

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

**IN THE MATTER OF COMPLAINTS AGAINST
THE MANUFACTURING, SCIENCE AND FINANCE UNION**

**APPLICANTS: MR L MACDONALD
MR D WARRINGTON**

**Date of Decisions:
2001**

31 August

DECISIONS

- 1.1 Under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (as amended) (“the 1992 Act”) 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 me for a declaration to that effect.
- 1.2 Section 108B of the 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 declaration asked for. Whether or not I make the declaration sought, I am required to give the reasons for my decision in writing.

- 1.3 Where I make a declaration under section 108B I am required, unless I consider to do so would be inappropriate, to make an enforcement order on the union. My enforcement order is required to impose 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.*
- 1.4 On 30 November 2000, I received an application from Mr L Macdonald, a member of the Manufacturing, Science and Finance Union (“MSF”, “the union”), complaining that by calling a Reconvened Annual Conference (“Recall Conference”), the National Executive Council (“NEC”) had breached union rules. On 19 March 2001, my Office received a similar complaint from MSF member, Mr D Warrington. The applicants complained that the union was in breach of union Rule 19 (b) by allegedly failing to comply with a resolution of Annual Conference and that by calling a Recall Conference the union was in breach of union Rule 24. Both applicants raised other issues in correspondence but they have each agreed that only the above alleged breaches should be dealt with in this decision.
- 1.5 The allegations were accepted by me as complaints under section 108A (1) of the 1992 Act that MSF had breached its rules relating to matters mentioned in section 108A(2) (d), as set out below.
- 1.6 I investigated the complaints in correspondence, following which as required by section 108B(2)(b) of the Act, I offered the parties the opportunity of a formal hearing. The applicants and the union agreed that such a hearing was unnecessary.
- 1.7 For the reasons that follow, I decline to make the declarations sought relating to the alleged breaches of union rules.

Requirements of the Legislation and the Relevant Union Rule

1.8 It may be helpful, at this point, if I set out the relevant statutory requirements of the Act to which I have referred in this decision, the union rules alleged to have been breached and other union rules which have a bearing on this application. The relevant statutory requirements 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)

(d) the constitution or proceedings of any executive committee or of any decision-making meeting”.

1.9 In referring to MSF’s Rules throughout this decision I have referred to the MSF Rule book as at January 1999.

1.10 The relevant union rules relating to the authority and powers of the NEC are found under Rule 3(b), Rule 19 (b) and Rule 24 of the MSF Rule book.

1.11 Under the Rule heading “Rules”, Rule 3 (b) provides:

“The general management of the Union is carried out by the National Executive Council (NEC) under the control and government of an Annual Conference.”

1.12 Under the Rule heading “Annual Conference”, Rule 19 (b) provides:

“The Annual Conference shall be the supreme governing body of the Union. The Annual Conference shall have complete control over the policy, the financial affairs and the conduct and management of the Union.....The National Executive Council, all National Committees, Regional Councils, District and Area Committees and Branch Councils and Committees shall be bound to give effect to such directions and instructions as the Annual Conference may, from time to time, determine. This Rule overrides all other duties, powers and obligations set out in any other Rule in relation to the policy, financial affairs and conduct and management of the Union.”

1.13 Under the Rule heading “Annual Conference Reconvention”, Rule 24 provides:

“The NEC, or the NEC at the request of a majority of Regional Councils, has the authority to reconvene Annual Conference if it considers that an emergency has arisen that requires such a reconvention.”

Background

2.1 Since 1999, MSF had been in dialogue with the Amalgamated Engineering and Electrical Union (“AEEU”) in respect of a proposed merger. A draft Instrument of Amalgamation was circulated in advance to every delegate attending the MSF Annual Conference, held in Harrogate in May 2000. The proposed merger was debated at Annual Conference and the following motions were carried on 7 May 2000:

“COMPOSITE MOTION D.

This Conference believes the best interests of the Craft Sector and MSF as a whole are best served through a merger with the AEEU.

This Conference agrees that if we are to grow into a strong campaigning union for the 21st century, that makes us more relevant to the membership, then the way forward should be based on industrial sectors.

Conference calls upon the NEC to keep the best interests of the members as its prime objective at all times during the merger talks. Conference also calls on the NEC to keep the whole process fully accountable to the membership and ensure democratic lay membership involvement at all stages of the decision making process. This merger must be agreed through a vote of the membership of this union.

It should also be acknowledged with great sensitivity, that in a number of workplaces where MSF and the AEEU represent members, the relationship is not wholly conducive to merger partnership.

