

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	
)	
TODD SYVERSON, d/b/a)	P&S Docket No. D-05-0005
Syverson Livestock Brokers)	
)	
Respondent)	Decision and Order

Decision Summary

1. I decide that in every sale of cows to Lance Quam during 2002 and 2003 at issue here, Respondent Todd Syverson, doing business as Syverson Livestock Brokers (frequently herein “Respondent Syverson,” “Syverson” or “Respondent”): (a) was *not* acting as a market agency or “order-buyer” who had bought those cows for Lance Quam but was instead acting as a cattle dealer who had bought those cows for his own account; (b) did *not* disclose to Lance Quam when he, Respondent Syverson, had twice bought the cows, the second time from his own consignment (from himself); (c) would *not* have been required to make such disclosure had he not represented his higher, second, purchase price as his price for the cows (which was the truth but not the whole truth); and (d) did violate the fair dealing requirements of Section 312(a) of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181, *et seq.*), 7 U.S.C. § 213(a), on those occasions when he represented to Lance Quam that his higher, second, purchase price was his price for the cows but failed to disclose to Lance Quam his (Respondent Syverson’s) lower, initial, “arm’s length” purchase price, at times one day earlier.

2. Further, I decide that Respondent Syverson failed without good cause to produce for examination within a reasonable time when asked by Packers and Stockyards, all of the

accounts, records, and memoranda as are required to be kept under Section 401 of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181, *et seq.*), 7 U.S.C. § 221, that would have fully and correctly disclosed his 2002 and 2003 transactions with Lance Quam.

Introduction

3. Lance Quam became angry with Respondent Syverson in February 2003, because Lance Quam mistakenly came to believe that Respondent Syverson had included cull cows (cows that were meant to go to slaughter) (Tr. 49-50) among the 62 cows that Lance Quam had bought from Respondent Syverson during the summer of 2002 (June through August, RX 3) and the eight cows that Lance Quam had bought from Respondent Syverson in February 2003. RX 6.

4. In truth, none of the cows Lance Quam bought from Respondent Syverson was a slaughter cow, as confirmed by veterinary examination at the auction (required before the cow could be auctioned on Tuesday). Tr. 368-71, 374-77, 456-57. Being auctioned on a Monday at the Zumbrota Livestock Auction Market did not make a cow a slaughter cow; and wearing a four-digit yellow back tag (*see* CX 21 as an example) did not make a cow a slaughter cow either. Tr. 368-71.

5. The testimony of a fully credible and very valuable witness, Tom Webster, employee and part owner of Zumbrota Livestock Auction Market (“Zumbrota”), established without doubt that the Monday auctions at Zumbrota included all sorts of cows - - including cull cows, yes, but also cows that are *not* sick or maimed: cows that are open (not pregnant), cows that “didn’t fit that producer’s breeding schedule,” feeder cattle, baby calves, market cattle, fat cattle. Tr. 373, 362, 366.

6. Mr. Webster's testimony established without doubt that the marketplace had other uses in 2002 and 2003 for the four-digit tags like CX 21 (commonly referred to as a "slaughter tag," Tr. 373), in addition to the purpose originally intended by the U. S. Government. Tom Webster described the reality (that is, that Monday's auctions included all sorts of cows, and that the four-digit tag had much wider application), that existed in 2002 and 2003. Tr. 366-71.

Mr. Oldfield: Were there different kinds of cattle that were sold at Monday's auction?

Mr. Webster: Yes, all basically from the baby calves to market cattle.

Mr. Oldfield: And from out of state as well as from in state, is that right?

Mr. Webster: Yes. We were a federally-approved market at that time and we could accept cattle from anywhere.

Mr. Oldfield: And that would include feeder cattle, fat cattle, right?

Mr. Webster: Yes.

Mr. Oldfield: Would you use a back tag on Monday's cattle?

Mr. Webster: Yes.

Mr. Oldfield: Would that be a four-digit number?

Mr. Webster: Yes.

