

# TASMANIAN RACING APPEAL BOARD

## Appeal No 20 of 2018/19

<b>Panel:</b>	<b>Kate Cuthbertson (Chair) Kate Brown (Deputy Chair) Wendy Kennedy (Member)</b>	<b>Appellant:</b>	<b>Rodney Ashwood</b>
<b>Appearances:</b>	<b>Anthony O'Connell (on behalf of the Appellant) Stephen Shinn (on behalf of the Stewards)</b>	<b>Rules:</b>	<b>AHRR 240(a)(ii)</b>
<b>Heard at:</b>	<b>Office of Racing Integrity Level 2, Henty House, 1 Civic Square LAUNCESTON</b>	<b>Penalty:</b>	<b>Driver's licence suspended for 4 months</b>
<b>Date:</b>	<b>26 August 2019</b>	<b>Result:</b>	<b>Upheld</b>

### REASONS FOR DECISION

1. The appellant was the driver of *Sutter Star* in Race 6 – Roberts Rural Supplies Globe Derby Prelude – 2200m at the Launceston Pacing Club meeting on 2 June 2019. Following the race, Stewards inquired into the appellant's tactics in driving that horse and subsequent to the inquiry charged and found the appellant in breach of AHRR 240(a)(ii) in that he drove in a manner that unlawfully disadvantaged another runner in the race, namely *Sunny Sanz* in the home straight.
2. The particulars of the charge are set out in a document entitled Inquiry Result dated 14 July 2019:

*Stewards today completed an adjourned inquiry into Race 6 of the Launceston Pacing Club meeting June 2, 2019.*

*Further evidence included results of an investigation into the betting activities which failed to reveal any concerns as well as past performances of runners.*

*After considering additional evidence from Mr Rodney Ashwood, driver of Sutter Star in the race in question, Stewards issued Mr Ashwood a charge under the provisions of AHRR 240(a)(ii).*

*240 A person shall not, whether alone or in association with others, do, permit or suffer anything before, during or after a race which in the opinion of the Stewards or the controlling body:-*

(a) may cause someone to be:

(ii) unlawfully disadvantaged.

*Details of the charge were that Mr Rodney Ashwood being the driver of Sutter Star in Race 6 at the Launceston Pacing Club meeting on June 2, 2019, in the opinion of the Stewards, caused Mr John Walters driver of Sunny Sanz, the \$1.80 favourite, to be unlawfully disadvantaged when Mr Ashwood shifted Sutter Star wider on the track entering the back straight on the final occasion when his colt was giving ground resulting in Sunny Sanz being checked with the sulkies of these runners locking wheels and both horses losing significant ground. Mr Ashwood pleaded not guilty to the charge however after considering his submission in support of his not guilty plea Stewards found Mr Ashwood guilty as charged.*

*After considering his submission in regards to penalty, his past record and personal circumstances Stewards suspended Mr Ashwood's reins person's licence for a period of 4 months to commence midnight July 14, 2019 to expire midnight November 14, 2019.*

3. When issuing the charge, Stewards advised the appellant that they felt he had *"made a deliberate action to shift Sutter Star wider on the track entering the back straight and shortly in the back straight on the final occasion and in doing so have caused interference including the locking of wheels to Sunny Sanz... and that in the opinion of the Stewards being the unlawfully disadvantage (sic.) runner Sunny Sanz"*.
4. During the course of the inquiry, Stewards initially focussed on the fact that the one of the *Sutter Star's* stablemates was also in the race and was the second favourite. *Sunny Sanz* was the favourite. However, during the course of outlining the charge, Stewards stated that they did not consider there had been any talk before the race or that the appellant had set out to try and take care of the favourite.

***Australian Harness Racing Rules r.240(a)(ii)***

5. The elements of a charge pursuant to AHRR 240(a)(ii) are:
  - (a) a person (alone or in an association with others);
  - (b) permits anything;
  - (c) during a race;
  - (d) which in the opinion of Stewards causes someone to be unlawfully disadvantaged.
6. The concept of unlawful disadvantage introduces a concept of particular seriousness in relation to the conduct required to make out the charge. Charges under this rule often involve allegations that a person took deliberate action to influence the outcome of a race.

