



Arbitration Tribunal
International Triathlon Union (ITU)
Avenue de Rhodanie 54
1007 Lausanne, Switzerland

Felipe Barraza Rojas vs ITU Competition Jury
of the Elite Men ITU World Cup race held in Tiszaujvaros, Hungary on July 14, 2019

DECISION

delivered by the

ITU ARBITRATION TRIBUNAL

Sitting in the following composition:

President of the Panel: Kevin S. Sullivan, Attorney-at-Law in Massachusetts, United States of America

Members of the Panel: Geneviève Pellerin, Attorney-at-Law in Ottawa, Canada

Ize Matebese, Attorney-at-Law in Lagos, Nigeria

in the appeal proceedings between

Filipe Barraza Rojas,

Appellant

Against

Competition Jury of the Elite Men ITU World Cup race held in Tiszaujvaros, Hungary on July 14, 2019,

Respondent

I. PARTIES

1. The Appellant, Felipe Barraza Rojas (hereinafter "Rojas"), is an athlete with the recognized national governing body in Chile for triathlon and its related disciplines.
2. The Respondent, the Competition Jury is the recognized body for ITU Events and other Games that do not include the Olympic Games and is constituted of three persons elected by the ITU Technical Delegate.

II. BACKGROUND FACTS

3. Though lacking the “*references identifying the source of each fact and the brief legal justification*” required by Articles 33 and 35 of the ITU/Disciplinary Rules, the Panel has considered all the facts, allegations, arguments, and evidence submitted by the parties. This decision contains the available relevant and material facts, allegations, and arguments of the parties as well as the Panel’s reasoning behind this decision.
4. The Elite Men ITU World Cup race (“the Race”) took place on July 14, 2019 in Tiszaujvaros, Hungary.
5. Rojas (#8 CHI) was disqualified by the Race Referee based on the swim segment of the race. Rojas’ contact with another athlete during the swim segment was described as follows: Rojas “*had grabbed the other athlete with their (sic) left hand/arm and pulled back the other athlete of which resulted in that athlete being impeded – he stopped mid swim and hit his head into the swim buoy.*”
6. Shortly after the race, Rojas filed an Appeal Form concerning the Race Referee’s swim penalty disqualification ruling to the ITU Competition Jury.
7. Rojas did not provide any information for the following portion of his Appeal Form:

Description of the Incident (Use additional paper if required)

Witness Details (2):

Name of Witness 1:

Name of Witness 2:

8. The ITU Competition Jury, composed of three members, heard the Appeal, deliberated, and rendered a decision.
9. The Minutes of the Competition Jury reflected that:
 - a. The Chair of the Competition Jury informed Rojas why he had been disqualified, the applicable rule [4.1 (e)(iii)¹] violated, and that the Competition Jury would review the Head Referee’s video evidence.
 - b. Rojas explained that he did not do anything intentional.
 - c. The Competition Jury retired to review the evidence and make a decision.
 - d. After reviewing the video, the Competition Jury concluded that Rojas had “*deliberately target(ed) another athlete to impede their progress, gain unfair advantage*” because he “*had grabbed the other athlete with their (sic) left hand/arm and pulled back the other athlete of which resulted in that athlete being impeded – he stopped mid swim and hit his head into the swim buoy.*”
 - e. The Competition Jury upheld the Head Referee’s decision.

¹ “4. SWIMMING: ... 4.1. General Rules: ... e.) Athletes may sportingly maintain their own space in the water: ... (iii) Where athletes deliberately target another athlete to impede their progress, gain unfair advantage and potentially because harm will result in disqualification and may be reported to World Triathlon Tribunal for potential suspension or expulsion.”

- f. The Jury explained the decision to Rojas, and agreed as a gesture of goodwill to the emerging nation of Chile, to refund Rojas' appeal fee.