Mr. Oldfield: Okay. And would back tags be placed on different varieties of cattle coming in?

Mr. Webster: Yes.

Mr. Oldfield: Would you say because a four-digit number was on a particular cow that it was a slaughter cow just because it was a four-digit number slapped on the back?

Mr. Webster: The intent of the four-digit tag, if I have got the right tag in my mind, you're talking about the oval tag that has some -- do you have one that you're looking for? There it is. Just so you understand that tag, --

....

Mr. Webster: [looking at a sample tag later marked as CX 21] Yeah, this tag is a tag that's issued by the federal government. It is specific to a location on the very, very top line. There's a number which is a state code and a letter or a group of letters that indicates where that tag is being applied.

So when that animal ends up at a slaughter establishment they can trace that animal back to its farm of origin. The bar coding is a way to be able to identify that animal back to the farm of origin by coming through the livestock barn.

And that tag, its intent as it comes from the government is to be applied to slaughter livestock. But in reality and in practice it gets used more widely. If that tag is applied to any animal, be it a slaughter cow if that's the term we're using, if it's applied to a slaughter cow I think it says Do Not Remove on the side of it or something like that or --

....

[Mr. Ball approaches Mr. Webster with the sample tag later marked as CX 21.]

Mr. Webster: It's oval, approximately four inches long, two and a half, three inches wide, has a big bold black number bar codes, and it has a statement on it that says State and Federal Do Not Remove.

Judge Clifton: Now, what color is it?

Mr. Webster: It's yellow.

Judge Clifton: Are all of them the same color?

Mr. Webster: Typically I think most of what we used were yellow, although we did see some white ones that came across once in a while.

Judge Clifton: All right. Go ahead. Thank you.

Mr. Webster: This tag's intent, as I said, was to be placed on slaughter livestock. In practice it got used more widely. But for this tag to be removed from an animal, that animal had to be taken out of the slaughter channel by a veterinarian.

So if an animal with this tag was purchased, before that tag could be removed that animal had to go through the veterinary inspection I previously mentioned, which would require all of the current health regulations, both state and federal, and the practice, the market practice that was in place at the time in order to make it eligible for the next step if it was reconsigned to the auction.

If a buyer decided to process that animal through the veterinary chute, find its status out and take it out of the auction, take it home, he could do that when it was deemed worthy by the veterinarian. Not all cattle that would have been purchased out of say a slaughter-type auction, not all of those cattle necessarily went back through the Tuesday auction. Some of those cattle would go back home. They wouldn't all automatically be through the veterinarian reconsigned to the auction.

And I think the one point I want to make and get away from the tag is that it was a public auction. Anybody could buy them. And as long as they were taken out of the slaughter channel via veterinary inspection they could move and go and do anything else. This did not -- this does

not seal their doom. All this does is identify them for future reference if she ends up at slaughter.

Mr. Oldfield: So if I understand your testimony, Mr. Webster, because a cow at Monday's sale has a four-letter back tag similar to what you've just identified doesn't mean that it's a cow that's only good for slaughter, is that right?

Mr. Webster: That's right.

Tr. 366-71.

7. On May 9, 2003, Lance Quam provided a statement to Packers and Stockyards indicating that a truck driver named Mr. Klecker, while loading cattle on Lance Quam's farm on February 18, 2003, suggested to Mr. Quam that he (Mr. Quam) was getting ripped off. Tr. 57, CX 15.

Mr. Quam testified that Mr. Jim Klecker said, "Oh, you're the one, and meaning that the scuffle down in Zumbrota that Todd [Respondent Syverson] was buying these cattle on Monday and turning around and running them up on Tuesday and selling them to somebody and they didn't know who. It was sort of interesting during the summer of the conversation when I was talking to Mr. Syverson he just said, Well, just keep it quiet about who we tell about where we got cattle there. Nobody else needs to know this so - -" Tr. 57.