7. In *Steven Davis* TRAB Appeal No.34 of 2016/17, this Board considered a conviction appeal in respect of an allegation of unlawfully advantaging another person pursuant to AHRR 240(a)(i). The Board noted the following:

*Because of the seriousness of the charge, which involves allegations akin to race fixing by deliberate, albeit spontaneous, conduct, this Board must reach a high level of satisfaction that the appellant acted in the manner alleged and did so with the intent to unlawfully advantage another horse.*

8. That matter concerned a charge based on an allegation that the driver unlawfully advantaged another horse by providing it sufficient room to move away from the marker pegs' position and into clear running. Noting that the circumstances of the race in that case were "highly suspicious", the Board was not able to reach the requisite degree of satisfaction for such a serious allegation to find that the appellant's actions in that case had been deliberately taken to advantage another horse or another driver. The appeal was upheld.
9. This Board was also directed to the case of *Trista Dixon* from Queensland. This involved an allegation of a driver again unlawfully advantaging a stablemate by causing interference to another driver. Stewards in that case found that the applicant's actions were taken to afford the stablemate clear running and as such caused the driver of that stablemate to be unlawfully advantaged. An internal review was conducted in respect of the matter and found that the evidence against the applicant was compelling and confirmed the original decision on the charge. The focus of the internal review was to consider whether the driver's actions were deliberate and taken with the intention of providing the clear running, that is the advantage, to the stablemate.
10. In light of the text of AHRR 240 (a)(ii) and the decisions referred to above, the Board approached this appeal on the basis that the stewards' decision may only be affirmed if the evidence is capable of establishing to a high degree of satisfaction that the appellant's actions were deliberate and undertaken with the intention of disadvantaging *Sunny Sanz*.

### **Appellant's Submissions**

11. The appellant submitted that the evidence was not capable of meeting the high level of satisfaction required to sustain the charge.
12. The Board permitted the appellant to call the trainer of *Sutter Star*, Mr Whitmore, during the course of hearing the appeal. Mr Whitmore was also the trainer of *Resurgent Storm*, which was also in the race. The Board heard that Mr Whitmore was an experienced trainer who has enjoyed some success.
13. Mr Whitmore gave evidence that *Sutter Star* did not race well on the night. He referred to some indications of poor performance prior to the race in the horse's work. He stated that all of his horses were "off their feed" prior to the race, but that he needed to start his horses in the heats to be able to secure a spot in one of the classic three year old features.
14. He described *Sutter Star's* racing style during the race as "not tractable". He expressed the view that the horse had not been maintaining its correct line and

had been hanging in on turns and also hanging out. The horse was raced with a near side rein burr to stop it hanging in, but Mr Whitmore found this had not been effective in track work. The horse had displayed these traits for a long period of time. Mr Whitmore described it as the most challenging horse he has had to train. He said it could be arrogant and he sometimes had trouble getting it into gates and the float. The horse was known to go from being stubborn to anxious and these traits had been observed by other drivers, including the appellant, over a period of time.

15. *Sutter Star* was three years' old at the time of the race and had had 11 starts.
16. *Sutter Star* was examined by the vet post-race, but nothing abnormal was detected, other than a slow recovery rate. The evidence before the Board suggested that the veterinary check undertaken at that time was largely confined to checking the horse's heart rate.
17. As a result of the horse's performance, Mr Whitmore organised for bloods to be taken from *Sutter Star*, but nothing concerning was detected. The horse was rested for a couple of weeks but continued to perform poorly. A further physical examination was organised with Dr Charlton on 18 July 2019 who noted "a number of issues... that may be contributing to *Sutter Star* performing below expectation. These include indications of right fore high suspensory pain, right fore knee pain, increased digital pulses with heat in both front feet, bilateral lower hamstring pain and bilateral hock pain." She recommended that *Sutter Star* be spelled for four months.
18. Under cross-examination, Mr Whitmore described *Sutter Star's* racing habit as one "that seemed to be keen then drop a bit" and that "this was a regular sign in previous starts". Mr Whitmore said he had not apprehended any indication of lameness in *Sutter Star* prior to or immediately following the race. Following the race, the horse was spelled for a period, but still failed to come back. It was on that basis that the further veterinary examination was sought. A problem was detected even though *Sutter Star* had not presented with lameness. He considered it possible that this may have been a problem contributing to the performance during the race the subject of this appeal.
19. Mr Whitmore had given the driving tactics he had discussed with the appellant to Stewards on the night of the race, and believed that the appellant had driven in accordance with those instructions.

### **The race footage**

20. The race footage was carefully examined during the course of the appeal and submissions made in respect of it by both the appellant and the Stewards.
21. Stewards stated that they examined three aspects of the race between the 900 and 700m mark during the course of their initial inquiry. The Stewards' summary of their conclusions is usefully set out in the transcript as follows:

