

33rd America's Cup
February 2010, Valencia Spain
International Jury
Case AC33/01
Decision
2nd February 2010 at 23:54

1. On 19th January 2010, the Jury Chairman received a Request for Redress from USA (sail number USA 17, representing Golden Gate Yacht Club), listing five instances in which USA alleged the Organising Authority (OA) (Société Nautique de Genève) and/or the Race Committee (RC) had made an improper action which USA claimed may lead to the possibility that her score be made significantly worse, through no fault of her own.

2. A hearing was held in the Hearing Room at Antiguo Edificio Varadero starting at 11:00 on 1st February.

3. Richard Slater and Russell Coutts represented USA; Hamish Ross represented the OA, the RC and Alinghi, and Brad Butterworth represented Alinghi.

SUBMISSION ON VALIDITY

4. Hamish Ross argued that the Requests were not valid, as all the requirements of the Racing Rules of Sailing (RRS) 62.1(a) had not been met. RRS 62.1(a) did not permit a Request to be made before a boat's score had been affected.

5. RRS 62.1(a) states: 'A request for redress ... shall be based on a claim or possibility that a boat's score in a race or series has, through no fault of her own, been made significantly worse by an improper action or omission of the race committee ... or organizing authority...'

REASONS FOR DECISION

6. RRS 60.1(b) states: 'A boat may ... request redress. RRS 62.2 states: 'The request shall be in writing and be delivered to the race office no later than the protest time limit or two hours after the incident, whichever is later. The protest committee shall extend the time if there is good reason to do so...'

7. The Requests were in writing and delivered in time and hence comply with RRS 62.2.

DECISION

8. The Requests are valid.

DECISION REGARDING ADDRESSING A REQUEST FOR REDRESS BEFORE THE RACE

9. The Jury determines that the words 'possibility that a boat's score' used in RRS 62.1 permit the Jury to consider a Request for Redress before the race.

REQUEST 01-1: INCORRECT RULES PRECEDENCE

10. USA submitted that 'In both NoR 1.2 and SI 1.2 SNG has improperly set the order of precedence so that the Notice of Race and the Sailing Instructions prevail over the ISAF Racing Rules of Sailing. This improper action leads to the possibility of USA's score being made significantly worse in that USA is required to comply with the rules taking into account an incorrect order of precedence. What is worse is that the order of precedence that USA must follow is in conflict in NoR 1.2 in that the Jury deals with conflict over the rules in a different manner.'

11. Richard Slater submitted that setting the order of precedence as the Organising Authority (OA)/Race Committee (RC) have done in the NoR and SI, would allow the Sailing Instructions to change any rule in the RRS, even rules that the RRS themselves do not allow to be changed. There would be uncertainty regarding rules governing the event.

12. Hamish Ross submitted that USA had failed to show how through no fault of her own USA had been prejudiced. Giving redress is a post-race remedy, not a pre-race remedy. It is for the OA to set the rules and this Request is premature.

13. He further submitted that the correct order had been applied, as the NoR and SI amend the RRS and therefore should be placed prior to the RRS in order of precedence.

REASONS FOR DECISION

14. NoR 1.1 and SI 1.1 list the rules applicable to the match in the following order: (a) Deed of Gift; (b) Notice of Race; (c) Sailing Instructions; (d) RRS.

15. NoR 1.2 states: 'Subject to RRS 63.7 any conflict in the rules shall be resolved by applying the rule in the first listed document above which shall prevail over a conflicting rule in a subsequently listed document.'

16. Sailing Instruction (SI) 1.2 states: 'Any conflict in the rules shall be resolved by applying the rule in the first listed document above which shall prevail over a conflicting rule in a subsequently listed document.'

17. RRS 63.7 states: 'If there is a conflict between a rule in the notice of race and one in the sailing instructions that must be resolved before the protest committee can decide a protest or request for redress, the committee shall apply the rule that it believes will provide the fairest result for all boats affected.'

18. The RRS is the document that empowers the publication of the NoR and SI. The RRS are clear that some of its rules may not be changed by the SI. To give precedence to the NoR and SI over the RRS may result in conflict between the rules of the event. Such a conflict may give rise to the possibility that a boat's score could be made significantly worse through no fault of her own.

DECISION

19. The Request is upheld. The OA/RC are directed to issue an amendment deleting NoR 1.2 and SI 1.2, and replacing them with 'The Deed of Gift shall prevail over any other conflicting rule'.

REQUEST 01-2: CHANGING THE RULES TO OUTLAW WIND DETECTION EQUIPMENT.

20. USA submitted that 'In amending NoR 1.5(b) SNG has not provided adequate notice to now attempt to outlaw the use of wind detection equipment. Such equipment was clearly allowed in the original Notice of Race and USA has spent time and money in obtaining and developing such detection equipment. Being unable to use such equipment leads to the possibility of USA's score being made significantly worse in that its ability to detect the wind is removed and that it had committed time and resources to this project that may have been used in other areas of the yacht preparation.'

