



Ontario
Racing
Commission

RULING NUMBER GEN 002/2008

COMMISSION HEARING

TORONTO, ONTARIO – SEPTEMBER 9, 2008

IN THE MATTER OF THE RACING COMMISSION ACT, S.O. 2000, c.20;

**AND IN THE MATTER OF THE APPEAL OF
WESTERN FAIR RACEWAY'S APPLICATION
TO CANCEL FIVE APPROVED 2008 LIVE RACE DATES**

Western Fair Raceway appealed the Notice of Decision dated August 25, 2008, issued by the Executive Director. The Notice of Decision denied the application by Western Fair Raceway to cancel five live race dates (October 4, 11, 18, 25 and December 20, 2008) due to a decrease in customer demand.

On September 9, 2008, a Panel of the Ontario Racing Commission consisting of Chair Rod Seiling and Commissioners Pam Frostad and David Gorman convened to hear the appeal.

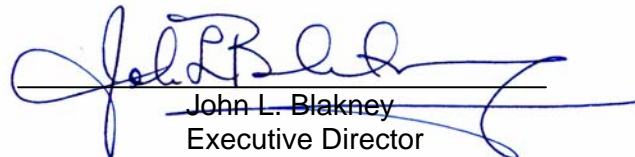
Maureen Harquail appeared as Counsel for the Administration. Ian Fleming and Hugh Mitchell appeared on behalf of Western Fair Raceway. John Walzak and Brian Tropea appeared on behalf of the Ontario Harness Horse Association.

Upon hearing the evidence of Ms. Wendy Hoogeveen and upon reviewing the written submissions filed and upon reviewing the evidence and hearing the submissions of Counsel for the Administration, Western Fair Raceway and the Ontario Harness Horse Association, the Panel denies the appeal.

The Panel's Reasons for Decision is attached to this Ruling.

DATED at Toronto, this 12th day of September 2008.

BY ORDER OF THE COMMISSION


John L. Blakney
Executive Director



REASONS FOR DECISION

Overview

1. Western Fair Raceway (WF) appealed the decision of the Director of the Ontario Racing Commission (ORC) to deny the track's application to cancel five previously approved live race dates. The dates in question were all Saturdays, October 4, 11, 18, 25 and December 20. The basis of the appeal was that the ORC Administration did not take into account the change in customer demand in their market.

Background

2. Western Fair Raceway submitted an application (Ex. 1, tab 4) to the ORC on July 14, 2008 to cancel five Saturday live race dates and replace the lost racing opportunities by adding races to previously approved race days. If approved, there would have been a net gain of seventeen live races. The track, in this application, had also requested and had approved changes in some post times to better position WF as a more competitive simulcasting product.

3. Hugh Mitchell, Chief Operating Officer for the track, submitted that the basis of the appeal was to allow it to move to a demand basis and the need to rationalize race dates in their market area. If the appeal is not allowed, he argued, the track will have to wait until the fall of 2009 to try this experiment. It was his position that the industry needs to have flexibility to be able to respond to the market. He also requested the ORC modify the race date allocation process by changing its processes to a supply management program that would match demand and to include benchmarks in the process. John Walzak, Chief Operating Officer for the Ontario Harness Horse Association (OHHA), who was opposing the appeal, (Ex. 1, tab 9) submitted that the current ORC process already does this. Mr. Walzak submitted that his association had convened a meeting of its members before taking its stand where about fifty out of seven hundred voted (not unanimous) to oppose the track's application to cancel the dates in question although it did support the other aspects of the application.

4. Ian Fleming, Racing Manager for WF, submitted that the five Saturdays in question were selected because they were the five poorest days in terms of overall revenue for the track's 130-day race meeting. The track submitted unchallenged figures showing average daily revenue for the track's Saturdays were \$68,000 compared to \$100,000 for Fridays, \$200,000 for Mondays and \$230,000 for Tuesdays (Ex. 1, Tab 4). The track was not arguing to make the change for financial reasons, it was not sure there would be any cost savings, nor was there any issue with purse levels or horse supply. The track did reference head to head competition with Hiawatha in Sarnia for the Saturdays in October.

5. In terms of live on track business the Saturdays actually outperformed the other dates with wagering averaging about \$2,000 compared to \$1,500 on other days. The difference being WF's simulcasting business. OHHA questioned the business rationale WF was utilizing to expect the added races would increase the revenues from wagering over those lost from the proposed cancelled Saturday dates given the sizeable decrease in commissions that flow from simulcasting races versus live racing. OHHA submitted (Ex. 1, tab 9) data from Woodbine Racetrack that it claimed demonstrated those benefits would not happen.

