

NEW ERA ADR

Case No. 24061101

In the Matter of the Arbitration between

SANTO CONDORELLI, Claimant

and

USA SWIMMING, INC., Respondent

and

JOSEPH HUNTER ARMSTRONG, BRENT PINFOLD, and Others, Affected Athletes.

FINAL AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated by New Era ADR and in accordance with the Ted Stevens Olympic and Amateur Sports Act ("ASA"), 36 U.S.C. §220505 et seq., Section 9 of the United States Olympic and Paralympic Committee ("USOPC") Bylaws (effective April 1, 2024) and the United States Olympic & Paralympic Movement Arbitration Rules ("Arbitration Rules"), and having been duly sworn, and having fully considered the Claimant's June 11, 2024 Section 9 Complaint and Demand for Expedited Arbitration pursuant to Section 9.8 of the USOPC Bylaws; Respondent's June 13, 2024 Answer and Pre-Hearing Statement; and the parties' respective exhibits and witness as well as Affected Athlete Brent Pinfold's written statement during an approximately two-hour Zoom hearing from 5-7pm CT on June 14, 2024, does hereby AWARD, as follows:

PARTIES

Claimant Santo Condorelli is a 28-year-old elite swimmer, a U.S. citizen and passport holder, and a member of U.S.A. Swimming who currently has an "Italian Sport Nationality" until July 30, 2024. He seeks an opportunity to qualify for his first U.S. Olympic Team by competing in the men's 50 and 100-meter freestyle and 100-meter fly events during the 2024 U.S. Olympic Team Trials – Swimming ("Trials") on June 15- June 23, 2024 in Indianapolis, Indiana. Based

on his Trials competition results, he could earn the opportunity to participate for Team USA in these individual events and/or various relays held on July 30, 2024 or thereafter during the 2024 Paris Olympic Games. He was represented by Howard L. Jacobs and Katlin N. Freeman, Law Offices of Howard L. Jacobs, Westlake Village, CA.

Respondent USA Swimming, Inc., whose headquarters are in Colorado Springs, CO, is the National Governing Body (“NGB”) recognized and certified by the USOPC for the sport of swimming in the United States. As the U.S. NGB for swimming, it is a member of World Aquatics (“AQUA”), the international federation for the sport of swimming, and required to abide by its rules, including athlete eligibility requirements. USA Swimming was represented by Bryan Cave Leighton Paisner LLP, specifically Steven B. Smith and Suzanne A. Crespo, Colorado Springs, CO, and David L. George, St. Louis, MO.

Affected Athletes Joseph Hunter Armstrong, Brent Pinfold, and Others are female and male swimmers who are members of USA Swimming that will compete in various swimming events during the Trials. None of them observed or participated in the arbitration hearing.

MATERIAL FACTS

Mr. Condorelli was born in Hokkaido, Japan to a Canadian mother and an American father. He was raised and currently lives in Portland, Oregon. As a U.S. citizen, he competed in the 2012 U.S. Olympic Team Trials—Swimming and the 2014 U.S. National Swimming Championships. Based on his mother’s Canadian citizenship, he competed as a Canadian Sport National at the 2015 World Swimming Championships and the 2016 Rio Olympic Games. On October 3, 2018, he changed his sport nationality to Italian (based on his father’s Italian heritage) and began competing as a swimmer for Italy, including at the 2020 Tokyo Olympic Games, which were held July 23—August 8, 2021 because of the Covid-19 pandemic.

In May 2023, Respondent drafted and distributed its ATHLETE SELECTION PROCEDURES 2024 Olympic Games (May 2023; updated November 2023) (“Selection Procedures”), which were approved by the USOPC and the Chair of USA Swimming’s Athletes’ Advisory Council. The Selection Procedures establish the requirements for athletes to be eligible to compete at the Trials, including Section 1.1.1 (a)’s stipulation that an “Athlete . . . be able to represent the U.S. in an international competition at the time of the Qualifying Competition”

[i.e., Trials]. This requirement is consistent with the USOPC’s Athlete Selection Procedures Template, which states that “Athlete must be a national of the United States at the time of selection or time of nomination.”

While competing for Italy, Mr. Condorelli struggled with the Italian language barrier, which had negatively affected his ability to train and compete as an elite swimmer at the international level. For this reason and because of his father lived in Portland and has a worsening illness, in June 2023, he formally sought to change his sport nationality to American (i.e., U.S.) prior to the 2024 Paris Olympic Games.

On June 12, 2023, USA Swimming submitted a request on behalf of Mr. Condorelli to AQUA to change his sport nationality to the U.S.

On June 22, 2023, AQUA’s Office denied his request for the following reason:

“[A]ccording to Art. 3.3.1 of the Competition Regulations, an athlete shall observe a waiting period of three years between the last representation for the Member and the first representation for the New World Aquatics Member. The Athlete shall not be entitled to represent any World Aquatics Member at International Competitions during this waiting period. In the present case, we note that the Athlete represented Italy internationally on 30 July 2021 at the occasion of the Olympic Games Tokyo 2020. Therefore, the Athlete does not comply at the current time with the waiting period requirement.”¹

On October 3, 2023, AQUA’s Bureau confirmed the June 22, 2023 decision by AQUA’s Office for, *inter alia*, the following reasons:

“The Bureau adopted new Competition Regulations on 21 February 2023. Within these new rules, the Bureau approved new rules on Sport Nationality.