8. After Lance Quam heard what truck driver Jim Klecker had to say, he felt he had been made a fool. Lance Quam began to blame Respondent Syverson for cows he had bought from Respondent Syverson that had died or showed symptoms of Johnes disease. Lance Quam tried to get Respondent Syverson's purchase records from Zumbrota but was not successful (Tr. 59, 68). Lance Quam was successful in getting veterinary records (Tr. 71) which showed that some of the cows Respondent Syverson had bought at Zumbrota on Tuesday, he had previously bought

at Zumbrota on Monday. After Packers and Stockyards obtained documentation of Respondent Syverson's transactions, including Respondent Syverson's Monday purchases, Lance Quam was given access to such documentation. Tr. 71. Lance Quam's complaint to Packers and Stockyards began this litigation.

Procedural History

9. The Complainant is the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture (frequently herein "Packers and Stockyards" or "Complainant"). The Complaint, filed on December 14, 2004, alleged violations of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181, *et seq.*) (frequently herein the "Packers and Stockyards Act" or the "Act"), and especially Section 312(a) of the Act, 7 U.S.C. § 213(a), which broadly prohibits any unfair or deceptive practice by a livestock dealer or market agency.

10. Packers and Stockyards is represented by Charles E. Spicknall, Esq. and Gary F. Ball, Esq., each with the Office of the General Counsel (Trade Practices Division), United States Department of Agriculture, 1400 Independence Ave. SW, Washington, D.C. 20250.

11. Respondent Syverson is also known as Todd C. Syverson. The Answer, filed on January 19, 2005, denied the allegations of the Complaint and stated affirmatively, among other things, that "there was no obligation on either party for cattle to change hands on a first cost basis or on any basis;" and that "at no time was Mr. Syverson hired to fill an order for or purchase cattle on an at cost plus commission basis for (Mr. Quam)."

12. Respondent Syverson is represented by E. Lawrence Oldfield, Esq., Oldfield & Fox, P.C., 2021 Midwest Road, Suite 201, Oak Brook, Illinois 60523.

13. The case was assigned to me, Jill S. Clifton, on October 24, 2005, and I held the hearing in Red Wing (Goodhue County), Minnesota on April 4-5, 2006. The record includes two transcript volumes, prepared by Neal R. Gross & Co., Inc., Court Reporters. Volume I (April 4) contains pages 1- 267 “Tr. 1-267” ; Volume II (April 5) contains pages 268-584 “Tr. 268-584”.

14. The following exhibits were admitted into evidence:

Complainant’s Exhibits (Packers and Stockyard’s)

EX 1; CX 1, p. 1; CX 2, pp. 1-2; CX 3; CX 4 (limited purposes); CX 5 (limited purposes); and CX 6 through CX 21.

Respondent’s Exhibits (Respondent Syverson’s)

RX 1 through RX 9.

15. Four witnesses were called by Packers and Stockyards; and four witnesses were called by Respondent Syverson. The eight who testified were: Lance Quam (Tr. 38-117); William Arce (Tr. 178-264), 272-322; Robert Merritt (Tr. 324-355); Tom Webster (Tr. 356-411); Marilyn Syverson (Tr. 414-435); Sterling Sibley (Tr. 435-450); Respondent Syverson (Tr. 450-552); Branard England (Tr. 554-570).

16. The parties’ post-hearing briefs were timely filed on July 12, 2006.

Discussion

17. Credibility of the witnesses is important in this case. Findings I make which impact the conclusions and affect the severity of the remedies to be imposed come from evidence in which the testimony of Lance Quam is opposite from the testimony of Respondent Syverson. Their testimony conflicts on several issues, including what Lance Quam said to Respondent Syverson in April or May 2002 to describe the type of cows Lance Quam hoped to buy from Respondent

Syverson; whether cows Respondent Syverson eventually sold to Lance Quam met that description; whether Lance Quam, prior to each delivery of cows from Respondent Syverson's farm, chose the cows to be delivered to him; whether Respondent Syverson knew, when he was bidding for cows out of his own consignment, that Lance Quam would be paying the price; whether Lance Quam complained to Respondent Syverson about the condition of any of the cows; and whether Lance Quam provided his cattle adequate feed.