Conference believes that the best interests of Branches, the Tobacco Sector and MSF members in general, would be best served if a full merger with the AEEU were to take place.

Conference therefore, in highlighting the reality of the problems that exist at workplace level, believes that an education training exercise should be undertaken with clear guidelines by the NEC, for a proactive campaign to ensure the provision of all the positive aspects of partnership and merger between MSF and the AEEU.

All industrial sectors of MSF must feel that MSF is their union. In order to achieve smaller sectors’ feelings of ownership, they must be offered lifetime protection within their industrial sectors, and given written assurances of that protection, through conditions prescribed, prior to the Rules Commission meeting, to discuss the new rule book.

MOTION 15

Conference notes that both the 1998 and 1999 MSF Annual Conferences insisted that any new union concept be based on the democratic principles of lay member control, including a sovereign annual lay conference whose powers extend to the control and government of the NEC.

Conference welcomes

- . *The AEEU Conference approval of the principle of a merger with MSF to form a new union.*
- . *The consultation that has taken place to identify safeguards required at sectional and other levels.*
- . *Guarantees that the proposed new union would respect the professional, occupational and industrial autonomy of the members of each section.*
- . *The commitment to maintain branch and regional structures.*
- . *The commitment to equalities campaigning in every form and a strong women's representation.*

Conference believes that a merger of MSF and the AEEU to form a new union could represent a strategic alliance for the future. However, because the draft AEEU/MSF Instrument of Amalgamation meets only some of the necessary pre-conditions and assurances which would be required to proceed with a merger to form a new union, the necessary democratic safeguards must be negotiated.

Conference instructs the national Executive Council to cease forthwith all preparation for a ballot of the membership on whether or not they approve an amalgamation of MSF and the AEEU, unless and until a revised instrument of amalgamation, containing the following safeguards and revisions, is brought to, and approved by, MSF Annual conference.

1. *The NEC to be under the control and government of an Annual conference.*
2. *Annual Conference to be the supreme governing body of the union: with that supremacy established in a rule which overrides all other duties powers and obligations set out in any other rule.*
3. *All mechanisms, which allow an NEC to circumvent Annual conference, to be removed from the instrument and the transitional rules.*
4. *A requirement that all changes to the initial rules, or new rules, must be put to Annual conference as amendable propositions."*

2.2 By a letter of 8 May 2000, the General Secretary of the AEEU wrote to the General Secretary of the MSF in the following terms:

"Motion 15, as amended, passed yesterday at Conference puts both the AEEU and MSF in an invidious position.

We have both been working to a timetable that would have seen us ballot on the Instrument of Amalgamation and the General Rules towards the end of this year with the new union coming into existence in January 2001.

As I interpret your Conference decision, that is no longer possible. As you will be aware, I am due to report on progress with the merger at our Conference in June of this year. Advising that Conference that the merger will be delayed at least another year is not a realistic option. Furthermore, we have delayed a number of our own internal procedures in order to accommodate the agreed timetable.

Therefore, it is with great regret that this decision jeopardises the merger and unless you can indicate a clear way forward, I can only assume that discussions will cease."

2.3 At a meeting of the NEC of MSF on 10 June 2000, the following motion was carried:

“The NEC regrets the Conference decision not to allow the outcome and terms of the further negotiations with the AEEU to be tabled on the grounds that they did not constitute an emergency.

The NEC takes note of the letter of 8 May from the AEEU General Secretary saying that he was due to report on progress to his union’s conference in June, that delay for a further year was not a realistic option and that unless a clear way forward could be indicated, then discussions on the formation of the new union would cease.

The NEC considers the terms of this correspondence constitute an emergency as it was the clear overall decision of MSF Conference that the merger should take place and therefore instructs the General Secretary, in accordance with Rule 24, to make arrangements for a recall Conference as soon as practicable later this year.

Prior to the proposed recall Conference, the NEC instructs the General Secretary and the Officers of the union to take all necessary steps to comply with both amended motion 15 and Composite D carried by MSF 2000 Conference.

Furthermore, in line with Composite D, the NEC instructs the General Secretary to initiate a pro-active campaign amongst the membership to outline the positive aspects of the merger/new union project, and involve the lay membership in the decision-making process through a consultative postal poll aimed at establishing the degree of support for the principles and aims of the new union. The results of this consultative poll to be advised to the proposed recall Conference.