...

[T]he Bureau considered that the fact that the Athlete would hypothetically be prevented from taking part in an edition of the Olympic Games by applying the new rules is not a decisive factor.

...

¹ In a June 21, 2023 email to Lindsay Mintenko (Managing Director, USA Swimming National Team), Cesare Butini (Technical Director, Italian national swimming teams) stated: “[P]lease be advised that Santo Condorelli’s last competition representing Italy was the 100 butterfly at the Tokyo Olympic Games on July 29, 2021.”

[I]t should also be noted that the newly defined waiting period of three years is in line with the one prescribed under By-law to Rule 41 of the Olympic Charter[.]

On another note, the Bureau considered that the Athlete's Sport Nationality question must be distinguished from his place of living and training. Although, on the one hand, the Bureau may understand that the Athlete is nearly obliged to reside in the United States for family reasons, on the other hand, it considered that there is nothing to prevent him from continuing to take part in international competitions while representing Italy. Many swimmers live and train in the United States but represent another country internationally.

Finally, the most exceptional element about the Athlete's situation is that he could be the first swimmer to represent three different countries at three consecutive Olympic Games. This kind of "forum shopping" warrants regulation, especially when the Athlete in question already had the opportunity to decide and switch his Sport Nationality on careful reflection at age twenty-three (23) (at his first switch from Canada to Italy)."

On July 13, 2023, Mr. Condorelli appealed AQUA's June 22, 2023 denial of his application for a change of sport nationality to the U.S. to the Court of Arbitration for Sport, requesting that "the decision of World Aquatics be set aside" and his "application for a change of sport nationality be granted." STATEMENT OF APPEAL OF SANTO CONDORELLI AGAINST DECISION ISSUED BY WORLD AQUATICS REGARDING CHANGE OF SPORT NATIONALITY at p. 3.

On June 10, 2024, in CAS 2023/A/9806, *Cordorelli v. World Aquatics*, the Sole Arbitrator partially upheld his appeal by holding that "[t]he application by USA Swimming to change [Mr. Condorelli's] sport nationality to the United States is granted, with effect from 30 July 2024 (inclusive)." (¶ 107). She rejected his contention that "he is able to take advantage of [the] one-year waiting period in the 2019 FINA [i.e., AQUA] General Rules because he satisfied the transitional requirements of the New Rules" (¶ 29), which otherwise provide for a three-year waiting period to change an athlete's sport nationality. Because the record evidence does not establish Mr. Condorelli "made an application to [AQUA], or notified [AQUA] of his intention to apply, for a change of sport nationality prior to 21 February 2023, when the New Rules came into force," she determined he "cannot avail himself of the transitional provisions of the New Rules." (¶ 81).

Summarizing the parties' respective submissions on this issue, the Sole Arbitrator explained the limited scope of her CAS award and jurisdiction:

"World Aquatics submits that, without its approval of [Mr. Condorelli's] nationality change, [he] does not have the requisite standing to compete in the US Olympic Team Trials. World Aquatics submits that the effect of [USA Swimming's] Rulebook and

Selection Procedures is that [he] must be eligible to represent the United States in international competitions at the time of the trials, i.e., from 15 to 23 June 2024. Those dates are over one month prior to the end of [his] designated three-year waiting period as determined by the Sole Arbitrator above.

[Mr. Condorelli] draws attention to correspondence from USA Swimming:

‘if World Aquatics determines that [he] is eligible to represent the US in international competition as of the US Olympic Team trials -Swimming, we will allow him to enter the competition’.

He submits that, should the Sole Arbitrator set aside the decision of the Bureau and grant his transfer request such that he will be deemed eligible to compete for the United States at some point between 25 and 30 July 2024 (and therefore be eligible to compete for the United States in some portion of the swimming events at the 2024 Olympic Games), his understanding is that USA Swimming will not permit him to compete in the Olympic Trials in June 2024. [He] advises that he does not accept that decision (by USA Swimming) and, if that decision were made, he would appeal a negative decision.

...

The decision of USA Swimming whether to permit Mr. Condorelli to participate in the Trials, following a decision of the Sole Arbitrator that Mr. Condorelli is entitled to change his sport nationality as of 30 July 2024, is not the subject of this proceeding and the Sole Arbitrator does not have jurisdiction to make that decision.”

(¶¶ 102-106).

On June 10, 2024, after being notified by Claimant of the Sole Arbitrator’s ruling in CAS 2023/A/9806, Respondent informed him: “USA Swimming’s position is that per our Selection Procedures, athletes must be eligible to represent the U.S. as of the date of the Qualifying Competition, which begins June 15. Since Santo is not eligible until July 30, he is not eligible for entry into the Qualifying Competition.”

