

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration  
Between

Kenneth R. Pires, D. Scott Erwin,  
K. H. Detweiler, Andrew T. Schreiber,  
John C. Rodemacher, Karl E. Bjerge,  
James C. Pew, Donald Smith,  
Robert Price, Shane Peterson

Claimants,

and

The United States Rowing Association  
Respondent.

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ARBITRATOR'S FINDINGS  
DECISION AND AWARD

**I. INTRODUCTION**

1. Claimants are ten amateur athletes who desire to compete for selection to the men's 1992 Olympic Rowing Team ("The Team"). Respondent, a group A member of the United States Olympic Committee ("the USOC"), has been designated by the USOC under the provisions of the Amateur Sports Act of 1978, 36 U.S.C. Sect. 371 et seq., as the national governing body for amateur rowing in the United States.

2. As part of its obligations as the national governing body, the Respondent has agreed to submit to binding arbitration, conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association, any controversy involving the opportunity of any amateur athlete to participate in amateur athletic competition including the Olympics.

3. Under the terms of the USOC's Constitution the Respondent is prohibited from denying any amateur athlete the opportunity to compete in the Olympic Games (Article IX) and is obligated to provide an equal opportunity to amateur athletes to participate in amateur athletic competition including the Olympics without discrimination and with fair notice and opportunity for a hearing to any amateur athlete before declaring any such individual ineligible to participate (Article IV).

4. Claimants initiated a grievance before the USOC as required by Article IX, Sec. 2 of the Constitution. The USOC declined to intervene, and Claimants instituted this arbitration.

5. Claimants contend that the procedures adopted by the Respondent (and approved by the USOC) to select athletes to represent the United States in the men's rowing competition at the 1992 Olympic Games ("The Selection Procedure") deny them the opportunity to compete for a spot in three of the five sweeps boats which comprise the Team. Respondent contends that the Selection Procedure does not have the effect attributed to it by the Claimants and is fair, reasonable and rationally related to the purpose of fielding the most competitive boats possible at the Olympic Games.

6. Claimants have complied with all necessary procedural requirements for pursuing this challenge to the Selection

Procedure. The controversy is ripe for review and given the importance of this issue to all oarsmen aspiring to make the 1992 Olympic Team, a prompt resolution is required.

## II. THE ARBITRATION HEARINGS

7. The arbitration hearings began on March 12, 1992 at the offices of The American Arbitration Association, 230 South Broad Street, Philadelphia, Pennsylvania, and continued on March 22, 23 and April 5, 1992. Final written submissions were made by the parties on April 9, 1992. Neither party requested a stenographic reporter at the hearings and none was present. The hearings proceeded in accordance with the Commercial Rules of The American Arbitration Association on an expedited basis as provided by the arbitration provisions of the USOC's Constitution and its By-Laws.

8. Claimants were represented by R. Nicholas Gimbel, Esq. of the Philadelphia firm of Hoyle, Morris & Kerr. Respondent was represented by John Swarbrick, Jr., Esq. of the Indianapolis firm of Baker & Daniels.

9. Claimants called the following witnesses: Messrs. James C. Pew, David Krmpotich, Daniel Lyons and Frances Reininger. Respondents called the following witnesses: Messrs. Ted A Nash, Patrick McNerney, Kris Korzeniewski, Robert Jaugstetter, Jeff McLaughlin and Michael Tati.

## III. FACTUAL BACKGROUND

A. The Team

10. Twenty-four athletes will make up the Team.\*

These athletes will be divided into five boats, as follows:

1.	The Eight	8
2.	The Four Without Coxswain	4
3.	The Four With Coxswain	4
4.	The Pair Without Coxswain	2
5.	The Pair With Coxswain	2
		20

The four remaining athletes on the Team will be alternates. (The selection process set forth in Claimant's Exhibit 1 establishes the format by which crews for all fourteen boats included in the rowing competition at the 1992 Olympic Games will be chosen.)

11. Claimants' challenge is limited to the selection process for three of those boats: the three large boats, viz. the Eight and Four With Coxswain and the Four Without Coxswain.

