

**BEFORE THE AMERICAN ARBITRATION ASSOCIATION**

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**In the Matter of Arbitration Between:**    )

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**Caroline Barry**                                    )

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**Arbitration No. 77 190 E 00049 11 JENF**

**and**    )

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**USA Boxing, Inc.,**                                )

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**AWARD OF ARBITRATOR**

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THIS MATTER came for hearing before the undersigned arbitrator commencing at 9:30 a.m. on March 7, 2011, at the offices of the American Arbitration Association in Denver, Colorado. The Claimant and Respondent were represented by counsel, as were two affected athletes, Marlen Esparza and Queen Underwood. Tiffany Hearn and Franchon Crews are affected athletes who were not represented but offered evidence. Several other affected athletes and auditors attended the hearing on an open telephone line provided by AAA. All participants were allowed to make opening statements, call and cross-examine witnesses, offer exhibits and make closing arguments. John Ruger, USOC Athlete Ombudsman, and Gary Johansen, USOC Associate General Counsel, attended the proceedings. The hearing concluded at approximately 2:55 p.m., at which time the undersigned arbitrator announced that his decision and award would be rendered in writing as soon as possible. This matter arises and is being heard under Section 9 of the Bylaws of the United States Olympic Committee, and the arbitrator is required by Section 9.7 to render a reasoned award.

**ISSUE FOR DETERMINATION**

The issue to be resolved is whether a change in the system for selection of athletes to represent the United States in the boxing competition at the 2011 Pan-American Games deprived

Claimant and other affected athletes of “the opportunity to participate” protected by Section 9.1 of the Bylaws of the United States Olympic Committee (USOC), which in turn implements provisions of the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501 et seq. (1998) that require the USOC to “protect the opportunity of any amateur athlete . . . to participate in amateur athletic competition,” § 22052(8), and to “establish and maintain provisions . . . for the swift and equitable resolution of disputes . . . relating to the opportunity of an amateur athlete . . . to participate in . . . the Pan-American Games . . . or other protected competition as defined in the bylaws of the [USOC].” §22059(a). Specifically, the issue is whether a January 11, 2011 amendment to the “USA Boxing Athlete Selection Procedures -- Pan-American Games,” should be declared invalid, and if so, to fashion a remedy that protects the opportunity to participate.

### FACTUAL BACKGROUND

The basic underlying facts are not in dispute. In June, 2010, USA Boxing adopted Athlete Selection Procedures for the Pan-American Games. Those procedures assumed that three qualifying competitions to be conducted by the boxing federation for the American zone, the American Boxing Confederation (AMBC), scheduled for the spring of 2011, would be used to allocate national qualifying slots that each participating National Olympic Committee could later fill with individual athletes. Although the right to name and enter U.S. team members for the Pan-American Games is vested in the USOC, it relies heavily on national governing bodies, such as USA Boxing, to establish systems for the selection of athletes. The June 2010 Selection Procedures provided that the winners of the 2010 National Championships in the weight classes being contested at the Pan-American Games would represent the United States at the three AMBC qualifying competitions, where they would attempt to procure Pan-American Games boxing slots for the U.S. The June 2010 Selection Procedures then designated a series of qualifying competitions from which boxers would be chosen to compete in the “2012 U.S. Olympic Team Box-Offs” to be held in July, 2011, and that “The winner of each of the 13 weight categories at the 2012 U.S. Olympic Box-offs will be USA Boxing’s nominee to the 2011 Pan American Games Team for the qualified weight categories.” June 15, 2010 USA Boxing Athlete Selection Procedures -- Pan-American Games, p. 5.<sup>1</sup>

The June 15, 2010 USA Boxing Athlete Selection Procedures -- Pan-American Games were reviewed and approved by the USOC Team Selection Working Group. The TSWG focused on the Selection Procedures’ compliance with internal USOC and US Boxing standards for selection systems, and not on whether the proposed Selection Procedures accurately reflect the qualification paths delineated by AMBC as reflected in the Pan-American Games Technical Manual.

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<sup>1</sup> While USA Boxing conducts National Championship competitions in ten weight classes for both men and women, the 2011 Pan-American Games (and 2012 Olympic Games) will offer only three weight classes for women. This disparity complicates the tactical decisions for women who want to qualify in a weight class other than that in which they would normally compete in national competition, but it does not materially affect my analysis.