In a June 11, 2024 email to World Aquatics’ Legal Counsel Caroline Cusinato, Michelle Steinfeld, USA Swimming Secretary & General Counsel, inquired:

“We are anticipating that Santo Condorelli will file a Section 9 dispute with the USOPC today. My understanding from his lawyer is that one argument they will make is that a National Governing Body cannot make rules more restrictive than its International Federation. I don’t think World Aquatics is taking the position that eligibility at the time of Trials is more restrictive than its own 3-year rule, since Santo is not eligible until July 30. Would it be possible to get a declaration from World Aquatics on this topic?”

On June 12, 2024, Ms. Cusinato responded to her as follows:

“You are correct. I acknowledge that World Aquatics is **not** taking the position that eligibility at the time of the trials is more restrictive than World Aquatics’ own three-year rule.

In the CAS Proceedings between Mr. Condorelli (the “**Appellant**”) and World Aquatics, the Appellant argued that World Aquatics incorrectly applied a three-year waiting period. The Sole Arbitrator ruled against the Appellant’s argument that a three-year waiting period should be replaced by a one-year wait period, and instead explicitly clarified that the Appellant’s change in sport nationality to the United States be granted as of **30 July 2024**. For maximum clarity, I note that this day signifies a three-year waiting period.

During the June 2024 U.S. Olympic Trials, the Appellant is still recognized as having **Italian Sport Nationality**.

Given that the Appellant is considered Italian for competition purposes until 30 July 2024, he ‘may only represent that World Aquatics Member in International Competitions,’ pursuant to Rule 3.2.1 of the World Aquatics Competition Regulations.”

Mr. Condorelli satisfies all Selection Procedures eligibility requirements to participate in the Trials except for Section 1.1.1 (a)’s requirement that an “Athlete . . . be able to represent the U.S. in an international competition at the time of the Qualifying Competition.”

PROCEDURAL BACKGROUND

On June 11, 2024, Claimant simultaneously filed his Section 9 Complaint with the USOPC and Demand for Expedited Arbitration with New Era, which requested that the Arbitrator “[d]etermine that Mr. Condorelli is eligible to participate in the 2024 U.S. Olympic Team Trials in swimming; and [o]rder Respondent USA Swimming to accept Mr. Condorelli’s entry to the 2024 U.S. Olympic Team Trials.”

On June 12, 2024, New Era appointed Professor Matthew J. Mitten, Marquette University Law School, to serve as the Arbitrator in this proceeding.

On June 12, 2024, the Arbitrator approved the agreement between counsel for the Claimant and Respondent providing that 1) Respondent’s Answer would be filed on June 13, 2024; and 2) a hearing consisting of only their respective oral arguments regarding the merits of Claimant’s claims would be held on June 14, 2024 beginning at 5pm CT via Zoom.

On June 12, 2024, the Arbitrator approved the following “Notice of [New Era] Arbitration Hearing That Could Impact Olympic Team Roster,” which was emailed by USA Swimming to the 968 Athletes participating in the Trials:

“You are being notified **as a potentially affected athlete** whose status on the 2024 Olympic swim team could be impacted. An athlete has filed a complaint pursuant to the U.S. Olympic & Paralympic Committee (“USOPC”) Bylaws regarding the selection of the 2024 Olympic swim team, alleging that USA Swimming’s requirement that an athlete ‘must be able to represent the U.S. in an international competition at the time of the Qualifying Competition’ denies him the opportunity to compete in the U.S. Olympic Team Trials – Swimming and potentially at the 2024 Olympic Games. If the claim is successful, it could impact your ability to qualify for the Olympic swim team.

A hearing in this matter has been set for Friday, June 14 beginning at 6:00 pm Eastern, 5:00 pm Central, 4:00 pm Mountain and 3:00 pm Pacific. If you wish to participate in this hearing, you must notify New Era ADR by emailing New Era ADR at support@neweraadr.com by no later than noon PT on Friday, June 14th.

The hearing will consist of oral arguments of the parties, and if you wish, you will have an opportunity to speak during the hearing. Please note that if you wish to have a representative attend the hearing on your behalf YOU must reach out to the above-mentioned New Era ADR email and include the representative's name and email address. Your representative cannot request access on your behalf.

If you are receiving this notice, then the arbitrator’s decision in this case has the potential to adversely affect you, meaning your chances of qualifying for the Olympic swim team could potentially be impacted. You have the right to appear and participate as a party in the arbitration, and to be represented by counsel or another individual of your choice, if you so desire. You are not required to appear. However, having now been given notice of the arbitration and hearing, and your right to appear and participate as a party, **you shall be bound by the results of the arbitration regardless of your decision to appear.**

The Team USA Athlete Ombuds is a confidential resource for athletes to seek independent advice about any sport-related rule or process, or how to access legal or mental health resources. You may contact the Athlete Ombuds at 719-866-5000 or ombudsman@usathlete.org.

More information about the Section 9 and arbitration process can be found in Section 9 of the USOPC Bylaws.