B. The Selection Procedure

12. Respondent's stated Selection Procedure essentially provides that the Team will be selected in three stages. First, the Four Without Coxswain will be picked from a group of six athletes. Second, a selection camp ("the Selection Camp") will be held to select twelve athletes for the Eight and Four With Coxswain. The alternates will be chosen from this group as well. Third, trials races will be held to select the Pair Without Coxswain and the Pair With Coxswain. Although there are four seats available in the Pair Without Coxswain and the Pair With Coxswain, the trials for these two boats are

scheduled at the same time and Claimants can try to participate in only one. Moreover, in sweep rowing, each oarsman rows on only one side. Therefore each individual claimant competing for a place in the Pair Without Coxswain or the Pair With Coxswain actually has an opportunity to try out for only one place on the Team.

13. The Selection Camp will include up to twenty athletes. Fourteen of these athletes will have earned a place in the Selection Camp by performing well in races for Pairs Without Coxswain. Two athletes, however, will be given an automatic invitation solely because they previously were invited, on a discretionary basis, to try out for the Four Without Coxswain. Mr. Kris Korzeniowski, the Respondent's National Technical Director and Head Coach of the Team ("the Head Coach") may also invite up to four other athletes to the Selection Camp on a discretionary basis.

14. The Head Coach has absolute discretion to choose athletes for the Eight and the Four With Coxswain, from among those attending the Selection Camp.

15. Respondent has stated in its Selection Procedure that the Head Coach's four additional invitations to the Selection Camp "will be based on participation and performance in the national testing program and speed order races." (Ex. 1\*, p.3, Section II B 2) Patrick McNerney, Respondent's International Program Manager, testified that under the wording

of the official document issued by Respondent setting forth its procedures for selecting the Team, the above criteria are the only ones to be employed. However, Mr. McNerney further testified that, in actuality and based on Respondent's past practice, the Head Coach would not be limited by the criteria stated in the Selection Procedures in making the invitations. The Head Coach, in his testimony, also maintained that he has discretion to employ criteria other than those set forth in the Respondent's Selection Procedure.

16. In sum, up to six athletes will be invited to the Selection Camp on a discretionary basis. Only twelve athletes will be chosen at the Selection Camp to compete on the team. Therefore, up to half of the athletes ultimately chosen for the team at the Selection Camp may be discretionary invitees.

17. The Mens' Olympic Rowing Committee ("MORC") is the Committee of Respondent which adopted the Selection Procedure for the Team. MORC essentially adopted a framework proposed to it by certain rowing coaches, with adjustments.

18. Although I do not believe it is necessary to discuss in great detail the previous selection procedures adopted by MORC, I note that those selection procedures have varied significantly over the years.

19. In 1992, none of the three boats at issue in this

arbitration are subject to a trial procedure in which the crews to be selected for participation in the Olympics must win a race or series of races against other contenders. This is a departure from the procedures adopted in most preceding years. From 1984 through 1991, with one exception, either the Four With Coxswain, the Four Without Coxswain, or both boats were subject to a trial for participation in the World Championships for the Olympics. (In 1985, the United States did not send a Four Without Coxswain to the World Championships.)

20. As further background, I note that there was a substantial amount of debate at the hearings about the value of speed order races by Pairs Without Coxswain as a technique for selecting oarsmen for participation in the three boats at issue. Pairs are two-person boats in which the oarsmen each row one oar on the port or starboard side of the boat, respectively. Despite the debate at the hearings, I note that Respondent's own Selection Procedure states that: "Speed Order Racing will . . . be used as a primary criteria [sic] for invitations to the Olympic Team selection camps." (Ex. 1., p.2, Section I B) Claimants' allegations have focused in part on the role of such Speed Order Racing in Respondent's ultimate selection process.

#### IV. REVIEW OF CLAIMANTS' ALLEGATIONS AGAINST RESPONDENT

21. Claimants allege that Respondent's selection process: (i) has completely removed the four places in the Four Without Coxswain from any open competitive selection process;

and (ii) has seriously disadvantaged Claimants in their efforts to compete for places in the Eight, the Four With Coxswain or as alternates. In addition, Claimants urge that Respondent's description of its selection process admittedly diverges from that set forth in the Selection Procedure approved by the USOC, since coxswain can be invited on a purely discretionary basis to the Selection Camp.

A. The Four Without Coxswain

22. Respondent has provided that the Four Without Coxswain will be chosen from a group of only six athletes. This group will be comprised of the four athletes who competed in the Four With Coxswain in the 1991 World Championships and two additional athletes invited to try out at the discretion of Respondent's designated coach (Mr. Nash). Respondent's justification for removing the Four Without Coxswain from any competitive selection process is that it finished in second place at the 1991 World Championships.