In December 2010, USA Boxing realized that the AMBC qualifying competitions would in fact select specific individual athletes from the participating countries, and not simply reserve slots that could be filled at a later time. Clearly, the Selection Procedures had to be revised, because USA Boxing designed the published selection system to choose athletes after the conclusion of all of the AMBC qualifying competitions. The revised procedures adopted by USA Boxing were again vetted and approved by the USOC TSWG, and although dated January 11, 2011, were not published until February 4, 2011, due to delays in the approval process. The Amended Athlete Selection Procedures altered the selection system by providing that instead of the 2012 U.S. Olympic Box-offs serving as the athlete selection event, the already completed 2010 National Championships would do so. Consequently, all of the domestic competitions that had been designated qualifiers to the selection box-off were stripped of that status. In other words, the National Championship winners in the 13 Pan-American weight categories (10 men and 3 women), who were originally expected to compete in the AMBC qualification tournaments for slots to be filled later, would now be representing not only the United States, but would compete for personal qualification and selection.

Claimant, on behalf of herself and other athletes who had not won 2010 National Championships in the 13 weight classes, commenced this proceeding, claiming that the January 2011 amendment improperly denied them an opportunity to participate in protected competition, specifically the 2011 Pan-American Games. She asks that USA Boxing be required to conduct a box-off to select U.S. athletes to compete in the AMBC qualifying competitions. Athletes who won their 2010 National Championships weight classes respond that they have already earned the right to fight in the qualifiers, and that to require them to participate in a box-off before entering tournaments for which they already qualified deprives them of their opportunity to compete. In other words, if both athlete groups are correct, then there is no way to select a Pan-American Games U.S. boxing team without depriving someone of a vested legal right. USA Boxing sides with the 2010 National Champions. Not only does it agree with them, but additionally believes a late-scheduled box-off in advance of the first AMBC qualifier (which begins March 24, 2011 in Venezuela) would work an organizational and financial hardship on the NGB, would disrupt plans for competition preparation, and might result in the selection of athletes who are not optimally prepared to secure spots in the Pan-American Games.

#### ANALYSIS

Section 9.1 of the Bylaws of the United States Olympic Committee provides, in part:

No member of the corporation may deny or threaten to deny any amateur athlete the opportunity to participate in . . . the Pan American Games . . . or other such protected competition as defined in Section 1.3 of these Bylaws.

Section 1.3(v)(1), in turn, defines “protected competition” in a manner that includes the AMBC qualifying tournaments because they involve athletes designated by USA Boxing to compete as

representatives of the United States against athletes representing other nations. In other words, both the Pan American Games and the three AMBC qualifying tournaments constitute protected competitions as to which all USA Boxing athletes have an opportunity to participate.

There can be no doubt that the amendment of the Selection Procedures after the conclusion of the 2010 National Championships and at least two events into the series of designated tournaments leading to the anticipated July 2011 box-off denied a large number of athletes the opportunity to compete for selection to the Pan American qualifying tournaments. It is not enough to argue, as did some witnesses and counsel during the hearing, that athletes who chose not to box in the National Championships, or who chose to compete in that tournament in weight classes not recognized at the Pan American Games, could have done otherwise, and that they thus effectively opted out of the selection process. That argument fails for at least two reasons. First, a meaningful decision requires advance knowledge – or at least advance notice – of the consequences of the available choices. If an athlete does not know or have reason to know that declining to enter an event or that electing to compete in one discipline instead of another will prevent him or her from qualifying to a later competition, then he or she cannot be said to have decided against seeking selection. A box-off would not be, as asserted by some witnesses, a “do over” because the individuals in question were unaware and could not know that the National Championships would some months later be considered their first and only chance. Second, and perhaps more significantly, USA Boxing’s published Selection Procedures put all athletes on notice that at the National Championships they were *not* competing for Pan-American selection, but only for the right to represent all U.S. boxers by winning slots that would be filled at the July 2011 box-off.<sup>2</sup>

USA Boxing and the National Championship winners of the Pan American weight classes from whom evidence was received argue not only that they have earned the right to compete in the AMBC qualifiers, but that to require a box-off now would improperly deprive them of that opportunity. I disagree. The only right these athletes earned at the 2010 National Championships was the privilege to fight on behalf of all Pan-American hopefuls by attempting to procure as many slots as they could. Under the Selection Procedures published and in effect at the time, they, and all the other hopefuls, would still have to box their way through the domestic qualifiers to the 2012 U.S. Olympic Team Box-Offs, to be held in July, 2011, where the competition would fill the slots that the National Champions had secured in the AMBC qualifiers. The prevailing rules did not confer a vested right to fight in the AMBC competitions

