

CAS 2005/A/936 UCI v/ Bakker & KNWU

## ARBITRAL AWARD

rendered by the

### COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Ercus **Stewart** SC, Barrister, Dublin, Ireland

Arbitrators: Mr Olivier **Carrard**, Attorney-at-Law, Geneva, Switzerland  
Mr Hendrik Willem **Kesler**, Attorney-at-Law, Zeist, The Netherlands

Clerk of the Court: Mr Adrian **Holloway**, Attorney-at-Law, Geneva, Switzerland

in the arbitration between

**INTERNATIONAL CYCLING UNION**, Aigle, Switzerland  
represented by Mr Philippe Verbiest, Leuven, Belgium

- Appellant -

and

**ERWIN BAKKER**, Liessel, The Netherlands  
represented by Mr Maarten Vrolijk, Eindhoven, The Netherlands

- first-named Respondent -

&

**KONINKLIJKE NEDERLANDSCHE WIELREN UNIE**, Woerden, The Netherlands

- second-named Respondent -

**I. FACTS**

**1. Parties**

- 1.1 The International Cycling Union or Union Cycliste Internationale (UCI) is the international body governing disciplines related to cycling.
- 1.2 Koninklijke Nederlandsche Wielren Unie (KNWU) is the Dutch national cycling federation and a member of UCI.
- 1.3 Mr Erwin Bakker is cyclist of elite category with a licence issued by the KNWU.

**2. The UCI Rules**

- 2.1 Art. 14 of the Anti-Doping Rules of the UCI Cycling Regulations provides:

*“Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in article 15.”*

Art. 15

*“The following constitute anti-doping rule violations:*

*1. The presence of a Prohibited Substance or its Metabolite or Markers in a Rider’s bodily Specimen.*

*1.1 It is each Rider’s personal duty to ensure that no Prohibited Substance enters his body. (...) Accordingly, it is not necessary that intent, fault, negligence or knowing use on the Rider’s part be demonstrated in order to establish an anti-doping violation under article 15.1.*

*1.2 Except in those substances for which a threshold concentration is specifically identified in the Prohibited List, the detected presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a Rider’s Sample shall constitute an anti-doping rule violation.”*

- 2.2 According to the 2005 Prohibited List the Prohibited Substances includes:

*“Testosterone”*

and provides:

*“Where a Prohibited Substance (as listed above) is capable of being produced by the body naturally, a Sample will be deemed to contain such Prohibited Substance where the concentration of the Prohibited Substance or its metabolites or markers and/or any other relevant ratio(s) in the Athlete’s Sample so deviates from the range of values normally found in humans that is unlikely to be consistent with normal endogenous production. A Sample shall not be deemed to contain a Prohibited Substance in any such case where the Athlete proves by evidence that the concentration of the Prohibited Substance or its metabolites or markers and/or the relevant ratio(s) in the Athlete’s Sample is attributable to a physiological or pathological condition.”*

2.3 According to art. 256 of the Anti-Doping Rules:

*“A violation of these Anti-Doping Rules in connection with an In-Competition test automatically leads to Disqualification of the individual result obtained in that Competition.”*

2.4 According to art. 261 of the Anti-Doping Rules:

*“Except for the specified substances identified in article 262, the period of Ineligibility imposed for a violation of article 15.1 (presence of Prohibited Substance or its Metabolites of Markers), (...)*

*First violation: 2 (two) year’s ineligibility.*

*However, the License-Holder shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in articles 264 and 265.”*

2.5 Art. 264:

*“If the Rider establishes in an individual case involving an anti-doping rule violation under article 15.1 (...) that he bears No Fault or Negligence for the violation, the other-wise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in a Rider’s Specimen in violation of 15.1 (presence of a Prohibited Substance), the Rider must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility eliminated. (...)”*

2.6 Art. 265:

*“This article 265 applies to anti-doping rule violations involving article 15.1 (presence of Prohibited Substance or its Metabolites or Marker) (...). If a License-Holder establishes in an individual case involving such violation that he bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. (...)”*

2.7 Art. 280 of the Anti-Doping Rules provides:

*“The following decisions may be appealed to the Court of Arbitration for Sport:*