III. PROCEEDINGS BEFORE THE ITU ARBITRATION TRIBUNAL

10. On the 6th of August 2019, Rojas filed a "Level 1 Appeal"² with the ITU Arbitration Tribunal. Rojas' appeal is based upon four alleged "breaches" of the ITU Competition Rules that deprived him of the opportunity to "*fairly provide (his) version of events.*" In summary the four alleged breaches are:
 - i. He was never given the opportunity to view the video footage of the incident and present his account of what happened in the water, in violation of Rule 12.8(ix). He should have had the opportunity to review and comment upon the video.
 - ii. He was never given the opportunity to present any witnesses, in violation of Rule 12.8(x). He would have presented testimony from Chilean Coach Ana Maria Lecumberri and Mick Delamotte because they have known him for years and saw the whole race.
 - iii. The Competition Jury's decision was not posted until July 31, 2019, 17 days after he requested a copy of the decision, in violation of Rule 12.8(xii)³.
 - iv. The Competition Jury dismissed Rojas' appeal, but also refunded Rojas his appeal fee, in violation of Rule 13.2(b)(ii)⁴.
11. On the 15th of August 2019, the President of the ITU Arbitration Tribunal communicated a Procedural Order to the Parties by email indicating the composition of this ITU Arbitration Panel and the following, in accordance with Article 25.2 of the ITU Disciplinary Rules:

A deadline of August 19, 2019 for Rojas and the concerned ITU Competition Jury, to determine the composition of the Panel.

A deadline until August 23, 2019 for the Competition Jury to respond to the facts, violations of rules, and arguments expressed in Rojas' August 6, 2019 Level 2 Appeal.
12. The Parties did not provide the Panel with any response within the time limits of the Procedural Order.
13. On August 27, 2019, the Competition Jury submitted the following information in response to the four breaches alleged by Rojas:
 - i. Rojas was not shown the footage initially, but was shown the footage and given a copy of the video after the Referee's decision was upheld.
 - ii. Rojas and Chilean Coach Lecumberri appeared before the Competition Jury. The "Appeal Process" was explained to Rojas. It is an athlete's responsibility to know the rules. It was up to the athlete to determine whether or not to have any witness speak.
 - iii. Rojas never asked for a written copy of the decision.

² Rojas' Level 1 Appeal filing erroneously refers to itself as a "Level 2 Appeal".

³ Rojas' "Level 2 Appeal" discusses and intended to refer to Rule 12.8(xii), but, due to a typographical error, erroneously refers to Rule "12.8(iii)".

⁴ Rojas' "Level 2 Appeal" discusses and intended to refer to Rule 13.2(b)(ii), but, due to a typographical error, erroneously refers to Rule "13.2iii".

- iv. The Competition Jury explained to Rojas that it was refunding his appeal fee as a gesture of goodwill for an emerging nation and for remuneration expenses.
14. On September 9, 2019, the Panel submitted a written Request for Additional Evidence to the parties with the following Order:

Mr. Felipe Barraza Rojas shall submit his response to all parties by reply email on or before midnight on Thursday, September 5, 2019.

The ITU Competition Jury shall submit its response to all parties by reply email on or before midnight on September 7, 2019.

15. Rojas submitted the following Additional Evidence in accordance with the Order:

Coach Lecumberri witnessed the competition jury, but she did not participate. We were not able to speak with Mick to (sic) until after the hearing. Coach Lecumberri never was asked to speak. Only Mr. Barraza spoke with the jury as the jury asked for the circumstances of the "deliberate targeting" of another athlete had occurred as he had no reconciliation of any incident. No video of evidence was shown at this moment even when Mr. Barraza asked for it to be able to properly explain his actions. It was explained that the Jury after talking to Mr. Barraza was going to review the footage and make the decision. If Mr. Barraza disagreed, he would have to proceed with a formal appeal with the Triathlon Tribunal. They did not deny any witness the opportunity to speak as the Jury only ask Mr. Barraza (sic) version on the matter. There was no opportunity for others to speak as the Jury after hearing Mr. Barraza told them that they needed time alone to make the decision. The Competition Jury did not deny any witness the opportunity to speak. Rojas was informed of the Competition Jury's decision "straight after the meeting" and received a copy of the written decision on August 31, 2019. The full explanation of the process and rules was not clear by Mr. Barraza in the post-race stressed state, but post competition Mr. Barraza is clear on the rules. There was no opportunity to review the video evidence and explain his actions to the competition jury before the decision was made. By email Mr. Barraza contacted ITU to get the minutes of the protest and the final decision the same day 14th of July 2019.

