THOROUGHBRED RACING NORTHERN TERRITORY

APPEAL of CARL SPRY – AR 135(b)

Appeal Committee: Mr John Stewart (Chairman) and Mr Charles Burkitt
Date of hearing: 23 July 2010

REASONS FOR DECISION

We delivered our decision in this matter on 26 July 2010 for the reasons which follow.

Stewards Inquiry

AR 135(b) is in these terms: "The rider of every horse shall take all reasonable and permissible measures throughout the race to ensure that his horse is given full opportunity to win or to obtain the best possible place in the field."

After inquiring into the running of "Activation" on 26 June 2010 Stewards delivered a letter to Jockey Spry on 2 July 2010 containing this charge: "When you rode Activation in the NT TAB ROANT Cup run at Fannie Bay on Saturday 26th June 2010, that from near the 350 metres to approximately the 150 metres you failed to ride your mount with sufficient endeavour or vigour so as to ensure that your mount was given full opportunity to obtain the best possible place in the field."

Jockey Spry was represented by a lawyer, Mr Piper, at the hearing of the charge. The Chairman of Stewards, Mr Lane, gave Jockey Spry these further particulars (transcript page 99): "And so that you're clear, and Mr Piper is clear, we believe that at 350m or thereabouts there's room to ride forward up behind runners ahead of you. There is a clear run to take ahead and we believe that in the early part of the straight a run appears to the inside of Austpak, a horse which you indicated you believed was going to shift out. We don't believe there was sufficient endeavour or vigour to attempt to take the run on the inside of Austpak , and then when Austpak did shift in, then when you come to the outside, we don't believe that there was any vigour or endeavour to shift out to get the run quickly, and then when you did get out towards the outside to then ride forward until the 150m."

Jockey Spry gave this explanation to Stewards (transcript page 98):

- From the 350m he was urging his mount forward in the hope of a run inside "Austpak".
- The run inside "Austpak" momentarily appeared then closed as "Austpak" shifted in.
- He had to be careful to keep "Activation" balanced when negotiating the bend into the straight. He said this task was more difficult because "Activation" was carrying 63 kilograms and Spry was using a trackwork saddle.

Trainer Michael Hickmott told the Stewards that Activation would at best have improved from his sixth placing to fifth if ridden with more vigour. There was no way he would have run a place.

At the conclusion of the hearing Stewards suspended Jockey Spry's permit to ride for 2 months.

The Appeal

Jockey Spry appealed to this body as the Principal Racing Authority on 14 July 2010. He appealed against the finding of guilt and against the severity of the penalty. He applied for a stay of enforcement of the penalty pending the hearing of the appeal. The stay was granted.

Jockey Spry lodged grounds of appeal as follows:

1) The stewards misunderstood the requirements for a finding of guilt under AR 135(b).
2) The stewards misunderstood the standard of proof to be applied for a finding of culpability under AR 135(b).
3) The error of judgment, if any, was not sufficient for a finding of culpability under AR 135(b).
4) The stewards should have accepted I showed adequate vigour in my riding given the circumstances as they were between the 350m and 150m marks in the race.
5) The explanation for the ride that I gave to the stewards was supported by the video footage and was not or not adequately taken into consideration.
6) The stewards did not take into account or adequately take into account the following circumstances of the race between the 350m and the 150m marks.

Ground 6 was followed by a detailed description of circumstances which were relied upon to support an argument that between 350m and 150m in the race "Activation" had inadequate galloping room and Jockey Spry was therefore unable to ride his mount out. After mentioning that he was disappointed for a run inside "Austpak" the circumstances concluded: "By the time I got my mount into a clear run between the two horses [*"Austpak" and "Spakatak"*] it was the 150m mark in the straight and then I was able to test my mount but by this time of the race the bird had flown and the placegetters had already got away. My mount finished off the race very well."

The appeal was heard on 23 July 2010. Both parties were legally represented – Jockey Spry by Mr Piper, the Stewards by Mr Bernardi and Mr de Silva. We had the advantage of viewing video film of the race taken from several different camera angles. We heard a small amount of additional evidence from Jockey Spry, Mr Kevin Ring of the Australian Jockeys' Association and Mr Lane. The evidence, which was received without objection, was mainly designed to assist us to form an impression of the circumstances of the race consistent with the case advanced by each party. In the end we felt that the film revealed clearly enough what was happening at the relevant points in the race and of itself enabled us to come to the conclusions to which we will refer.

We were referred to this passage - adopted by Justice Haylen of the Racing Appeals Tribunal of New South Wales in the Appeal of Allan Robinson (1 October 2009) - from the decision of Mr T E F Hughes AC, QC of the Racing New South Wales Appeal Panel on 5 June 2003:

> "The task of administering this rule is not always easy. One must keep it clearly in mind that on its true interpretation it is not designed to punish a jockey unless on the whole of the evidence in the case the Tribunal considering a charge under the rule is comfortably satisfied that the person charged was guilty of conduct that in all the relevant circumstances fell below the level of objective judgment reasonably to be expected of a jockey in the position of the person charged in relation to the particular race.
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> The relevant circumstances in such a case may be numerous; they include the seniority and experience of the person charged. They include the competitive pressure under which the person was riding in the particular race. They include any practical necessity for the person charged to make a sudden decision between alternative courses of action. The rule is not designed to punish jockeys who make errors of judgment unless those errors are culpable by reference to the criteria that I have described."

