may be confused as to the reason for duplicating a ballot when there was such an overwhelming majority. The Union also drew my attention to the definition of the date of the ballot in sections 96 and 246 of the 1992 Act. Section 96 concerns the definition of “*the date of the ballot*” for the purposes of political fund ballots and section 246 for the purposes of industrial action. In these sections “*the date of the ballot*” is defined as being “*in the case of a ballot in which votes may be cast on more than one day, the last of those days*”.

Conclusion

20. The Union concedes that it has breached rule XIX.C.3, as alleged by the Applicant. I find that on the facts of this case the concession was correctly made. The Union did not circulate its branches with the proposals of the EC before taking the ballot vote. The definition of “*the date of the ballot*” in section 52 and section 246 of the 1992 Act is not

relevant to the interpretation of rule XIX.C.3 of the rules of the Union. I therefore make a declaration in the following terms:-

“The Musicians’ Union breached paragraph 3 of rule XIX.C of its rules by failing to circulate all the Branches of the Union with the proposals of the Executive Committee to alter the rules of the Union before a ballot vote of the membership on the proposals was taken.”

21. I must now consider whether it is appropriate that I issue an enforcement order. Section 108B(3) of the 1992 Act provides that where I make a declaration I shall also, unless I consider that to do so would be inappropriate, make an enforcement order. An enforcement order is defined as 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 may be 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.
22. I have had regard to the arguments advanced by the Union as to why I should not make an enforcement order but, after careful consideration, I am not persuaded by them. An unincorporated association has no inherent power to alter its rules. Rule changes can only be made in the manner provided by the rules themselves and accordingly the procedure for amending the rules of a union is properly regarded as being a cornerstone of its constitution. In these circumstances it is normally appropriate that a strict approach should be taken to compliance with that procedure.
23. The rules of the Musicians’ Union dealing with the alteration of rules are quite brief. They provide for two ways of initiating a rule change; one by the EC and one by a branch. When a rule change is initiated by a branch there is to be a lengthy consultation process whereas a rule change to be initiated by the EC enjoys a more straightforward procedure. In the latter case, the only procedural requirement is that the EC’s proposal is circulated to branches before the ballot vote is taken. The purpose of the pre-balloting procedures

in both cases appears to be quite clear. They are intended to give members the opportunity of considering the proposed rule changes before being asked to vote upon them. This was clearly regarded as being a significant procedural step by the body which adopted these rules as, indeed, it is the only step preceding the actual ballot in the case of a proposal emanating from the EC. It may be that in some branches the proposal will lie on the table and arouse no debate but this does not mean that it is a step which can be either ignored or regarded as a mere technicality or formality. There may well be other branches which would wish to debate the proposed changes in detail and lobby vigorously for or against them. The failure to circulate the branches deprives the members of those branches of that fundamental protection given to them by the rules.

24. I am likewise not persuaded that the circulation of the proposals on 17 January 2002 cured the procedural defect. This material was circulated one week into a balloting period which was to last three weeks. Many members would have already voted by the time they received this information and would have done so without the benefit of any branch information or discussion. Further, the information circulated on 17 January was effectively the same as that enclosed with the ballot papers and so would not have materially assisted those members wishing to promote discussion on the precise wording of the proposed amendments prior to any votes being cast.
25. I recognise the force of the arguments relating to the size of the majorities and the cost of re-balloting. However, the failure to comply with rule XIX.C.3 was realised at an early stage of the voting process and some of the costs of proceeding could have been avoided if an early decision had been taken to re-run the ballot. It may well be that a similar result will emerge if the ballot is re-run but I cannot speculate on that. I consider that the obligation on the union to facilitate debate on the rule changes being proposed by the EC by circulating branches before voting commenced is a fundamental part of the rule change procedure. I therefore consider that it is a mandatory requirement with which the Union must comply in order to alter its rules lawfully in accordance with rule XIX.C.
26. For the above reasons I make an enforcement order in the following terms:-

“The Musicians’ Union shall treat as void and ineffective the alteration of rules approved by a ballot, the result of which was declared on 31 January 2002. The Union shall continue to apply the rules that prevailed prior to that purported alteration, unless and until the rules of the Union are altered in accordance with rule XIX.C of its rules.”

D Cockburn
Certification Officer