16. The Competition Jury not only filed its initial response to the Procedural Order four days late (see paragraphs 11 and 13 above), but also did not respond at all to the Panel's Request for Additional Evidence.⁵
17. Therefore, the information and evidence before the Panel was limited to:
- a. Rojas's July 14, 2019 Appeal Form requesting a review of the Referee's decision
 - b. The July 14, 2019 Meeting Minutes of the Competition Jury.
 - c. The August 6, 2019 Level 2 Appeal by Rojas.
 - d. The Competition Jury's August 27, 2019 additional information.
 - e. Rojas' September 4, 2019 Additional Evidence.

⁵ In the future, the Panel suggests that Competition Juries need to respect the appeal process, understand the importance of their role in a Level 1 Appeal, and honor their obligations that extend beyond the day of the competition.

- f. The video footage of the applicable portion of the swim segment of the Race.

IV. LEGAL ANALYSIS

A. JURISDICTION

18. The ITU Arbitration Tribunal has jurisdiction of this Appeal under:

- Article 37.3 of the ITU Constitution, which provides that: *“The Arbitration Tribunal will resolve any appeal to decisions from the Competition Juries or from any ITU panels other than the Discipline Tribunal, as outlined in the ITU Competition Rules.”*
- Article 2.2 of the ITU Disciplinary Rules that provides that *“The Arbitration Tribunal recognizes recourses submitted to it according to article 37 paragraphs 37.3 and 37.4 of the ITU Constitution.”*
- Article 13.2. (b) (i) of the ITU Competition Rules, states that *“... an athlete may appeal the decision of the Head referee to the ITU Appeal Panel.”*

19. Based on those provisions, this ITU Arbitration Panel has jurisdiction to decide this Appeal.

B. APPLICABLE LAW

18. Pursuant to Article 34 of the ITU Constitution, *“The governing law of the ITU shall be Swiss law”*. Article 1 of the ITU Disciplinary Rules states that *“These rules set out the applicable procedure before the ITU, within the limitations of Swiss law”*.

19. As the Appeal against the ITU Competition Jury concerns a decision regarding an incident during a competition, the ITU Competition Rules and ITU Disciplinary Rules govern.

C. SCOPE OF PANEL’S REVIEW

20. According to Article 16 of the ITU Disciplinary Rules, *“The Panel has full power to review the facts and the law”*.

D. ADMISSIBILITY

21. Article 31 of the ITU Disciplinary Rules requires the appeal to be submitted by mail or by email at ITU headquarters, no more than thirty (30) days following the communication of the contested decision to the Appellant.

22. Rojas filed his Appeal by mail with the ITU headquarters on the 6th of August 2019, 23 days after the contested decision.

23. The report was timely submitted.

24. Therefore, the Panel determines the Appeal is admissible.

E. DISCUSSION

25. The parties are required to know and to comply with the applicable rules. The Panel finds it unfortunate that the parties did not submit more facts identifying the source of each fact, supporting documentation (e.g. affidavits), and exhibits with their respective factums to meet the “minimum” requirements of Articles 33 and 35 of the ITU Disciplinary Rules.
26. With this decision, the Panel emphasizes the importance of procedural compliance; that all Parties to an appeal must provide the Arbitration Panel with specific facts with references identifying the source of each fact, supporting documentation (e.g. affidavits), and legal arguments to warrant reversing or upholding the Competition Jury’s decision.
27. Nevertheless, the Panel has analyzed the disqualification based upon the information submitted by the parties and determined that the Referee’s Decision was a non-reviewable field of play decision.
28. The following is the Arbitration Panel’s field of play analysis based upon the limited information submitted by the parties and the video.

A. Field of Play:

29. Article 13.1(b)(ii) of the Competition Rules states: *“Decisions from any Competition Jury and any ITU panel may be appealed to the ITU Arbitration Tribunal, except: ... Field-of-Play decisions.”*
30. The main issue to solve is whether the physical contact between Rojas and another athlete during the swim portion of the competition was unfair or constituted unsportsmanlike conduct deserving a disqualification. In other words, whether Rojas deliberately targeted the other athlete *“to impede their progress, gain unfair advantage and potentially cause harm ...”*.
31. The physical contact is obvious in the video between the 44th second and the 46th second. In the Race Referee’s field of vision, the Appellant’s left arm is extended to his left side and in contact with the left head and shoulder of the other athlete. That initial accidental contact does not appear to have been deliberate.
32. The contact does not end there, however. After that initial contact, Rojas did not immediately move apart from the other athlete⁶. Instead, Rojas continued to press his left arm down on the other athlete with enough force to cause the other athlete to submerge, stop forward progress, and then stop after colliding with the swim buoy.
33. Even though the initial contact can be seen as accidental, the subsequent prolonged follow through contact cannot. The follow through contact clearly impeded the other athlete’s progress, provided Rojas with an unfair advantage, and had the potential to cause harm to the other athlete.⁷

⁶ ITU Competition Rule 4.1(e)(i): *“Athletes may sportingly maintain their own space in the water: (i) Where athletes make accidental contact in the swim and them immediately afterwards move apart no penalty will be incurred; ...”*.

