

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) P&S Docket No. D-05-0005
)
Todd Syverson, d/b/a)
Syverson Livestock Brokers,)
) **Order Denying Petition to**
Respondent) **Reconsider on Remand**

PROCEDURAL HISTORY

On November 16, 2010, I issued a Decision and Order on Remand in which I suspended Todd Syverson as a registrant under the Packers and Stockyards Act, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act], for a period of 16 months. *In re Todd Syverson* (Decision on Remand), ___ Agric. Dec. ___ (Nov. 16, 2010). On November 26, 2010, Mr. Syverson filed “Respondent Todd Syverson’s Petition for Reconsideration or, In the Alternative, Motion for Stay Pending Appeal” [hereinafter Petition to Reconsider].¹ On December 20, 2010, the Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter GIPSA], filed “Complainant’s Response to Respondent’s

¹I address Mr. Syverson’s request for a stay in *In re Todd Syverson* (Stay Order), ___ Agric. Dec. ___ (Dec. 22, 2010), which I file simultaneously with this Order Denying Petition to Reconsider on Remand.

Petition for Reconsideration and Motion for Stay Pending Appeal.” On December 21, 2010, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for a ruling on Mr. Syverson’s Petition to Reconsider.

CONCLUSIONS ON RECONSIDERATION

Mr. Syverson raises eight issues in the Petition to Reconsider. First, Mr. Syverson asserts I “did no more than pay lip service to the Eighth Circuit’s clear direction concerning the importance of the effect of the sanction on the registrant.” (Pet. to Reconsider at 2.)

I gave considerable weight to the Court’s guidance and decreased the suspension of Mr. Syverson as a registrant under the Packers and Stockyards Act from 5 years to 16 months. Generally, “lip service” is an avowal of adherence expressed in words, but not backed by deeds. My significant reduction of the period of Mr. Syverson’s suspension is a deed that belies Mr. Syverson’s assertion that I only paid lip service to the Eighth Circuit’s guidance.

Second, I concluded the period of time in which a suspension of a registrant under the Packers and Stockyards Act is likely to bankrupt that registrant and deprive that registrant of a livelihood is not dispositive in determining the period of suspension, since the national interest of having fair conditions in the livestock industry prevails over a violator’s interest in continuing to conduct business as a registrant under the Packers and Stockyards Act. *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ___, slip op.

at 7-8 (Nov. 16, 2010). Mr. Syverson contends this conclusion “is in direct contradiction to the Eighth Circuit’s indication that the effect [of a sanction] on the registrant is crucially important.” (Pet. to Reconsider at 2.)

The United States Court of Appeals for the Eighth Circuit states the effect of a sanction on a registrant under the Packers and Stockyards Act is “crucially important,” as follows:

We have emphasized that the nature of the conduct in question is crucially important, as well as the effect of the proposed sanction on the registrant. *Ferguson*, 911 F.2d at 1282.

Syverson v. U.S. Dep’t of Agric., 601 F.3d 793, 804 (8th Cir. 2010). I do not read the Court’s reference to the crucial importance of the effect of a sanction on a registrant as requiring that a suspension of a registrant must in all cases be for a period shorter than the period that might bankrupt the registrant and deprive the registrant of his or her livelihood. Instead, I interpret *Syverson v. U.S. Dep’t of Agric.*, as holding that the effect of a sanction on a registrant and the nature of the conduct of a registrant are factors, albeit crucially important factors, that I must consider when determining the sanction to be imposed on a registrant under the Packers and Stockyards Act. In *Ferguson v. U.S. Dep’t of Agric.*, 911 F.2d 1273 (8th Cir. 1990), referenced by the *Syverson* Court as a case in which the Eighth Circuit previously emphasized the crucial importance of the effect of a sanction, the Eighth Circuit concluded that the Judicial Officer’s 6-month suspension of a registrant was too severe, stating “[o]ur conclusion is not based upon but is strengthened

by the fact that the six-month suspension would likely put Ferguson out of business.” *Ferguson v. U.S. Dep’t of Agric.*, 911 F.2d at 1282. This conclusion in *Ferguson* indicates the Eighth Circuit does not view the effect of a sanction as dispositive, but, instead, as an important factor that must be considered when determining the sanction to be imposed on a violator. Therefore, I reject Mr. Syverson’s contention that my conclusion that the effect of a sanction on a registrant is not dispositive of the sanction to be imposed on that registrant, is error.