21. Through NoR 1.5(b) the OA deleted RRS 41(c) and (d) and replaced them with a new (c):

'The RRS are changed (or applied) as follows: ... RRS 41 (c) and (d) are deleted and replaced with: "(c) communications to and from the Umpires and Race Committee to the competing boats via equipment to be provided by the Race Committee, the use of GPS devices, low power onboard communication systems, use of onboard laser, radar and other detection equipment operated solely from onboard as permitted by NOR 14.(b).(iv), and the operation of onboard event broadcast equipment, and to permit any actions authorised by the NOR and the SI'"

22. Hamish Ross submitted that it was not the intention of the OA to prohibit wind detection equipment and offered to meet with Richard Slater to try to come to an agreement on an amendment to clarify the matter.

23. At the request of the parties, the Jury adjourned the hearing in relation to this issue, pending the outcome of their meeting.

24. Subsequent to the meeting, on 2nd February, the parties advised the Jury they had mutually agreed in satisfaction of this request that NoR 14.2(d) will be deleted and replaced with: '(d) onboard lasers, radar or other detection equipment operated solely from onboard; and'.

25. Consequently, the Jury has allowed the request to be withdrawn (RRS

63.1).

REQUEST 01-3: FAILURE TO MUTUALLY AGREE ON THE START TIME FOR RACES.

26. USA submitted that: 'When NoR 6.6, NoR 1.5(I)(ii) and SI 5.6 are read in conjunction, it is clear that the scheduled start time has been set by SNG unilaterally as 1006 hrs. This is in direct contravention of the clear and unambiguous language of the Deed of Gift that states: "*The challenged Club shall not be required to name its representative vessel until at a time agreed upon for the start,...*"

In improperly setting this start time SNG has created the possibility that USA's finishing position has been made significantly worse in that the start time SNG unilaterally set may provide for conditions that suit the defending yacht over USA.'

27. Richard Slater submitted that the Deed of Gift required the Challenger and Defender to come to an agreement as to the start time, and that to set a start time of 10:06 could prejudice USA's finishing position.

28. He submitted that a later start time would be more appropriate and there was nothing in the Deed to prevent races finishing after dark, and that some past America's Cup Matches had done so.

29. He suggested that a representative of each party should meet with the chairman of the Jury and that if the parties fail to agree, the Jury should, after receiving submissions, set a start time.

30. Hamish Ross submitted that in the absence of agreement, the OA/RC have the responsibility to set a start time.

31. Harold Bennett, the Principal Race Officer, stated that to be sailing after dark would give rise to safety concerns in relation to the racing boats, in addition to race committee and spectator boats. The conditions for sailing would not be ideal but are 'doable'. To have the whole day available gives a greater opportunity to conduct a fair race.

REASONS FOR DECISION

32. There is a clause in the Deed: '*The challenged Club shall not be required to name its representative vessel until at a time agreed upon for the start, but the vessel when named must compete in all the races, and each of such races must be completed within seven hours.*'

33. In a decision of the New York Supreme Court dated 29th July 2009, Justice Shirley Kornreich stated (on page 10) 'It is only after the parties have failed to agree that the Deed defaults to the defender's rules'. A footnote was added to that statement which said 'Golden Gate argued at the hearing on July 21st that the mutual consent language should also be read to control the

clause requiring that the default races be sailed subject to the defender's rules. The court finds that the clauses are separate and that a consent requirement would be entirely inconsistent with the default provisions intent to create a situation where the race can still be held regardless that the parties have failed to agree.'

34. The clause in the Deed does not require the parties to agree a time for the start; rather it allows the Defender to delay naming its vessel until an agreed start time for the first race. If no start time is agreed then the OA has no alternative but to set a start time to facilitate a Match. The OA had engaged with the Challenger and attempted to agree a start time. USA had wanted an afternoon start time. No agreement was reached.

35. The New York Courts have the authority to interpret the Deed.

36. Following the Court's decision, the Jury is of the opinion that in the absence of agreement as to a first race start time, the OA has the responsibility to set appropriate start times.

37. The OA has set a scheduled start time of 10:06. The Jury is of the opinion that a scheduled start time of 10:06 is reasonable and is therefore not an improper action.

DECISION

38. The Request is denied.

REQUEST 01-4: IMPOSING WIND AND WAVE LIMITS THAT DIRECTLY FAVOUR SNG'S OWN YACHT.

39. USA submitted that 'SNG has imposed limits on the wind strength and the sea state for the Match. This limitation is neither supported by the clear and unambiguous language of the Deed nor the findings of the New York Court of Appeals in Mercury Bay Boating Club v San Diego Yacht Club 76 NY2d 256 (1990). Imposing wind and wave limits creates a design restriction that is not found in the Deed of Gift. This leads to the possibility that the finish position of USA is made significantly worse in that conditions that may benefit the defender over USA are the only conditions that are raced in.'

40. NoR 6.7 states: 'To ensure the safety of competitors, officials and spectators, and taking into account the length of the courses to be sailed and the nature of the boats, RRS 27 and RRS 32 shall apply. It is anticipated that races shall be sailed in winds having a windspeed of not more than 15 knots measured at 60 metres, and in waves of not more than 1 metre in height.'

