



DECISION OF THE FEI TRIBUNAL

dated 5 June 2009

Alleged Abuse Case No.: 2009/01

Horse: CORNET OBOLENSKY

FEI Passport No: GER28145

Person Responsible: Mr. Marco Kutscher, GER

Event: Games of the XXIX Olympiad, Beijing 2008, Hong Kong

1. COMPOSITION OF PANEL

Mr. Erik Elstad
Mr. Patrick A. Boelens
Mr. Pierre Ketterer

2. CASE DETAILS

2.1 Memorandum of case: By Legal Department.

2.2 Summary information provided by Person Responsible (PR):

The FEI Tribunal took into consideration all documents presented in the case file, which were also made available to the PR. The Tribunal also heard the testimony of the PR.

2.3 Oral hearing: by Conference Call on 29 May 2009

Present: The FEI Tribunal Panel

For the FEI:

Mr Alexander McLin, Secretary General

Ms Lisa F. Lazarus, General Counsel

For the PR:

Mr Marco Kutscher, Person Responsible

Additional Persons Present:

Dr Hanfried Haring, FEI Bureau Member

Mr Sönke Lauterbach, Secretary General GER NF

Dr. Joachim Wann, Legal Counsel to the German NF

3. APPLICABLE STATUTES, REGULATIONS, AND RULES

3.1 Articles of the Statutes/ Regulations which are applicable or are alleged to have been infringed:

Statutes, 22nd edition, effective 15 April 2007 ("**Statutes**"), Arts. 1.4, 34 and 37

General Regulations, 23rd edition, effective 1 January 2009, Arts. 118 and 142, 161 and 163 ("**GRs**"); (former version General Regulations, 22nd edition, effective 1 June 2007, Arts. 142, 167 and 174.)

Internal Regulations of the FEI Tribunal, effective 15 April 2007.

Veterinary Regulations, 10th edition, effective 1 June 2006 ("**VR**"), Art. 1013.

FEI Code of Conduct for the Welfare of the Horse ("**Code of Conduct**").

Internal Regulations of the FEI Bureau, effective 16 April 2007, updated 21 November 2008.

The FEI Regulations for Equestrian Events at the Olympic Games (22nd ed.9 ("**FEI OG Reg**"), effective for the 2008 Beijing Olympic Games

(Hong Kong)

3.2 Person Responsible: Mr. Marco Kutscher

3.3 Horse: CORNET OBOLENSKY

3.4 Alleged Justification for sanction:

GR Art. 142: Abuse of Horses

"1. No person may abuse a horse during an Event or at any other time. 'Abuse' means an action or omission which causes or is likely to cause pain or unnecessary discomfort to a horse, including without limitation any of the following:

- To whip or beat a Horse excessively;
- To subject a Horse to any kind of electric shock device;
- To use spurs excessively or persistently;
- To jab the Horse in the mouth with the bit or any other device;
- To compete using an exhausted, lame or injured Horse;
- To 'rap' a Horse.
- To abnormally sensitise or desensitise any part of a Horse;
- To leave a Horse without adequate food, drink or exercise;
- To use any device or equipment which causes excessive pain to the Horse upon knocking down an obstacle.

2. Any person witnessing an Abuse must report it in the form of a protest (Art 163) without delay. If an Abuse is witnessed during or in direct connection with an Event, it should be reported as a protest (Art 163) to an Official. If the Abuse is witnessed at any other time it should be reported as a protest (Art 163) to the Secretary General for referral to the FEI Tribunal."

GR Art. 163 – Protests

"[...]

8. Notwithstanding anything to the contrary, the Secretary General may, in special circumstances which – in his sole discretion – warrant a Decision, refer to the FEI Tribunal a protest against any person or body made by any person or body or on his own initiative, at any time, in regard to any matter and even without the payment of a deposit."

GR Art. 161 – FEI Tribunal

"[...]

2. The FEI Tribunal may impose the following penalties:

[...]

(v) Suspension of individuals and Horses for any period up to Suspension for life.”