18. Lance Quam's testimony is not fully credible. Lance Quam's May 9, 2003, statement to Packers and Stockyards (CX 15), includes, in part, the following:

On May 8 (2003) I talked to Zumbrota Livestock in Zumbrota and they told me that he (Syverson) was selling and buying is (*sic*) own livestock. Buying on Monday Slaughter and selling and running the price up on Tuesday dairy sale. I feel Todd Syverson owes me the difference from what he paid for them on Monday and what I paid for them on Tuesday.

s/ Lance Quam
43550 40 Acre Trail
Wanamingo MN 55983

CX 15, p. 2.

Upon careful consideration of all the evidence as a whole, I believe that Lance Quam, in the foregoing excerpt of his statement to Packers and Stockyards, attributed statements to Zumbrota Livestock on May 8 that did not come from Zumbrota Livestock. The name that Lance Quam gave (to Packers and Stockyards investigator Robert Merritt), was "Tom Webster" (Tr. 346-47), as the person from Zumbrota Livestock who told Lance Quam on May 8 that Syverson was selling and buying his own livestock, buying on Monday Slaughter and selling and running the price up on Tuesday dairy sale. Based both on Tom Webster's testimony (Tr. 361, 380-81, 400-401) and Lance Quam's testimony (Tr. 59-60), I find that the foregoing description of

Respondent Syverson's activities came not from Tom Webster, but from Lance Quam's own understanding. I find it likely that Lance Quam attributed to Tom Webster what Lance Quam wanted Packers and Stockyards to believe, thereby increasing the power of his complaint (aggrandizing). I find that Lance Quam had a tendency to aggrandize throughout the events beginning in February 2003 and continuing through the hearing in April 2006. CX 19 is a good example: Lance Quam included many more specifics in his Declaration about the cows he wanted than he ever articulated to Respondent Syverson back in April or May 2002.

19. I find that the misfortunes of Lance Quam's cows in 2002 and 2003 cannot be blamed on their condition when Respondent Syverson delivered them to Lance Quam's farm. I cannot comprehend how cows that were delivered in June, July, and August of 2002, could suddenly become so unsatisfactory to Lance Quam on February 18, 2003, following truck driver Jim Klecker's comments, after Lance Quam had all along behaved as if the cows had been satisfactory. Not only had Lance Quam continued to buy cows from Respondent Syverson all summer long in 2002, he *again* bought cows from Respondent Syverson in February 2003.

20. Mr. Quam was understandably upset when, beginning on February 18, 2003, he thought he got slaughter cows. Lance Quam has interpreted the events of 2002 and thereafter through the filter of belief that Lance Quam got slaughter cows. I find to the contrary, that the cows that Respondent Syverson bought at Zumbrota's Monday's auctions and resold at Zumbrota's Tuesday auctions were *not* slaughter cows, as confirmed by veterinary examination, and as explained in the testimony of both Tom Webster of Zumbrota and Respondent Syverson. Tr. 548-50. Sterling Sibley testified credibly that the cattle he delivered from Mr. Syverson's farm to Mr. Quam's pasture appeared to be healthy livestock. Tr. 440.

21. Lance Quam testified that for each delivery of cows (and there were ten such deliveries during the summer of 2002, RX 3), Respondent Syverson had shown him the Zumbrota purchase invoices. Tr. 47.

Mr. Quam: Yes, he would show me what he had paid for them and that was what I was to pay him.

Tr. 47.

Lance Quam testified that he then went to Respondent Syverson's farm to "pick up the receipt" (unless Respondent Syverson had already given it to him) and to "write a check and leave it there" but denies that he ever went to Respondent Syverson's farm to select cattle that he wanted to purchase. Tr. 46-47.

