UNITED STATES ANTI-DOPING AGENCY v. FLOYD LANDIS
American Arbitration Association No. 30 190 00847 06
Northern American Court of Arbitration for Sport Panel
RE: Motion in Limine Award; Retesting of B Samples, May 1, 2005

Christopher L. Campbell, dissenting.

I. FACTUAL BACKGROUND

On April 22, 2007, Landis' attorney, Mr. Suh, informed the Panel of the following alleged flaws in the retesting of the seven additional "B" samples:

> 1. All the urine from the other sample stages had been used up in the retesting process;
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> 2. In the retesting process, Mr. Landis' experts were routinely excluded from observing critical parts of the retesting analysis, while USADA's expert and lawyer were able to have free access and directed the retesting process of LNDD; and
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> 3. USADA's expert and lawyer decided to go home early and Landis' expert was not allowed admission to the LNDD at the direction of USADA's lawyers. Mr. Landis' expert literally sat outside the LNDD, while further testing and analysis occurred inside the laboratory.

As a consequence of these alleged shortcomings, Landis' attorney requested the right to bring a motion in limine (a motion to exclude the results of the seven B Sample tests into evidence at the hearing scheduled for May 14, 2007).

Landis' allegations are not without some factual support and represent more than just mere attorney posturing. Under the World Anti-Doping Code ¶7.2, the athlete has the "right. . .to attend the B Sample opening and analysis if such analysis is requested." In line with this rule, the Panel's Interim Award dated March 17, 2007, specifically ordered that Landis would "have the same rights of attendance and participation as were extended to him at the time of the confirmation analysis of the 'B' sample at issue in this proceeding." Landis had made the additional request that not all the B Samples be used

so that he could do independent testing on the samples. These safeguards were requested by Landis for the stated reason of allowing him the opportunity to prove his innocence and prevent against tampering with evidence.

A telephone conference was held with the parties and the Panel on April 24, 2007. In that telephone conference USADA admitted that Landis' experts were intentionally excluded from the testing of some of the seven samples by the LNDD Laboratory. USADA's rationale for this exclusion was that Landis' expert had mislead their expert into believing he would not appear for the Sunday testing of the additional samples.

Given these facts, on April 25, 2007, the Panel issued an order directing a briefing schedule on Landis' motion in limine. The briefing schedule provided the following: Landis would file his brief on April 27, 2007 and USADA would file its brief on April 30, 2007.

Landis filed his brief on April 27, 2007. The brief alleged that Landis' experts were excluded from witnessing the retesting of three of the seven B Samples. They also alleged that Landis' experts were excluded from witnessing major portions of the retesting of the remaining B Samples. The brief with an attached declaration from Landis' expert, stated that USADA was not excluded from witnessing any of the retesting.

At around 12:10 a.m. Pacific time on May 1, 2007 USADA submitted its brief to the Panel. Five hours later, at around 5:11 a.m. Pacific time, the majority of the Panel, comprised of Richard McLaren and Patrice Brunet issued an order denying Landis' motion in limine.

As a member of the Panel, I was never informed that the Panel was going to issue an order within five hours of the submissions of the briefs. I was never consulted about the order. I was never given an opportunity to deliberate with the Panel regarding the order.

As I understand the sequence of events, one member of the Panel drafted a proposed order and sent it to the other member of the Panel. The proposed order was not sent to me. After the Panel members had the proposed draft, they had a telephone conference between themselves regarding the order without notice to me, my knowledge or inclusion.

When I reviewed my e-mails on May 1, 2007, I learned along with the parties that the Panel had issued its ruling on Landis' motion in limine. I confirmed that the majority of the Panel had in fact deliberated on, drafted and issued an interim award without my inclusion in the process. It is doubtful that the Panel even had time to review USADA's brief. I do not know why there was such a rush to judgment given the serious nature of the allegations and the admissions made by USADA.

II. LIMITATIONS OF MY DISSENT

I am writing a dissent limited to the issuance of the May 1, 2007 award. I have not yet reviewed USADA's brief because the Panel has already issued its order and I have prioritized writing this dissent. Therefore, I withheld expressing any opinion regarding the ultimate merits of Landis' motion until proper procedures are followed.

III. LEGAL ANALYSIS

Arbitrators must provide a "fundamentally fair" hearing. Fundamental fairness means adequate notice, hearing on evidence and impartial decisions by arbitrators.

Carpenters 46 No. California Counties Conference Board v. Zcon Builders (9th Cir. 1996) 96 F3d 410, 413.

The three-member Panel is a system under the USADA Protocol and CAS rules. It is designed to provide each party in the dispute, the athlete and the organizations (in this case USADA), the right to select one arbitrator. Ideally, those two arbitrators select the third arbitrator as the chair of the Panel. This Panel is then entrusted with the duty to hear all of the evidence in the case and deliberate on the facts and the law before reaching a decision. This very important process is put in place to protect against bias.

Regardless of the merits of Landis' position, the Panel does not have to rule in his favor. The Panel can be right or wrong. Even a wrong decision is part of the legitimate, inherent risk of arbitration. *Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1, 11, 10 Cal. Rptr. 2d 183,188.

What the Panel cannot do is refuse to consider a party's arguments or exclude a party-appointed arbitrator from a legitimate, deliberative process. Courts have required that three-member arbitration panels meet for deliberation so that full consultation may be had. *American Eagle Fire Inc. Co. v. New Jersey Ins. Co.*, 240 N.Y. 398; 148 N.E. 562 (1925). All should meet and hear the proofs but the report of two is valid unless the third has been excluded from participation in their deliberations without fault on his part. *Id.;* See also *Parker v. McCaw* (2005) 125 Cal. App. 4th 1494, 24 Cal. Rptr. 3d 55. A three-arbitrator panel allows the arbitrators to hear, consider, and weigh the evidence and arguments presented by the parties, and to participate in consultation and deliberation collectively. *Parker* 125 Cal. App. 4th at 1506; See *also Davey Three*

Surgery Company v. International Brotherhood of Electrical Workers, Local 1245 (1976) 65 Cal. App. 3d 440, 135 Cal. Rptr. 300 (citing *Simons v. New Syndicate* (1956) 152 N.Y.S.2d 236).

The action of the majority in excluding a party-appointed arbitrator from the deliberative process is unprecedented and wholly inappropriate. It sends a clear message that the majority is unwilling to hear and consider valid arguments regarding a dispute and undermines the integrity of the arbitration process and the decision(s) resulting therefrom. This violates the notion of fundamental fairness and should give the party who has experienced such unfair treatment cause for concern.

Dated: May 3, 2007

Christopher L. Campbell, Esq.