RULE 56: CONFIDENTIALITY. Confidential Nature of Proceeding. Except as agreed by the parties or as provided in Rule 42 regarding public hearings, the arbitrator and Arbitral Body will maintain the confidential nature of the arbitration proceeding and any award. b. Protective Orders. The arbitrator may issue orders to protect the confidentiality of information upon agreement of the parties or for good cause shown. c. Section 9, 10, and 11 Decisions. Partial final and final awards or orders in matters under Sections 9, 10, and 11 of the USOPC Bylaws may be posted publicly by the USOPC, except that the USOPC may redact certain information to protect the privacy of individuals, proprietary information, trade secrets, medical information, or other sensitive information. d. Certified Copies. The Arbitral Body shall, upon the written request of a party, furnish to the party, at the party’s expense, certified copies of any papers in the Arbitral Body’s possession that may be required in judicial proceedings relating to the arbitration, provided that such request is made within the Arbitral Body’s applicable document retention period.”

Pursuant to Rule 28(b) of the United States Olympic & Paralympic Movement Arbitration Rules (“Arbitration Rules”), the Arbitrator determined that the seat of this arbitration proceeding is Chicago, Illinois, where he resides and conducted the hearing for this case.

On June 13, 2024, the Respondent filed its Answer and Pre-Hearing Statement, which requested that “Mr. Condorelli’s claims be denied, and that the Complaint be dismissed with prejudice.”

On June 14, 2024, the Arbitrator conducted a hearing of approximately two hours from 5-7pm CT via Zoom, which was video recorded by New Era at his request. At the beginning of the hearing the parties’ counsel agreed there was no objection to the Arbitrator’s appointment and that he has jurisdiction to resolve the parties’ Section 9 dispute. The Arbitrator admitted Claimant’s exhibits 1-20, Respondent’s exhibits 1-11, and Affected Athlete Mr. Pinfold’s written statement into evidence. The following persons observed the hearing: Michelle Steinfeld (Secretary & General Counsel, USA Swimming); Lindsay Mintenko (Managing Director, National Team, USA Swimming); Lucy Denley (Associate Director, Dispute Resolution, USOPC); and Kacie Wallace (Athlete Ombuds, USOPC) as well as France Farrell and Frances Hayward (Bryan Cave Leighton Paisner LLP summer interns).

Affected Athlete Mr. Armstrong did not observe or participate in the hearing, despite requesting and being given an opportunity to do so.

Affected Athlete Mr. Pinfold, who did not observe or participate in the hearing, submitted the following written statement:

"I think that the athlete ‘must be able to represent the U.S. in an international competition at the time of the Qualifying Competition’ should stand. If that is the rule then he shouldn’t be able to compete at trials. He can’t even compete for the US at the start of the Olympics games for which would go further into why he can’t compete for the US. I would gladly say that in the hearing. Not all of us are able to switch our nationalities just to go to the Olympic Games. Like last time, I got my FINA A cut but since I got 7th at trials I didn’t make the team. However, if I was a part of a different country, I would’ve made the team. Life isn’t fair but the rules are rules and shouldn’t be changed because the Olympics were 3 years apart instead of 4 this time around. The last thing I want to say is that he should not be able to compete at the Olympic trials based on the rules stated in place. This shouldn’t have been an issue at all based on that. If he is allowed to compete then this would hinder the US performance at the Olympics."

During the hearing counsel for the Claimant and the Respondent orally argued their respective positions and responded to the Arbitrator's questions. Neither the Claimant nor the Respondent called any witnesses to testify.

After oral arguments, Mr. Condorelli made a brief statement during which he stated his strong desire to swim for the U.S. and that he was willing to not participate in the 100-meter freestyle event during the Trials (thereby precluding his ability to qualify to compete as a member of the U.S. 4x100 Freestyle Relay team during the Paris Olympic Games), which would avoid any potential adverse effects on Team USA's performance in this event or on any other swimmers.

After Claimant, Respondent, and their counsel agreed they had been given a full and fair opportunity to be heard, the Arbitrator closed the hearing and agreed to render an Operative award by 12pm CT on June 15, 2024.

On June 15, 2024, the Arbitrator issued his Operative Award that "confirms Respondent's determination that Claimant is ineligible to compete in the Trials because he currently has an Italian Sport Nationality rather than Section 1.1.1 (a)'s required U.S. Sport Nationality and rejects his Section 9 Complaint and claims" that states he would issue a written reasoned award by July 15, 2024 in accordance with Rule 49 of the Arbitration Rules. The Arbitrator posted the Operative Award on New Era's website at 924am CT, and New Era emailed it to the parties and their counsel as well as the USOPC and Athlete Ombuds at approximately 932pm CT.

JURISDICTION

Pursuant to Section 9.2 of the USOPC Bylaws, the Arbitrator has undisputed jurisdiction to resolve the parties' dispute, specifically, whether Respondent has denied Claimant the opportunity to participate in its June 15-23, 2024 U.S. Olympic Team Trials that will determine the Team USA swimming team that will compete in the 2024 Paris Olympic Games, which is a "protected competition" pursuant to Section 1.3(x)(ii) of the USOPC Bylaws.