Mr. Spicknall: Did Mr. Syverson have cattle at his farm at that time?

Mr. Quam: Yes.

Mr. Spicknall: Did you ever go to Mr. Syverson's farm and select cattle that you wanted to purchase?

Mr. Quam: Never, no.

Mr. Spicknall: Did he ever offer to sell you cattle that were on his farm?

Mr. Quam: No. I was there that day we were talking [in April or May 2002, a month or two before Lance Quam's first purchase]. He was showing me some of his cattle that he owned but never offered them for sale. They were - - he just said, well, he got this for this and they were there. Never offered them to me.

Tr. 46-47.

22. Respondent Syverson testified that after Lance Quam had visited him in April or May 2002 (which was before Lance Quam had arranged his financing to buy cows), Lance Quam came to Respondent Syverson's farm to buy cattle, beginning June 12, 2002; that the invoice dates (RX 3) are the dates that Mr. Quam was at Respondent Syverson's place and purchased cattle. Tr. 460-61. Respondent Syverson testified, after examining CX 7 through CX 14, that none of those transactions was an order-buying situation on behalf of Mr. Quam. Tr. 486.

Respondent Syverson's testimony on direct concluded as follows. Tr. 486.

Mr. Oldfield: In each of those occasions were you approached by Mr. Quam after you bought the cattle and had them shipped to your farm regarding their purchase?

Mr. Syverson: Yes.

Tr. 486.

23. Lance Quam's testimony describing his cows that had Johnes disease or viruses and describing his cows that died (Lance Quam claims that about one-third of the cows he bought from Respondent Syverson died), was remarkably vague as well as remarkably unreported and undocumented (such as by veterinary records) to Respondent Syverson. Lance Quam and Respondent Syverson were neighbors who lived three miles from one another. Tr. 123. They had done cattle business with one another for close to 15 years. Tr. 452. With each delivery of cows to Lance Quam by Respondent Syverson, they were at one another's farms. If the cows had been noticeably defective, I would expect Lance Quam to have acted accordingly (stopped buying more of them, for example) and to have communicated to Respondent Syverson that he had a problem. Even Lance Quam testified that his only complaint to Respondent Syverson

prior to the Jim Klecker statement, was, a couple of times, that some of the cows were skinny.
Tr. 55, 124.

Mr. Quam: Some of the cattle were coming in skinny. Asked Mr. Syverson about them and he just said, Well, they just need to be grained and things and they will come out of it.

Tr. 55.

24. On the issue of the whether Lance Quam complained about the cows' condition when Respondent Syverson sold them, Respondent Syverson's testimony is found at Tr. 463-65.

Mr. Oldfield: Okay. Did Mr. Quam ever complain about the condition of the cattle that you sold him?

Mr. Syverson: No.

Mr. Oldfield: Did Mr. Quam ever call you or talk to you about cattle being too skinny?

Mr. Syverson: No.

Mr. Oldfield: Did Mr. Quam ever call you or talk to you about you selling him cull cattle?

Mr. Syverson: No.

Mr. Oldfield: When Mr. Quam would buy cattle during the summer of 2002 from you who would truck the cattle to Mr. Quam's pasture?

Mr. Syverson: 90 percent of the time it was me or I would hire Sterling Sibley.

Mr. Oldfield: Okay. And did you ever see Mr. Quam when you delivered cattle there to his pasture?

Mr. Syverson: Yes.

Mr. Oldfield: And would Mr. Quam watch you off-load the cattle?

Mr. Syverson: Watch what?

Mr. Oldfield: Watch you take the cattle off the truck?

Mr. Syverson: Yes. Yes.

Mr. Oldfield: Did he ever complain about the cattle then?

Mr. Syverson: No.

Mr. Oldfield: After the summer of 2002 did you have occasion to sell anymore cattle to Mr. Quam?

Mr. Syverson: After the summer of 2002?

Mr. Oldfield: Yes, sir.

Mr. Syverson: Yes, in February of 2003.

