

**USA SWIMMING
NATIONAL BOARD OF REVIEW**

STEVE KNIGHT,)
)
Petitioner)
)
v.)
)
ROCHESTER SWIM CLUB ORCAS, INC.,)
)
Respondent.)
_____)

STATEMENT OF DECISION

The National Board of Review Panel consisting of James Crampton, Edwin W. Duncan and Steve Thrall ("NBR Panel") conducted evidentiary hearings in this matter on April 24 and 26, 2001. The proceeding was conducted on a *de novo* basis because the record before the NBR Panel was not considered to be complete and because the NBR Panel has the authority to conduct a *de novo* hearing pursuant to Rule 401.8.3 of the USA Swimming Rules and Regulations.

A. Persons in Attendance

The individuals in attendance during the evidentiary hearings were:

1. NBR Panel

James Crampton

Edwin W. Duncan

Steven Thrall

2. Petitioner

Robert G. Benner of Goodman, Guzinski & Benner, P.A., attorneys for

Petitioner Steve Knight

Steve Knight

3. Respondent

Robert M. Stahl of Wendlund & Utz, Ltd., attorneys for Respondent

Rochester Swim Club Orcas, Inc.

Ellen Youngers, President, Rochester Swim Club Orcas, Inc.,

4. Others

The following nonparties requested that their attendance be noted for the record:

Jack Boder, Administrative Vice Chair, Minnesota Swimming, Inc.

David Villafana, Board Member, Minnesota Swimming, Inc.

Dr. William Shaughnessy

Conrad Schiebel

Dave Knodel

Judy Rae

John Sfire

Jim Stewart

Steve Varney

Joel Cyganiewiz

B. Written Evidence.

The written evidence consists of:

1. The letter from Steve Knight to the Executive Director of USA Swimming, dated November 12, 2000, together with the enclosures referred to therein;
2. The letter from Roger M. Stahl to the Executive Director and to the Chair, National Board of Review, of USA Swimming, dated March 9, 2001, together with the enclosures referred to therein;
3. The letter from Steve Knight to the Chair, National Board of Review, of USA Swimming dated March 29, 2001, together with the enclosures referred to therein;
4. The letter from Roger M. Stahl to the Executive Director and to the Chair, National Board of Review, of USA Swimming dated April 17, 2001, together with the enclosures referred to therein;
5. The letter from Robert G. Benner to *inter alia* the Chair, National Board of Review, of USA Swimming dated April 18, 2001, together with the enclosures referred to therein; and
6. The Joint Stipulation of Facts dated April 24, 2001, as corrected so that Fact No. 5 includes the phrase "to Rochester Swim Club Orcas, Inc.," immediately following the word "transferred" on the third line thereof.

C. Witnesses

Each party presented live testimony during the hearing and no witness was barred from testifying. Each witness was sworn to tell the truth under the laws of the State of Minnesota (the State in which each witness was located) prior to giving testimony. Each witness was examined by Counsel for Petitioner, Counsel for Respondent and by the individual NBR Panel members. Since the proceedings were recorded and took in excess of eight hours, the tape recording is the official record of the testimony, and the testimony is not summarized in this Statement of Decision.

The witnesses were:

Steve Knight

Dr. William Shaughnessy

Tim Mann

Ellen Youngers

John Sfire

Jim Stewart

Conrad Scheibel

Natalie Kuramoto

D. Closing Argument

Both parties waived oral closing argument and elected instead to submit written argument. Petitioner submitted closing argument by letter from Robert G. Benner to *inter alia* the Chair, National Board of Review, of USA Swimming, dated April 30, 2001. Respondent submitted closing argument by letter from Roger M. Stahl dated April 30, 2001, to the NBR Panel.

In addition, the Chair of the NBR Panel ruled at the hearing on April 24, 2001, that those portions of Mr. Stahl's letter dated April 17, 2001, and of Mr. Benner's letter dated April 18, 2001, which consisted of argument would be considered only as argument rather than as evidence.

E. Statement of Issue

The issue presented in this case is stated in the Notice of Hearing from the Chair, National Board of Review, dated January 28, 2001, as follows:

Did the Minnesota Swimming Board of Review err when it decided that the Rochester Swim Club Orcas, Inc. "is, in the venue of competitive swimming, materially the same club" as the Rochester Swim Club, Inc. and that it must be considered the same club for the purposes of MSI Bylaws Sections 602.1 and 602.1A?