B. The Eight And The Four With Coxswain

23. Claimants allege that the procedures adopted and implemented by Respondent to select athletes for places in the Eight, the Four With Coxswain and the Team alternates, further deny them a fair opportunity to compete for those places. In particular, they allege that, although MORC has concluded that



pair racing should be a "primary" selection criterion for these places, the actual procedures will diverge from the stated procedures. In addition, Claimants challenge the absence of any trials races for any of the three boats at issue here. I will address these contentions in turn.

1. The Infirmities In The Implementation Of Respondent's Stated Selection Procedure.

24. It is clear that the Selection Procedure to be employed by Respondent diverges from those set forth in the Selection Procedure published to the rowing community and approved by the USOC. As set forth in paragraph 15 above, Patrick McNerney, Respondent's International Program Manager, acknowledged that under the wording of the Selection Procedure the four athletes who may be invited to the Selection Camp by the Head Coach must be evaluated based on their "participation and performance in the National Testing Program and Speed Order Races." However, the testimony at the hearings persuaded me that the Head Coach can, and very well may, invite athletes to the Selection Camp on the basis of criteria other than those stated in the Selection Procedure.

25. The testimony at the hearings also casts doubt on the reliability of Respondent's implementation of the provision in its Selection Procedure that "Speed Order Racing will . . . be used as a primary criteria [sic] for invitations to the Olympic Team selection camps." The Head Coach who, as noted above, will have the ultimate discretion to select athletes for

participation on the Team at the Selection Camp, testified at the hearings, and had submitted a memorandum to MORC, which strenuously argued the utility of pair speed order races as a selection device. Thus, his September 9, 1991 memorandum stated that: "We do not row pairs well enough to use this as a criteria." (Ex. 9) In his testimony at the hearings the Head Coach steadfastly affirmed his continuing skepticism about the use of pairs races as a selection criterion, stating that he did not believe in "selection by pairs at all." Given the discretion conferred upon the Head Coach under the Selection Procedure, he can effectively nullify the use of Pairs Speed Order Races by choosing the Team from athletes who are invited to the Selection Camp based on discretionary invitations, or who finish in the lower qualifying pair rankings.

26. In addition, the implementation of the stated selection criteria is affected by the fact that the Head Coach has been coaching certain athletes at a long-term training camp (the "Pre-Camp"). Since the Pre-Camp began in October 1991, the Head Coach, who is not only the head coach of the Team but also Respondent's National Technical Director, has devoted himself to preparing these athletes to be selected for places in the Eight, the Four With Coxswain and as alternates.\* The Pre-Camp will continue until the Selection Camp begins on April 17, 1992. As noted above, the Head Coach will also make the ultimate selection decisions at the Selection Camp, based on his discretion.

27. Respondent offered testimony to the effect that athletes had first suggested the Pre-Camp after the conclusion of the 1991 World Championships, in which the United States entries had disappointing finishes. However, a memorandum from the Head Coach to MORC, dated May 22, 1991 (Ex. 21, p.3), before the World Championships, already suggested a program similar to the Pre-Camp, as part of an overall program to give advantages to athletes whom he considered "strong candidates for the medals; probably members of the 1991 World Championship team." In this regard, I note that at least ten of the athletes who had been invited to the Pre-Camp were either members of the Eight or the Four With Coxswain in 1991. The Eight finished in eighth place at the World Championships, and the Four With Coxswain finished in seventh place. It was acknowledged by all witnesses at the hearings that these were disappointing -- and indeed poor -- results. In this regard, I credit the evidence at the hearings that some athletes, change from year to year in performance. A prior year's performance does not mandate that an athlete should be preferred for selection in the future.

28. Respondent urged at the hearings that there are a limited number of positions at the Pre-Camp. However, the Respondent has not provided any procedures by which athletes could obtain an invitation to the Pre-Camp. Nor were athletes provided with an opportunity after the Pre-Camp was decided upon

to demonstrate that they should be allowed to attend.\* In short, there has never been any competitive selection process to determine admission to the Pre-Camp.

29. Nonetheless, Respondent, which has supported the Pre-Camp financially, recognizes that the Pre-Camp confers "advantages" on those who attend. Respondent's February 5, 1992 letter to the USOC in response to Claimants' grievance states that:

" . . . in creating advantages for some, . . . programs [such as the Pre-Camp] cannot fairly be characterized as denying others an opportunity to participate. . . . That US Rowing would identify the members of its 1991 National Team and other athletes who have demonstrated special promise as the most likely candidates for its 1992 Olympic Team is both logical and appropriate . . ."  
(Emphasis supplied.)