Mr. Oldfield: Okay. I want you to take a look at what has been marked as RX-6. There are three pages. Please identify those.

Mr. Syverson: These are my invoices to Mr. Lance Quam for three cows on February 1 of 2003, three cows on February 11th of 2003, two cows on February 18th of 2003. These were cattle that were sold to Mr. Quam.

Mr. Oldfield: Were you ever paid for these cattle?

Mr. Syverson: No, I wasn't.

Mr. Oldfield: Did Mr. Quam ever tell you there was anything wrong with these cattle?

Mr. Syverson: No.

Mr. Oldfield: Nothing was said about their health or condition?

Mr. Syverson: No.

Mr. Oldfield: Do you know what happened to these cattle?

Mr. Syverson: These particular eight head of cattle?

Mr. Oldfield: Yes, sir.

Mr. Syverson: These eight cattle I never was paid for and I don't know what the circumstances of it was, but they [four of the eight cows, see Tr. 465-68] ended up at a later date being sold back at the Zumbrota Livestock Market under the name of Terry LaCanne.

Tr. 463-65.

25. I find Lance Quam's failure to pay for the eight cows he bought in February 2003 without even a letter of explanation, and his overall failure to communicate in a business-like fashion, to be irresponsible. Lance Quam's behavior accompanying his failure to pay Respondent Syverson for the eight cows adds to my distrust of Lance Quam's version of events, where Lance Quam's version conflicts with other evidence. Even after Respondent Syverson's attorney sent a demand letter, dated March 6, 2003 (RX 7), which included an option of having Respondent Syverson come to pick up the cows if Lance Quam was unable to pay for them, Lance Quam failed to respond¹ (Tr. 473) and "declined" to let Respondent Syverson take the cattle back and call it even. Tr. 467.

26. Respondent Syverson's testimony is also not fully credible, but for the most part I find Respondent Syverson to be the more trustworthy witness compared to Lance Quam. Respondent Syverson testified that he had mistakenly put his invoices to Mr. Quam (RX 3) in his farm account records, rather than with his dealer account records, and that he did not discover them until he had talked to Mr. Oldfield about the complaint in this case. Tr. 482-83. Thus the

¹ In a small claims court action initiated by Respondent Syverson (CX 20), Lance Quam won. Lance Quam "counter-sued". Tr. 62. Lance Quam testified that he was not required to pay for the eight cows (\$4,776.10), and in addition, "the judge had awarded me the winnings of (\$) 7,500". Tr. 62. No transcript is available. Tr. 65. I am mindful that the judge of that court had evidence different from that before me and apparently reached a conclusion opposite mine on credibility.

invoices to Mr. Quam (RX 3) had not been turned over to Mr. Arce of Packers and Stockyards in September 2003, with Respondent Syverson's other dealer records. CX 17. Respondent Syverson's explanation is possibly true, but I don't believe it; I believe Respondent Syverson intentionally withheld from Mr. Arce of Packers and Stockyards the invoices to Mr. Quam.

27. In another instance where I find Respondent Syverson's testimony to be less than credible, I find that Lance Quam probably did comment to Respondent Syverson that some of the cattle were coming in skinny. Tr. 55. Lance Quam testified that Mr. Syverson just said, Well, they just need to be grained and things and they will come out of it (Tr. 55), which is consistent with Respondent Syverson's testimony describing the conditioning of cows, adding value to them. Tr. 459-60.

Mr. Oldfield: Do you believe that the processing of these animals from Monday to Tuesday and then giving them shots after Tuesday's sale would add value to them?

Mr. Syverson: By finding out the sound, well-uddered young animals that the vet had gone through and you did their check health would considerably add value to the animals and that would increase their value considerably the next day or down the road if you, of course, bred them, fed them right, took care of them and, depending on the market conditions, of course, that yes, they would be animals that would increase in value considerably.

Mr. Oldfield: If any of these cattle that you consigned to the Tuesday dairy auction would have received what you thought was a fair market value price, would you have sold them?