LEGAL ANALYSIS

Pursuant to by Section 8.4(d)(ii) of the USOPC Bylaws, USA Swimming is required to “publish athlete . . . participation criteria for [the Olympic Games] (e.g., eligibility requirements and . . . conditions of participation).”

In relevant part, USA Swimming’s Selection Procedures for the Paris Olympic Games provide as follows:

DEFINITIONS

Available Swimmer. “Available Swimmer” means a swimmer who (i) qualifies to be Nominated to the Team in an Event according to these Selection Procedures and has complied with all eligibility requirements set forth in Sections 1.1-1.2 of these Selection Procedures . . . If a swimmer does not satisfy these requirements, then he/she is not considered an Available Swimmer. . . .

Eligible Replacement Swimmer. “Eligible Replacement Swimmer” means an athlete who (i) is not initially Nominated to the Team in the Event for which he/she wishes to be considered as an Eligible Replacement Swimmer; (ii) is the Available Swimmer with the next best finish in the Qualifying Competition in the Event(s) for which he/she wishes to be considered as an Eligible Replacement Swimmer . . .

Nominate/Nominated/Nomination to the Team. “Nominate/Nominated/Nomination to the Team” refers to the Team nominated by USA Swimming to the U.S. Olympic & Paralympic Committee (USOPC) by 11:59 a.m. EASTERN TIME on June 24, 2024 . . .

Qualifying Competition. “Qualifying Competition” means the 2024 U.S. Olympic Team Trials – Swimming, held June 15- June 23, 2024, in Indianapolis, Indiana. Team.

Team. “Team” means the 2024 Olympic Games Team Nominated to the USOPC on June 24, 2024 . . .

1. SELECTION SYSTEM

1.1. Provide the minimum eligibility requirements for an athlete to be considered for Nomination to the Team: To be considered for Nomination to the Team, an athlete must, at the beginning of the Qualifying Competition and at the time of Nomination to the Team, meet the following criteria:

1.1.1. Nationality/Passport requirements: (a) Athlete must be eligible to represent the United States in the Olympic Games; and Athlete must hold a valid U.S. passport and be able to represent the U.S. in an international competition at the time of the Qualifying Competition. That passport must not expire for six months after the conclusion of the Olympic Games.

1.1.2. Minimum International Olympic Committee (IOC) standards for participation: (a) Any competitor in the Olympic Games must be a national of the country of the National Olympic Committee which is entering such competitor. For additional information regarding an athlete

who is a national of two or more countries, has changed his/her nationality or acquired a new nationality, refer to the Olympic Charter (Rule 41). (b) {add it}

...

1.1.4. Other requirements (if any):

...

(c) qualify for the Qualifying Competition, as described in Section 1.2, and compete in the Qualifying Competition;

...

(f) In order to be considered for Nomination to the Team, an athlete must, at the time of Nomination to the Team, be an Available Swimmer;

1.2. Tryout Events:

...

(b) To qualify for the Qualifying Competition, an athlete must, at the beginning of the Qualifying Competition, satisfy the minimum eligibility requirements for an athlete to be considered for Nomination to the Team, which are set forth in Section 1.1.

...

1.3 Provide a comprehensive, step-by-step description of the method that explains how athletes will go through the selection process (include maximum Team size).

...

1.3.2 Qualifying Competition. Performances at the Qualifying Competition, from among those eligible to compete in the Qualifying Competition as provided in Section 1.2, will be used to determine the Team. . . .

...

8. DATE OF NOMINATION

The Nomination of Athletes form, including replacements, will be announced to all athletes and submitted to the USOPC on or before: June 23, 2024.

...

11. DEVELOPMENT OF SELECTION PROCEDURES

Lindsay Mintenko, Managing Director, National Team, USA Swimming
Caitlin Leverenz Smith, USA Swimming Athletes' Advisory Council Representative
Michelle Steinfeld, Secretary & General Counsel, USA Swimming

...

13. INTERNATIONAL DISCLAIMER

These procedures are based on IOC, USOPC, and/or World Aquatics rules and regulations as presently known and understood. . . .

The terms and conditions of these written Selection Procedures take priority over any verbal explanation, clarification, or interpretation of the Selection Procedures, and an athlete relies on a verbal explanation, clarification, or interpretation of these Selection Procedures at his/her sole risk. Any request or question that would involve a formal clarification or interpretation of these Selection Procedures or that would address an issue not otherwise covered in these Selection Procedures, should be submitted to the Managing Director, National Team in writing by no later than December 31, 2023, and the response to such request by USA Swimming must be provided in writing and, where appropriate, must be published promptly on the USA Swimming website. Any change to these Selection Procedures must first be approved by the USOPC.

. . .

15. NGB/HPMO SIGNATURES I certify that I have read and understand the standards/criteria set by our IF and/or CF (PAG/PPAG only) and incorporated those standards/criteria into our Selection Procedures. I further certify that the information provided herein regarding Athlete Selection Procedures represents the method approved by USA Swimming.