Third, Mr. Syverson asserts I erroneously used the Decision and Order on Remand “as an opportunity to make a new policy statement, without citation, that the national interest of having ‘fair’ conditions in the livestock industry prevails over the violator’s interest in continuing to conduct business.” (Pet to Reconsider at 2.)

The policy is not new. I have long held that collateral effects of a sanction on a violator and on a violator’s community, customers, employees, and creditors are given no weight in determining the sanction to be imposed for violations of the Packers and Stockyards Act since the national interest of having fair conditions in the livestock industry must prevail over a violator’s interests and the interests of the violator’s community, customers, employees, and creditors.² Within the jurisdiction of the United

²See *In re Marysville Enterprises, Inc.*, 59 Agric. Dec. 299, 328 (2000); *In re Hines & Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408, 1430 (1998); *In re Sam Odom*, 48 Agric. Dec. 519, 540-41 (1989); *In re Great American Veal, Inc.*, 48 Agric. Dec. 183, 206 (1989), *aff’d*, 891 F.2d 281 (3d Cir. 1989) (unpublished); *In re Edward Tiemann*,
(continued...)

States Court of Appeals for the Eighth Circuit, my policy of giving no weight to the effect of a sanction on the likelihood of a violator's bankruptcy and on the likelihood that a violator will be deprived of his or her livelihood is modified to comport with *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793 (2010).

Fourth, Mr. Syverson asserts I stated that I do not rely on consent decisions when determining the sanction in a litigated case, but then, contrary to that statement, heavily relied on *In re Todd Syverson* (Consent Decision), 60 Agric. Dec. 302 (2001), when determining the period of Mr. Syverson's suspension as a registrant under the Packers and Stockyards Act (Pet. to Reconsider at 2-3).

As I noted in *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ____, slip op. at 9 (Nov. 16, 2010), "I have long held that sanctions in consent decisions, *which involve parties other than the party before me*, are given no weight in determining the sanction in a litigated case." (Footnote omitted; emphasis added.) As Mr. Syverson was the subject of *In re Todd Syverson* (Consent Decision), 60 Agric. Dec. 302 (2001), I took that prior consent decision into account when determining the sanction to be imposed on

²(...continued)

47 Agric. Dec. 1573, 1593 (1988); *In re Paul Rodman* (Order Denying Pet. for Recons.), 47 Agric. Dec. 1400, 1415 (1988); *In re Richard N. Garver*, 45 Agric. Dec. 1090, 1104 (1986), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 488 U.S. 820 (1988); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 636 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439, 445 (1984), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Hugh B. Powell*, 41 Agric. Dec. 1354, 1365 (1982).

Mr. Syverson. My consideration of Mr. Syverson's prior consent decision is consistent with the Eighth Circuit's consideration of the same prior consent decision:

We agree with the judicial officer that a suspension is appropriate because this case involves a serious violation of 7 U.S.C. § 213(a), as well as a violation of 7 U.S.C. § 221 that hindered the investigation. These serious offenses are deserving of a significant sanction, especially in light of the prior cease and desist order for price manipulation that had been imposed on Syverson.

Syverson v. U.S. Dep't of Agric., 601 F.3d 793, 805 (8th Cir. 2010). Therefore, I reject Mr. Syverson's contention that my consideration of *In re Todd Syverson* (Consent Decision), 60 Agric. 302 (2001), is error.

Mr. Syverson cites *Spencer Livestock Comm'n Co. v. Dep't of Agric.*, 841 F.2d 1451 (9th Cir. 1988), as support for his contention that my reliance on *In re Todd Syverson* (Consent Decision), 60 Agric. Dec. 302 (2001), is error. However, the Ninth Circuit in *Spencer Livestock Comm'n Co.*, did not find the Judicial Officer's reliance on prior consent decisions, error:

The fact that the consent orders were *violated* could be used to determine what kind of sanction is needed to *deter* these petitioners from conduct prohibited by the statute. In each of the prior administrative proceedings, petitioners agreed to cease and desist from precisely the sort of behavior at issue in this case. Use of this information along with the fact that petitioners violated their criminal probation was appropriate to evaluate the deterrent value of various sanctions.

Spencer Livestock Comm'n Co. v. Dep't of Agric., 841 F.2d 1451, 1458 (9th Cir. 1988) (emphasis in original). Therefore, I find my Decision on Remand consistent with the

Ninth Circuit's holding in *Spencer Livestock Comm'n Co. v. Dep't of Agric.*, 841 F.2d 1451 (9th Cir. 1988).