Mr. Syverson: Yes.

Mr. Oldfield: And you did in fact sell some of those cattle, is that right?

Mr. Syverson: Yes.

Tr. 459-60.

28. Respondent Syverson testified that Lance Quam viewed the cows at Respondent Syverson's farm before the cows were delivered to Lance Quam's farm. Tr. 528.

Mr. Ball: Is it your position, Mr. Syverson, that every time Mr. Quam bought cattle from you he came to your place to view the animals?

Mr. Syverson: That's correct.

Mr. Ball: And you never sent them directly from the auction market to Mr. Quam's?

Mr. Syverson: No.

Tr. 528.

Lance Quam denied that he ever went to Respondent Syverson's farm to select the cattle that he wanted to purchase. Tr. 46. Marilyn Syverson credibly corroborated Respondent Syverson's testimony that Lance Quam did come to Respondent Syverson's farm to observe and apparently select cattle; she observed Lance Quam do that on four to six occasions during the summer of 2002. Tr. 417-18, 425.

29. I find that Lance Quam either viewed or had the opportunity to view at Respondent Syverson's farm, and either selected or had the opportunity to select at Respondent Syverson's farm, every cow he purchased from Respondent Syverson during June, July, and August 2002, and during February 2003.

30. Lance Quam testified he fed his animals adequately. Tr. 56. Respondent Syverson testified that Lance Quam did not feed his animals adequately, which was one reason the Sheriff alerted the Humane Society. RX 9. Illustrative is the conflict in testimony about Respondent

Syverson's bull, which he rented to Lance Quam from the summer of 2002 until about late February 2003. Tr. 475-76.

Mr. Oldfield: Do you recall the condition that your bull was in when you first lent or rented it to Mr. Quam?

Mr. Syverson: When I rented the bull to Mr. Quam?

Mr. Oldfield: Yes.

Mr. Syverson: Yes, the bull was a two-year-old Holstein bull that I had purchased at a sale that was a young Holstein bull weighing approximately at that time 1,400 pounds. He was out of a herd of dairy cows that I was familiar with at one time that had very good milk records and he was out of a good breeding.

Mr. Oldfield: And when you got it back in late February 2003 what was the condition of that bull?

Mr. Syverson: The bull probably from the time that Mr. Quam got him until the time I picked him up I would say had lost an easy 300 pounds of weight. The bull was -- I wouldn't say emaciated but he was in very poor health and shape. And the majority of the problem was the lack of feed for the animals, including my bull.

Tr. 475-76.

31. Lance Quam claimed Respondent Syverson's bull weighed about 2,000 pounds (when the Humane Society person inspected in February 2003) (Tr. 75); that Mr. Syverson never complained about Lance Quam's care of the bull (Tr. 78); and that the bull was well taken care of and probably put on extra weight (Tr. 78).

Findings of Fact and Conclusions

32. Paragraphs 33 through 61 contain intertwined Findings of Fact and Conclusions.

33. The Secretary of Agriculture has jurisdiction.

34. Respondent Syverson is an individual who, during 2002 and 2003, farmed in Minnesota and was a livestock dealer who did business as Syverson Livestock Brokers. Respondent Syverson's mailing address is P.O. Box 1, Wanamingo, Minnesota 55983.

35. Lance Quam is an individual who, during 2002 and 2003, bought and sold real estate and had apartment rentals and a car lot plus car repair shop and a farm side business concerned primarily with dairy cattle. Tr. 43, 44, 117, 420. He also drove a school bus. Tr. 420. Mr. Quam's address is 307 N. Main Street, Pine Island, Minnesota 55963. Mr. Quam's place was "approximately three miles from Mr. Syverson's and about seven miles from Zumbrot Livestock barn." Tr. 123.

36. A subpoena was issued for James Klecker, 10263 SE 24th Ave, Owatonna, Minnesota 55060, to appear, to testify on April 5, 2006; Mr. Klecker was not, however, called as a witness. Tr. 57-58.