(Ex. 11, pp. 6-7) Moreover, the letter recognizes that the Pre-Camp is a part of Respondent's program for preparing the 1992 Team. In fact, it is apparent that attendance at the Pre-Camp confers a substantial advantage on the athletes who attend -- and a corresponding disadvantage on athletes who do not. Among the advantages to athletes participating in the Pre-Camp are the opportunity to work closely with the coach who will make the ultimate discretionary decisions on selecting the Team.

2. Trials Races

30. As noted above, the 1992 Selection Procedures do

not provide for a trials competition for any of the three boats at issue here. Although such procedures have not heretofore been adopted by Respondent with respect to the Eight, they have, as noted above, been adopted in past years with respect to the Four With Coxswain, the Four Without Coxswain, or both boats. Having at least one of these boats open to trials would undoubtedly provide substantially greater equality of opportunity to participate in the Olympic Games than that provided by the Respondent's Selection Procedure. Put simply, the current selection process forecloses athletes who are not invited to the Selection Camp, or who choose not to attend the Selection Camp, from forming a boat and demonstrating that they are faster than the boats produced by the selection camp procedure.

31. Respondent has had previous experience in this regard. In 1984, the Four With Coxswain produced by Respondent's camp was defeated at a trials race by a boat composed of oarsmen who were not asked to participate through the camp procedure. The boat winning that trials race went on to win a silver medal at the 1984 Olympic Games. Similarly, in 1986 the Four Without Coxswain was chosen at a trials race. The athletes fielded from the Respondent's camp were beaten by outside challengers. All but one of the athletes in the winning

boat had not been invited to the camp. The boat winning that trials race in 1986 went on to win a gold medal at the 1986 World Championships.

32. The rationale offered by Respondent's witnesses at the hearings for the decision not to provide a trials procedure for any of the boats at issue here strongly confirms my conclusion.

33. The Head Coach, in fact, stated that he had no opposition to the use of a trials procedure for athletes who were not asked to participate in the Selection Camp, or who were not selected for the Team during the Selection Camp. His only objection had to do with the timing of such a trials race in relation to other selection events.

34. With respect to the right of athletes who were invited to the Selection Camp but made a decision not to attend, Mr. Robert Jaugstetter, the Chairman of MORC, and the Head Coach both testified that they opposed a trials procedure because it would allow athletes who decided that they have a better opportunity of making up a fast boat outside Respondent's Selection Camp to attempt to do so. The Respondent's position is that all athletes must be "shoe horned" into the Selection Camp regardless of the athletes' own judgment that they can make up a faster boat outside the Camp. Respondent made clear its

view that athletes who are eligible to attend the Selection Camp but make the value judgment not to do so should be deprived of an opportunity to qualify for the boats of their choice.

35. I do not believe that there is any sufficient reason for such a deprivation of opportunity to qualify for the Olympic Games, or such a restriction on athlete choice.

36. Respondent's testimony at the hearings was to the effect that promising athletes must be compelled to participate in the Selection Camp because, if they go elsewhere, the athletes who do attend the Pre-Camp will be deprived of such other athletes' talents. I do not believe that this rationale is sufficient to deprive athletes of a basis for qualifying for participation in the Olympic Games. I find that the potential harm asserted by Respondent to be somewhat speculative in nature, and in any event not a basis for such an immediate and concrete deprivation of athlete choice.

37. At the hearings, Mr. Nash, who coached the silver-medal winning Four Without Coxswain in the 1991 World Championships and will coach the same boat again in the 1992 Olympics, advanced a proposal for what he termed a challenge for the Four With Coxswain -- a proposal essentially equivalent to trials. My review of that proposal, and of the testimony at the hearings, confirms my conclusion that it is feasible to allow a challenge to the Four With Coxswain to be chosen through the

Selection Camp, and that the considerations advanced by Respondent as to the timing of such an event do not provide an adequate basis for foreclosing free and equal competition.

38. I have considered the contentions advanced by Respondent concerning alleged difficulties which would be caused if a trials race were to be ordered at this juncture. I view such contentions with skepticism, because any contention that Claimants must be left without a remedy if they demonstrate a violation of the USOC Constitution must be viewed with disfavor.

