

AAA/CAS North America 2002 Brooke Blackwelder and USADA No. 30 190 00012 2

ARBITRAL OPINION & AWARD

delivered by the
American Arbitration Association
NORTH AMERICAN COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Walter G. Gans, Attorney-at-law, New York, New York, USA
Arbitrators: Prof. Richard H. McLaren, Barrister, London, Ontario, Canada
Maidic Oliveau, Attorney-at-law, Los Angeles, California, USA

in the arbitration between

Brooke Blackwelder, Boise, Idaho, USA

represented by herself

- Claimant -

and

United States Anti-Doping Agency ("USADA"), Colorado Springs, Colorado, USA

represented by Richard R. Young and Travis T. Tygart, Attorneys-at-law, Colorado Springs, Colorado

- Respondent -

I. PARTIES CONCERNED

Ms. Brooke Blackwelder ("Claimant") is a racing cyclist in the elite class category, resident in the USA.

The Respondent, USADA, is the independent anti-doping agency for Olympic sports in the United States and is responsible for conducting drug testing and adjudication of positive test results pursuant to the United States Anti-Doping Agency Protocol for Olympic Movement Testing ("USADA Protocol").

Union Cycliste Internationale ("UCI") is the international federation for the sport of cycling.

ARBITRAL OPINION

II. FACTS

II.1 UNDISPUTED FACTS

On the morning of 17 June 2001, which was the 6th stage and last day of the road cycling race, the "Hewlett-Packard LaserJet Women's Challenge Road Race" (the "HP Race") sanctioned by the UCI, the Claimant was selected randomly to, and did, provide a urine sample. The Claimant's sample arrived at the International Olympic Committee ("IOC") accredited Olympic Analytical Laboratory at the University of California Los Angeles ("UCLA Lab") on 20 June 2001. An analysis of the urine at the UCLA Lab resulted in an A sample analysis finding of the prohibited anabolic steroid, 19-norandrosterone in excess of 5 ng/ml and 19-noretiocholanoles, the cut off established by the UCI. The amount was approximately 9 times the 5ng/ml cut off. The UCLA Lab report containing its finding was sent to the UCI by fax of 17 July 2001.

UCI informed USA Cycling, the national governing body ("NGB") for the sport of cycling in the United States, of the Claimant's positive test. USA Cycling in turn informed the Claimant, who requested that the B sample be tested. The B sample was then analyzed by the same lab, and the analysis confirmed the positive results of the A sample analysis.

USADA followed the USADA Protocol and engaged in its multi-part review of the circumstances. The matter went to the USADA Anti-Doping Review Board ("Review Board"). Following the Review Board's decision USADA determined that in accordance with Article 90, Section 1, Paragraph 1, Elite (Women), of the UCI Antidoping Examination Regulations ("UCI AER") for the use of an anabolic steroid, the Claimant was subject to a disqualification from the event at which the sample was taken; a suspension for one year; and a fine of SFr. 1,000. It is from that decision that Claimant makes application to this panel of Arbitrators ("Panel") in accordance with the USADA Protocol.

By letter of 27 March 2002, supplemented by the positions taken at the 5 May 2002 evidentiary hearing, the parties agreed as follows:

1. The USADA Protocol and the UCI definition of doping, prohibited substances and sanctions will be applied ("UCI Rules").
2. The Claimant's sample analyzed by the UCLA Lab is her sample which was collected on 17 June 2001 at the HP Race.
3. The Claimant does not contest the laboratory analysis, but does, however, contest the reliability of the single or spot urine test as a method of the detection of doping. Specifically, the Claimant asserts that the hydration level of the person providing the urine sample and the specific gravity of the urine sample may affect the spot urine test's reliability for the detection of doping.
4. The Claimant's position is that the finding of approximately 45 ng/ml of 19-norandrosterone in her urine sample was the result of natural production by the Claimant. The Claimant is not claiming that the presence of 19-norandrosterone in her urine sample was caused by a dietary or nutritional supplement.
5. The Claimant does not contest the integrity of the sample collection process or the sample collection or laboratory chain of custody.

The specific gravity of the Claimant's sample was recorded at the UCLA Lab as 1.03.

During the five days prior to giving the sample the Claimant had competed at altitude and completed the 5th stage of the race at 7 p.m. Moreover, during the 6th stage, the day of testing, she had raced 80 miles in more than 90 degree temperatures.

II.2. PARTIES' SUBMISSIONS

II.2.1 Facts pleaded by the Claimant

The Claimant asserts she was dehydrated at the time of giving the sample. She claims that dehydration can and did affect the sample and distorted the lab results. She also contends that the spot or single urine test can generally be considered unreliable as a result of the dehydration of the athlete and the specific gravity of the sample.

