



AMERICA'S CUP 32

AMERICA'S CUP JURY JURY NOTICE JN064



Protest by +39 Challenge
Protest and Request for Redress by United Internet
Team Germany
Protest by the Jury

Case ACJ025

6th April 2007

To: Challengers and Defender, ACM, Chief Measurer, Regatta Director ("**Parties**")

Protest by +39 Challenge v United Internet Team Germany

Protest by United Internet Team Germany v Areva Challenge

Protest by the Jury v Areva Challenge

Date of Incident: 4th April 2007, Act 13 Fleet Racing, Race 3

Date of Hearing: 4th April 2007 at 20h00, subsequently adjourned to 5th April 2007 at 18h30

+39 Challenge Protest

[1] +39 Challenge delivered a protest at 19h08 on 4th April 2007.

[2] The +39 Challenge protest was:

"1. EVENT 32nd America's Cup Act 13 Date 04 April Race no. 3 of the series.

2. TYPE OF HEARING

+39 Challenge Protest UITG for on the following:

- 1. Breach of RRS section 14;*
- 2. +39 Challenges requests redress pursuant to section 62 of the RRS;*
- 3. +39 Challenges requests awarding of damages pursuant to section 68 of the RRS*

3. DESCRIPTION OF INCIDENT

Approximately 6 lengths before mark 1 on the first lap ITA 85 were on starboard tack laying the mark while UITG on port tack were ducking to go behind. At the last moment UITG eased both mainsail and jib so that their boat came up right and their mast collided with the mast of ITA 85.

ITA 85 mast broke in two places causing irreparable damages to their mast mainsail and jib. Our engineers are currently assessing further structural damages to hull and rigging. ITA 85 saw UITG ducking but from the moment a collision appeared likely ITA 85 had no reasonable action to avoiding contact

As soon as the situation was stabilized on board ITA 85 displayed a red protest flag and hailed protest.

Witnesses an Umpire boat witnesses the incident (Bill Edgerton and Craig Mitchell)

ITA 85 requests redress for ACT 13 and full compensation of damages which are currently being assessed.

+39 Challenge is represented by Stefano Feltrin and Iain Percy.”

United Internet Team Germany (“UITG”) Protest

[3] UITG delivered a protest at 19h11 on 4th April 2007.

[4] The UITG protest was:

“GER 89 protests FRA 93 for the incident that occurred just before the first windward mark in Race 3. 89 and 93 were overlapped on port tack as they approached the starboard tack layline, with 93 to windward.

GER 89, sailing a close-hauled course, was going to cross just in front of ITA 85 which was on the starboard layline. At the same time, FRA 93 was bearing off to pass astern of ITA 99, who was also on the starboard layline. FRA bore off to a close reach and converged with GER 89 and 89 had to bear off. However, once 89 bore off she was no longer able to cross in front of ITA 85. 89's only chance to avoid contact with 85 and other boats to windward was to bear off sharply below 85, which she did. However, there was contact between the masts and both boats suffered serious damage. GER 89 was unable to continue in the race and therefore requests redress.”

Protests Heard Concurrently

[5] As both protests related to the same incident, the Jury determined that they should be heard concurrently.

Opening Statements

[6] Opening statements of the circumstances concerning the protest incident were made by Iain Percy representing +39 Challenge, David Dellenbaugh representing UITG and Dawn Riley representing Areva Challenge.

Validity of +39 Challenge Protest

[7] The time limit for delivering protests was 19h15. The protest was delivered within the time limit.

[8] +39 Challenge advised that she displayed a red flag as soon as possible after the incident occurred. The Umpires and UITG were informed of +39 Challenge's protest.

[9] The Jury determined that the protest was valid, pursuant to the Racing Rules of Sailing ("RRS").

Validity of UITG Protest

[10] Dawn Riley representing Areva Challenge submitted that UITG did not display a red flag and that their protest was delivered too late.

[11] The Jury did not immediately rule on the validity of the UITG protest. The +39 Challenge protest had been ruled as valid. As a result of initial evidence provided by representatives of +39 Challenge and UITG, the Jury considered that Areva Challenge may have broken RRS 11 and caused a collision between UITG and +39 Challenge. The Jury therefore protested Areva Challenge under RRS 60.3(a)(2) and under Notice of Race clause 2.3(d)(ii)(b), making further consideration of the issue of the validity of the UITG protest unnecessary.

Hearing Adjourned

[12] Dawn Riley advised that they had received the UITG protest less than one hour before the hearing and they were not ready to proceed.