Statutes, Art. 34 – FEI Tribunal

“34.1 Subject to Articles 34.2 and 34.4, the FEI Tribunal shall decide all cases submitted to it by or through the Secretary General, whether Appeals from or matters not otherwise under the jurisdiction of the Ground Jury or Appeal Committee. These cases may be:

[....]

(iii) Notwithstanding anything to the contrary to this Article, the FEI Tribunal may review and decide upon any matter involving abuse of horses.”

4. LEGAL PROCEEDINGS

4.1 The Secretary General of the FEI, under Article 163 paragraph 1 and 8 (“Protests”) of the FEI General Regulations, registered a protest against Marco Kutscher for failing to “observe the Statutes, GRs or Sport Rules” “in connection with an International Event”, FEI GRs, Art. 163 (1). This protest was supported by the majority of the FEI Bureau. In particular, a violation of Article 142 of the FEI General Regulations, “Abuse of Horses”, was alleged to have been committed by Mr. Kutscher.

4.2 By virtue of this protest, and the FEI Tribunal’s powers under Article 161 of the FEI General Regulations, the Secretary General sought a three (3) week preliminary suspension of Mr. Kutscher, from any FEI related activities or events pending the outcome and determination of the Presidential Ethics Panel convened to investigate allegations of Anti-Doping rule violations involving German athletes and German NF representatives.

4.3 In accordance with Article 34.1 (iii) of the FEI Statutes, the Protest was submitted to the FEI Tribunal for review and decision. Specifically, the FEI relied on the Tribunal’s authority to order a suspension for “any period” as the basis for its request to provisionally suspend Mr. Kutscher.

4.4 By Notification Letter of 28 May 2009, Mr. Kutscher was informed

that the FEI Secretary General had registered the above Protest against him. Mr Kutscher was also informed that a provisional suspension was requested pending the outcome of the Presidential Ethics Panel that had been convened to investigate the doping allegations against him and others.

4.5 Mr Kutscher was further advised that the above Protest as well as the request for provisional suspension would be presented to the FEI Tribunal on 29 May 2009 at 3.30pm. Mr. Kutscher was invited to confirm whether or not he would like to be heard at the above-mentioned time.

4.6 The German NF confirmed, on Mr. Kutscher's behalf, that he would like to be heard in the matter and would join the conference call at 3:30pm. The hearing was therefore held on 29 May 2009 by means of a conference call. Both sides had the opportunity to argue the facts and present legal arguments to the Tribunal.

5. FACTUAL SUMMARY

5.1 Mr. Kutscher, the Person Responsible, is an international Show Jumping rider and a member of the GER NF. He has been competing in Show Jumping competitions for many years and is an integral member of the German team.

5.2 From 8 to 21 August 2008, the Person Responsible participated at the Games of the XXIX Olympiad, Beijing 2008, Hong Kong (the "Event") with the Horse.

5.3 In relation to such Event, the Person Responsible, made the following statements during the television show "Sport inside", which was broadcast on 4 May 2009:

"What has actually happened is that Cornet Obolensky, after the first round of the Nations Cup, has received a sports medical treatment. And upon this, to explain it this way, he got a bit sick. As you know, when humans receive medicines, they are asked to lie down on a couch. Horses stand – and for a short while, his knees started

shaking. But has been ok again immediately. Yes, and this is what has happened. Yes."

"This has been administered by a colleague of mine – as had been agreed with the treating veterinarian."

In support: Statement of Marco Kutscher in:
"Statements of Persons involved" (for Wagner
Report)

- 5.4 Also on 4 May 2009, the Deutsche Reiterliche Vereinigung (also known as "German NF"), issued a press release with a statement by Dr. Björn Nölting, former team veterinarian of the German team, in response to Mr Kutscher's television interview of 4 May 2009:

"After the first flag of the Nations Cup during the OGS in Hong Kong, Marko Kutscher and I have discussed the treatment of his horse Cornet Obolensky with Arnika and Lactanase, in order to optimally allow the regeneration of the horse's muscles. Unfortunately, the caretaker, without permission and absolutely hastily, administered the treatment, even before I could have asked for permission for the injection. I only became aware of the problem when I was asked to see the horse, which, after the administration of the substances, had undergone a short dizzy spell. Due to the turbulence over there, I have decided - and I take over the entire responsibility for this - to maintain silence."