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<sup>2</sup> The 2010 National Champions who testified, and the coach of one of those athletes, expressed their unequivocal belief that winning their weight class at the National Championships qualified them for all international competitions, including the Pan-American Games if they prevailed at the AMBC qualifiers. In their view, it had always been thus and they assumed such to be the continuing case. However, at least in this instance, they were mistaken. The then published and prevailing Selection Procedures specifically provided that the *only* thing the National Champions qualified for with respect to the Pan-American Games was the right to box for slots on behalf of all U.S. boxes at the AMBC qualification events. Indeed, their National Championship victories did not even gain them entry into the July 2011 box-off, when the slots were expected to be filled. To garner that opportunity, even the National Champions had to place sufficiently high in designated national qualifying competitions.

to qualify themselves to the Pan-American Games. If a box-off is held now, the 2010 National Champions still have the opportunity to fight for places in both protected competitions: the AMBC qualifiers and the Games themselves.<sup>3</sup>

In other words, contrary to the position of USA Boxing and the 2010 National Champions who appeared at the hearing personally, by counsel or by coach, it is possible to provide all eligible USA Boxing athletes the opportunity to compete in both protected competitions, the 2011 Pan-American Games and its qualifiers. The only way to do that is to conduct a box-off in advance of the first AMBC qualifying competition.

The arbitrator is not unmindful of the burdens holding a box-off will impose on USA Boxing. Nor is he unappreciative of the concern that yet another last-minute revision to the selection process may result in appointment of less than the strongest possible cadre of boxers, at least for the first AMBC qualifying event. But the arbitrator's charge is to protect the opportunity of all athletes to participate in protected competitions, and requiring a box-off is the only way to discharge that responsibility.

The cases cited by USA Boxing and the 2010 National Champions are not to the contrary. In neither *Nieto and USA Track and Field* (AAA No. 77 190 00275 08 JENF) nor *Booth et al. and United States Rowing Association et al.* (AAA No. 30 190 259 07) were the selection system rules and procedures changed after the qualification period began. In *Beckon and US Bobsled and Skeleton Federation, Inc.*, (AAA No. 77 190 E 00105 10 JENF) a change was made in the testing of prospective sled pushers, but the procedures were amended before any testing had begun and all candidates were equally affected, so the amendment did not disadvantage any athlete disproportionately. Here, in contrast, the denomination of the National Championship winners as the only athletes eligible for selection to the Pan-American Games came long after they won their Championships and after other athletes embarked on what they were told and reasonably believed to be the path to the Games.

#### AWARD AND ORDER

The January 11, 2011 USA Boxing Athlete Selection Procedures -- Pan-American Games are null and void. USA Boxing is ORDERED to organize and conduct a single elimination box-off to select the athletes who will represent the United States in the AMBC qualifying competition series with the objective of qualifying individuals to compete in the 2011 Pan-American Games boxing competition. The box-off shall be conducted in time to send U.S.

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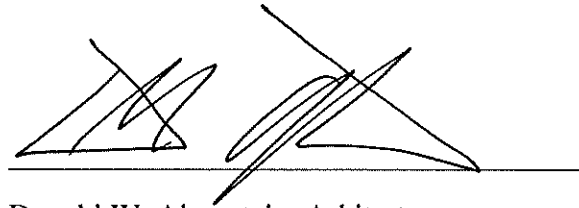
<sup>3</sup> Ironically, the principal practical argument (as opposed to legal argument) advanced for finding in favor of the 2010 National Champions was the concern that they might be injured or depleted if they were required to box-off for entry into the qualifiers. Realistically, they are better off in this respect if they box-off now than under the June 2010 Selection Procedures. Under that system, each National Champion could have been required to compete in up to three AMBC qualifying events on behalf of all U.S. boxers, and then, on their road to the Pan-American Games, each of them would still have had to qualify for, compete in and prevail at the 2012 U.S. Olympic Team Box-Offs in July, 2011. Either way, the path to the Pan-American games passes through a box-off. The only question is the timing of that competition.

boxers to the first AMBC qualifying event. USA Boxing is directed promptly and diligently to develop, publish and publicize criteria and rules for the box-off that contemplate the procedures specified in the Pan-American Games Technical Manual and that comply with Section 9 of the Bylaws of the United States Olympic Committee, the Ted Stevens Olympic and Amateur Sports Act and USA Boxing's own governance and selection documents. In so doing, USA Boxing shall work with and obtain the approval of the USOC Team Selection Working Group.

The administrative fees of the American Arbitration Association and the compensation of the arbitrator shall be borne by USA Boxing. Therefore, upon receipt from USA Boxing of the administrative fees and arbitrator compensation, AAA shall reimburse to Claimant any portion of these expenses heretofore advanced by her. Each party and all affected athletes shall bear their respective attorney fees.

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

SO ORDERED AND AWARDED at Denver, Colorado this 8th day of March, 2011.

A handwritten signature in black ink, appearing to be 'Donald W. Alperstein', written over a horizontal line.

Donald W. Alperstein, Arbitrator

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