



COMMISSION HEARING

TORONTO, ONTARIO – SEPTEMBER 17, 2009

**IN THE MATTER OF THE RACING COMMISSION ACT S.O. 2000, c.20;  
AND IN THE MATTER IN THE APPEAL AND REQUEST FOR HEARING OF  
STANDARDBRED LICENSEE DAN CREIGHTON**

On September 14, 2009, the horse, Angostura, driven by Trevor Ritchie (“Ritchie”) and trained by Daniel L. Creighton (“Creighton”) finished first in the second race at Mohawk Raceway.

On September 14, 2009, the Judges at Mohawk issued Standardbred Official Ruling SB 41336 to Angostura wherein the horse was placed from first to last for conduct contrary to Rules 22.23.04(a) and 22.23.05(c) of the Rules of Standardbred Racing and in accordance with Policy Directive No. 2-2009: “for an offence where a driver has driven with both lines in one hand and struck the horse with the whip, the Judges shall place the horse last”.

On September 14, 2009, Creighton filed a Notice of Appeal.

On 17, 2009, a Panel of the Ontario Racing Commission, comprised of Chair Rod Seiling, Vice Chair Hon. James M. Donnelly, and Commissioner Bernard Brennan, DVM, was convened to hear the appeal.

Jennifer Friedman appeared as counsel for the Administration. Creighton was self-represented.

Upon hearing the testimony of Senior Judge Jeff Minler and Creighton, reviewing the exhibits filed including the tape recorded voicemail of Ritchie and the film of the race, and upon hearing the closing submissions, the Panel dismissed the appeal.

The transcript with the Panel’s Reasons for Decision is attached to this Ruling.

DATED at Toronto this 8<sup>th</sup> day of October, 2009.

BY ORDER OF THE COMMISSION

  
John L. Blakney  
Executive Director



## REASONS FOR DECISION

### Overview

1. Standardbred licensee, Dan Creighton, (Creighton) appealed SB Ruling No. 41336 wherein the horse, Angostura, was placed from first to last (7<sup>th</sup>) in the second race at Mohawk Raceway on September 14, 2009 for violating SB Rules Nos. 22.23.04 (a) and 22.23.05 (c) with reference to Policy Directive No. 2-2009.

### Background

2. The Ontario Racing Commission implemented new rules regarding the urging of a horse on September 1, 2009.
3. Before implementation, the Commission undertook an extensive communications initiative to ensure participants were aware of the new rules and penalties.
4. One of the new provisions requires a driver to keep a line in each hand from the beginning to the end of the race. If a driver moves the lines into one hand and strikes the horse with the whip with the other hand, the penalty is the Judges shall place the horse last.
5. Unfortunately, the appellant opted not to have driver, Trevor Ritchie, present for the hearing. Evidence was introduced via an audio tape with Mr. Ritchie discussing the incident with the Judges just minutes after the race, wherein he admitted to tapping the horse with his whip.
6. The video replay of the race clearly showed Mr. Trevor Ritchie, the driver of Angostura, move the lines to one hand and make a striking action towards the horse from the outside in with his whip with the free hand. Judge Minler testified that the Judges could not actually see the whip touch the horse because of the black whip, the quality of the tape replay and the camera angle. After hearing the audio tape and viewing the video, Judge Minler expressed his concluded view that the whip made contact with the horse.
7. Because of time constraints secondary to the draw for the series final, Creighton was self-represented.
8. Creighton relied upon dictionary definitions of “strike”, asserting that if there was contact with the horse, it was tapping not striking. Creighton contended that there was no proof beyond a reasonable doubt that the horse was struck notwithstanding Ritchie’s admission.
9. The standard of proof is upon a balance of probability and not beyond a reasonable doubt.

### Issue

10. Did Mr. Ritchie violate SB Rules Nos. 22.23.04 (a) and 22.23.05 (c) during the running of the second race at Mohawk Raceway on September 14, 2009 and was the penalty assessed by the Judges correct?



### **Decision**

11. After carefully reviewing the evidence, it is clear the driver of Angostura, Trevor Ritchie, violated SB Rules Nos. 22.23.04 (a) and 22.23.05 (c). Furthermore, the penalty assessed, the placing of the horse to last position was correct as per Policy Directive No. 2-2009.

### **Reasons for Decision**

12. The new rules are specific; a driver must keep a line in each hand for the entire race. The only exception is to allow the driver to use a hand for the purpose of adjusting equipment. Mr. Ritchie did not follow the rules as he moved the lines to one hand and then struck the horse with his whip.

13. The new urging rules were implemented on September 1, 2009 following a comprehensive and extended industry consultation exercise. The objective was a new urging of the horse regimen that improved the overall protection and welfare of the horse and the best interests of the sport and its perception by the public.

14. The Commission conducted an extensive communication program as outlined in the exhibits. This included paddock meetings with video demonstrations, press releases, and notices in the paddock, race offices, race programs, public announcements and oral reminders by the starter just prior to the race.

15. The placing aspect of the new rule was included with the support of the Board of the Commission to protect Ontario drivers against out-of-province drivers in major races having an unfair advantage by one handed driving and whipping with only a nuisance financial penalty. Ironically, an Ontario driver who had a momentary memory lapse is one of the first to feel the impact.

16. The Panel has empathy for driver Ritchie, trainer Creighton and the owners, especially considering the short time the rule has been in place. However, the Panel must adhere to a zero tolerance policy. To do anything else risks undercutting the intent of the rule and all the work of the industry and the industry working group which helped put it in place. It would also be unfair to all the other drivers in the race who obeyed the rules.

