

**INTERNATIONAL WATERSKI AND WAKEBOARD
APPEALS COMMITTEE**

Decision in the Appeal of:

Ski Racing Australia, Inc.

Petitioner,

v.

IWWF Racing Division,

Respondent.

**Jeffrey D. Smith
Chairman
Aubrey Sheena
Datuk Lee
Silvia Terracciano
Jim McClintock
Members**

Decision

This matter is before the International Waterski and Wakeboard Federation's ("IWWF") Appeals Committee (the "Committee") pursuant to an appeal filed by Ski Racing Australia, Inc.¹ challenging a decision disqualifying "Boat #17" (the "Boat") from participation in the 2013 World Waterski Racing Championships (the "Event"), and the consequent striking (disqualification) of the scores of the waterskiers towed by the Boat.

For the reasons set forth below, the appeal is **granted, and the disqualification ordered in this case is reversed.**

The Hearing Panel

Ski Racing is a sport division of IWWF (hereinafter "Ski Racing") which is governed by Ski Racing's "Racing Council." IWWF is the international federation for competitive waterski and wakeboard events. The Committee is a standing committee under IWWF's Bye-laws (Article 20). The Committee members participating in this decision have been appointed by IWWF, have no known conflicts of interest, and have served in this matter without objection by the parties.

The Standard of Review

Under the IWWF Bye-laws, concerned persons may have recourse to the Committee in the case of sanctions "taken other than at a competition." Bye-laws (Article 20.1). Under IWWF's Policies and Procedures governing appeals, the Committee is required to affirm the decision under appeal unless it is shown by clear and convincing evidence that such action was in error or was otherwise improper. All findings of the Committee, as set forth below, are based on that standard unless expressly stated to the contrary.

The Committee has relied upon the written submissions provided to it by the parties, as well as the IWWF Bye-laws and Ski Racing Rules, as the sole basis for this decision. Further, the findings and determinations set forth in this decision represent the unanimous decision of the Committee.

Discussion of the Appeal

Ski Racing held its World Waterski Racing Championships from 7 September to 15 September 2013, in the Canary Islands (the "Event"). The Event was conducted pursuant to IWWF's 2013 Racing Rules (the "Rules"). This Appeal followed the post-tournament disqualification of "Boat #17" from the Event, and the consequent striking of the individual and team scores of all waterskiers towed by Boat #17.

The Racing Council gave notice of this disqualification by letter dated 7 December 2013, following which Ski Racing Australia, Inc. initiated this appeal by letter dated 18 December 2013.

¹ The Committee finds that Ski Racing Australia, Inc. has standing to make this appeal on behalf of the affected waterskiers, and this appeal is thus properly brought by Ski Racing Australia, Inc.

Additionally, there were certain other communications between the parties relating to the initiation of the appeals process. The Committee has determined that this appeal was timely filed.

The underlying facts are summarized as follows:

- The Rules govern Ski Racing events, including the World Waterski Racing Championships. Rule 1.
- Participants in Ski Racing events participate in timed racing events in which the waterskiers are towed by towboats.
- Ski Racing events are divided into different divisions. Rule 2. Those divisions include “Formula 2” Competitions. Rule 2.07.
- Specific rules have been established governing the hulls and engines of boats used in “Formula 2” Competitions. Rule 5.34.
- The Rules intend that all boats will be inspected and approved for use in the event, prior to the commencement of the event. Specifically, Rule 4.10 requires the appointment of a Chief Scrutineer for each event whose duties are as follows:
 - “Chief Scrutineer: appointed by the appropriate authority for the level of the competition and by reason of his special technical knowledge of ski boats and their use in water similar to that on which the race will take place. Responsible for seeing no boat starts in the race until it and all racing equipment meets all Technical Rules and the engine(s) fall within the class structure for which entry has been made.”
- If a boat is pronounced unserviceable by the Chief Scrutineer, competitors may substitute a boat or engine in order to participate in the event. Rule 8.11.
- The rules of eligibility for “Formula 2” Competition boats include several requirements and restrictions, including:
 - “No modifications are permitted with the exception of nosecones and torque tamers. *** No performance enhancing. Rule 5.34(c);
 - “The upgrading of engines from their original year specifications will not be accepted.” Rule 5.34(f);
 - “Original factory Engine Management System to remain in place and unaltered.” Rule 5.34(m).
- Consistent with the duties of the Chief Scrutineer, the Rules provide that:
 - All “Formula 2” Competition engines “will be inspected and sealed by the organizing committee prior to the competition.” Rule 5.34(p);
 - “All engines competing in F2 will be technically inspected after each race and at the completion of the competition.” Rule 5.34(q).
- The Rules strictly prohibit the modification of any engine after it has been approved by the Chief Scrutineer (“Scrutineers shall check to ensure an engine has not been changed from that recorded before or after the race”). Rule 5.20.