NGB/HPMO President or CEO/Executive Director Tim Hinchey 11/8/2023

Managing Director, National Team Lindsay Mintenko 11/8/2023

USA Swimming Athletes' Advisory Council Caitlin L Smith 11/8/2023

Consistent with the Selection Procedures, the 2024 USA Swimming Rulebook provides as follows:

“207.5 TRIALS CLASS MEETS —

Trials Class shall be the selection meets for United States teams for the World Championships and Olympic Games and may be held in conjunction with the USA Swimming National Championships. . . Only United States citizens eligible to represent the United States on the Olympic or World Championship teams may compete in these Trials.”

The Official Event Information for the U.S. Olympic Team Trials for Swimming states:

“Eligibility

All athletes who compete at the Trials should have a U.S. passport valid through January 31, 2025 . . .

To compete in the Trials, a swimmer must also:

◆ be a U.S. citizen who is eligible to represent the USA in the 2024 Olympic Games . . .”

The ASA prohibits an NGB from having “eligibility criteria related to . . . participation in the Olympic Games . . . that are more restrictive than those of the appropriate international sports federation.” (36 U.S.C. § 220522 (15)).

In relevant part, AQUA’s Competition Regulations (In force as from 1 January 2024) provide as follows:

3.2 Election of a Sports Nationality

3.2.1 The Sport Nationality of an Athlete, if aged of more than sixteen years old . . . is established at the occasion of the first International Competition that the Athlete is competing on behalf of a World Aquatics member. If an Athlete is eligible to compete at International Competitions for more than one World Aquatics Member, he/she may choose which World Aquatics Member to represent, being specified that this choice is exercised by competing on behalf of the World Aquatics Member in an International Competition. Thereafter, an Athlete may only represent that World Aquatics Member in International Competitions.

. . .

3.23 . . . a representation at the World Aquatics Championships or Olympic Games determines in all cases a Sport Nationality, no matter the age of the Athlete.

3.3 Change of Sport Nationality

3.3.1 Any Athlete that intends to change his/her Sports Nationality from one World Aquatics Member to another (“New World Aquatics Member”) shall request World Aquatics’ approval, which will be granted under the following requisites:

- the Athlete shall observe a waiting period of three years between the last representation for the Member and the first representation for the New World Aquatics Member. The Athlete shall not be entitled to represent any World Aquatics Member at International Competitions during this waiting period;
- the Athlete shall be a citizen by birth or naturalization of the country or Sport Country he/she will represent; and
- the Athlete shall have uninterrupted residence in the country or Sport Country of the New World Aquatics Member for at least three years prior to his/her first International Competitions or shall be able to demonstrate by the end of the waiting period at the latest, that he/she has a genuine, close and established link to the country or Sport Country he/she will represent.

Respondent has refused to permit Claimant to participate in its Trials to determine the Team USA swimmers that will compete in the Paris Olympic Games because he currently does not satisfy the nationality requirement of Section 1.1.1 (a) of its Selection Procedures requiring that an “Athlete . . . be able to represent the U.S. in an international competition at the time of the Qualifying Competition” [i.e., Trials] and other related provisions of the Selection Procedures.

See also Section 1.2 (b) (“To qualify for the Qualifying Competition, an athlete must, at the beginning of the Qualifying Competition, satisfy the minimum eligibility requirements for an athlete to be considered for Nomination to the Team, which are set forth in Section 1.1”); Section 1.1.4 (f) (“In order to be considered for Nomination to the Team, an athlete must, at the time of Nomination to the Team, be an Available Swimmer”); **DEFINITIONS** (“Available Swimmer”) (“‘Available Swimmer’ means a swimmer who (i) qualifies to be Nominated to the Team in an Event according to these Selection Procedures and has complied with all eligibility requirements set forth in Sections 1.1-1.2 of these Selection Procedures . . . If a swimmer does not satisfy these requirements, then he/she is not considered an Available Swimmer. . .”).

Claimant is not challenging the facial validity of any provisions of Respondent’s Selection Procedures. Acknowledging he has the burden of proving at least one of his claims by a preponderance of evidence to prevail in this Section 9 arbitration proceeding, Claimant asserts that 1) there is no rational basis for Respondent to preclude his participation in the Trials because he will be eligible to represent the U.S. in swimming events for which he qualifies in the Paris Olympic Games beginning on July 30, 2024; and 2) by precluding his participation in the Trials, Respondent is impermissibly applying an athlete nationality eligibility requirement more restrictive than AQUA’s requirement in violation of ASA, 36 U.S.C. §220522 (15).