17. Anecdotal reports as to the conduct of racing since the new rules were implemented are very positive. The product looks and sounds “much” better. Perhaps more important, the horses are racing better. Four new track records and numerous personal best times speak volumes.

### **Penalty**

18. There is neither pleasure nor satisfaction in making this Ruling. The convergence of circumstances produced a result disproportionate to the character and severity of the conduct constituting the breach.



19. Those circumstances were:

- A violation 14 days after the Rule came into force.
- A driver known to be temperate in use of the whip.
- The violation, although clearly within the ambit of the Rule (lines in one hand, striking with the whip with the other), was not aggravated in form. The driver immediately after the incident described his action as “tapping” the horse. That characterization was fair. Prior to the rule change, that conduct would not have been misconduct.
- The horse won the race. By virtue of placement and redistribution of purse money, the owner suffered the loss of \$15,000 (subject to reductions).
- The horse as winner of the Elimination event would have qualified for the \$475,000 Peaceful Way Trot Final with the right to choose post position for the final. All of that is gone.
- The violation was inadvertent. Clearly a reflexive relapse into the habits of a driving lifetime which formerly would have been irreproachable. There was no intention to operate beyond the rules.
- The absence of intent cannot constitute a defense. By its nature, the doing of the prohibited act is the offence. Like speeding on Highways, this is an absolute liability offence.

20. The consequences of the finding of breach are legitimate considerations in assessing penalty. This is significant if the quantum of the penalty is discretionary (example, a fine ranging from \$500 to \$5,000 or a suspension ranging from 30 days to six months).

21. For this violation there is no discretion. Policy Directive No. 2-2009 establishing penalty guidelines for inappropriate urging of a horse in standardbred racing is mandatory in these terms.

For an offence where a driver has driven with both lines in one hand and stuck the horse with the whip, the Judges shall place the horse last.

22. The distinction between discretionary and mandatory penalties was discussed in Aimonetti (TB 009/2009). The rationale underlying mandatory penalties is deterrence. As stated in Aimonetti.

“The purpose was to deter potential violators so that ideally the penalties would never be required. They were intended to be of such powerful deterrence that the risk of punishment on that scale would dissuade even the most foolhardy.”

23. The issue then arises, is this an appropriate case to exercise the Commission’s “absolute discretion to waive the breach of any of the rules?” That absolute discretion can only be invoked if the Commission “does not consider the waiver prejudicial to the best interests of racing.” (Rule 1.09)



24. Absolute discretion is unavailable for two reasons:

- In cases of obvious hardship or inequity, the penalty may be modified if in so doing there is no encroachment on the equal rights of another licensee. In this case, the placement of Angostura bestowed upon the second place finisher the right to be moved up with the attendant benefits. Clearly it would be wrong to make a decision that the rule-breaker should not be deprived of the benefits of finishing first. That would be inflicting on the second place finisher who broke no rule, the precise same penalty that we decline to impose in the first instance. That second place finisher would lose his entitlement. Under strict application of the rule, the winner's purse, qualification to race for the rich purse of the final and opportunity to select post position is the lawful entitlement of that second place finisher. Extending that reasoning, the fifth place finisher is entitled to be moved up to fourth and thereby to race in the final. Under what authority is he/she to be stripped of that right?
- The rule change was intended to be onerous because the objective was to change the entire culture of whipping. There are drivers, young and old, who consider beating on a horse to be a skill set. There are those for whom it is a means of venting frustration, before and after the wire. The welfare of the horse and of the industry was consideration rendering the cultural change inevitable. Having started down that road, dramatically favourable results are apparent to all. The cultural change must go forward. Consistency is of the essence in the application of rules.

25. The ORC has no authority to distribute largesse to one licensee at the expense of another. Each is entitled to equal treatment. In result, the operation of the rule must be enforced. There is no place for whimsical benevolence.

26. The whipping regime will be reviewed six months following the September 1<sup>st</sup> inception. Although there may be a preponderance of opinion that the change is beneficial, there are varying opinions on how that change should be controlled. The placement aspect is one phase of an underlying strategy to involve the owners in what happens to their money when it steps on the track. Another approach is to focus directly on the drivers for first hand deterrence. At the upper levels of racing, substantial fines can be of little deterrent value, simply part of the cost of doing business. The counter foil to that is a suggested 30-day suspension which carries a serious financial hardship plus a potentially significant disruption in that driver's business associations.

27. These issues will be assessed more accurately with hindsight than foresight. No doubt they will receive attention on the six-month review.

28. The Creighton and Pseekos Reasons were issued in the same time frame. Those cases have common features:

- Both are absolute liability offences
- In both cases there was no willful intent to act in breach of the rules



29. Nonetheless the cases have different results. Why so?

30. The distinction is that in the Creighton case, driver Ritchie knew of the rule and had the easy competence to avoid breaching it by being mindful of its provisions and acting accordingly. His failure was mental lapse. He, through oversight, neglected to comply. In the Pseekos case, Pseekos had neither opportunity nor power to avoid the breach. That the feed was contaminated was beyond his ability to know or foresee. One could have avoided the breach. The other could not.

31. Some benefit may accrue from this unfortunate placement. The consequences are so high profile as to attract attention across the breadth of the industry. This will increase awareness and should promote compliance.

32. The entire matter cannot be dismissed without observation that the persons involved grew in stature by admirable restraint, fortitude and character. If permitted, a tip of the Commission hat to them.

DATED this 8th day of October 2009.

James M. Donnelly  
Vice Chair