In support: Press Release by the GER NF dated
4 May 2009

- 5.5 Further on 4 May 2009, the German magazine "DER SPIEGEL" published an article entitled "Eine Spritze zu viel", which elaborated further on the events stating that the Horse had collapsed after the injection, and "shortly after this", Marco Kutscher had continued competing with the Horse, "as if nothing would have happened".

According to the article, the Horse finished with 19 mistakes, the highest number of mistakes amongst the German team.

In support: "Eine Spritze zu viel" in DER SPIEGEL dated 4 May 2009

- 5.6 According to the DER SPIEGEL article, Ludger Beerbaum, who shares a stable with Mr. Kutscher, confirmed the incident. Mr. Beerbaum further stated that the team veterinarian Dr. Björn Nölting was present during the Horse's collapse.

In support: "Eine Spritze zu viel" in DER SPIEGEL dated 4 May 2009

- 5.7 A Legal Opinion drafted by Dr. Martens, CAS arbitrator and sports legal expert, upon request by the German NF and based upon facts provided to him by Mr. Breido Graf zu Rantzau, President GER NF, contains a relevant statement by Dr. Nölting dated 11 May 2009 ("Martens Report", updated 27 May 2009):

"After the first flag of the Nations Cup during the OGs in Hong Kong, I have been approached by Marko Kutscher with respect to some support of Cornet Obolensky for better regeneration of its muscles, taking into account the climatic conditions and their effects to the organism. The administration of Lactanase and Arnika has been discussed. Those products/substances had been brought over by the caretaker of M. Kutscher to Warendorf and had been shown to me. They had been placed, as this is usual practice, in a box which is accessible for the caretakers.

After the conversation with M. Kutscher I advised that at that point of time, no treatment had to be undertaken. I thereupon left the stable building.

I wanted to consider whether, and if so, by which means the concern of the rider M. Kutscher could be complied with.

At the time of the above conversation, several members of the German delegation have been present in the stable aisle of the German stable area, amongst others Reinhard Wendt (Chef de Mission), Breido Graf zu Rantzau (President of the NF), Hanfried Haring (General Secretary of the NF), Peter Hofmann (President of the jumping Committee), Michael Rüping (Member of the Jumping Committee) and Kurt Gravemeier (Equipechef).

Out of a sudden, I have been startled by cry and shout from the area of the German stable aisle and started running over into the stable. Apparently, Cornet Obolensky had suffered from a dizzy spell and has been backed up by Kurt Gravemeier and the caretaker of Marco Kutscher. Upon question Marie Johnson declared having administered to the horse an injection of Lactanase and Arnica.

At this point of time, the above mentioned members of the German delegation have been present in the stable aisle. The horse recovered after a couple of minutes.

I have been literally shocked by what had happened. Spontaneously, I did not see any possibility to report to the outside world what had happened without affecting the entire German team.”

In support: Legal Opinion drafted by Dr.
Martens, “Martens Report”, updated 24 May
2009

- 5.8 During the hearing, Mr. Kutscher confirmed the facts set forth in the documentary evidence. Specifically, he recounted that his Horse was treated by injection with Arnica and Lactanase at the Hong Kong Olympic Games, that his Horse reacted to the treatment by experiencing a dizzy spell and stumbling against the stable wall, and that the described treatment was undeclared. He further claimed that the Horse recovered quickly and was able to continue with the Competition. The PR stated that this incident happened after the first round of Nations Cup. He competed with his horse in the second round

the next day, about 20 hours after the treatment of the horse, and his horse was then fit to compete.