In response, Respondent asserts that it is applying its Selection Procedures, which were approved by the USOPC and consistent with its Athlete Selection Procedures Template as well as approved by the Chair of USA Swimming’s Athletes’ Advisory Council, as written in determining that Claimant is ineligible to participate in the Trials. Respondent contends that its legitimate interest in permitting only those athletes who currently have U.S. Sport Nationality and the approvals of its Selection Procedures by the USOPC and AAC Chair (who understood “in order for an athlete to compete at the [Trials], they must be eligible to represent the United States in an international competition, as of the beginning of the Trials”) provide a rational basis for its application of Section 1.1.1 (a) to deny Claimant’s participation in the Trials because he currently has an Italian Sport Nationality. In addition, Respondent contends that permitting only athletes with current U.S Sport Nationality to participate in the Trials is a rational application of Section 1.1.1 (a) that provides an orderly selection process benefiting athletes that eliminates uncertainty and avoids potential chaos. In particular, Respondent notes that “allowing [Claimant] to compete

in the Trials presents significant challenges due to his ineligibility for the 4x100 Freestyle Relay” to be held on July 27, 2024 at the Paris Olympic Games with “consequences negatively impact[ing] other athletes and risks denying them the opportunity to compete in the Games.” Answer and Pre-Hearing Statement at pp. 12-13.

In reply and to prevent any potential adverse effects on other U.S. athletes, Claimant stated during the hearing that he would agree not to compete in the 100-meter freestyle, thereby precluding his ability to qualify to be a member of the U.S. 4x100 Freestyle Relay team during the Paris Olympic Games. His counsel suggested that the Arbitrator could effectively eliminate Respondent’s foregoing concerns about any potential chaos by permitting Claimant to compete in only the 50-meter freestyle and 100-meter fly events during the Trials and prohibiting his participation in the 100-meter freestyle event.

Both parties cite and rely on the same general legal principles in their respective written submissions:

“Section 9 jurisprudence requires [Claimant] to prove [the NGB] breached its approved and published Athlete Selection Procedures for the [2024 Paris Olympic Games], applied them inconsistently to athletes similarly situated, acted in bad faith towards or with bias against [Claimant], and/or violated applicable federal or state laws (e.g., Ted Stevens Olympic and Amateur Sports Act).”

Section 9 Complaint and Demand for Expedited Arbitration at p. 13 (citing *Hyatt v. USA Judo*, AAA Case No. 01 14 000 7635); Answer and Pre-Hearing Statement at p. 9 (*Lui v. USA Table Tennis*, AAA Case No. 01-19-0001-4377). They also cite *Beckom et al. v. United States Bobsled and Skeleton Federation, Inc.*, AAA No. 7 190 E 00105 10 JENF (“Claimants must either prove there is no rational basis for the [NGB’s] USOPC-approved twelve objective and subjective criteria for selecting push cart athletes for the 2010 Olympics (which is not their contention), or that these criteria, if rational, were not followed or were applied arbitrarily in violation of their legally protected opportunity to participate . . .”).

After *de novo* consideration of the record evidence (i.e., only their respective exhibits because no witnesses testified during the hearing) as well as the parties’ respective written submissions and oral arguments, the Arbitrator concludes that Respondent did not violate any of the legal principles established by the foregoing Section 9 jurisprudence.

The Arbitrator finds that Respondent complied with and applied its published and approved Selection Procedures as written, specifically Section 1.1.1 (a), which expressly requires that an “Athlete . . . be able to represent the U.S. in an international competition at the time of the Qualifying Competition” [i.e., Trials]. The Claimant indisputably does not currently meet this requirement.

Claimant does not contend that Respondent inconsistently applied Section 1.1.1 (a) to him vis-à-vis other similarly situated U.S. Swimming athletes or “acted in bad faith towards or with bias against him.”

It is undisputed that Claimant satisfies all other applicable requirements to participate in the Trials. Claimant’s willingness to forego participating in the 100-meter freestyle event at the Trials would effectively remedy Respondent’s legitimate and reasonable concern that his participation and performance in this event could create uncertainty and potential chaos, which makes this a close case regarding whether Respondent applied Section 1.1.1 (a) “arbitrarily in violation of [his] legally protected opportunity to participate” in the Trials by not permitting him to compete in any other Trials events (i.e., 50-meter freestyle and 100-meter fly).

Even when exercising *de novo* review (which does not simply provide broad arbitral deference to an NGB’s team selection decisions without careful factual and legal scrutiny on a case-by-case basis), the Arbitrator is mindful of *Lui*’s guidance that his authority and appropriate role is limited to determining whether Respondent “rationally applied [its] published [Selection Procedures],” not . . . to substitute [his] judgment for the expert professional judgment of [an NGB] . . . in applying the criteria to individual [athletes].” “Arbitrators are not ombudsmen; they are authorized to resolve disputes under contracts and rules, not to declare how the world should work in the large.” *Lindland v U.S. Wrestling Ass’n, Inc.*, 227 F.3d 1000, 1004 (7th Cir. 2000).

The Arbitrator concludes that Respondent did not arbitrarily apply Section 1.1.1 (a) to Claimant’s unique situation (i.e., an athlete with current Italian Sport Nationality who competed for Italy’s swimming team less than three years ago in the 2020 Tokyo Olympic Games, which were delayed until 2021 because of the Covid-19 pandemic) by determining that only athletes currently with U.S. Sport Nationality are eligible to participate in the Trials and to compete to

earn spots on Team USA’s swimming team that will compete in the Paris Olympic Games on behalf of the United States.