In this case, the disqualification of Boat #17 was based on the alleged non-compliance of its engine with certain of the “Formula 2” engine requirements. However, under the unique circumstances of this case, it is claimed that those non-conformities could not be (and were not) discovered until after the Event was over. Thus, this case does not fall under Rule 5.20, as it

does not involve allegations of *post*-scrutinization modification (as determined from a “before and after” comparison of the recorded information for the engine) of the Boat’s engine.² Rather, the questions presented include (1) whether the Boat’s engine failed to meet the “Formula 2” Competition engine requirements; (2) whether the proper procedures were followed to arrive at Ski Racing’s disqualification decision; and (3) if the Boat’s engine failed to conform to the Rules, whether the resulting penalty was proper under the Rules.

As to these issues, the facts are further summarized as follows:

- Although the Rules anticipate that all boats will be inspected and approved by the Chief Scrutineer prior to the Event, the proper equipment (computer software needed to download and analyze data from each engine’s control module/engine management system (hereinafter the “ECM” and “ECM Software”) was not available to undertake that process for the “Formula 2” boats entered at the Event.
- The Rules must be complied with at all World Championship events, unless the IWWF Racing Council determines that “compliance with the rules is impossible.”
- Because of the unavailability of the ECM Software, the Racing Council determined that compliance with the pre-event scrutineering inspection requirement was impossible for “Formula 2” engines at the Event, and that the ECM from each engine would be removed and inspected after the Event.
- This exception to the Rules was announced at the Event’s team captain’s meeting on 14 September (mid-tournament, before the fourth and final race), without objection or protest.
- None of the “Formula 2” engines were scrutinized or tested before the races at the Event.
- At the conclusion of the Event, the ECMs for the “Formula 2” engines were removed and sent to a third-party for analysis.
- The results for the Event were posted, and became final, before the third-party ECM analysis was completed. Under the Rules, the results became final thirty (30) minutes after the provisional results were posted and all protests resolved. Rule 11.02.
- The ECM analysis results were received sometime later, although the exact date on which those results were reported to the Racing Division’s Racing Council is not known.
- The ECM analysis results reported as to Boat #17 that:
 - The ECM (Engine Management System) had been replaced, and was not the “factory original part”;
 - The replacement ECM was a “non-equal” part which gave “different mechanical” specifications;
 - The engine had been modified by using an extra long gear;
 - The engine had been changed from a counter-rotating engine to a clockwise-rotating (“normal”) engine;
 - The engine’s gear ratio had been changed;
 - The maximum engine rpm’s were lowered (from 6300 to 5800).

² Likewise, there is no evidence that the Boat or the waterskiers competing behind it engaged in any intentional or unsportsmanlike behavior under Rule 9.15.

- At least some of these changes may have been detectable through the pre-event scrutineering process required under Rule 5.34(p).
- Although the evidence supports the conclusion that Boat #17's engine had been modified from its "factory original" condition prior to the Event, there is no evidence that the engine had been "upgraded" in a way which gave the waterskiers competing behind this boat an unfair advantage (see "End Report scrutineering World Waterski Racing Championships Tenerife 2013: "In the program of the box itself there is no evidence that this would change the performance"). Nor is there any evidence that any of the waterskiers knew of the engine changes or that Boat #17 failed to meet the requirements of Rule 5.34.
- Because of the Rules exception relied on at the Event, waterskiers competing behind Boat #17 did not have the opportunity to compete behind another boat, as anticipated by Rule 8.11.
- The ECM analysis results were provided to the Event's Jury in late October or early November 2013, long after the Event was concluded and its results became final.
- The history of Boat #17's engine was then reviewed with the party supplying the boat, in which it was determined that the engine's history was not fully known. The party supplying the boat stated that, in his opinion, Boat #17 was raced with "no performances enhanced parts."
- The Event's Jury apparently made a decision to disqualify Boat #17 and all performances behind it, sometime in mid-November 2013. According to the Racing Council's submissions, the Chief Judge for the Event reported that the "majority of the Judges go for disqualification because the engine of boat #17 does not comply with Rule 5.34(m)." This decision was then reported to the Racing Council for review and implementation.
- On 7 December 2013, Ski Racing's President wrote to the Australian Team Captain to advise him that Boat #17 was found to have been in violation of Rules 5.34(c), 5.34(f) and 5.34(m). Specifically: "with these rule infractions as listed, Boat #17 is hereby disqualified in both the Men's F-2 class and the Women's F-2 class and the points earned by these teams are to be stricken from the team scores" and instructing that "all trophies from the individual races and the final placing medals" be returned.
- Although the Committee believes that this action was in the nature of a "judging report" under Rule 4.07, the Jury did not comply with the requirements of that rule which requires that:

"when there is a judging report, the Team Captains should be interviewed together with the competitors involved. The Judge making the report should also be interviewed. All relevant information should be discussed during consideration of the judging report with the Judge making the report, the Team Captains and the competitors involved all having the opportunity of making comments. After all relevant parties have had an opportunity to be heard the Jury shall make its decision which will be communicated via the Chief Judge to the Team Captain prior to the posting of the results. When all adjudication has

concluded the final results will be posted and the Jury decision will be final for the event and not subject to an appeal.”