[13] The hearing was adjourned until 5th April. The hearing time would be advised by the Jury.

Jury Protest

[14] On 5th April 2007 the Jury delivered its protest against Areva Challenge in writing as follows:

"From evidence received from the valid protest hearing on 4th April concerning +39 Challenge and United Internet Team Germany, the Jury decided that Areva Challenge may have broken a rule. In an incident near the windward mark on the first windward leg in Race 3 of Act 13, Areva Challenge was a boat to windward of UITG and may have failed to keep clear of UITG just before she passed in front of + 39 Challenge, thereby breaking RRS 11 and causing a collision between UITG and + 39 Challenge.

At the hearing the Jury advised that it would be protesting Areva Challenge.

The purpose of this email is to advise in writing that the Jury protests Areva Challenge in respect of the incident, in accordance with RRS 60.3 (a) (2) and NoR 2.3 (d) (ii) (b) which amends RRS 60.3.

The hearing of the protest by + 39 Challenge against UITG now includes Areva Challenge and will continue in the Jury Hearing Room on 5th April, 2007 at 20h00 or such other time as may be advised."

Hearing Reconvened

[15] At 16h44 the Jury informed the parties by email that the adjourned protest hearing would be reconvened at 18h30 on 5th April 2007.

Submissions

+39 Challenge Submissions and Evidence

[16] Iain Percy and Stefano Feltrin represented +39 Challenge.

[17] Iain Percy gave evidence that he was the helmsman of +39 Challenge. He provided a description of the incident as described in +39 Challenge's protest.

[18] In response to a subsequent question from Thierry Peponnet of Areva Challenge, Iain Percy stated that just prior to the incident he believed that +39 Challenge was approximately 3 boat lengths behind Mascalzone Latino – Capitalia Team ("Mascalzone Latino"). With regard to Areva Challenge, he considered that they had crossed ahead of +39 Challenge with a comfortable clearance of three-quarters of a boat length.

[19] +39 Challenge did not present any other witness.

UITG Submissions and Evidence

[20] David Dellenbaugh and Philippe Mourniac represented UITG.

[21] David Dellenbaugh presented to the Jury still photographs with matching Virtual Eye single frame video footage leading up to and at the time of and after the incident. The Virtual Eye film footage was also shown. He submitted that in order to avoid Areva Challenge UITG had to bear away. As UITG began to bear off the helmsman of UITG realised that he could not pass ahead of +39 Challenge and that his only option was to bear off and go below her.

Conan Hunt

[22] Conan Hunt gave evidence that he was the strategist on board UITG. Using boat models, he submitted that if UITG had not been required to bear away to avoid a collision with Areva Challenge, and UITG had been able to maintain its course, UITG would have crossed +39 Challenge by a quarter of a boat length.

Philippe Mourniac

[23] Philippe Mourniac gave evidence that he was the navigator on board UITG. Just prior to the incident he called that Alinghi and Mascalzone Latino were on the layline with +39 Challenge over the layline by half a boat length. He considered that UITG was able to cross +39 Challenge by one half of a boat length and advised the skipper of UITG accordingly. He submitted that this statement was based on measurements he had taken at 30 and then 20 seconds before ducking.

Jesper Bank

[24] Jesper Bank stated that he was the helmsman of UITG. Just prior to the incident with +39 Challenge both UITG and Areva Challenge were overlapped on port tack as they approached the starboard layline. Areva Challenge bore away onto a reach and as a result UITG had to bear away because otherwise they would have hit Areva Challenge

amidships. He further stated that if UITG had luffed, she would have hit Areva Challenge's rig or mainsail.

Philippe Mourniac

[25] Philippe Mourniac gave further evidence as to the boat speed and angle of sail calculations that he had computed, showing that the top of the mast on an America's Cup yacht extends 17 metres to leeward when going to windward in the conditions in which they were sailing (at 30 degrees of heel). He also explained the closing speed of Areva Challenge and UITG.

Areva Challenge Submissions and Evidence

Dawn Riley

[26] Dawn Riley submitted that there was no incident involving Areva Challenge and there was no rule that Areva Challenge had broken. At the time of the incident between Areva Challenge and UITG no "Y" flag had been flown, nor hail given by UITG. Areva Challenge only became aware of the protest from UITG some two and a half hours after the incident, after UITG had come ashore.

[27] Dawn Riley submitted that Areva Challenge did keep clear from UITG while overlapped and that when they became clear ahead, they did not have to keep clear. Dawn Riley submitted that the protest from UITG was an afterthought.