6. **LEGAL ANALYSIS**

6.1 The FEI Tribunal has jurisdiction over this matter pursuant to the FEI Statutes, in particular Article 34.1 (iii).

6.2 Under Article 118.3 GR: "*The Person Responsible shall be the Athlete who rides or drives the Horse during an Event [...]*". Therefore, Mr. Kutscher is the Person Responsible in this case.

6.3 The principle of the horses' welfare is of paramount importance and inherent in the conception of the equestrian sport promoted and regulated by the FEI, as expressed by the Code of Conduct, Statutes and GR. The rider who puts his or her horse's health and life at risk must be held responsible for this conduct.

6.4 Under the heading "Abuse of horses", Article 142 of the GR reads as follows:

"1. No person may abuse a Horse during an Event or at any other time. "Abuse" means an action or omission which causes or is likely to cause pain or unnecessary discomfort to a Horse, including without limitation any of the following:

[...]

- To compete using an exhausted, lame or injured Horse;

[...]".

6.5 According to Article 142.2 of the GRs, "*Any person witnessing an Abuse must report it in the form of a protest (Art. 163) without delay. [...]. If an Abuse is witnessed at any other time it should be reported as a protest (Art. 163) to the Secretary General for referral to the FEI Tribunal.*"

According to the general definition contained in Article 142 GR, the following requirements must be met to establish a case of abuse:

– act or omission;

- which causes or is likely to cause;
- pain or discomfort to a horse, such as competing with an “exhausted, lame or injured horse.”

6.6 The FEI argued that Mr. Kutscher abused his horse by virtue of the undeclared treatment, followed by the Horse’s dizzy spell which caused it to collapse against the wall, followed by Mr. Kutscher’s decision to nonetheless continue to ride the Horse in the Competition.

6.7 Conversely, Mr. Kutscher argued that the treatment, though undeclared, was standard and mild and that although his Horse stumbled momentarily, it was fine immediately thereafter and fit to compete.

7. DECISION

7.1 While the factual record in this case is somewhat troubling, the Tribunal finds it unnecessary to rule on whether or not the evidence establishes a finding of horse abuse as the Tribunal concludes it cannot grant the requested relief.

7.2 It is within the power of the FEI Tribunal according to GR Article 161 to impose sanctions against a PR for failing to observe the Statutes, GRs or Sport Rules, which includes abuse to the horse. As a sanction the PR and/or his horse can be suspended for a period decided by the FEI Tribunal. This is in cases brought before the Tribunal for a final decision.

7.3 In the present case the protest from the Secretary General asks for a *Provisional Suspension* for three weeks from any FEI related activities or events pending the outcome and determination of the Presidential Ethics Panel convened to investigate allegations of Anti-Doping rule violations involving German athletes and German NF representatives. The FEI Tribunal finds that GR Article 161 cannot be open to an interpretation permitting the granting of a preliminary suspension.

While the remedy of *Provisional Suspension* is well-developed in the context of the Equine Anti-Doping and Medication Rules, it does not specifically exist within the horse abuse framework. Thus, even though the Tribunal may suspend for “any period” following a finding of horse abuse, the Tribunal declines to find that “any period” includes the relief sought which requires the Tribunal to act ahead of a final resolution on the merits of the case.

7.4 The Tribunal must therefore on legal grounds deny the FEI’s request for a three (3) week *Provisional Suspension* for Mr. Kutscher. Even though the PR in his statement accepted the facts in the case, the Tribunal has not with this decision decided whether the PR has violated the rules as alleged by the FEI. This remains to be decided when the Ethics Panel has investigated the case and given its report to the Bureau or in such other appropriate forum.

8. DECISION TO BE FORWARDED TO:

8.1 **The person against whom sanctions were sought:** Yes

8.2 **The President of the NF of the person against whom sanctions were sought:** Yes

8.3 **The FEI Secretary General and FEI General Counsel:** Yes

A handwritten signature in blue ink, appearing to read 'Erik Elstad', is centered on the page.

For the Panel
The Chairman Mr Erik Elstad

Date : 05 June 2009