

OF SMOKE, FIRE & OBJECTIVITY

By Chris E. Wittstruck, Esq.



*Chris E. Wittstruck,
Esq.*

Here's the scenario:

A previously unknown harness trainer shows up at a major racing oval and quickly amasses an almost 60% in-the-money percentage. Leading the track's veterans in both wins and earnings, this invader has very few acquaintances in the paddock. It certainly doesn't help his social standing with the other horsemen when he claims many of their trainees and in short order improves them all by a couple of seconds.

This trainer's remarkable regularity is not limited to his activities on the track. He is also the mark of consistency in the state test barn. None of his hundreds of entrants have come up positive for any prohibited substance.

What's going on here? Well, that depends upon the value system you wish to embrace.

You might adopt the position reflected by the old adage, "Where there's smoke, there's fire" and conclude that this trainer is a cheating louse who should be stripped of his licenses and tossed from the industry for life. That's very nice, so long as you are willing to punish someone whose only identifiable transgression is being wildly successful. Consider that exhibiting substantial success in the training of Standardbreds is a criterion for getting on the ballot of our sport's Hall of Fame.

You could also take the position that everybody is presumed innocent until proven guilty, and that it's better to let a hundred juicing trainers go free than to pull the ticket of a truly innocent horseman. That's nice too, except for the fact that unless the state knows what they're looking for, a juicer is going to proceed with reckless abandon, his particular fluid being presently undetectable. While this likely scoundrel plays, "catch me if you can," legitimate horsemen are hurt and the betting public takes its business to leveler pastures. Repeated references to clean test results don't even begin to solve a huge industry crisis.

One thing is certain: There is no easy answer to this troubling situation, and on the topic of easy answers, let's examine first the most useless of them all: The mythical, all-powerful Continental Racing Czar. Assume that all racing commissions, track operators and horsemen's associations agreed to place a single individual in charge of North American harness racing. This person will not have spent months at the particular track where the subject trainer plies his trade. Simply, this person is not in the field.

The Czar could decide to exclude the trainer from all activities based upon nothing more than the scuttlebutt of grouching horsemen, sensationalized media reports and the pleas of a track operator weary of declining pari-mutuel handle, "for the good of the game." Lacking any hard proof of wrongdoing, the Czar could also conclude that nothing should be done at all, thus insulating the focused-upon trainer and conclusively tying the hands of track management. Wish we had a Czar? Be careful what you wish for.

Nor should the U.S.T.A. be looked at to provide a quick solution. As a breed registry and trade association, the group has no authority to take the position of several horsemen over that of another without a smidgen of objective evidence of skullduggery. The same goes for the racing commission. A government entity cannot take action unless its ruling is supported by substantial evidence of the violation of a published regulation. There is no regulation in any racing jurisdiction that bars a trainer from winning much more than the other trainers.

Denigrating racing officials doesn't help either, especially when the demeaning comments are widely published. In fact, rather than assisting in the arrival of a solution, the moaning and finger pointing actually exacerbates the situation, as readers both inside and outside the industry are left with the erroneous perception that nobody cares about the circumstance or that nothing is being done. By fueling an already raging fire with baseless accusations and innuendos, faultfinding commentators cause the very harm to the industry they so haughtily profess to be preventing.

Who's left? Obviously, track management has some options. If the racetrack is privately owned, the operators have the right to exclude the horseman from further participation. Of course, this solution is harsh, given the dearth of substantiation of either an ethical or legal lapse. At least one appellate court has held that tracks may not, with impunity, exclude a licensed owner or trainer when that action would cause injury. (*Jacobson v. New York Racing Association*, 33 N.Y.2d 144 (1973)) Additionally, if the facility is publicly owned, exclusion of the holder of a valid state license is not even an option.

Further, a track should not order a horseman to, for instance, race from the second tier or start fifty yards behind the rest of the field. In sum, we handicap horses in an appropriate race based upon their ability, but we don't place a burden on every horse of a particular trainer in every race based upon the trainer's victory percentages. Our sport is competitive, not socialistic.

What's left then? The aforementioned *Jacobson* case makes it clear that privately owned racetracks have the right to take actions that are within their reasonable discretionary business judgment. Without adorning the trainer with a scarlet letter and forcing him to take his business elsewhere, what about inviting the licensee to move his tack trunk onto the backstretch? There, under the watchful eye of judges, other state and track officials and fellow horsemen, the superb trainer can show everybody else how it's done.

The offer is one the trainer can't refuse for, if he does, he's out. If the trainer's key to success is prayer, voodoo, Gregorian chanting or strobe lights in addition to the finest hay, oats and water money can buy, his technique will in no way be inhibited by a shift in stabling to the secure confines of his home racetrack. If his remarkable percentages remain constant, he might just earn an eventual trip to immortality at Goshen; if, however, they drop precipitously, there will be no need to exclude the rascal, as he and his horses will voluntarily bid adieu to their very transitory quarters, not to mention the race secretary's entry box.

The trick for a public racetrack may be to institute or re-institute a pre-race detention barn on even a temporary basis for selected races. Again, the suspect trainer can have no beef about his horses racing from a secure environment, so long as all other race entrants are subjected to the same conditions. If the trainer can still win at the same clip, it'll be hard to argue with the legitimacy of his success; while if his statistics return to earth during the experience, the obvious will have manifested itself.

Everybody knows what's going on. Nobody can prove what it is. The solution may be to render proof unnecessary by putting the trainer in an enhanced position of scrutiny so that what's going on no longer does go on. Testing may not provide enough of a deterrent. Exclusion is not the best answer. Blaming everybody in the industry simply creates animosity and shifts the focus of the concern away from the subject horseman. Intensive supervision of training activities and animal husbandry might prove to be the solution.

No easy answers. Just one person's suggestions about what could be employed in this situation, as well as some cautionary advice about what shouldn't be done.

Chris E. Wittstruck, an attorney and Standardbred owner, is the founder and coordinator of the Racehorse Ownership Institute at Hofstra University, New York and a charter member of the Albany Law School Racing and Gaming Law Network.