Tanguy Cariou

[28] Tanguy Cariou gave evidence that he was the strategist on board Areva Challenge. He was positioned on her leeward quarter just prior to the incident. At the time Areva Challenge crossed behind Mascalzone Latino, he considered that there was three quarters or perhaps even one boat length between the two yachts. Areva Challenge's speed was much faster than that of UITG. In response to questions, Tanguy Cariou stated that he considered UITG began to bear away after Areva Challenge became clear ahead.

[29] He stated that Areva Challenge started to bear away when they were six boat lengths from UITG and that the closest the two yachts got at any point was three quarters of a boat length. He further stated that UITG was never on a collision course with Areva Challenge and UITG could therefore not have hit Areva Challenge.

Thierry Peponnet

[30] Thierry Peponnet gave evidence that he was the tactician on board Areva Challenge. At the time Areva Challenge decided to bear away her boat speed was about 13.5 knots. He considered UITG were travelling about 9.3 to 10 knots.

[31] Areva Challenge was able to cross with a clearance of one and a half to two boat lengths. He was sure that Areva Challenge did not interfere with the track of UITG. He stated that there was never a call for room from UITG.

[32] In response to questions Thierry Peponnet advised that there was no problem for Areva Challenge to cross between Mascalzone Latino and +39 Challenge. He considered

UITG was much closer to +39 Challenge and he was “100%” sure that UITG was never in a position to cross in front of +39 Challenge. He felt that UITG waited too long to bear away. Also, UITG after ducking, had let her jib go and not her main go, whereas they should have done the opposite.

Jury Witnesses

[33] The Jury called two umpires as witnesses who were in different umpire boats at the time of the incident. The Jury also called a representative of Virtual Eye.

Bill Edgerton

[34] Bill Edgerton stated that he was in an umpire boat on the same track and just to leeward of +39 Challenge and that he had a good view of the incident. He gave evidence that +39 Challenge was on the starboard tack layline and UITG was on port tack as she approached the starboard tack layline. He said he was positioned for a possible incident between Areva Challenge and +39 Challenge, as Areva Challenge was going to cross +39 Challenge and tack in front of her. He felt there could be a possible late overlap created by +39 Challenge. Bill Edgerton stated that he saw UITG start to duck and come down very quickly along the port side of +39 Challenge. Just prior to the contact between the two boats, he told his fellow umpire to watch the rigs. There was a large bang and the rig of UITG made contact with the top portion of the rig of +39 Challenge. In his opinion UITG was not able to cross +39 Challenge and that had she tried to do so, +39 Challenge would have hit UITG approximately amidships. He saw UITG first do a small bear away and then a much harder bear away a few seconds later. He said the jib was eased before the mainsail.

Paul Sharp

[35] Paul Sharp stated that he was the software developer of the Virtual Eye program that was being used for the television coverage of the Event.

[36] Paul Sharp said that the Virtual Eye data is first “warped” prior to being viewed and transmitted to the television networks. He produced and showed video evidence of the incident in which he had removed the warp as much as was technically possible.

[37] The heading usually depicted was a combination of a projection of the sampling track positions and magnetic headings taken from a compass on the yacht. However, the video evidence given used only the compass data to give a more accurate depiction.

[38] After reviewing the video footage and in response to questions, Paul Sharp advised that the layline and windlines are put in manually by a Virtual Eye operator ashore. The system was based on a GPS installed on the stern of each America’s Cup yacht which he believed provided an accurate position to one to one and a half metres after removing the warping. A boat’s heading was calculated at the centre of the yacht. As the yacht turned, it was based on compass settings and its accuracy was considered to be within a few degrees. As the yachts got closer the level of warping reduced. The unwarped version that he showed to the Jury he thought was likely to be accurate to within approximately half a metre.

[39] Through the GPS system, he showed the speed of Areva Challenge as she bore off to pass behind Mascalzone Latino and come towards UITG, as 14.5 knots. The speed of UITG, before she bore away, was 9.7 knots. Placing an imaginary line at 90 degrees to the wind direction showed that UITG would probably have been able to pass in front of +39 Challenge.

Sally Burnett

[40] Sally Burnett stated that she was an umpire and had been following Areva Challenge prior to the incident, just astern and to leeward of her. She was just to windward of UITG.

[41] Sally Burnett stated that she saw Areva Challenge bear away in order to sail behind the stern of Mascalzone Latino. She commented at the time that the manoeuvre was not as close as she had initially expected. Sally Burnett considered that the distance between UITG and Areva Challenge was never closer than three quarters of a boat length. She also stated that Areva Challenge was travelling much faster than UITG and that she never saw a problem with Areva Challenge keeping clear of UITG.

