

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between

Re: 77 190 00275 08 JENF

Jamie Nieto

and

USA Track & Field

and

Dustin Jonas Affected Athlete

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated by the American Arbitration Association and in accordance with the United States Olympic Committee Bylaws, having been duly sworn, and having duly heard the proofs and allegations of the Parties, and the Affected Athlete do hereby, AWARD, as follows:

1. This is a difficult case involving two outstanding athletes, only one of whom can go to the Olympics. The decision by USA Track and & Field (“USATF”), the national governing body, to select Dustin Jonas over Jamie Nieto has been challenged by Mr. Nieto as being in violation of Section 220522(a)(14) of the Ted Stevens Olympic and Amateur Sports Act (the “Stevens Act”) and Section 9.1 of the United States Olympic Committee (“USOC”) Bylaws.
2. The issue to be determined is whether, by requiring athletes to achieve the international qualifying standard by the end of the U.S. Olympic Team Trials for Track & Field (the “Olympic Trials”) on July 6, 2008, the USATF has impermissibly denied Mr. Nieto the opportunity to participate in the Olympic Games.
3. In light of all the evidence, the Arbitrator determines that USATF’s July 6 deadline neither violates the Stevens Act nor otherwise denies Mr. Nieto the opportunity to participate. The arbitrator therefore denies Mr. Nieto’s appeal.

Background

4. Under the rules of the International Association of Athletics Federations (“IAAF”) for the 2008 Beijing Olympics, a country may send up to three qualified athletes for each individual event, provided that all athletes achieve the “A” qualifying standard set by the IAAF. The 2008 “A” standard for men’s high jump is 2.30 meters. For the high jump event and other events, the IAAF rules require that athletes achieve the “A” standard between January 1, 2007, and July 23, 2008.
5. For the high jump event and other events, the USATF athlete selection procedures for the 2008 Olympics (the “USATF Selection Procedures”) provided that, if at least three athletes achieved the “A” standard between January 1, 2007 and the end of U.S. Olympic Team Trials for Track & Field (the “Olympic Trials”) on July 6, 2008, then the top three such finishers at the Trials would be nominated to the 2008 U.S. Olympic Team. This represented a departure from the USATF’s practice in previous years of letting top finishers at the Trials “chase the standard” following the Olympic Trials until the IAAF deadline.

6. Prior to the Olympic Trials, Mr. Jonas had achieved the “A” standard; Mr. Nieto had not yet achieved the “A” standard.
7. At the Trials, Mr. Nieto tied for second place but failed to achieve the “A” standard of 2.30 meters. Mr. Jonas tied for sixth place.
8. In accordance with its Selection Procedures, USATF nominated to the Team the top three finishers at the Trials who had by the end of the Trials achieved the “A” standard. Mr. Jonas was nominated to the Olympic Team; Mr. Nieto was not.
9. Six days after the Trials, on June 12, 2008, Mr. Nieto achieved the “A” standard in competition at Cork, Ireland, with a jump of 2.30 meters.
10. On July 15, 2008, Mr. Nieto filed a Demand for Arbitration with American Arbitration Association, along with a Statement of Dispute and various exhibits. The Arbitrator’s jurisdiction arises from the USOC Olympic Games Code of Conduct and Grievance Procedures.
11. Also on July 15, 2008, David W. Rivkin was selected by the American Arbitration Association to serve as the sole Arbitrator in this case. After receiving certain disclosures from the Arbitrator, the parties agreed to the selection of Mr. Rivkin. On the morning of July 16, 2008, the Arbitrator held a one-hour preliminary hearing by telephone. On July 17, 2008, USATF and Mr. Jonas made submissions to the Arbitrator.
12. On July 18, 2008, the Arbitrator held a seven-hour hearing at the offices of Debevoise & Plimpton LLP in New York, NY. The hearing included Mr. Nieto, Mr. Jonas, USATF, and the parties’ legal representatives. Rana Dershowitz and John Ruger of the USOC participated as observers. During the hearing, each of the parties, including Mr. Jonas, was able to present evidence, question witnesses, and make arguments. Each of the athletes made certain statements and was subject to questioning by counsel for all sides.

