TASMANIAN RACING APPEAL BOARD

Appeal No 12 of 2014/15

Panel:	**Mr R Foon (Chair)** **Mr G Elliott** **Mr W Burnett**	**Appellant:**	**Mr M Yole**
Appearances:	**The appellant in person** **Mr A Crowther on behalf of stewards**	**Rule:**	**Australian Harness Rule AR156(3)(b)**
Heard at:	**Launceston**	**Penalty:**	**A $400 fine ($200 suspended for 12 months on condition he not commit a similar offence)**
Date:	**19 March 2015**	**Result:**	**Dismissed**

REASONS FOR DECISION

1. The appellant, Mr Yole, was the driver of *Blended Family* which raced in race 6 over 2950 metres at the New Norfolk Pacing Club on 26 January 2015. Following an inquiry into his drive (which concluded on 15 February 2015) stewards charged Mr Yole with a breach of AR156(3)(b), which provides:

> *"A driver shall not use a whip excessively"*

2. The stewards summarised the charge as follows:

> *"As the driver of Blended Family at New Norfolk Pacing Cup on the 26th of January 2015 you've used your whip throughout the race, for basically the entirety of the race and in doing so on 44 occasions."*

3. A penalty of $400 was imposed with $200 of that penalty suspended for 12 months on condition that Mr Yole not commit a similar offence in that period.

4. Mr Yole has appealed both conviction and penalty.

5. Mr Yole's grounds of appeal are: "*I do not believe I have breached this rule as I felt I followed all the requirements set down under the Australian Rules of Racing*."

6. Mr Crowther, on behalf of stewards, tendered an Industry Notice which was published on 2 October 2014 on the Racing Services Tasmania website and in the National harness racing publication. This notice was published in consultation with the Harness Advisory Group, which is made up of industry representatives and states:

> *"The use of whips in Harness Racing is an extremely important and often contentious issue.*
>
> *It is essential that the Harness Industry effectively regulates whip use to protect the welfare of the racing animal and the image of the industry. Whip rules have changed significantly in recent years to reflect wider community and industry values.*

Following consultation with the Harness Advisory Group it has been agreed to issue the following guidelines to drivers in relation to a breach of the rules:

- *Use of the whip excessively or in other words "too much" relating to how many times used and the amount of force used.*
- *Striking an obviously beaten runner or a horse out of contention or past the winning post.*
- *Use of the whip in a jabbing or prodding motion.*
- *Use of the whip with an extravagant or uncontrolled action.*
- *Raising the whip hand back past the shoulder.*
- *Drawing the whip hand back further than level with the helmet.*
- *Drawing the whip arm back beyond a 90 degree angle relative to the track.*
- *Loose reining.*
- *Use of the whip "down low" in a side arm motion so as to be outside the confines of the sulky.*
- *Irrespective of whether the whip is striking the dust sheet or sulky shaft, a driver's action can still warrant a charge under the rules.*

AR 156(4) explains the correct use of the whip, that is that the whip is to be used in a "flicking motion". The general principle is that if the driver can see the whip when being used it will conform to the rule, however, if the whip hand, when being used, goes out of eyeshot that driver is generally breaching the rule.

Stewards will continue to advise drivers when their actions are close to breaching the rule to assist them in understanding what is or is not acceptable.

Notwithstanding this, any blatant and/or severe breach of the whip rule will be dealt with on its merits."

7. Mr Crowther went on to submit that animal welfare issues are under intense scrutiny in the current climate and a driver using a whip on a horse in a race 44 times was in the opinion of stewards excessive. He said that in the Macquarie dictionary "excessive" is defined as "exceeding the usual or proper limit or degree".

8. Mr Yole explained that it is difficult for drivers to understand what is classed as excessive as there is no distinct definition. He considered that as stewards did not vet the horse after the race they did not appear to be concerned, at that time, about the welfare of the horse. His obligation, as a driver, was to ensure the horse finished in the best possible position or risk breaching another rule. The particular rule he was referring to was AR149(1) which states:

"A driver shall take all reasonable and permissible measures during the course of a race to ensure that the horse driven by that driver is given full opportunity to win or obtain the best possible placing in the field."

9. The Board has viewed the video footage of the race in question. It was conceded by Mr Yole that the video showed him using the whip in the race 44 times. That did not include times the whip may have been used off camera. It was disputed how much of the race Mr Yole was off screen. It is unnecessary for the purposes of the appeal to determine, however, it could have been up to 400 metres of the race. Given the whip usage on the footage, it is extremely likely the whip was used during that period also, although that is uncharged and will be disregarded.

10. The stewards consider that the use of the whip every four seconds, on the basis of what was shown on the video, was excessive.

11. Drivers can be put in a difficult position where rules conflict with other rules, however, in the case of AR149 the driver is to take all reasonable and permissible measures. To whip a horse excessively is not permissible.

12. The precise number of times that a driver might use a whip in a race cannot be precisely and numerically defined. It is going to be very much a question of fact and degree in the circumstances of each case. In our view the horse was not coming on so strongly that use of the whip so frequently was justified. We do not believe the stewards erred in their finding that the whip use was excessive on this occasion.

13. In submissions Mr Crowther referred to two cases in New South Wales where action had been taken by stewards where drivers used the whip excessively. On one occasion it was determined that 33 times was excessive and on the other occasion it was 55 times. Although this case falls within the middle, we do not know if all the other factors were the same. The distances in the race were not the same. The New South Wales authority should not be taken as authority to say that in every case 33 times is too much. As we indicated it has to be a matter of fact and degree. What might be too much for a horse dead last and not in contention at all, might be different to a horse very much in contention. However, the board believes objectively 44 times in this case was too much.

14. As to penalty, Mr Yole challenged penalty on the basis that he would ordinarily expect a lesser fine for a third offence within three months.

15. As to penalty Mr Crowther explained that this is the first occasion where Tasmanian stewards have taken action under this particular part of the rule.

16. Mr Crowther referred to Mr Yole's offence record where he had previously been reprimanded and fined a number of times in relation to other whip rules. Although this fine was $400, $200 was wholly suspended for a period of 12 months on the proviso that Mr Yole does not breach that particular part of the rule within that period. It will not be breached by other whip charges not comprising that part of the rule.

17. The board is not satisfied that the penalty imposed was inappropriate. In our view the fine fell within the reasonable discretion of the stewards, having regard to the appellant's previous breaches of the rules. It was not excessive. The whip rules are important ones to ensure that animal welfare concerns are taken into consideration. In our view the stewards have correctly suspended part of the fine in recognition of the fact that Mr Yole was the first to be prosecuted.

18. The Board affirms the decision of stewards in relation to both conviction and penalty. It is ordered that, in accordance with s.34(1A) and (2)(a) of the *Racing Regulation Act* 2004 the appellant forfeit 50% of his prescribed deposit to the Secretary of the Department. Further, pursuant to s34(4A) and (4B)(a) of the Act, the appellant must pay to the Secretary of the Department 50% of the cost incurred in preparing the transcript of the original stewards' inquiry.