39. In any event, I find Respondent's contention in this regard to be tenuous. I believe that a procedure can be adopted which adequately protects the rights of all athletes while affording Claimants a trials race. I note in this regard that the Head Coach himself indicated at the hearings that coaches should have substantial flexibility in changing the composition of a boat until late in the process of preparing for a race such as the Olympics.

#### V. **AWARD**

40. On the basis of the foregoing findings, I conclude that the Selection Procedure adopted and implemented by Respondent must be invalidated, at least in part.



41. I have considered the parties arguments as to what standard of review should be applied in this case. I adopt Claimants' conclusion that the guarantee of "opportunity to participate" in Article IX of the USOC Constitution requires an equal opportunity. Moreover, I accept Claimants' argument that where rights so fundamental to the USOC Constitution are at stake, once it has been demonstrated that the Selection Procedures, either on their face or as implemented, deprive Claimants of an equal opportunity to participate, the burden shifts to Respondent to demonstrate a compelling justification for such a denial of equal opportunity. In addition, Claimants should be entitled to prevail, if, as alleged here, the selection procedures promulgated are not consistent with those actually being implemented by Respondent.

42. The relief to be afforded in view of the findings set forth above is a matter which I believe is subject to my discretion. However, I conclude that Claimants and other athletes are entitled to some relief. In evaluating this matter, I note that a number of the conclusions set forth above concerning the role of Pairs Speed Order Races and Trials in Respondent's selection process are directed to a single underlying objective -- the need for greater objectivity in the Selection Procedures for the Team. Mr. Jaugstetter, MORC's, Chairman, himself acknowledged that MORC was motivated in this

objective by the poor finishes of United States' boats at the 1991 World Championships.

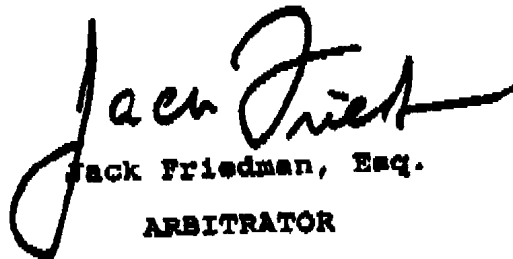
43. For the foregoing reasons, I find that there has been a violation of Article IX of the USOC Constitution, and on that basis I invalidate the Selection Procedure in part. I require Respondent to provide an open challenge for the Four With Coxswain. This challenge must be held at least four weeks prior to the trials for the Pair Without Coxswain and the Pair With Coxswain. The challenge for the Four With Coxswain must be held over three days and the winner of two out of three races shall win the right to represent the United States as the Four With Coxswain on the 1992 Olympic Team.

44. I direct that Respondent shall disseminate a public notice concerning the Selection Procedure as modified by this Decision, as promptly as possible. I will reserve jurisdiction to consider issues relating to compliance with this Decision.

45. The administrative fees and expenses of the American Arbitration Association totaling \$525.00 shall be borne equally by the parties. Therefore, Respondent shall pay to Claimants the sum of \$37.50 for that portion of the administrative fees and expenses previously advanced by Claimants to the Association, and Respondent shall pay to the American Arbitration Association the sum of \$225.00 for its one-half share of the administrative fees and expenses still due the

Association.

46. The arbitrator's fees totaling \$5,250.00 shall be borne equally by the parties. Therefore, Claimants and Respondent shall each pay to the American Arbitration Association the sum of \$2,625.00 for their respective one-half share of the arbitrator's fees due the Association.

  
Jack Friedman, Esq.  
ARBITRATOR

New York, NY  
April 14, 1992

Footnotes (denoted by \*)

Par. 10: This case concerns the selection of oarsmen for the sweep rowing team, in which each person uses one oar. It does not address the selection of coxswains, who steer certain boats or scullers who use two oars apiece, although these people will also be included on the Team.

Par. 15: References in this form are to Claimants' exhibits admitted into evidence, without objection, at the hearings.

Par. 26: It is interesting to note that there was credible evidence at the hearings to the effect that all athletes attending the Pre-Camp are devoting substantial time to pairs rowing and are becoming proficient in this area.

Par. 28: Cf., the Head Coach's representation: "THE WHOLE PROCESS OF SELECTION OF THE OLYMPIC TEAM WILL BE OPEN TO EVERYONE." (Ex. 21, p.5)