Fifth, Mr. Syverson asserts I erroneously failed to discuss why the instant proceeding is different from *Ferguson v. U.S. Dep't of Agric.*, 911 F.2d 1273 (8th Cir. 1990); *Western States Cattle Co. v. U.S. Dep't of Agric.*, 880 F.2d 88 (8th Cir. 1989); and *Farrow v. U.S. Dep't of Agric.*, 760 F.2d 211 (8th Cir. 1985), in which the Court overturned sanctions imposed by the Judicial Officer (Pet. to Reconsider at 3).

The United States Court of Appeals for the Eighth Circuit concluded that the 5-year period of suspension of Mr. Syverson as a registrant under the Packers and Stockyards Act that I imposed in *In re Todd Syverson*, 67 Agric. Dec. 1326 (2008), was not reasonable and remanded the proceeding to me for reconsideration. *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 805 (8th Cir. 2010). The Eighth Circuit cited *Ferguson v. U.S. Dep't of Agric.*, 911 F.2d 1273 (8th Cir. 1990); *Western States Cattle Co. v. U.S. Dep't of Agric.*, 880 F.2d 88 (8th Cir. 1989); and *Farrow v. U.S. Dep't of Agric.*, 760 F.2d 211 (8th Cir. 1985), as examples of cases in which the Court has taken a critical view of the Judicial Officer's sanctions and vacated those sanctions. *Syverson v. U.S. Dep't of Agric.*, 601 F.3d at 804. Therefore, as Mr. Syverson indicates, with respect to the Court's treatment of sanctions imposed by the Judicial Officer, the instant proceeding is similar to *Ferguson*, *Western States Cattle Co.*, and *Farrow*. However, *Syverson* can be distinguished from *Ferguson*, *Western States Cattle Co.*, and *Farrow* in a number of

ways, including most importantly the Eighth Circuit's view of the severity of the violations in each of these cases. The Eighth Circuit found Mr. Syverson acted as a market agency and owed a fiduciary duty to Lance Quam, Mr. Syverson knew his conduct was illegal, and Mr. Syverson's violations were serious offenses deserving of a significant sanction. These factors are absent in *Ferguson*, *Western States Cattle Co.*, and *Farrow*.³

Sixth, Mr. Syverson asserts I did not give appropriate weight to Mr. Syverson's lack of knowledge that he was acting as a market agency and that his actions breached a fiduciary duty (Pet. to Reconsider at 3).

I gave no weight to Mr. Syverson's claimed lack of knowledge that he was acting as a market agency and that his actions breached a fiduciary duty in *In re Todd Syverson* (Decision on Remand), ___ Agric. Dec. ___ (Nov. 16, 2010), because the Court did not instruct that I was to consider these factors on remand. Moreover, even if I were to find Mr. Syverson did not know he was acting as a market agency and his actions breached a

³*Ferguson v. U.S. Dep't of Agric.*, 911 F.2d 1273 (8th Cir. 1990) (the Court found very little evidence that Ferguson acted as a market agency and did not find Ferguson's violations of the Packers and Stockyards Act flagrant, intentional, or serious); *Western States Cattle Co. v. U.S. Dep't of Agric.*, 880 F.2d 88 (8th Cir. 1989) (the Court found Western States Cattle Company acted as a dealer, not as a market agency, and Western States Cattle Company's violations of the Packers and Stockyards Act were not substantial or intentional); *Farrow v. U.S. Dep't of Agric.*, 760 F.2d 211 (8th Cir. 1985) (the Court found no evidence establishing the petitioners' (two principal buyers of pound cows who entered into an anti-competitive agreement) violations of the Packers and Stockyards Act were intentional, flagrant, or serious or the petitioners were aware their agreement was unlawful).

fiduciary duty, I give much more weight to Mr. Syverson's knowledge that his practices were illegal, which knowledge the Eighth Circuit described, as follows:

We reject Syverson's argument that he could not have known that his practices were illegal. "[T]he act does not specify forbidden practices in detail," *Donahue Bros.*, 59 F.2d at 1023, and prior disciplinary cases for price manipulation were sufficient to put Syverson on notice that his actions were unlawful. *Coosemans Specialties, Inc., v. Dep't of Agric.*, 482 F.3d 560, 568 (D.C. Cir. 2007) (holding that prior disciplinary cases put registrant on notice); *In re: Marvin J. Dinner & Kenneth S. Ross*, 41 Agric. Dec. 2201 (1982) (disciplinary case involving similar scheme of price manipulation via repurchasing from own consignment). Syverson had already been subject to a cease and desist order for price manipulation. *In re: Todd Syverson*, P & S Docket No. D-99-0011 (June 12, 2001) (enjoining further issuance of "accounts of purchase or sale which fail to show the true and correct nature of the livestock transaction accounted for therein"). Moreover, his initial refusal to produce complete records of his dealings with Quam, which in and of itself was a willful violation, belies his claim that he did not know there was anything wrong with what he had done.