Respondent has a reasonable and legitimate interest in permitting only those athletes presently “able to represent the U.S. in an international competition at the time of the [Trials]” (i.e., only those with current U.S. Sport Nationality), which is consistent with World Aquatics Rule 3.3.1 requiring an athlete intending to change one’s Sports Nationality from one member to another to “observe a waiting period of three years between the last representation for the Member and the first representation for the New World Aquatics Member.” Because Claimant currently has an Italian Sport Nationality, Respondent’s refusal to grant his *de facto* request for an individualized waiver from the clearly expressed nationality requirement of Section 1.1.1 (a) is not arbitrary, capricious, or irrational. *Bloom v. NCAA*, 93 P.3d 621, 626 (Colo. App. 2004) (upholding sport governing body’s application of its eligibility rules to an individual athlete and refusal to grant him a waiver because its decision is “rationally related to [its] legitimate purpose of retaining the [then-existing] ‘clear line of demarcation between intercollegiate athletics and professional sports’”). A contrary decision by Respondent would arguably effectively convert the Trials into an “international competition” between athletes with a U.S. Sport Nationality and an athlete with an Italian Sport Nationality in the swimming events in which Claimant would participate.

Because its facts and holding are inapposite, *Lea v. USA Cycling & Duehring*, AAA Case No. 01-16-0000-8307 does not support Claimant’s position that Respondent arbitrarily applied Section 1.1.1 (a) to him. In *Lea*, the Arbitrator determined that “the ambiguity in the meaning of the term ‘nomination’ [in its team selection criteria] must be read against USA Cycling” and that the athlete “meets all of the minimum eligibility criteria prior to the date on which USA Cycling nominates athletes to the Olympic team and should have been nominated by USA Cycling to the Long Team.” By contrast, because Claimant has an Italian Sport Nationality, he does not currently meet Section 1.1.1 (a)’s clear and express requirement that he must have US Sport Nationality at the time of the Trials. Moreover, *Lea* is distinguishable because Claimant does not satisfy Section 1.1.4 (f) of Respondent’s Selection Procedures for the 2024 Paris Olympic Games, which requires “[i]n order to be considered for Nomination to the Team, an athlete must, at the time of Nomination to the Team, be an Available Swimmer [defined as

having ‘complied with all eligibility requirements set forth in Sections 1.1-1.2 of these Selection Procedures’].”

Contrary to Claimant’s contention, the Arbitrator concludes that Respondent’s application and enforcement of Section 1.1.1 (a) as written by not permitting Claimant to participate in the Trials does not violate federal law, specifically 36 U.S.C. §220522 (15). This ASA provision prohibits an NGB from having “eligibility criteria related to . . . participation in the Olympic Games . . . that are more restrictive than those of the appropriate international sports federation.” On June 12, 2024, AQUA Legal Counsel Caroline Cusinato informed Respondent as follows: “World Aquatics is **not** taking the position that eligibility at the time of the trials is more restrictive than World Aquatics’ own three-year rule.” She explained: “During the June 2024 U.S. Olympic Trials, the Appellant is still recognized as having **Italian Sport Nationality**.” (emphasis original). Therefore, the Arbitrator finds that Respondent’s interpretation of Section 1.1.1 (a) to require that an athlete currently have U.S. Sports Nationality to be eligible to participate in the Trials and its application to Claimant determining he is ineligible for the Trials because he currently has Italian Sports Nationality is consistent with AQUA’s clearly expressed view that Respondent’s interpretation and application of its nationality requirement for the Trials is not impermissibly more restrictive than AQUA’s three-year nationality rule. See *DeFrantz v. U.S. Olympic Committee*, 492 F. Supp. 1181 (D.D.C. 1980) (court relies on statement by IOC president that a National Olympic Committee’s participation in the Olympic Games is entirely voluntary in support of its ruling that USOC did not violate the ASA by choosing not to enter a team of U.S. athletes to participate in the 1980 Moscow Olympic Games solely for political reasons); *Nieto v. USA Track and Field*, AAA Case No. 77 190 00275 08, (“[a]n aberration in the time deadline for achieving” the qualifying standard “must be very material in order to” violate the ASA).

DECISION AND AWARD

Based on the foregoing material facts and legal analysis, the Arbitrator decides and awards as follows:

The Arbitrator confirms USA Swimming's determination that Mr. Condorelli is ineligible to compete in the Trials because he currently has an Italian Sport Nationality rather than Section 1.1.1 (a)'s required U.S. Sport Nationality and rejects his Section 9 Complaint and claims.

Considering the circumstances of the case, the conduct of the parties and their representatives during the arbitration proceeding, and the result of the arbitration, the Arbitrator determines it is not appropriate to reapportion the administrative expenses and arbitrator's compensation and expenses between or among the parties pursuant to Rule 51(c) of the Arbitration Rules.

The parties shall bear their own attorney's fees and/or expenses associated with this arbitration.

This Award fully resolves all claims and defenses submitted by the parties in connection with this arbitration proceeding. All claims and defenses not expressly granted herein are denied.



June 20, 2024

Matthew J. Mitten, Arbitrator