F. Findings of Fact

The NBR Panel makes the following Findings of Fact:

1. The Rochester Swim Club, Inc. ("RSC"), was incorporated as a nonprofit corporation under the laws of the State of Minnesota in 1966. Prior to 1999, RSC obtained its own taxpayer identification number and was qualified as a 501 (c)(3) organization by the Internal Revenue Service.
2. RSC was a Club member of USA Swimming (or its predecessor in interest) from about 1966 through 2000.
3. The Bylaws of RSC provided that its Board of Directors was to be elected by members of RSC and that the RSC Board of Directors could create an Executive Committee.
4. The last election of the RSC Board of Directors was in the Fall of 1999.
5. The laws of the State of Minnesota require that every Minnesota nonprofit corporation file an annual registration with the State of

Minnesota [Minn. Stat. §§ 317A.821 and 317A.827] and, in the event a nonprofit corporation fails to make such filings, the corporation would be deemed administratively dissolved [Minn. Stat. § 317A.821].

6. The laws of the State of Minnesota further provide that a nonprofit corporation organized prior to 1987 which is deemed dissolved for failing to make the filings required by Minnesota law can be reinstated by making the filings and by paying a fee of \$25.00 [Minn. Stat. § 371 A; letter from Minnesota Secretary of State dated March 23, 2001].
7. RSC failed to make the annual filings required by Minnesota law and, as of December 31, 1997, was deemed dissolved under Minnesota law.
8. RSC could have been reinstated under the laws of the State of Minnesota by filing the forms and paying the necessary fees.
9. John Sfire is a coach member of USA Swimming and was the Head Coach of RSC from about 1992 to June 26, 2000.
10. On about February 9, 2000, John Sfire prepared and filed with the State of Minnesota Articles of Incorporation forming the Rochester Swim Club Orcas, Inc. ("Orcas"), as a Minnesota nonprofit corporation. At that time Sfire formed the Orcas, he was Head Coach at RSC.
11. At the time Sfire formed the Orcas, RSC was registered and functioning as a USA Swimming Club member, had its own taxpayer identification number, and had its own qualification from the Internal Revenue Service as a 501 (c)(3) organization.

12. Prior to June 26, 2000, John Sfire prepared Bylaws for the Orcas which provided *inter alia* that the Orcas Board of Directors would not be elected by its members. Instead, its initial Board was appointed by the incorporator (John Sfire) and the Orcas Bylaws provided that any replacements to the Board were to be appointed by the then sitting Board of the Orcas.
13. Prior to June 26, 2000, Sfire obtained a taxpayer identification number for the Orcas which was different from the taxpayer identification number for RSC, and obtained from the Internal Revenue Service a new qualification of the Orcas as a 501 (c)(3) organization which was separate from the qualification of RSC as a 501(c)(3) organization.
14. Prior to June 26, 2000, the formation of the Orcas by John Sfire was known only by a limited number of the RSC Board members [Ellen Youngers, Jim Stewart, Dave Knodel and John Sfire] and was not known by any members of or athletes attached to RSC.
15. The formation of the Orcas was done without the knowledge or authorization of RSC, the RSC Board or any Committee of the RSC Board. Certain members of the RSC Board [Youngers, Stewart, Knodel and Sfire] had knowledge of Sfire's actions and contended they were acting as members of the Executive Committee of the RSC Board. The then current RSC Board, however, had not created an Executive Committee and these individuals were not acting on behalf of RSC.
16. Except for those RSC Board members identified in Finding No. 14, no members of RSC and no athletes attached to RSC had knowledge of or had authorized the formation of the Orcas.

17. Prior to June 26, 2000, there had been problems between John Sfire and certain members of the RSC Board as well as problems between John Sfire and certain members of RSC.
18. Prior to June 26, 2000, the Minnesota Attorney General had been investigating RSC and had concluded that there had been a problem with respect to the handling of certain funds. The investigation of the Minnesota Attorney General was also concerned with the failure of RSC to keep accurate records and accounts and because of supposed misrepresentations made by the RSC Board to RSC's members on May 28, 1999 and August 6, 1999.
19. A few days prior to June 26, 2000, Natalie Kuramoto (a member of the RSC Board) contacted the Office of the Attorney General to ascertain the status of the investigation. When this was learned by John Sfire, he decided to resign as coach of RSC and start coaching with the Orcas. Sfire then convinced the other RSC coaches that they should simultaneously resign with him and start coaching at Orcas.
20. On June 26, 2000, there was an emergency meeting of the RSC Board of Directors to consider what it should do since John Sfire had announced that he and all the other RSC coaches were resigning immediately, that he had formed a new swimming club (the Orcas), and that he and the other RSC coaches would start coaching for the Orcas.
21. At the June 26, 2000, meeting of the RSC Board, the resignations of all RSC coaches were accepted. There was no action by the RSC Board or anyone with authority to act on behalf of RSC to reinstate the former RSC coaches.