*a) The decision of the hearing body of the National Federation under article 242”*

2.8 Art. 281 of the Anti-Doping Rules provides:

*“In cases under article 280a), the following parties shall have the right to appeal to the CAS:*

*c) the UCI”*

2.9 Art. 285 of the Anti-Doping Rules provides:

*“The statement of appeal by the UCI (...) must be submitted to the CAS within 1 (one) month of receipt of the full case file from the hearing body of the National Federation. Failure to respect this time limit shall result in the appeal being disbarred. Should the Appellant not request the file within 15 days of receiving the full decision as specified in article 247, the time limit for appeals shall be 1 (one) month from the reception of that decision.”*

**3. The doping test and the proceedings so far**

- 3.1 From 24 March to 27 March 2005, Mr Bakker participated in the Mountain Bike Cycling Race “*Vuelta Internacional a Valladolid*” in Spain.
- 3.2 On 26 March 2005, after having competed, he had to undergo a doping control conducted by the UCI.
- 3.3 The samples were sent to the “*Laboratorio de Control del Dopaje*” (the Laboratory) in Madrid.
- 3.4 On 15 April 2005, the laboratory reported to KNWU that the A sample showed the presence of “*Testosterona/Epitestosterona 18.30 – Incertidumbre/uncertainty 3.4 – IRMS Positivo/Positive.*”
- 3.5 On 21 April 2005, the case was referred by the UCI to the KNWU.
- 3.6 After Mr Bakker requested an analysis of the B sample, the Laboratory issued a certificate on 27 June 2005 stating: “*Testosterona – IRMS Positivo/Positive.*”
- 3.7 On 29 June 2005, a hearing was held before the KNWU Anti-Doping Committee and was attended by Mr Bakker and his team leader, Mr R. Poels.
- 3.8 On 1 July 2005, the KNWU Anti-Doping Committee issued a decision that acquitted Mr Bakker from any charges related to a doping offence.
- 3.9 The decision was received by the Appellant by fax on 4 July 2005 and by post on 15 July 2005.
- 3.10 On 4 July 2005, the Appellant asked the KNWU to send the complete file.
- 3.11 The Laboratory test reports were received by the Appellant on 3 August 2005.
- 3.12 A statement of appeal was filed before the CAS on 4 August 2005.
- 3.13 Each party designated an arbitrator. The third arbitrator - the President – was in turn appointed by the President of the Division. Thus the Panel sat in the following composition (which was accepted by the parties at the hearing on 2 February 2006):

President: Mr Ercus Stewart  
Barrister, Dublin, Ireland

Arbitrators: Mr Olivier Carrard  
Attorney-at-Law, Geneva, Switzerland

Mr Hendrik Willem Kesler  
Attorney-at-Law, Zeist, The Netherlands

- 3.14 On 22 December 2005, the President of the Panel issued an order of procedure that was signed by the parties.
- 3.15 In accordance with article R28 of the Code of Sports-related Arbitration (in the version in force as of January 2004 and hereinafter referred to as the “Code”), the seat of the Panel is established at the Secretariat of the CAS, Chateau de Béthusy, 2 Avenue de Beaumont, 1012 Lausanne.
- 3.16 In accordance with art. R29 of the Code, the official language of this arbitration is English.
- 3.17 KNWU filed its answer brief on 12 October 2005.
- 3.18 The hearing was held in Lausanne on 2 February 2006.
- 3.19 At the beginning of the hearing, Mr Bakker filed a document containing several contentions and motions, some of them were withdrawn. He also made an oral statement during the hearing.
- 3.20 KNWU did not attend the hearing.

**4. The Appellant’s contentions and motions**

- 4.1 The Appellant submits that the Laboratory report of the A sample showed Testosterone ratio of 18.3 that was confirmed by the B sample analysis.
- 4.2 As Testosterone is on the 2005 Prohibited List and the substance was declared as exogenous, a period of ineligibility of two years shall be imposed on Mr Bakker and he shall be disqualified from the “*Vuelta Internacional Valladolid 2005*”.
- 4.3 Accordingly, the Appellant asks the Panel to reverse the decision of the KNWU issued on 1 July 2005.