Syverson v. U.S. Dep't of Agric., 601 F.3d 793, 803 n.6 (8th Cir. 2010).

Seventh, Mr. Syverson contends I erroneously failed to explain why the clear public policy, codified in 5 U.S.C. § 558, "requiring a respondent to have notice of wrongdoing before suspension is permissible *at all*, can not be considered in evaluating the *length* of a suspension." (Pet. to Reconsider at 3 (emphasis in original).)

I did not explain why the failure to provide notice of wrongdoing cannot be considered in evaluating the length of a suspension as a registrant under the Packers and Stockyards Act in *In re Todd Syverson* (Decision on Remand), ___ Agric. Dec. ___ (Nov. 16, 2010), because the Court did not instruct that I was to consider this factor on

remand. Moreover, I note 5 U.S.C. § 558(c) does not indicate the length of a suspension is affected by an agency's failure to comply with 5 U.S.C. § 558(c). As Mr. Syverson indicates, if an agency fails to provide a licensee the notice required by 5 U.S.C. § 558(c), no suspension would be lawful. Mr. Syverson has waived the argument that 5 U.S.C. § 558(c) precludes his suspension as a registrant under the Packers and Stockyards Act because he raised it for the first time on appeal to the United States Court of Appeals for the Eighth Circuit. *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 803 (8th Cir. 2010).

Eighth, Mr. Syverson asserts I did not properly address the relationship of Mr. Syverson's violations of the Packers and Stockyards Act to the remedial purposes of the Packers and Stockyards Act (Pet. to Reconsider at 4).

As I stated in *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ___, slip op. at 4 (Nov. 16, 2010), one of the primary purposes of the Packers and Stockyards Act is to assure fair trade practices in the marketing of livestock. The United States Court of Appeals for the Eighth Circuit found Mr. Syverson acted as a market agency in connection with his purchases of cattle for Mr. Quam that are the subject of the instant proceeding. As a market agency, Mr. Syverson owed a fiduciary duty to Mr. Quam,⁴ and Mr. Syverson's failure to disclose that he had repurchased cattle from his own consignment was an unfair and deceptive practice and a violation of 7 U.S.C. § 213(a). *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 802 (8th Cir. 2010). Thus, I conclude

⁴See *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1022 (8th Cir. 1932).

Mr. Syverson's unfair and deceptive practice directly relates to one of the primary, remedial purposes of the Packers and Stockyards Act: to assure fair trade practices in livestock marketing. Moreover, Mr. Syverson thwarted the Secretary of Agriculture's ability to enforce the Packers and Stockyards Act when he failed to produce records, which he was required to keep, for examination by United States Department of Agriculture investigators, in violation of 7 U.S.C. § 221. When I compare the remedial purposes of the Packers and Stockyards Act to Mr. Syverson's unfair and deceptive practice, I find Mr. Syverson's violations directly relate to one of the remedial purposes of the Packers and Stockyards Act.

For the foregoing reasons and the reasons set forth in *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ____ (Nov. 16, 2010), Mr. Syverson's Petition to Reconsider is denied. The rules of practice applicable to the instant proceeding⁵ provide that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider (7 C.F.R. § 1.146(b)). Mr. Syverson's Petition to Reconsider was timely-filed and automatically stayed *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ____ (Nov. 16, 2010). Therefore, since Mr. Syverson's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ____ (Nov. 16,

⁵The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

2010), is reinstated; except that, the automatic stay is replaced with a Stay Order issued pursuant to Mr. Syverson's November 26, 2010, request for a stay pending the outcome of proceedings for judicial review.⁶

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Syverson's Petition to Reconsider, filed November 26, 2010, is denied. This Order shall become effective upon service on Mr. Syverson.

Done at Washington, DC

December 22, 2010

William G. Jenson
Judicial Officer

⁶*In re Todd Syverson* (Stay Order), ___ Agric. Dec. ____ (Dec. 22, 2010).