22. Prior to the June 26, 2000, meeting of the RSC Board, Ellen Youngers consulted an attorney, and was supposedly told that the only recourse for RSC was to wind-up its affairs. Youngers had the attorney prepare a form of Resolution transferring all of the assets of RSC to the Orcas and authorizing the RSC Board to wind up RSC's affairs. There were no letters or memoranda from the attorney to the RSC Board and he never appeared before the RSC Board to discuss the alternatives. The attorney was unable to testify before the NBR Panel because of health problems. It is unknown whether the attorney consulted by Ms. Youngers considered whether RSC could be reinstated under Minnesota law as the Minnesota Secretary of State so advised by letter dated March 23, 2001.
23. At the RSC Board meeting on June 26, 2000, John Sfire tendered his resignation as head coach along with the resignation of the other coaches, advised the RSC Board that he had formed a new club named Rochester Swim Club Orcas, Inc., at which he and the former RSC coaches would be coaching, and that he would change the name of the new club if RSC so requested. Mr. Sfire also provided the RSC Board one copy of the Orcas' Bylaws which materially differed from the RSC Bylaws *inter alia* with respect to member voting rights.
24. The RSC Board then voted to accept the resignation of Sfire and the other coaches, to transfer RSC's assets to the Orcas, and to wind-up the affairs of RSC. The RSC Board did not consider whether RSC could be reinstated under Minnesota law.
25. The RSC Board did nothing further to wind-up the affairs of RSC.

26. The Orcas informed Minnesota Swimming, Inc., by letter dated June 27, 2000, that the RSC swimmers should be transferred to it with ten exceptions.
27. In July 2000, the Orcas formed its permanent Board of Directors. The Orcas Board consisted of all of the prior RSC Directors, except Dr. William Shaughnessy, Conrad Schiebel and Natalie Kuramoto.
28. None of the swimmers of RSC or the Orcas, and none of the members of RSC or the Orcas (excluding therefrom the RSC Board members), had any information about the change from RSC to the Orcas and simply believed that the Orcas was a continuation of RSC.
29. None of the members of RSC were informed that RSC could have been reinstated under Minnesota law by filing certain documents and by paying a \$25.00 fee.
30. None of the members of RSC were advised that they had lost the right to elect members to the Orcas Board prior to being transferred from RSC to the Orcas.
31. None of the members of RSC were asked whether they wanted to be transferred from RSC to the Orcas; the transfer was done without their knowledge.
32. Steve Knight's son (Christopher Knight) was a member of Minnesota Swimming and USA Swimming during the year 2000 and last competed for RSC in February 2000. Steve Knight's son was one of the ten RSC swimmers who was not transferred to the roster of the Orcas.

G. Conclusions

1. Knight Has Standing.

The NBR Panel concludes that Steve Knight has the standing necessary to bring this appeal. His son was a registered athlete of Minnesota Swimming in 2000 and was affected by the creation of the Orcas. Moreover, the results of the team scoring at the Minnesota Long Course Championships for 2000 were affected by the participation of the Orcas, thus having an impact on all swimmers registered with Minnesota Swimming, including Christopher Knight. Finally, Christopher Knight was affected by involuntarily having to change his club affiliation. Based on the foregoing, Steve Knight as father of Christopher Knight has standing.

2. There Has Been No Denial Of Due Process.

The Orcas contend there had been a denial of due process because of the lack of notice or right to participate in the proceedings conducted by the Minnesota Swimming Board of Review. The record before the NBR Panel does not show the basis for any supposed due process violation by the Minnesota Swimming Board of Review and the Orcas offered no evidence on the issue. In any event, this NBR proceeding was conducted *de novo*, all parties were given adequate notice and the right to present any and all evidence before this NBR Panel which they deemed appropriate, and all parties were given the right to cross-examine, thereby eliminating any concerns about due process. The Orcas have been provided due process.

3. The Minnesota Swimming Board of Review Erred.

The NBR Panel concludes that the Minnesota Swimming Board of Review erred when it decided that RSC is materially the same club as the Orcas in the venue of swimming.

RSC and the Orcas are not the same entity under the laws of the State of Minnesota. This conclusion, however, is not controlling and the NBR Panel agrees with the interpretation provided by B. Wells O'Brien, the General Counsel of USA Swimming, in his memorandum of August 31, 2000, in which he stated that the question whether one

club is the same as another club does not depend on State law, because the form and structure of a club can change and evolve with the passage of time and changing circumstances. The issue is one of intent.

The intent in this case was to form a **new** club as demonstrated by the evidence. First, the formation of the Orcas was done surreptitiously by John Sfire and certain RSC Board members. Second, the RSC members were given no notice or choice, particularly a choice about the loss of their voting rights. Third, John Sfire admitted that the clubs were separate and even offered to change the Orcas name if RSC so desired. Fourth, the complicated and elaborate set of events used to justify the transfer of assets and swimmers from RSC to Orcas was motivated by the desire to eliminate three Individuals from the RSC Board and ten swimmers from the team because they had apparently questioned John Sfire's policies, and further motivated by John Sfire's goal that there be no member voting on a team coached by him. Fifth, there was no crises which required action without first informing and consulting those affected - the athletes and members of RSC. The supposed crises was contrived and intended to terminate RSC (a member controlled team) and transfer its assets to Orcas (a team in which members have no rights as to governance).