*Mr Ashwood we're continuing this inquiry that we adjourned back on the 2nd and essentially that was into pretty much, circumstances of the whole race and in particular events that took place between the, about the 900*

and the 700 metres. You were the driver of Sutter Star who was approximately a \$13 horse in the race and stable mate of Resurgent Star was it, Resurgent Storm, both the horses being trained by Roger Whitmore. We took quite a bit of evidence on the night, of concern to the Stewards were at the time three parts of the race, we did inquire into the early part of your driving tactics where you went forward which resulted in the short priced favourite, \$1.85 favourite which had tried to, which had showed initial gate speed from your outside and tried to progress forward, however you to inside also progressed forward and ultimately John Walters who was driving Sunny Sanz took that horse back. The Stewards took into consideration the driving tactics that were given to us prior to the race by Mr Whitmore and also confirmed by you and Stewards felt that action of you early in the race was quite reasonable, the driving tactics were quite reasonable in that you were trying to progress forward and ultimately to look for cover, and that's exactly what you did and that were the instructions that Mr Whitmore did confirm. The next part of the race that the Stewards had some concerns with was, essentially that after the initial gate speed that you did show and chose to progress forward and take the position outside the leader, that the stable mate of your runner had immediately pulled off your back, the moment the horses started to enter the back straight on the first occasion and at which stage you took hold and let him go straight away. Once again the Stewards felt that that was not unreasonable, the tactics at all, in that your horse had gone faster than average lead time in that race and that once again it was adhering to the driving tactics that Mr Whitmore had explained to us, that you confirmed to us, so Stewards have no problem with those early parts, however, as the race progressed and I'm just trying to recap and the evidence that was presented on the first night, towards the later part of the turn into the back straight on the final occasion Mr, Sunny Sanz driven by John Walters had commenced to ease away from your back, he was following you, you were one out one back and your horse was having trouble keeping up, he was going in spasms, he was going forward on the bit then dropping the bit, going forward, hanging a little at different times during the race, and there probably about the 850 or thereabouts Mr Walters had started to make a move to your outside, your horse was commencing to give a little ground at that point, and there was from the evidence presented by both drivers and the videos, it appears that your outside wheel was stuck by the front legs of Sunny Sanz, it's very noticeable on the replays that at that stage your mud guard was dislodged sent skew whiff, at that point you can see clearly on the video that the mud guard is now instead of straight it's sideways now, it's gone a little off so clearly it was contacted, we can see that clearly. The evidence at that time of Mr Walters was that he felt that your horse had shifted out a little and that's the reason why that contact occurred, however you told the Stewards that you didn't think that was the case at all and that you felt that it was Mr Walters' horse that'd hung in and that's the reason why there was contact at that point. The video evidence, and there's no Steward in that tower at the back, the video evidence is, certainly cannot say either way which way it was, so the Stewards aren't really taking that into account at all, there's really no evidence yours and Mr Walters' evidence were differing, however, as I said there's no Steward

*observation in that tower and from the videos they're not prime for that particular spot, so we're not taking any of that into account whatsoever, I think it's fair to both you and him that we can't, however as the race progressed, as the horses went into the back straight, your horse has shifted up the track, he had been hanging a little round the turn and as you've entered the back straight your horse has shifted up the track initially, you had told the Stewards that the reason for that it that your horse had been hanging and you wanted to give the horse inside you to provide Mr Mark Yole more room so you've shifted out according to evidence to do that, however, as the horses progressed further into the back straight it was noticeable that, it certainly did appear from the videos that you have either steered your horse wider on the track even though it was giving ground, or certainly didn't appear to do anything to prevent him from going wider and it did appear from the video evidence from the head on that your horse, from straightening at a position one off the peg line within 20 or 30 metres has now all of a sudden gone to approximately three-wide from the marker pegs or maybe a little more. The stewards looked further into the reasons for that, I believe at this stage that the evidence concurs with what you said on the night, is there anything there that you disagree with to this point?*

22. As can be seen, there were in fact four aspects of the race that were examined. Stewards considered whether the initial contact made by *Sunny Sanz* to *Sutter Star*'s outside wheel was the result of any actions taken by the appellant but were unable to conclude one way or the other whether that contact was a consequence of any breach of the rules of racing.
23. The part of the race relating to the charge followed immediately after the initial contact between the two horses. It is apparent during the course of the race that the appellant's drive lost its tyre. The appellant argued that it was open to find that the puncture resulting in the tyre coming away from the wheel occurred during the first contact between *Sutter Star* and *Sunny Sanz*. The appellant submitted that a deflating tyre can cause uneven balance on the cart which may explain why the appellant's drive shifted outwards after the initial contact.
24. There is considerable dispute between the appellant and the Stewards regarding how far the appellant shifted in the period *following* the initial contact. As can be seen from the above summary of the race, Stewards stated that the appellants drive went from a position one off the peg line and to a position approximately three wide from the marker pegs or maybe a little more within 20 or 30 metres. Having confined their consideration of whether there was a breach of AHHR 240((a)(ii) to the period following the initial contact, it is only the shifting that occurred from that point that is relevant to the charge.
25. The appellant submitted that his cart had shifted only half a cart wide in the period following the initial contact and that it was open for the Board to find that a punctured tyre had contributed to that move. Further, the appellant gave evidence in the inquiry that following the initial contact, which he clearly noted by turning his head to look behind, he as a driver "lost a bit of focus". It was submitted that the shifting that then occurred was not a deliberate action. Once

the appellant had locked wheels with *Sunny Sanz*, he took appropriate action to unlock the wheels rather than prolong the interference.