We were content to apply Mr Hughes' guidelines. And, bearing in mind the seriousness of the charge and that Jockey Spry was appealing from a suspension of licence, we were also mindful of the need to reach a state of "reasonable satisfaction" (or to be "comfortably satisfied" as Mr Hughes puts it) in accordance with the decision of the High Court in *Briginshaw v Briginshaw* (1938) 60 CLR 336 if the Stewards' finding of guilt was to be upheld.

The Evidence

On viewing the film it was evident why the Stewards considered it necessary to inquire into the running of "Activation". The film supported the Stewards' complaint that Jockey Spry was not proactive enough in positioning "Activation" to take advantage of opportunities as the race developed. He could and should have moved "Activation" forward to close the gap behind "Austpak" earlier than he did. His reasons for failing to take that action were unconvincing.

Stewards also pointed to a run inside "Austpak" at about the 255m which Jockey Spry didn't take. To our minds the opening only occurred briefly and, therefore, we are not convinced that this was an error of judgment on the part of Jockey Spry . It is possible that the run could have been taken. Jockey Spry said that taking it would have been a dangerous move and we are prepared to give him the benefit of doubt in this respect. The requirements of AR 135(b) must be tempered by the need to ride safely at all times hence the modifier "permissible".

However, at about 220m when "Austpak" started to shift inwards there was sufficient galloping room for "Activation" to take a run outside "Austpak" yet Jockey Spry waited for another 70 m or thereabouts before doing so. Jockey Spry said he couldn't take the run outside "Austpak" at the 220m because "Faslination" was on his outside. The film showed adequate galloping room between "Activation" and "Faslination" at that stage but there was no apparent effort by Jockey Spry to visually check, let alone take, the opening. And it is to the point that if Jockey Spry had moved his mount up closer to "Austpak" at an earlier stage then a run outside or inside may have become apparent that much sooner.

The film did not provide any indications that Jockey Spry was having any difficulty controlling "Activation" or keeping him balanced. Rather it was, as Stewards submitted, a "passive" ride from about the 350m. Passive in comparison with the obvious effort displayed by other jockeys during that part of the race and the vigour when Jockey Spry ultimately applied himself from about the 150m.

Mr Ring expressed the opinion that it would have been reckless to try to take "Activation" to the outside earlier in the straight. He said if there was anything wrong about Jockey Spry's ride it was a "wrong judgment call" in electing to wait for the run inside "Austpak". We believe the jockey's failure was worse than that, consisting as it did of a prolonged failure to exercise reasonable vigour and/or take advantage of opportunities to improve his horse's position.

The rule has been breached. The punters who invested on "Activation" were entitled to get a better run for their money. We do not consider it necessary to find that, absent the breach, "Activation" would have secured a better finishing position. The question of guilt is not illuminated by the trainer's opinion given with the benefit of hindsight. Racing is a fluid activity; we can only speculate about what would have happened if Jockey Spry had given "Activation" full opportunity. While loss of eventual position may be relevant when ascertaining the extent or consequences of the breach, it appears to us that the focus of the rule is on opportunities throughout the race.

If that view is wrong, then it is clear on Jockey Spry's own admission that his lack of vigour and endeavour had possible consequences in that by the 150m "the bird had flown and the placegetters had already got away." It is also notable that according to Jockey Spry "Activation" finished off the race very well. It is easy to see that an earlier run may have resulted in an improved finishing position.

We were told that a breach of this rule may have an impact on Jockey Spry's ability to obtain rides in Asia. It is hard to see why that would be so given that the Stewards made no allegation of dishonesty on the part of Jockey Spry. To establish the breach it is sufficient that it was clearly a sub-standard effort on the part of Jockey Spry, an otherwise experienced and capable jockey.

Penalty

An examination of other cases reveals that the usual penalty for a breach of this rule in the Northern Territory is from 1 month to 3 months suspension of licence. Jockey Spry has been a jockey for about 12 years and has no recorded breaches of this rule. His breach on this occasion was of moderate severity. Every breach of this rule has to be taken seriously; it is hard to conceive of a minor breach.

At the appeal hearing the Stewards submitted that 2 months was considered a fair penalty at a time when Jockey Spry would lose 4 days of racing at the Darwin Cup Carnival within that period. Otherwise, they would have imposed 3 months suspension.

Mr Piper pointed out that AR 135(c) states that "Any person who in the opinion of the Stewards has breached, or was a party to breaching, any portion of this Rule, may be punished, and the horse concerned may be disqualified." He submitted that the words "may be" confer a discretion to punish or not punish. It is unnecessary for us to decide that point. We are of the view that the breach clearly merits punishment.

We consider that the Stewards have failed to give Jockey Spry the full benefit of his good record and that suspension for 1 month is more appropriate.

Decision

1. **Appeal as to finding of guilt dismissed.**
2. **Appeal against severity of penalty upheld; period of suspension reduced to 1 month commencing from 26 July 2010.**
3. **The appeal deposit will be retained.**

Dated 27 July 2010

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John Stewart

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Charles Burkitt