⁷ ITU Competition Rule 4.1(e)(iii): *“Where athletes deliberately target another athlete to impede their progress, gain unfair advantage and potentially cause harm will result in disqualification ...”*.

34. Based upon the video, there is no doubt the Race Referee present on the field-of-play observed the physical contact (and Rojas has not asserted, that the Race Referee did not observe the physical contact).
35. The decision of the Race Referee to disqualify the Appellant constitutes a field-of-play decision. That decision was made by the Race Referee in the performance of his duties and within the discretion inherent to his function.
36. According to the case law of the Court of Arbitration for Sport (see e.g. CAS 2004/A/727; CAS OG/12/010), decisions of referees are not reviewable unless there is evidence that the referee rendered (i) a decision in bad faith, (ii) an arbitrary decision or (iii) a decision, made not in appreciation of the state of affairs on the field at the time but in application of a wrong rule, or made by failing to apply the correct rule to the factual circumstances.
37. In the present case, there is no evidence that indicates the Race Referee acted in bad faith or in an arbitrary manner. In fact, the Appellant made no such claim.
38. There is also no evidence that the Race Referee's decision to disqualify was made by application of a wrong rule, or made by failing to apply the correct rule to the factual circumstances.
39. What remains for determination is whether or not the four procedural "breaches" alleged by Rojas deprived him of due process (i.e. the opportunity to present evidence that could have altered the Competition Jury's decision).

B. Alleged Breach 1: Rule 12.8(ix); the Video:

40. Rule 12.8 (ix) states that: "*The protestor and the accused will be given adequate time to give their accounts of the incident*".
40. The Competition Jury reviewed the video before it arrived at its decision. For that reason, the Panel agrees that the Competition Jury should have provided Rojas with an opportunity to review and comment upon it.
41. Nevertheless, Rojas has now had ample opportunity to view the video. He was provided with a copy of the video after the Competition Jury informed him of its decision. Although Rojas has had several weeks to review the video, he did not recite any facts identifying any portions of the video to support his appeal. Rojas also did not provide this Panel with any evidence that had he viewed the video earlier the Competition Jury may have come to a different conclusion, or that he was harmed in any way as a result of not seeing the video before the Competition Jury heard his protest.
42. The Panel finds that procedural error involving the video to be an inconsequential harmless error.

C. Alleged Breach 2: Rule 12.8(x); Witnesses:

43. Rule 12.8(x) provides that: "*Witnesses (up to two each) may speak for up to three (3) minutes each*".
44. Although Rojas' Level 2 Appeal claims that he "*was never given the opportunity to present any witnesses*", the Additional Evidence he submitted concedes that the Competition Jury "*did not deny any witness the opportunity to speak*".

45. Although not specifically raised by Rojas, Rule 12.8(viii) specifies that: “The Competition Jury Chair will explain the process and everyone’s rights”.
46. The Competition Jury’s represented to this Panel that the “*Appeal Process was explained to*” Rojas. The Competition Jury’s did not provide any description of the “Appeal Process” explained to Rojas and Coach Lecumberri. In the future, the Panel suggests Competition Jury’s obtain written confirmation of the specifics of the process and the rights explained before the commencement of the hearing (e.g. a check list that describes the process and all of the rights explained) for the appellant to date, sign and/or initial.
47. Rojas did not provide this Panel with specific facts with references identifying the source of each fact and legal arguments to question that representation.
48. Based on the evidence submitted by the parties, the Panel does not find any procedural error with respect to the witnesses.