The Claimant asserts that the lab results can be explained by the natural production of nandralone in the body from vigorous exercise over a prolonged period of time prior to giving a sample. She also asserts that her medical condition of endometriosis can contribute to the nandralone reading, particularly when an athlete is ovulating or is pre-ovulatory at the time of sampling. Finally, she claimed the combined effect of all of these factors resulted in the positive lab finding.

II.2.2 Facts pleaded by the Respondent

The IOC Analytical Criteria for Reporting Low Concentrations of Anabolic Steroids recommend certain adjustments when analyzing concentrated urine samples for low level steroids. If an adjustment is made in accordance with these IOC Criteria the concentration of nandrolone in Claimant's sample is approximately 33 ng/ml from the A sample as compared to the reported 45 ng/ml. Therefore, the specific gravity issue raised by the Claimant is a moot point, because the adjusted result remains well above the cut-off of 5 ng/ml.

The UCI Rules do not require the sanctioning body to prove the validity of the cut-off level. Nevertheless, the cut-off level has been accepted as being scientifically validated and fair. It is set to avoid detection of any natural nandrolone production. The scientific literature concerning natural production of nandrolone arising from exercise confirms that, if there is any for elite female athletes, it is well below the UCI cut-off level. Vigorous exercise does not alter these conclusions.

Earlier or later negative test results for nandrolone are not a defense to a specific, positive, test such as that performed from the sample given on 17 June 2001.

Finally, endometriosis is a not uncommon female condition. There are no studies or other evidence that support any conclusions that it causes 19-norandrosterone production at any level but in particular not at the level of the sample of the Claimant.

III. PROCEEDINGS

By letter of 1 November 2001 the Respondent advised that Claimant's positive test result was being forwarded to a panel of the Review Board for its consideration. Pursuant to the USADA Protocol the Claimant had the right to, and did, make written submittals to the Review Board.

The Review Board recommended that the matter proceed. USADA proposed in accordance with the UCI Rules: disqualification from the HP Race; a sanction of a one-year suspension; and a fine of SFr. 1,000. The Claimant chose to contest the sanctions and fine proposed by USADA through arbitration as is her right under the UCI Rules and the USADA Protocol. This AAA/CASNA arbitration panel was formed to hold the requested hearing and issue this Opinion and Award.

Pursuant to preliminary telephonic hearings which took place on 3 March and 25 April 2002, an evidentiary hearing was held on 6 May 2002 in Boise, Idaho. Present at the hearing were, in addition to the members of the Panel, the Claimant, represented by herself, and the Respondent, represented by its attorneys, Richard Young and Travis Tygart of Holme, Roberts and Owen LLP.

The following witnesses were heard at the hearing:

For the Respondent:

Dr. Don H. Catlin, Director of the UCLA Olympic Analytical Laboratory
Dr. Larry D. Bowers, USADA Senior Managing Director, Technical and
Information Resources
Ms. Louise LaLonde, UCI Drug Test Inspector (by telephone)

For the Claimant:

Sima Trapp, cyclist on local cycling team founded by Claimant
Alan Head, cycling team sponsor

The parties had the opportunity to, and did, present opening and closing arguments. Both

parties had filed pre-hearing briefs in accordance with the Panel's Procedural Orders. After closing arguments had been made, the Panel closed the hearing and informed the parties that an award would be issued within the time frame of the USADA Protocol, namely 10 days after the closing of the record.

IV. PROCEDURAL ISSUES

IV.1. ARBITRATION CLAUSE

Pursuant to the USADA Protocol Section 9.b.i. & ii., the Panel has jurisdiction to decide whether Claimant has violated the provisions of the UCI AER:

- i. If the sanction is contested by the athlete, then a hearing shall be conducted pursuant to the procedure set forth below.
- ii. The hearing will take place before the American Arbitration Association ("AAA") using a single arbitrator (or a three arbitrator panel if demanded by either of the parties) selected from a pool of the North American Court of Arbitration for Sport ("CAS") Arbitrators who shall also be AAA Arbitrators..."

The Panel was properly constituted under the USADA Protocol and has jurisdiction to make a final and binding award in respect of the parties' dispute.

IV.2. APPLICABLE LAW

The Panel is under an obligation to decide the dispute according to the applicable regulations of the federation concerned, in accordance with the USADA Protocol. The instant case is, therefore, to be decided on the basis of the UCI Rules and, more particularly, on the basis of the UCI AER (on the general application of the UCI Rules see: CAS 98/192, S. v/UCI, Award of 21 October 1998 p. 14 *et seq.*; CAS 98/181, p. 14; N. v/UCI, Award of 26 November 1998, p. 13 und CAS 99/A/239, M. v/UCI, Award of 14 April 2000, p. 7). The Panel invokes the version of the UCI AER which applied at the time the urine sample was taken. It should be noted that the UCI Rules changed as of 1 July 2001.