[NB This poll is not a ballot under the terms of the 1992 Act]”

2.4 In October 2000, a consultative poll of MSF members was held which was supportive of the aims, objectives and proposed democratic structure of the new union. A Recall Conference was held in London on 11 November 2000, prior to which each delegate attending was sent a copy of a renegotiated Instrument of Amalgamation. The Recall Conference carried a motion in the following terms:

“Conference having received an updated report on the changes to the draft Instrument of Amalgamation and General Rules, agrees that the NEC proceed to a ballot of all members to determine whether they approve a merger of MSF and the AEEU to form a new union”.

In April 2001, MSF members voted in favour of the proposed amalgamation by 73,045 votes to 18,462 votes, 79.8% of the valid votes being in favour.

2.5 That then is the background and relevant legislation. I now set out the facts and arguments put by the parties and the reasons for my decisions.

The Applicants’ Case

- 2.6 In correspondence with my Office, Mr Macdonald and Mr Warrington maintained that by holding a Recall Conference, the NEC had breached union Rule 19 (b) by not complying with the clear instruction contained in Motion 15 as carried at Annual Conference and had breached union Rule 24, the rule empowering the NEC to call a Recall Conference.
- 2.7 The applicants argued that in calling and holding a Recall Conference, the NEC had deliberately ignored, and therefore breached, union Rule 19 (b) (see paragraph 1.12 above), by which it was bound to give effect to the directions and instructions of Annual Conference (see paragraph 2.1 above).
- 2.8 The applicants also contended that the NEC had made no reference to any emergency in statements provided when convening the Recall Conference and that no attempt had been made to justify why it should be considered an emergency. The NEC had not, therefore, abided by union Rule 24 (see paragraph 1.13 above), which only empowered it to reconvene the Annual Conference “...if it considers that an emergency has arisen that requires such a reconvention”. It was argued that as the Harrogate Conference had refused to accept an emergency motion, the NEC was not able to decide at a later stage that an emergency had arisen for the purposes of union Rule 24.
- 2.9 Mr Macdonald and Mr Warrington further contested the union’s view that Rule 24 does not impose an objective test in determining what is an emergency and that the power conferred on the NEC gives it a wide discretion in determining what constitutes an emergency. The applicants disputed the view of the union that to postpone a decision on the proposed merger with the AEEU until the 2001 Annual Conference would have endangered the whole project.

The Union’s Response

- 2.10 In correspondence with my Office, MSF stated that it had taken on board the resolutions carried at its Annual Conference in 2000 in respect of the proposed merger. MSF

accepted that its Annual Conference 2000, had, by resolution, instructed the NEC to renegotiate the Instrument of Amalgamation in respect of the proposed merger and to present a revised Instrument to Annual Conference. The union maintained that this had been done and that the membership had demonstrated its approval by voting in favour. The union further maintained, that a motion approved by Conference was not a rule of the union. Accordingly, even if it were to be established that the NEC had not strictly complied with a particular Conference motion, which was denied, the fact remained that the motion was not a union rule and therefore no breach of rule had occurred.

- 2.11 The union stated that Rule 24 provides the NEC with discretion to convene a Recall Conference if it considers there is an emergency warranting such action. In its correspondence to my Office, the union stated that the AEEU had expressed concerns that a delay until MSF made its decision at the next Annual Conference in June 2001 could jeopardise the project (see paragraph 2.2 above); that sectors and regions within MSF had sought an early resolution to the issue; and that the details of the renegotiated Instrument of Amalgamation would be known well in advance of June 2001.
- 2.12 The union contended that there was a need to proceed as swiftly as possible to finalise details in respect of the proposed merger, and that the NEC, in convening a Recall Conference, had exercised its discretion in determining that such a situation was an emergency as provided for under Rule 24 and that, accordingly, there was no breach of that rule.

Reasons for my Decisions

- 2.13 Under Rule 24, the NEC has “...*authority to reconvene Annual Conference if it considers that an emergency has arisen that requires such a reconvention*”. Accordingly, in order to reconvene Annual Conference, the NEC must specifically address whether an emergency has arisen. This the NEC clearly did at its meeting on 10 June 2000. In determining whether an emergency has arisen, the NEC has a wide, but not unfettered, discretion. This discretion must not be exercised arbitrarily, in bad faith or otherwise perversely. On the facts as presented to me there was clear evidence before the NEC

upon which such discretion could lawfully be exercised and there is no convincing material before me that the decision of the NEC was made in bad faith or was otherwise perverse.