**5. KNWU’s contentions and motions**

- 5.1 KNWU, relying on the report of Dr. P. H. Th. Koch, submits that the high level of testosterone/epitestosterone found in Mr Bakker’s urine has a natural origin.
- 5.2 Accordingly, KNWU considers that its Anti-Doping Committee has made a correct application of the Anti-Doping Rules and its decision has to be upheld.
- 5.3 For these motives, this Respondent requests the Panel to reject the appeal.

**6. Mr Bakker's contentions and motions**

- 6.1 Based on a medical examination provided by the Elkerliek Hospital, the medical certificate drafted by his doctor and the fact that intense exercise may cause an important variation of the level of testosterone, Mr Bakker submits that the testosterone found in his urine has an endogenous character.
- 6.2 Relying on various medical publications, the Respondent contends that no further researches were carried out by the Laboratory in relation to the origin of the testosterone. Accordingly, he considers that the burden of proof regarding the presence of exogenous testosterone is not met.
- 6.3 On a formal point of view, Mr Bakker submits that the appeal has been filed too late by the UCI and should therefore be considered as inadmissible.
- 6.4 For all those motives, Mr Bakker requests the Panel to reject the appeal.

**II. IN LAW**

**7. Competence of the CAS**

- 7.1 The competence of the CAS to act as an appeal body is based on art. R47 of the Code which provides that:

*“A party may appeal from the decision of a disciplinary tribunal of similar body of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body.”*

and on article 280 of the UCI Anti-Doping Rules.

- 7.2 Moreover, the jurisdiction of the CAS is explicitly recognised by the parties in the order of procedure they have signed and accepted at the hearing on 2 February 2006.
- 7.3 Under Art. R57 of the Code, the Panel has the full power to review the facts and the law. The Panel did not therefore examine only the formal aspects of the appealed decision but held a trial *de novo*, evaluating all facts, including new facts, which had not been mentioned by the parties before the KNWU Anti-Doping Committee and all legal issues involved in the dispute.

**8. Applicable law**

- 8.1 Art. R58 of the Code provides:

*The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in absence of such choice, according to the law of the country in which the federation, association or sports body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems*

*appropriate. In the latter case, the Panel shall give reasons for its decision.”*

8.2 Such provision was expressly mentioned in the Order of Procedure signed by the parties.

8.3 The “*applicable regulations*” in this case are the UCI rules.

8.4 The parties have not expressly or impliedly agreed on a choice of law applicable to these proceedings before the CAS. Therefore, the rules and regulations of UCI shall apply primarily, and Swiss law, as UCI is domiciled in Switzerland, shall apply subsidiarily.

## **9. Admissibility**

9.1 The Appeal is admissible for the following reasons:

9.2 The KNWU Anti-Doping committee decision was sent by fax to the parties on 4 July 2005 and received by the Appellant by post on 15 July 2005.

9.3 The Appellant’s statement of appeal was filed on 4 August 2005, namely within the one month time limit set by art. 285 of the UCI Anti-Doping Rules.

9.4 In this case, the Appellant has met the deadline set by the UCI Rules.

9.5 Besides, the appeal complies with all other requirements of Art. R47 and R48 of the Code.

## **10. Examination of the contested decision**

### **10.1 The legal presumption under the Anti-Doping Rules**

10.1.1 According to art. 15.1 the presence of a Prohibited Substance or its Metabolites or Markers in a Rider’s bodily Specimen constitutes an anti-doping rule violation.

10.1.2 Under the UCI Anti-Doping Rules an offence has therefore been committed when it has been established that a prohibited substance was present in the athlete’s body. There is thus a legal presumption that the athlete is responsible for the presence of a prohibited substance.

10.1.2 The burden of proof of UCI lies in art. 16 of the Anti-Doping Rules, which provides the following:

*“The UCI and its National Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI or its National Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.”*

10.1.3 In the case at hand, the question to be answered is whether the UCI has met its burden of proof or whether the conditions provided for at art. 15.1 are met.