Decision

13. Mr. Nieto claims that by requiring athletes to achieve the “A” qualifying standard by July 6, 2008, instead of by the IAAF deadline of July 23, 2008, USATF has impermissibly denied him the opportunity to participate in the Olympic Games as provided in Section 9 of the USOC Bylaws. He argues that the USATF Selection Procedures (*i*) lack a rational basis and (*ii*) violate Section 220522(a)(14) of the Stevens Act, which prohibits USATF as a National Governing Body (“NGB”) from having “eligibility criteria related to amateur status or participation in the Olympic Games . . . more restrictive than those of the appropriate international sports federation.” He seeks an order to USATF to select him for the Olympic Team.
14. Mr. Jonas and USATF have made a motion to dismiss this case. They assert that Mr. Nieto’s claim is more properly a facial challenge to the USATF Selection Procedures, and that it therefore must be brought only under Section 220527 of the Stevens Act and Section 10 of the USOC Bylaws. The provisions require a complainant to exhaust remedies within the NGB and within the USOC before demanding arbitration. They also assert that the relief that

Mr. Nieto seeks – an order placing him on the Olympics team -- is unavailable under these provisions.

15. The issues raised by the motion to dismiss focus on the complicated interplay among the provisions of the Stevens Act and the USOC Bylaws. USATF and Mr. Jonas make compelling arguments that if an athlete believes that procedures adopted by an NGB violate the mandates of the Stevens Act, then they must be challenged, as they can be under Section 220527 of the Stevens Act and Section 10 of the USOC Bylaws, before athletes and others operate under and rely upon them, and that the remedies provided in those documents do not extend to an order changing an NGB's team selection. On the other hand, the Stevens Act and the USOC Bylaws, especially their Section 9, provide important rights to athletes to protect their opportunity to participate.
16. In *Mary C. McConneloug v. USA Cycling*, AAA Case No. 30 190 00750 04 (July 20, 2004), another Olympics eligibility case, I ruled that the NGB could not change the rules on the athletes after the time period for Olympics qualifying had elapsed. Similarly, after athletes had relied upon the USATF Selection Procedures through the Olympics Trials, an athlete has a heavy burden to convince an arbitrator to adopt different rules after the fact. That is particularly so where, as here, the alleged violation of the rule is clear on its face – the “A” standard deadline of July 6, 2008 instead of July 23, 2008 – and was known to the athletes well in advance of the final selections, as compared to a situation where the rules may create ambiguities that are not clear until they are finally applied.
17. Nevertheless, I would not want to fashion a rule that all such challenges must be brought under Section 220527 of the Stevens Act or Section 10 of the USOC Bylaws, because that could impose a serious limitation on the rights of athletes to have the opportunity to participate, as provided in Section 9 of the USOC Bylaws. Because I hold below that the USATF Selection Procedures do not violate either the Stevens Act or the USOC Bylaws, I do need to determine in this case where that line should be drawn or finally to decide the motion to dismiss.
18. *First*, Mr. Nieto has not carried his burden of persuasion to show that the USATF rule barring athletes from chasing the “A” qualifying standard after the end of the Trials on July 6, 2008, lacks a rational basis.¹ USATF has submitted evidence of several rationales for the July 6 deadline that Mr. Nieto cannot prove are irrational by a preponderance of evidence.
19. USATF reasonably believed that the practice of chasing the standard after the Olympics Trials had a negative effect on the physical preparedness of athletes chasing the standard, who were forced to peak twice before the Olympic Games, and on the mental and emotional preparedness of athletes who believed that they had made the team but were in danger of being bumped from it by a competitor chasing the standard. It is reasonable for USATF to give athletes a year and a half to meet an international qualifying standard and then to say that all final selections will be made at the end of the Olympics Trials. Such a rule provides an element of certainty to the athletes that is clearly beneficial. It is a cruel irony that part of the reason for the USATF's current, earlier deadline is the disappointment that Mr. Nieto suffered in 2005 when he was bumped off the World Championships team by another athlete who met the international standard only after the national trials. The rationale for the new rule, however, is not diminished by the misfortune of this reversal.