Oral Decision

[42] At 21h30 after receiving the submissions and evidence, the Jury adjourned. At 22h25 a summary of the facts found, conclusions and the decision was given orally.

Jury Findings of Fact and Conclusions

[43] +39 Challenge on starboard tack close-hauled approached UITG on port tack close-hauled. The relative positions and speeds of the boats was such that UITG may have been able to cross ahead of +39 Challenge.

[44] When Areva Challenge was approximately 6 boat-lengths from UITG overlapped to windward; Areva Challenge bore away and was sailing 20 to 30 degrees lower than close-hauled, so as to pass astern of Mascalzone Latino which was about 3 boat lengths clear ahead of +39 Challenge.

[45] Areva Challenge's speed was approximately 50% faster than UITG. The overlap was broken shortly before Areva Challenge luffed to pass astern of Mascalzone Latino, when the boats were more than two boat lengths from +39 Challenge.

[46] At no time did Areva Challenge and UITG get closer than three quarters of a boat length from each other. Based on the respective speeds and headings of the two boats, the Jury is satisfied that UITG could not have made contact with Areva Challenge.

[47] UITG bore away quickly to a course approximately parallel with +39 Challenge. Their rigs made contact, causing +39 Challenge's mast to break.

[48] Areva Challenge was not required to give room to UITG to pass +39 Challenge which was an obstruction to both boats.

[49] Areva Challenge kept clear of UITG. UITG failed to keep clear of +39 Challenge and caused serious damage.

Decision

[50] Areva Challenge broke no rule.

[51] UITG broke RRS Rule 10 and Rule 14, as amended by the Notice of Race, paragraph 2.3(d)(i).

[52] +39 Challenge broke no rule.

[53] +39 Challenge's protest was upheld.

[54] UITG was disqualified.

[55] The Jury's protest against Areva Challenge was dismissed.

Request for Redress

[56] After delivery of the oral summary of the facts, conclusions and decision in respect of the protests, the Chairman invited all parties to the protest hearing, and all parties with representatives from Competitors present at the hearing to make a submission in relation to redress.

[57] Submissions were received from representatives of +39 Challenge, UITG, Emirates Team New Zealand, BMW Oracle, Luna Rossa, Desafio Espanol, Mascalzone Latino, Victory Challenge, Areva Challenge and Alinghi.

Decision on Redress

[58] The Jury decided that UITG broke RRS Rules 10 and 14, that serious damage occurred, that +39 Challenge's score was made significantly worse and that as this was through no fault of her own, the requirements for awarding redress had been satisfied.

[59] The redress awarded was:

- (i) +39 Challenge is to be awarded points for place 5 in Race 3 of Act 13. No other yachts' scores are to be affected.
- (ii) Two bonus points are to be awarded to +39 Challenge at the conclusion of Act 13 (unless they earn more through their own results). No other yachts' scores are to be affected.
- (iii) With regard to the matter of the damaged mast, the Jury considered that the fairest arrangement for all Competitors was to allow +39 Challenge to accept the offer by UITG of a Version 5 mast. The Jury recognises that this would require a Protocol change. In order to facilitate this decision, the Jury recommends that a Protocol change is made which could be limited to this particular case.

Apportionment of Percentage of Responsibility for Damage

[60] Submissions were then invited by the Jury in respect of apportioning the percentage responsibility for damage with reference to the Notice of Race clause 2.3(d)(iii)(b).

[61] The Jury determined that the apportionment was that UITG is 100% responsible for the damage to +39 Challenge.

[62] The Jury directed that the damage costs were to be agreed by +39 Challenge and UITG in consultation with the Technical Director. The damage costs related to repairing the existing broken mast and if a Protocol change was agreed, to obtaining a Version 5 mast from another Team. In the event that it was not possible for +39 Challenge to obtain a Version 5 mast from another Team, +39 Challenge is entitled to make a further application to the Jury with reference to them constructing a new Version 5 mast.

[63] The damages awarded shall not include normal operating expenses such as already contracted employee costs of +39 Challenge but may include all specifically required external contractor costs.

[64] Leave was given to the parties to apply to the Jury if they were unable to agree.

A handwritten signature in black ink that reads "Bryan Willis". The signature is written in a cursive style and is positioned to the left of a vertical red line.

Bryan Willis

America's Cup Jury:
Graham McKenzie, Henry Menin, Henry Peter, David Tillett, Bryan Willis (Chairman)