D. Alleged Breach 3: Rule 12.8(xii)⁸; Decision Posting and Delivery:

49. Rule 12.8(xii) reads: “*The decision will be posted immediately and delivered in writing to the parties upon request.*”
50. The Competition Jury notified Rojas of its decision in a timely manner on July 14, 2019 after the protest hearing.
51. The Competition Jury’s decision is noted on the bottom of the second page of the Appeal Form submitted by Rojas as “UPHELD” and “Amount of fee withheld/refunded: 50 EURO’S – REFUNDED N GOOD FAITH”, with no other explanation or further information about the decision.⁹
52. Rojas received a copy of the Competition Jury Meeting Minutes on August 31, 2019.
53. Despite the Panel’s request, neither party submitted any other information regarding the timing and location of the posting of the decision.
49. Based on the evidence submitted, the Panel finds that any procedural error regarding the posting and delivery of the decision was an inconsequential harmless error.

E. Alleged Breach 4: Rule 13.2(b)(ii)¹⁰; Appeal fee refund:

50. Rule 13.2(b)(ii) requires that appeals “be accompanied by a fee of \$50 USD or equivalent. It will be refunded if the appeal is successful. If the appeal is denied, there will be no refund and the money will be retained by ITU.”
51. Although that Rule does not provide for the refund of the fee when an appeal is denied, it also does not prohibit a refund when an appeal is denied.

⁸ Rojas’ “Level 2” Appeal discusses and intended to refer to Rule 12.8(xii), but, due to a typographical error, erroneously refers to Rule “12.8(iii)”.

⁹ In the future, the Panel suggest that the Competition Jury document the time, date and location of the posting of each decision (e.g. The “Part 2 Official use only” section on the bottom of the second page of the Appeal Form could be amended to provide for that information).

¹⁰ Rojas’ “Level 2 Appeal” discusses and intended to refer to Rule 13.2(b)(ii), but, due to a typographical error, erroneously refers to Rule “13.2iii”.

52. On July 14, 2019, the Competition Jury notified Rojas of its decision that his appeal fee would be refunded to him. The Competition Jury also documented its refund decision on the Appeal Form with the explanation "REFUNDED IN GOOD FAITH".
53. In addition, the Competition Jury Meeting Minutes explains that the Competition Jury "agreed that due to Chile being an emerging nation that as a gesture of goodwill to return the 50 Euro's."
54. Based on the evidence submitted, the Panel finds that any procedural error regarding the refund of the appeal fee was harmless and a benefit to Rojas.
55. For all these reasons, the Panel determines that the decision of the Race Referee cannot be changed, the decision of the Competition Panel is confirmed, and the appeal is dismissed.

V. COSTS

56. The Panel decides not to award costs.

VI. APPEAL FEE

57. Article 31.4 provides that the amount of the appeal fee "paid will only be refunded if the appeal is successful."
58. Rojas' Level 2 Appeal raised substantive claims (i.e. he did not deliberately target any athlete) and procedural claims.
59. The Panel finds that, while Rojas' Level 2 Appeal failed on the grounds that there is no evidence that the referee rendered his field of play disqualification decision (i) in bad faith, (ii) arbitrarily or (iii) not in appreciation of the state of affairs on the field at the time but in application of a wrong rule, or made by failing to apply the correct rule to the factual circumstances, the Appeal succeeded in demonstrating procedural shortcomings in the Competition Jury hearing and he should, therefore, be refunded one half of the appeal he fee paid.

ON THESE GROUNDS

The Panel of the ITU Arbitration Tribunal rules that:

1. The Appeal is admissible pursuant to Articles 33 and 34 of the ITU Disciplinary Rules.
2. The Referee's decision was a Field of Play decision made in good faith, without any evidence that it was made arbitrarily, or with application of an incorrect rule.
3. The Referee decision and its confirmation by the ITU Competition Jury is binding, the Appeal by Rojas is dismissed.
4. ITU is ordered to refund Rojas one half of the appeal fee he paid.

Made in Lausanne, on September 20, 2019

ITU ARBITRATION TRIBUNAL



Kevin Sullivan, President of the Panel



Geneviève Pellerin, Member of the Panel



Ize Matebese, Member of the Panel

Appeal to CAS

According to Articles 38 and 39 of the ITU Constitution, and Articles 45 of the ITU Disciplinary Rules, any dispute relating to their application or interpretation, after internal recourses have been exhausted, may be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration. The request for arbitration must be filed with CAS no later (21) twenty-one days following the receipt of the decision that is the subject of the arbitration procedure.