In the venue of competitive swimming, RSC and the Orcas are **not** the same club.

H. Penalty

The most difficult aspect of this case is the determination of the appropriate remedy.

Since the athletes who represented the Orcas in 2000, particularly at the Minnesota State Championship, had no knowledge of the circumstances regarding the creation of the Orcas and the events resulting in their transfer from RSC to Orcas, and since to the extent they inquired, the athletes and members were told that the Orcas was simply a continuation of RSC, no penalty should affect any of their individual or relay

swims or results. Rule 203.3 of the USA Swimming Rules and Regulations is deemed not to apply because the registered athletes and their parents acted without knowledge and innocently, and in reliance upon what the Orcas coaches and Board were advising when they were asked.

The conduct of those who formed Orcas and ended RSC was deceptive and manipulative. Their goal was to force certain swimmers out of swimming in the City of Rochester and to deprive the RSC members of their corporate governance by eliminating voting rights and blackballing certain RSC Board members. The change eliminated fundamental voting rights without the knowledge or consent of those whose rights were so affected. They justified their actions with a contrived emergency.

This NBR Panel recognizes that the passage of time and the limited scope of this appeal render it impossible to return events to the status quo ante. This NBR Panel does believe, however, that those affected should be informed about this Decision. Accordingly, it is ordered that Minnesota Swimming, Inc., send the letter attached hereto as Exhibit 1 (a) to all athletes who were registered with RSC in 2000, (b) to all athletes registered with the Orcas in 2000 and 2001, and (c) to all group members of Minnesota Swimming, Inc. It is further ordered that the Orcas receive no team points or team awards in any USA Swimming sanctioned competition which occurred during the 120 day period from July 1, 2000 through October 28, 2000, and that the official results of any such team competitions be corrected consistent with this Order.

Each side shall bear its own costs.

I. Right to Appeal

The right to appeal this decision is to the USA Swimming Board of Directors in accordance with Rule 401.9 of the USA Swimming Rules and Regulations. Rule 401.9 provides:

Any real party in interest, including any officer of the Corporation or the Executive Director, may appeal to the Board of Directors for

review of any decision of the National Board of review within thirty (30) days of the postmark date of the mailing of its written decision. The petition on appeal is to be served upon the Executive Director and shall be accompanied by a \$50 filing fee payable to USA Swimming. The petition shall set forth the grounds for appeal, citing factual and legal issues in as much detail as possible. USA Swimming Board of Directors may, in cases where USA Swimming is not a party, assess fees and costs against the losing party. Unless the Board of Directors by majority vote decides otherwise the review by the Board of Directors shall be on the basis of the record and written briefs and shall not be a *de novo* hearing.

Dated this 10th day of May, 2001.

National Board of Review

James Crampton

Edwin W. Duncan

Steve Thrall

EXHIBIT 1

[TO BE PLACED ON STATIONERY OF

MINNESOTA SWIMMING, INC.]

[insert Date]

This letter is being sent to advise you of the decision by the National Board of Review of USA Swimming regarding the question whether the Rochester Swim Club, Inc., is the same club as the Rochester Swim Club Orcas, Inc. The National Board of Review decided unanimously on May 10, 2001, that they are not the same club in the venue of competitive swimming.

The National Board of Review further ordered, based on the circumstances which resulted in the transfer of the assets and certain athletes from Rochester Swim Club, Inc., to Rochester Swim Club Orcas, Inc., that the Rochester Swim Club Orcas, Inc., shall receive no team points and no team awards in any USA Swimming sanctioned competition which occurred during the 120 day period from July 1, 2000 through October 28, 2000, and that the official results of any such team competition be corrected consistent with this Order.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed by Arter & Hadden LLP in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5959 Topanga Canyon Boulevard, Suite 244, Woodland Hills, California 91367.

On May 18, 2001, I served the foregoing document described as **STATEMENT OF DECISION** on the interested parties in this action by placing the same in sealed envelopes addressed as follows:

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Steve Knight
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Rochester Swim Club Orcas, Inc.
Attention: Ellen Youngers, President
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Jack Boder
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I am readily familiar with Arter & Hadden's practice of collection and processing correspondence for mailing. Under that practice, mail is deposited with the U. S. postal service on the same day as it is prepared with postage thereon fully prepaid at Woodland Hills, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing, as set forth in this declaration.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct and was executed on May 18 001, at Woodland Hills, California.

Michelle Dangott

Proof of Service