Decision

Based on these facts, the Committee’s unanimous decision is as follows:

1. **The Committee finds and determines that it has jurisdiction in this matter under IWWF Bye-laws Article 20.** The Event was concluded at the time the Event results became final, and the Jury’s disqualification decision was made long after the Event was concluded. Consequently, the Committee finds that the decision was not taken during the competition, and was thus “taken other than at a competition.” Ski Racing Australia, Inc. thus is entitled to recourse under IWWF’s Bye-laws.

2. While undoubtedly well-intentioned, the procedures used in the decision to disqualify Boat #17 were fundamentally flawed. As a result, Boat #17’s engine was not scrutinized before the Event, the waterskiers competing behind Boat #17 were not given an opportunity to compete behind another boat, and the affected teams and waterskiers were not given an opportunity to participate in the fact-finding process resulting in the disqualification of Boat #17. As a result of these errors in applying the Rules, **the disqualification decision is improper and is therefore ordered set aside and reversed.**

3. Although Rule 1.03 allows the Racing Council to authorize exceptions to the Rules at World Championship events where “compliance with the rules is impossible,” the rules exception should have been limited to those aspects of the scrutineering process which could not be performed at the tournament. All other pre-scrutineering requirements should have remained in place as required by the Rules. The evidence suggests that at least some of the changes to Boat #17’s engines could have been detected through the pre-scrutineering process. Had this taken place (or some additional pre-scrutineering procedures been implemented), many and perhaps all of the issues presented in this case could have been avoided. Most significantly, the failure to complete the scrutineering process before the event makes the “before and after” comparison and application of Rule 5.20 impossible, and **any consideration by the Jury and Racing council of the penalties for Rule 5.20 violations was improper.**

4. As the basis for its decision, the Racing Council relied on Rules 5.34(c), 5.34(f) and 5.34(m).

A. There is no evidence that the changes to Boat #17’s engines were “performance enhancing,” which is the stated purpose underlying Rule 5.34(c). Accordingly, **the disqualification decision under Rule 5.34(c) is set aside and reversed.**

B. There is no evidence that the changes to Boat #17's engines amounted to an "upgrade" from the engine's "original year specifications," which is the stated purpose underlying Rule 5.34(f). Accordingly, **the disqualification under Rule 5.34(f) is set aside and reversed.**

C. As to the disqualification under Rule 5.34(m), the evidence supports the Jury's conclusion that the ECM (Engine Management System) of Boat #17's engine was altered from its original factory condition. However, as to this evidence:

- i. It seems likely to the Committee that this rule is intended to prohibit the use of non-original ECMs which modify the engine's performance, and not to prohibit the use of replacement parts meeting factory specifications. On the whole, the intent of this rule is to prohibit engine modifications which provide a competitive advantage.
- ii. Although the party providing Boat #17 failed to take adequate steps before the tournament to confirm the history and compliance of Boat #17 with Rule 5.34, there is no evidence that the waterskiers received any competitive advantage from the changes made to Boat #17's engine;
- iii. The "Formula 2" Rules (Rule 5.34) do not set forth specific penalties for their violation, nor are any penalties for violations of Rule 5.34 prescribed under Rule 12. Thus, if any penalty were to be imposed for a violation of Rule 5.34, reference would presumably necessary to other rules for which specific penalties are provided, e.g., Rules 5.20 or 9.15. Those rules are not, however, applicable in this case based on the findings set forth above.
- iv. The issue of whether a penalty could properly be imposed under the circumstances presented in this case is problematic, given the mid-tournament change in the rules regarding pre-scrutineering, and the posting of final results long before action was taken to disqualify Boat #17, as discussed above.
- v. The Jury failed to provide any "due process" to the interested parties, as anticipated by Rule 4.07, in considering the alleged violation of Rule 5.34(m) and imposing a penalty in this case.

Although there may have been a "technical" basis for a finding that Rule 5.34(m) was violated in this case, there were multiple errors attributable to many of the parties involved, as discussed above. Ultimately, however, there is no evidence from which it can be concluded that the waterskiers pulled by Boat #17 were given a competitive advantage, or that the Rules provided for or anticipated the imposition of a disqualification penalty under the unique circumstances of this case. Likewise, it is clear that the process leading to the Jury's decision was improper for failing to provide any "due process" to the interested parties, such as set

forth in Rule 4.07. Although additional facts – determined through proper procedures - may very well have supported the Jury’s decision, those facts have simply not been proven in this case.

Accordingly, **the disqualification under Rule 5.34(m) is set aside and reversed.**

Summary

For these reasons, the **disqualification ordered in this case is reversed.**

The parties are hereby further notified that any further appeal of this matter shall be to the International Court of Arbitration for Sport, in accordance with its applicable requirements and procedures.

Respectfully submitted,

IWWF Appeals Committee

Jeffrey D. Smith
Chairman
Aubrey Sheena
Datuk Lee
Silvia Terracciano
Jim McClintock
Members