6. The Chair questioned Mr. Fleming and he agreed that it was important to service existing fans and develop new fans via live racing as simulcasting only services existing customers. He also asked and received concurrence that the slot program with the Ontario Lottery Corporation was to benefit live racing. The Chair added there is a need for the industry partners to work together.



7. Wendy Hoogeveen, Director of Industry Development and Support for the ORC testified and confirmed that she has direct involvement in the race date allocation process and that the ORC has a published policy (Ex. 1, tab 5). Accordingly, she followed that policy on receiving the WF request. She notified the industry (Ex. 1, tab 4) asking for comment and she wrote to the track requesting it respond to all six indicators required for consideration for a race date change, not just number one, customer demand and satisfaction. The policy requires a business case to support a request for a race date change and states that for mid season changes, an increased burden is placed on the applicant to demonstrate the positive benefits to all the stakeholders. The increased burden aspect was added to provide certainty to both industry participants and customers.

8. Maureen Harquail, legal counsel for the ORC, stated that WF did not meet the requirements for changes to an approved race date schedule as listed in Policy Directive No. 3-2007 (Ex. 1, tab 5). It was her position that the matters WF raised were best dealt with during the annual race date application process. She also suggested that the Commission review the race date allocation process.

9. Ms. Harquail also referenced a contract (Ex 1, tab 10) between the track and OHHA that allowed the track to apply for a reduction in live race dates from its one hundred and thirty if wagering fell below \$3,900,000 in a given fiscal year the following year. Wagering at the track has been below that figure for the past couple of years but the track had not opted to trigger the clause until now. She stated the contract only allowed the track to utilize the clause for an annual race date application, not mid-year. Mr. Mitchell acknowledged this fact but asked the Panel for some leeway on the basis the track could have applied in previous years but chose not to in hopes of reversing the trends.

Issue

10. Did the ORC Administration follow the policy directive for race dates in its consideration of the WF request and did the Administration give due consideration to the track's claim related to the customer demand aspect?

Decision

11. After careful consideration of the evidence and testimony, the Panel denies the appeal.

Reasons for Decision

12. The basis for Western Fair's appeal was that the Administration did not consider the changes in customer demand in their market. The ORC Administration followed the process outlined in Policy Directive No. 3-2007 to the letter. The Administration had to ask WF to resubmit its application and respond to all six indicators it must consider, not just the change in customer demand in its market. Those indicators are as follows: customer satisfaction and demand for the product, adequate purse levels, racing opportunities and available horse supply, financial condition of the racetrack association to deliver, harmonization of date schedule with other Ontario racetracks and motivation to engage in the conduct of live racing. There were no issues with four of the six indicators. The Panel agrees that there is no conflict with Hiawatha and the numbers suggest that is the case for both live customers and simulcasting. Hiawatha does not simulcast so there can be no conflict with customers in that respect. WF's live on track attendance and handle is better on Saturdays than any other day it operates live racing. Therefore the burden on these two indicators was not met and any contemplated change is best addressed via the annual race date allocation process.



13. The Administration also had to take into account the binding contract between Western Fair and OHHA. The terms did not provide for a mid season application to vary from the agreed number of one hundred and thirty live race dates.

14. The Panel does question the concept for an increased burden aspect of the race date policy for mid season applications given the need in today's market for flexibility and adaptability as Mr. Mitchell underscored. It raises this point in the context for the ongoing need for any changes to still benefit the industry as a whole. The clause, in its current form, may stifle opportunities for experimentation and beneficial change.

15. The Panel discounted the OHHA data from the Woodbine experience. Mr. Walzak, himself, admitted there are a number of variables, therefore making a meaningful comparison most difficult. It also recognizes the limited turnout of members for the OHHA vote could also suggest many were not opposed to the WF application or at the very least, had no strong feelings.

16. The Panel commends WF for wanting to try new initiatives as management attempts to make its product offering more competitive in the marketplace. WF raised important philosophical issues that the industry must address. The track does not have to wait until the fall of 2009 "to experiment". The Panel suggests the track could implement the extra races to existing approved dates. Based on the evidence, the purse account can handle the added races and there are sufficient horses to fill these races.

17. The variance in opinion between the partners (track & horse people) re race dates is a continuation of each respective side operating on a philosophic difference in business models. OHHA accepts there are different customers, on and off track, but advocates for the maximum number of live races. Mr. Mitchell implored the ORC to move towards a supply based management system to match demand with benchmarks for race date allocations. This Panel rightly so, has no jurisdiction or authority, as it is a policy matter. Given Mr. Mitchell's well-deserved reputation within the industry, a copy of this decision will be forwarded to the Commission members and to the government.

DATED this 12th day of September 2008.

Rod Seiling
Chair