V. DECISION

V.1 INTERPRETATION OF THE APPLICABLE LAW

V.1.1 Provisions of UCI AER with respect to Doping

As regards doping the English version original of the UCI AER in effect as of the date of the sample submitted by Claimant contains the following provisions:

"Art. 2 The use of the pharmaceutical categories of substances and of the doping methods appearing on the list of doping agents and methods adopted by the UCI president shall be prohibited.

Participants in cycling races are required to undertake not to avail themselves of the forbidden agents and methods even if they consider that neither their sporting performance nor their health would be affected. Such considerations shall not be open to discussion.

Should a doping method be found to have been used or should the analysis or other evidence reveal the presence or administration of a doping agent or any substance likely to influence the result of the analysis, the rider shall be punished."

Part I.C. of the list of "prohibited classes of substances and prohibited methods" adopted pursuant to Article 2 of the UCI AER, which entered into force on 1st April 2000, prohibits certain anabolic steroids.

"Androgenic Anabolic Steroids:

| | |
|-----------------------|------------------------|
| ... | |
| 19-norandrostenediol | nandrolone* |
| 19-norandrostenedione | and related substances |

*As for nandrolone and its derivatives, a sample will be considered positive if the norandrosterone concentration found in the urine after hydrolysis exceeds 5ng/ml. "

The above provisions are interpreted by the Panel to mean that the finding of an anabolic steroid in an athlete's urine, with the requisite concentration level, means that a violation of the doping provisions occurred.

V.1.2 Apportionment of the Burden of Proof

Pursuant to the USADA Protocol and the UCI AER the burden of proof that a doping violation has occurred is that of USADA. It must prove the objective elements of a doping violation. If these elements are proven, then the burden of going forward with the evidence shifts to the athlete to demonstrate that a doping infraction has not taken place.

V.1.3 Provisions of UCI AER with respect to Sanction

For a doping infraction committed by an elite class rider, Article 90 Section 1, para 1, Elite (Women) of the UCI AER provides (for a first offence) for disqualification from the competition in question and a suspension of six months to one year. In addition a fine of between SFr. 1,000 and SFr. 2,000 must be imposed.

Pursuant to Article 94(2) of the UCI AER the suspension takes effect on the day following the final decision. The term of the suspension imposed does not, however, include what is called the "period of inactivity", which, for a road racing cyclist, is between 1 November and 31 January and, therefore, constitutes three months. On the other hand, pursuant to Article 94(3), any period for which the rider has already been suspended from her team because of the accusation of doping, can be offset against the suspension imposed. In this case no interim suspension had been served.

V.1.4 Higher Standard of Proof than in Civil Procedure

This is not a criminal proceeding. The principles of criminal law do not generally apply when reviewing the sanctions proposed by USADA. Such sanctions are purely a matter of civil law. Consequently only civil law standards and civil procedural standards apply to any review of the penalties imposed by associations, which include doping sanctions.

CAS panels, however, have found that because of the drastic personal and possibly financial consequences of a doping suspension on the athlete's life, it is appropriate to apply a higher standard than the general standard required in civil procedure, namely simply having to convince the Court on the balance of probabilities. Under such decisions of the CAS, the disputed facts, therefore, have to be "established to the comfortable satisfaction of the court having in mind the seriousness of the allegation" (cf. CAS OG/96/003, CAS OG/96/004, K. & G. v/IOC; CAS 98/208, N. *et al.* v/FINA, Award of 22 December 1998, p. 23; confirmed by the Swiss Federal Tribunal, Judgement of 31 March 1999 [SP.83/1999], which can be downloaded from www.bger.ch). We would adopt a similar approach in this AAA/CASNA proceeding.

V.2. FINDINGS

V.2.1. Doping

The Claimant, acting as a witness on her own behalf, testified credibly that she rode in the HP Race last year in order to help other cyclists compete and to increase participation of local women cyclists rather than to race competitively herself. This testimony was confirmed by two witnesses in her community of Boise, Idaho, one an athlete trained by Claimant and the other a restaurant owner who "sponsored" the women's cycling team founded and developed

by her. We have no doubt from that testimony and her own demeanor that Claimant has been and remains a credit to her community and a role model to young women as a result of her volunteer community service apart from her efforts in the development of women's cycling. Nevertheless, she tested positively for nandrolone metabolites at a level that could not be rationalized by studies or other scientific evidence that might support the theories she presented and discussed infra for reaching that test result. These theories were that her positive result was caused by a combination of natural production, her condition of endometriosis, her state of dehydration when tested as evidenced by the specific gravity of the sample, and the reliability of the spot or single urine test. She stated at the hearing that she has taken dietary or nutritional supplements in her training. In accordance with the agreed stipulations she does not claim that they caused the positive finding of nandrolone in her system.