- 2.14 Further, I do not accept the applicants' argument that because Annual Conference in May 2000 rejected an emergency motion relating to the proposed merger, the NEC was not able to determine in June 2000 that an emergency existed which required there to be a Recall Conference. As is clear from the AEEU letter of 8 May 2000, and the subsequent minutes of the (MSF) NEC meeting of 10 June 2000, events developed rapidly after the proposed merger was debated at Annual Conference on 7 May 2000. The NEC was clearly entitled to exercise its discretion under Rule 24 in accordance with the circumstances which prevailed on 10 June 2000. I accordingly dismiss the complaints based on the alleged breach of Rule 24.
- 2.15 Rule 19 (b), together with Rule 3 (b), establish Conference as the supreme governing body of the union. More specifically, Rule 19 (b) requires the NEC, inter alia, to give effect to such directions and instructions as Annual Conference may from time to time determine.
- 2.16 Conference motions, however, do not in themselves constitute rules of the union. Conference derives its authority from the union's rules and is accordingly subject to them. Conference does not have the authority to create new rules, or to amend existing rules, other than in accordance with the procedures as contained in the rules. Indeed it is frequently said colloquially that it is not Annual Conference which is sovereign but the rules. Accordingly, in each case, the status of any motion carried by Annual Conference requires careful consideration to be given to not only the precise terms of the relevant rule or rules which deal with Conference and/or Conference motions, but also the precise terms of the motion itself.
- 2.17 Having regard to the wording of both the relevant rule and the relevant motion in this case, it is clearly arguable that there would have been a breach of Rule 19 (b) had the NEC not complied with the specific instruction upon which the applicants rely. For the reasons set out below, however, it is not necessary for me to determine this issue. Had

it been necessary for me to do so, I would have listed this matter for an oral hearing in order to hear the submissions of the parties.

2.18 The Annual Conference in Harrogate carried two relevant motions. These are not entirely consistent with each other, but they share much common ground. In general terms, both motions were supportive of the proposed merger but called for further protections and safeguards. The subsequent letter from the AEEU dated 8 May 2000 (see paragraph 2.2 above), is expressed in terms which put the whole merger in jeopardy and made time of the essence. Further negotiations took place. As is not unusual in such negotiations, MSF was able to achieve some of its negotiating objectives but not all of them. In these circumstances, the NEC invoked its discretionary power to reconvene Annual Conference in order that the revised terms could be reconsidered by Conference.

2.19 The applicants base their cases on the final paragraph of Motion 15 which states:

“Conference instructs the national Executive Council to cease forthwith all preparation for a ballot of the membership on whether or not they approve an amalgamation of MSF and the AEEU, unless and until a revised instrument of amalgamation, containing the following safeguards and revisions, is brought to, and approved by, MSF Annual conference.

1. *The NEC to be under the control and government of an Annual conference.*
2. *Annual Conference to be the supreme governing body of the union: with that supremacy established in a rule which overrides all other duties powers and obligations set out in any other rule.*
3. *All mechanisms, which allow an NEC to circumvent Annual conference, to be removed from the instrument and the transitional rules.*
4. *A requirement that all changes to the initial rules, or new rules, must be put to Annual conference as amendable propositions.”*

It is this instruction that the applicants allege has been breached and it is accordingly necessary to examine the precise terms of the instruction which was given. In my opinion, this gives rise to a short point. Taken in context, the reference in the motion to “...a ballot of the membership on whether or not they approve an amalgamation” can only refer to the formal merger ballot to be conducted in accordance with the statutory requirements. As there is no evidence before me that the NEC continued with preparations for a formal merger ballot on the basis of the unrevised version of the Instrument of Amalgamation, there is no evidence that the NEC did not cease forthwith

all preparations for such a ballot. Therefore the allegation that there had been a breach of this instruction has not been made good.

2.20 The Recall Conference had all the authority of Annual Conference and was not bound by any previous decision of the Harrogate Conference. Accordingly, when the Recall Conference carried the motion to proceed to a formal ballot of the membership on the proposed merger on the basis of the renegotiated Instrument of Amalgamation, the NEC was no longer subject to the instruction to cease all preparations for a formal ballot as contained in Motion 15 of the Harrogate Conference.

2.21 The union was therefore not in breach of Motion 15 in the actions it took prior to the Recall Conference in London, nor in commencing preparations for conducting a ballot on the proposed merger following the approval by the Recall Conference of the revised Instrument of Amalgamation. I accordingly dismiss the complaints based on the alleged breach of Rule 19 (b).

D COCKBURN
Certification Officer