10.1.4 As such, the findings of the Laboratory are sufficient to consider that Mr Bakker violated anti-doping rule:

- For the reasons set out in 8.3 above the UCI Anti-Doping Rules were applicable to him.
- According to article 18 of the UCI Anti-Doping Rules, WADA-accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the International Standard for laboratory analysis.
- Mr Bakker did not contest the fact that the sampling procedure and laboratory analysis were correctly performed.

10.1.5 UCI has thus met its burden to prove that in proper test proceedings, a prohibited substance was found in the athlete's urine.

## **10.2 Rebuttal of the presumption in the Respondent's case**

10.2.1 As the UCI has demonstrated that in a properly performed test procedure a prohibited substance has been found in the athlete's urine, the burden of proof shifts to the Respondents who have the opportunity to establish that either the test is not valid or that the athlete bears no fault or negligence in relation to the violation.

10.2.2 The KNWU Anti-Doping Committee considered that the testosterone found in the Rider's urine might result from a combination of two causes: a low endogenous testosterone level and a small amount of hormone that the Rider ingested through food supplements.

Such ingestion could have a greater influence on the T/E ratio than in someone with higher testosterone levels.

10.2.3 Mr Bakker submits that, according to the examination carried out by Dr P. H. Th. Koch, there is no evidence that he used hormone preparation.

10.2.4 This report drafted by the doctor mentions a "*low testosterone level which may reflect both free and total testosterone*".

10.2.5 In the document filed before the Panel, Mr Bakker argues that "*It is scientifically accepted that a high level of Testosterone has to be followed by further research before concluding an exogenous Testosterone. Only when these researches have taken place a sound decision is possible regarding the endogenous or exogenous character of Testosterone. As these complementary researches were not carried out, the burden of proof regarding the presence of exogenous testosterone is not met.*"

10.2.6 On the matter related to a prohibited substance being produced by the body naturally, the 2005 Prohibited List provides:

*"Where a prohibited substance is capable of being produced by the body naturally, a sample will be deemed to contain such prohibited substance where the concentration of the prohibited substance or its metabolites or markers and/or any other relevant ratio(s) in the Athlete's sample so deviates from the range of values normally found in humans that is unlikely to be consistent with normal endogenous production.*

(...)



*If the laboratory has reported the presence of a T/E ratio greater than four (4) to one (1) in the urine, further investigation is obligatory in order to determine whether the ratio is due to a physiological or pathological condition, except if the laboratory reports an adverse analytical finding based on any reliable analytical method, showing that the prohibited substance is of exogenous origin.”*

- 10.2.7 According to the report issued by the Laboratory, the urines of the Respondent showed a Testosterone/Epitestosterone ratio of 18.3 (A sample).
- 10.2.8 Accordingly, the Laboratory carried out an adverse analytical finding with the GC/C/IRMS analysis. This analysis showed that exogenous testosterone was present.
- 10.2.9 The counter-analysis performed on the B sample with GC/C/IRMS confirmed the A sample's results.
- 10.2.10 The Panel is of the opinion that the Laboratory complied with the procedures set by the UCI Anti-Doping Rules and provided two results that showed that a prohibited substance was found in the Respondent's urine and such substance was of exogenous origin.
- 10.2.11 With regard to the argument of Mr Bakker concerning the lack of complementary research, the Panel notes that the Laboratory carried out the GC/C/IRMS analysis that shall be considered as the complementary research. For this reason, this argument has to be rejected.
- 10.2.12 With regard to the contention that intense exercise can cause an important variation of the level of endogenous testosterone, the Panel relies on the GC/C/IRMS analysis that established that the testosterone found in the Mr Bakker's urine was of exogenous origin. This contention is rejected.
- 10.2.13 The Panel comes to the conclusion that the Respondents failed to rebut the presumption set by article 16 of the UCI Anti-Doping rules.
- 10.2.14 Mr Bakker has therefore committed a violation of article 15 of the Anti-Doping Rules.