41. Richard Slater submitted that the Deed prescribes a time limit but not a wind or wave limit. To do so directly impacts on design and therefore such limits conflict with the Deed.

42. Richard Slater submitted that 15 knots measured at 60 metres would often equate to less than 12 knots at sea level and that such a limit would be inappropriate if set only for safety reasons. Measurement at 60 metres could only be obtained from the Defender's yacht and it was inappropriate for the Race Committee to rely on wind readings obtained in this manner.

43. Hamish Ross submitted that the upper wind limits were based on safety concerns and that there were significant legal and insurance issues to be considered.

44. Hamish Ross submitted that as the OA had not broken a rule it could not have made an improper action.

45. Hamish Ross further submitted that the OA was required by the Spanish Royal Decree of 7th February 2008 to provide 'meteorological limits set for the organization of the race' to the Port Authority. The OA had advised the Port Authority of the wind limits as stated in NoR 6.7.

46. Tom Schnackenberg was called by the OA to give evidence. He is a physicist with 30 years experience in sail making and America's Cup boat development. He stated that a wind speed of 15 knots at 60 metres height in relation to the boats in this Match was equivalent to 23 knots at 10 metres height for the preceding generation of America's Cup boats in terms of the loads imposed.

47. Russell Coutts submitted that there were other significant factors determining the loads on the boats and that it was the responsibility of the crew (who are amongst the best sailors in the world) to exercise good seamanship by using the options available to them to reduce the loads to safe levels.

REASONS FOR DECISION

48. In a decision of the New York Supreme Court dated November 17th July 2009, Justice Shirley Kornreich, in respect of an issue concerning the safety of holding races off the coast of Valencia in February 2010, endorsed (on page 4) an extract from the Opinion of the Court's Expert Panel: 'At the hearing, both parties agreed that with the proper application of the RRS, races held in Valencia can be safely managed.'

49. The RRS contain adequate provisions for a RC to delay starting a race because boats are unlikely to complete the course within the time limit, or because of safety concerns. After the start the RC may 'abandon the race because of foul weather' or 'because of insufficient wind making it unlikely that any boat will finish within the time limit' or 'for any other reason directly affecting the safety or fairness of the competition.' (RRS 32.1)

50. The Jury concurs with the view of USA that to impose wind and wave height limits, which are not provided for in the Deed, without the consent of the Challenger is an improper action that may result in a boat's score being

made significantly worse through no fault of her own.

51. It is not necessary for an OA to have broken a rule for it to have made an improper action.

DECISION

52. Redress is granted. The OA is directed to issue an amendment deleting NoR 6.7.

53. The Jury recognizes that the RC has the obligation to comply with appropriate safety and legal obligations when making a decision to start or continue a race.

REQUEST 01-5: IMPOSING RULES REGARDING SKIN FRICTION REDUCTION.

54. USA submitted that 'The court has ruled that in the absence of mutual consent, RRS 53 does not apply. Furthermore, NoR 1.5(d) states: "*RRS 49 to RRS 54 (inclusive) are deleted. For the avoidance of doubt anything that may have been prohibited by such rules is permitted.*" SI 24 has been included into the rules with the clear intention of now stopping USA from using a process to reduce skin friction. This limitation is neither supported by the clear and unambiguous language of the Deed nor the findings of the New York Court of Appeals in *Mercury Bay Boating Club v San Diego Yacht Club* 76 NY2d 256 (1990) and it is a change to the rules of the regatta where adequate notice has NOT been given.

The improper inclusion of this Sailing Instruction leads to the possibility that the finish position of USA may be made significantly worse in that USA is unable to use a skin friction reduction process that it has developed and installed on the yacht.'

55. Richard Slater submitted that the inclusion of SI 24 is contrary to the New York Supreme Court orders and the Deed.

56. SI 24 states: 'Boats shall not put trash in the water, or fail to fully recover anything (other than discharged water ballast) intentionally left by the boat in the water. A boat's Chase Boats shall use reasonable efforts to recover any trash or other item left in the water from the boat.'

57. Richard Slater stated that USA intends to use skin friction reduction technologies and that these technologies comply with all appropriate laws applicable in the USA and Spain.

58. No evidence was submitted that any substances that may be ejected by USA will in any way be harmful to the environment.

59. Hamish Ross submitted that SI 24 was not intended to prevent skin friction reduction technologies; rather to prevent pollution. He further

submitted that if the Jury were to be satisfied that the technology and products used by USA complied with all laws and the SI, the OA's concerns would be met.

60. Richard Slater offered to provide the Jury, in camera, evidence to show that the technologies and products fully complied with all appropriate laws, and gave an assurance to that effect.

DECISION

61. For the purpose of SI 24, 'trash' does not include substances released into the water from a boat that are not in breach of any laws or regulations.

62. SI 24 has not reinstated RRS 53 and therefore there is no improper action by the OA and the Request is therefore denied.

David Tillett, chairman.

International Jury: David Tillett (AUS), John Doerr (GBR), Josje Hofland (NED), Graham McKenzie (NZL), Bryan Willis (GBR)