¹ See generally *Ruckman v. U.S. Rowing Assoc.*, AAA Case No. 30 190 259 07 (Mar. 16, 2008).

20. Mr. Nieto argued that USATF had not presented evidence that these performance issues affected high jump athletes in particular. However, it is rational for USATF to want to apply a single qualification deadline to athletes in all of its events, except where an event, like the marathon, has clearly different performance issues.
21. USATF also submitted evidence of a logistical rationale for the July 6 deadline. Although it is doubtful that USATF needed to know the composition of its 2008 Olympic Team on July 6 in order to submit names of the athletes to the USOC and to the Beijing Olympics Organizing Committee or to arrange the logistics of getting the athletes, coaches, and medical professionals to Beijing, it is certain that these logistical preparations take some amount of time. In light of those logistical considerations, it is rational for USATF to chose a deadline some time in advance of the final deadline for submitting names to the Olympics organizers and to choose as that deadline, for the reasons mentioned above, an event like the Olympics Trials.
22. In arguing against the rationale of the USATF Selection Procedures, Mr. Nieto presented powerful evidence that the means by which USATF adopted these procedures were seriously flawed. It appears that members of the Athletes Advisory Committee, like Mr. Nieto, were not properly consulted, and notice of meetings and of the adoption of the procedures was not properly given before their adoption. Evidence of such procedural violations is more important in a case challenging the validity of the procedures before they have been finally implemented, such as in an action under Section 220527 of the Stevens Act or Section 10 of the USOC Bylaws, than in a claim to change the procedures after the fact. However, USATF should be on notice that if it acts in such a manner in the future in adopting, it may face a serious facial challenge under those provisions.
23. *Second*, USATF's July 6 deadline for achieving the "A" qualifying standard does not violate Section 220522(a)(14) of the Stevens Act. The prohibition on NGB eligibility criteria more restrictive than those of the appropriate international sports federation must be understood in context. Violations of Section 220522 result in the suspension of the NGB or even in the revocation of its recognition. Thus, in determining whether a certain requirement, like a time deadline, is an eligibility criterion that is more restrictive than an international standard, one must take into account the seriousness of the sanction. In this context, it seems clear that the drafters of Section 220522(a)(14) intended to cover serious aberrations from the international standard and not aberrations that may be immaterial. For example, USATF could not permissibly have set its "A" qualifying standard for the high jump at more than 2.30 meters, as that is a critical eligibility criterion.
24. An aberration in the time deadline for achieving that standard, however, must be very material in order to fall within that proscription. A literal reading of this Section would lead to the absurd result that USATF must wait until the end of the day on July 23, the IAAF qualification deadline, to select its team. Because the IAAF qualification deadline is also the deadline for submitting the names of participating athletes, USATF could be unable in this circumstance to submit its names for the Olympic Team on time. On the other hand, it is clear that USATF could not permissibility have set a qualification deadline in, for example, July of 2007, thereby depriving athletes of over half the time allotted by the IAAF to achieve the "A" standard. In this case, limiting athletes' opportunity to meet the "A" standard by about two weeks – or about 3% of the total qualifying window – is not a material aberration that could violate the Stevens Act. This conclusion is reinforced by the rationale reasons for doing so that are described above.

25. Because the USATF Selection Procedures did not materially or unreasonably restrict athletes' opportunities to achieve the "A" qualification standard, they do not violate Section 220522(a)(14) of the Stevens Act.

26. Because the USATF Selection Procedures neither lack a rational basis nor violate the Stevens Act, they do not deny Mr. Nieto an opportunity to participate in the Olympic Games under Section 9 of the USOC Bylaws.

Therefore, I AWARD as follows:

Mr. Nieto's claim is hereby denied.

The administrative fees of the American Arbitration Association totaling \$750.00 shall be borne by Mr. Nieto.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

July 19, 2008

Date



David W. Rivkin

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