## **11. Sanction**

- 11.1 The violation is now established. The question is what sanction shall be imposed on the Rider.
- 11.2 According to art. 261 of the Anti-Doping Rules the period of ineligibility imposed for the first violation of art. 15.1 shall be of two years.
- 11.3 The UCI Rules provides for either elimination or reduction of the period of ineligibility based on exceptional circumstances:
- According to art. 264, if the rider establishes that he bears no fault or negligence for the violation, the period of ineligibility shall be eliminated.
  - According to art. 265, if the rider establishes that he bears no significant fault or negligence, then the period of ineligibility may be reduced, but the reduced period of

ineligibility may not be less than one-half of the minimum period of ineligibility otherwise applicable.

11.4 The Panel considers that art. 265 (no significant fault or negligence) is not applicable to Mr Bakker for the following reasons:

- According to article 15.1, Mr Bakker is responsible for the presence of a prohibited substance in his bodily specimen.
- Mr Bakker is aware of doping in sport.
- He ingested food supplements that might have contained hormones despite the fact that many warnings in relation to these food supplements were made.

11.5 According to the UCI Anti-Doping rules, the sanctions available are either two years (no exceptional circumstances), one year to two years (no significant fault or negligence), or no sanction at all (no fault or negligence).

11.6 The public interest that is sought by article 15.1 is the fight against doping in sports:

*“It is each Rider’s personal duty to ensure that no prohibited substance enters his body.”*

11.7 In the case at hand, the Appellant failed to abide by this duty. The Panel is of the opinion that the two year period of ineligibility appears to be appropriate to the seriousness of the infringement.

11.8 According to art. 275 of the Anti-Doping Rules, the period of ineligibility shall start on the date of the hearing. Therefore the period will start on 2 February 2006.

11.9 Pursuant to art. 256 the Anti-Doping Rules, a violation of the Anti-Doping Rules in connection with an in-competition test leads automatically to the disqualification of the individual result obtained in that competition. Accordingly, Mr Bakker is disqualified from the *“Vuelta Internacional a Valladolid 2005”*.

11.10 Pursuant to art. 274, all other competitive results obtained from the date of a positive sample was collected to the commencement of any ineligibility period shall be disqualified. Accordingly, Mr Bakker is disqualified from any other race in which he competed between 26 March 2005 and 2 February 2006.

## **12. Jurisdiction on Costs**

12.1 Pursuant to art. R65.4 of the Code, the proceedings related to disciplinary cases of an international nature ruled in appeal shall be free. The fees and the costs of the arbitrators are borne by the CAS.

12.2 The award is therefore pronounced without costs, except for the CAS Court Office fee of CHF 500 which is retained by the CAS.

12.3 According to art. R65.3, the cost of the parties shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion the parties shall

share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

- 12.4 In the present case, the appeal is upheld. The decision of the KNWU is annulled.
- 12.5 The Appellant was successful in this procedure. The first Respondent appeared as cooperative and travelled, with his lawyer, at his own expense to Lausanne. The second Respondent did not attend and provided very little explanation in relation to the grounds of its decision.
- 12.6 Accordingly, KNWU shall contribute to the amount of CHF 2000 to the legal fees and other expenses incurred by UCI in connection with these proceedings.

## **ON THESE GROUNDS**

The Court of Arbitration for Sport rules:

1. The appeal filed by Union Cycliste Internationale is upheld.
2. The decision of the Koninklijke Nederlandsche Wielren Unie's Anti-Doping Commission dated 1 July 2005 is annulled.
3. Mr Erwin Bakker is disqualified from the "Vuelta Internacional a Valladolid 2005" and any other race in which he competed between 26 March 2005 and 2 February 2006.
4. Mr Erwin Bakker shall be declared ineligible for competition for two years, commencing on 2 February 2006.
5. The award is rendered without costs, except for the Court Office fee of CHF 500 which is retained by the CAS.
6. Koninklijke Nederlandsche Wielren Unie shall contribute the amount of CHF 2000 to the legal fees and other expenses incurred by Union Cycliste Internationale in connection with the proceedings.

Done in Lausanne, 20 April 2006

### **THE COURT OF ARBITRATION FOR SPORT**

**Mr Ercus Stewart**

President of the Panel

Mr Olivier Carrard  
Arbitrator

Mr Hendrik Willem Kesler  
Arbitrator

Adrian Holloway  
Ad-hoc Clerk