26. It was submitted that in the context of a race where the horse was not being tractable, where the appellant had lost some interest in the race following the contact, and where potential unbalancing had occurred as a result of the tyre being punctured that the Board could not reach the level of satisfaction required to be satisfied that the action in shifting wider following the initial contact was deliberate and undertaken with the intent to disadvantage *Sunny Sanz*. It was submitted there was no evidence of the horse's head being turned outwards indicative of a deliberate action being taken by the appellant.
27. By contrast, Stewards submitted it was less likely that the wheel was punctured as a result of the initial contact as opposed to being punctured as a result of the locking of the wheels. It was submitted that the most likely scenario was that the mudguard had been contacted by *Sunny Sanz* which was less likely to result in a puncture.
28. Stewards also submitted that the appellant was hanging and shifted up to four carts wide. It was submitted that there was no reason for the appellant not to maintain its true line. It was submitted that *Sutter Star* was starting to lose ground at the time the initial contact occurred. In those circumstances it was submitted there was no good reason to move even half a cart wide at that point in the race, particularly when the odds on favourite was on the outside, a fact that was known to the appellant in light of having looked over his shoulder following the initial contact.
29. Stewards also submitted that the appellant engaged in a second look around and that this suggested the further shifting was deliberate. They also submitted that the appellant's right hand can be seen on the footage to tighten the right rein and that was the cause of *Sutter Star* shifting up to lock wheels with *Sunny Sanz*. Stewards formed the view that there had been a deliberate steering wide on the track which they argued was "clear on the video".

## Decision

30. The Board has carefully considered the race footage and the submissions of both parties. Having considered those submissions, the Board was unable to reach the requisite degree of satisfaction to find that the appellant had deliberately shifted *Sutter Star* wider on the track in order to interfere with *Sunny Sanz*. In forming that view, the Board took into the account the evidence of Mr Whitmore regarding *Sutter Star's* racing manners, the evidence given by the appellant during the course of the inquiry and the submissions made by both parties.
31. It is clear that the appellant had encountered difficulties during the course of the race with *Sutter Star*. Just prior to the part of the race that was the focus of the charge brought by Stewards, the appellant's sulky was checked by *Sunny Sanz*. This contact was clearly noted by the appellant and he turned around to ascertain its cause. *Sutter Star* and *Sunny Sanz* locked wheels shortly after this occurred. Unlike the opinion arrived at by Stewards, the Board was not convinced that the footage showed that this was a deliberate manoeuvre undertaken by the appellant.

The relevant shifting outwards was in the order of half a cart. The Board was not convinced that the footage showed the appellant taking any deliberate action to cause this to occur. It may be that the appellant could be criticised for not taking action to prevent *Sutter Star* from shifting out further following the initial contact, however this was not the basis upon which the charge was put. Stewards firmly alleged that the appellant took deliberate action by pulling the right rein and tapping the horse with the whip. Although the appellant was tapping *Sutter Star* with the whip, the Board could not discern a deliberate steering move made by the appellant to either cause it to move outwards nor did we discern an attempt to correct *Sutter Star* from hanging out. The racing manners of the horse, the after effects of the initial contact which was not the subject of any adverse finding by Stewards and the horse's young age are all possible explanations for *Sutter Star's* further move outwards.

32. The appeal is upheld and the decision of Stewards is quashed. The Board gave some consideration to whether it should exercise any powers under s.34(1)(b) of the *Racing Regulations Act 2004* (the Act). That section provides that if an appeal is made under s.28(1)(b), the Board may, if it considers it just to do so, refer the matter to the Stewards for rehearing if the Board is satisfied that the appellant did not engage in the conduct that prompted the making of the decision, but may have engaged in some other conduct that would have justified the respondent making another decision against the appellant. It might be argued that the appellant engaged in careless driving although the Board reached no conclusion to that effect. The appellant, however, has not sought a stay of his disqualification as a consequence of suffering an injury that has prevented him from driving in any event and has served almost the entirety of the period of disqualification imposed by Stewards. In those circumstances, the Board formed the view that it did not consider it just in the circumstances to remit the matter to Stewards for rehearing.
33. The whole of the appellant's prescribed deposit will be returned to him pursuant to s.34(2)(e) of the Act.