When questioned as to what might have caused the Claimant's positive test result, Dr. Catlin, Respondent's expert and long-standing director of the UCLA Lab, replied that he did not know, but that in his experience and judgment it was likely a supplement. There is no requirement, however, for USADA to prove either the cause of a positive finding or an intent to take a prohibited substance. See *UCI v. Outchakov* (CAS 2000/A/272)(holding that the UCI definition of doping is a strict liability offense, overturning the national federation's determination that the rider was "guiltless"); *UCI v. Moller* (CAS 99/A/239)(holding that UCI has a strict liability definition of doping).(emphasis added)

On the basis of the evidence taken, the Panel is convinced that, at the time the urine sample was taken, a prohibited substance under the UCI AER was present in the Claimant's urine. The Claimant was not able to present any evidence to require any other conclusion but that a doping violation had occurred. Under the applicable rules the Panel has no choice in view of that positive finding but to conclude that Claimant violated the UCI AER's provisions, no matter how unwittingly, and should be sanctioned.

V.2.2 Sanction

In assessing the appropriate sanction Claimant would have us consider Article 124 of the revised UCI AER (the "New Rules"). That Article, which was added to the UCI Rules in July

of 2001, permits consideration of extenuating circumstances to provide proportionality to the penalty for the violation. That provision of the New Rules came into force the month after the Claimant's sample was submitted for testing. Arguably, under the doctrine of *lex mitior* enunciated in a CAS Advisory Opinion¹ and discussed in *Foschi v. FINA* (CAS 96/156, pp.53, 60) the Panel, in light of the penal nature of the applicable AER, could apply Article 124 of the New Rules even though the event at issue occurred before that provision came into force. Claimant's circumstances, however, given her maturity, experience and admitted retirement from professional competition, are not such as to satisfy either the general principle of Article 124 or the enumerated elements set forth in that Article that must be considered to find the existence of extenuating circumstances.

We now consider what the appropriate period of suspension should be. We recognize that the existence and enforcement of anti-doping regulations would, *inter alia*, "level the playing field" so that athletes who take performance enhancing supplements that contain prohibited substances would not have a competitive advantage. Stiff sanctions exacted by regulatory authorities are designed to preclude cheating. Thus many international sports federations mandate a substantial suspension period, such as two years, even for first offenders, if a violation of the rules has been found. UCI's New Rules are an example.² From the testimony adduced at the hearing, it became evident that this is a case of a cyclist who in the HP Race, at which she was tested, was willing to sacrifice her competitive position among the front runners to assist others on her developmental team who were struggling merely to finish the race. This factor alone would not induce us to reduce the sanction from that sought by Respondent. We do believe though that to assess less than the maximum suspension is consistent with the findings by CAS panels in other UCI cases involving positive test results for anabolic steroids.³ The suspensions assessed in those cases, involving first offenders like

¹ See Advisory Opinion CAS 94/128, Union Cycliste Internationale (UCI) and Comité National Olympique Italien (CONT), of 5 January 1995 (translation) at para. 33.

² The new UCI Rules provide a minimum two year suspension, and the IOC sanction for nandrolone violation is two years.

³ See *UCI v. Nielsen* (CAS 98/181) imposing four months' temporary suspension served from 15 August to 14 December (and presumably including six weeks of normal inactivity) and six months commencing 24 February;

Claimant, ranged from five months to less than nine. The applicable rules, as they then were, implicitly provide for discretion, in that the suspension range is a minimum of six and a maximum of twelve months. We, therefore, apply the sanction of disqualification from the HP Race and an eight month suspension.

Further, we are of the opinion, and recommend, that the fine prescribed under Article 90 Section 1, para 1, Elite (Women) of the UCI AER (SFr. 1,000) be waived, or at a minimum, be reduced by two thirds within the meaning of Article 128(4) of the New Rules.

UCI v. Skelde (CAS 98/192) reducing period of suspension to nine months starting 12 December, presumably including seven months of normal competitive activity; UCI v. Mason & FCI (CAS 98/212) in which a nine month suspension was given from 14 July to 13 April (including almost three month inactivity period), but lifted commencing 21 January, after a little more than six months, with the balance served on probation. To similar effect in cases involving the T/E ratio see UCI v. Casagrande & FCI (CAS 98/213), providing for a nine month suspension, which included three months' normal period of inactivity; and UCI v. Moller (CAS 99/239) imposing approximately five months' suspension.

AWARD

The Panel decides as follows:

1. A doping infraction occurred and the Claimant is disqualified from the HP Race.
2. A suspension of eight months is ordered commencing 17 May, 2002, the date of this award.
3. The administrative fees and expenses of the American Arbitration Association and the compensation and expenses of the arbitrators shall be borne by USADA.
4. The parties must each bear their own legal costs.

This 17th day of May, 2002.

President of the Panel:

Walter G. Gans

Arbitrators:

Maidie Oliveau

Professor Richard H. McLaren