Mr. Spicknall: You mentioned Mr. Klecker was a trucker. Is that what he does for a living is trucks cattle?

Mr. Quam: Yes, he also farms family farm.

Mr. Spicknall: Do you know if he was at the Zumbrot auction frequently in 2002?

Mr. Quam: Yes, he usually goes down there and buys cattle for himself.

Tr. 57-58.

37. After hearing Mr. Klecker's comments, about February 18, 2003, Lance Quam stopped buying cattle from Respondent Syverson and began pondering whether Respondent Syverson should pay him damages for selling him cattle that were in poor condition, sick with Johnes.²

Tr. 55-56. [One of the cows had Johnes (CX 12 at 8), according to veterinary records in evidence. Johnes is aggravated by stress. Inadequate food is a stressor.]

38. Mr. Quam had begun to believe that Respondent Syverson had been cheating him: Tr.

54.

Mr. Quam: No. I guess I found out right at that time that he had deliberately misled me and I felt very took at that point.

Mr. Spicknall: Did you pay Mr. Syverson for the animals that he had delivered to you in early 2003?

Mr. Quam: No, I did not.

Mr. Spicknall: When you say you felt that he misled you, what do you mean by that?

Mr. Quam: I had been informed that the cattle that I had bought came from the Monday sale and -- which was the cull slaughter cow sale, and was repurchased again on the Tuesday sale, so basically I got slaughter cows.

Tr. 54.

39. Paragraphs 3 through 8 are hereby incorporated into Findings of Fact and Conclusions by this reference. Lance Quam thought Respondent Syverson had sold him cull cows (slaughter cows), but Respondent Syverson had not sold him slaughter cows, as confirmed by veterinary

² Johnes is a cattle disease that affects the digestive system and weakens the (cow's) condition over time. Tr. 394.

examination at the auction; the cows may have been open (not pregnant); they may have been bred but not in accordance with the producer's timetable; they may have been skinny and in need of good nutrition; but they were not slaughter cows.

40. Paragraphs 17 through 31 are hereby incorporated into Findings of Fact and Conclusions by this reference. For the cows he was interested in buying, Lance Quam specified to Respondent Syverson neither the type of sale nor the day of the sale those cows were to come from. The cows Respondent Syverson delivered to Lance Quam met Lance Quam's description, including Lance Quam's price range and the purpose he had for the cows.

41. Tom Webster recalled Lance Quam asking him about Respondent Syverson's transactions. Tr. 380-81.

Mr. Spicknall: And when Mr. Quam came to see you, do you have any recollection of what was discussed?

Mr. Webster: I don't remember that conversation in any detail at all. I remember him requesting some records, and my recollection is that the records were already being gathered by some agency, I'm not sure who, but I was aware that something was in the works, but he wasn't the customer that the name was on the paperwork so he wasn't going to get it.

Mr. Spicknall: And you testified earlier that's your practice. If someone comes in asking for someone else's records you wouldn't give them to them.

Mr. Webster: I wouldn't give them over the counter, no.

Mr. Spicknall: And that's just your policy.

Mr. Webster: That was our business policy.

Tr. 380-81.

42. Respondent Syverson knew Lance Quam wanted to buy cows that could bear calves, and Respondent Syverson was willing to buy such cows and to sell them to Lance Quam, but Respondent Syverson had no guarantee that Lance Quam would buy what Respondent Syverson had bought.

43. Every cow that Respondent Syverson sold to Lance Quam in 2002 and 2003 came from Respondent Syverson's farm, that is, was trucked from Respondent Syverson's farm to Lance Quam's place. Tr. 528, 439, 463-64.

44. Every cow that Respondent Syverson sold to Lance Quam in 2002 and 2003 had first been billed to Respondent Syverson by Zumbrota; none of those cows was billed to Lance Quam by Zumbrota.

45. Tom Webster testified credibly that in an order-buying situation, the cows would probably have been billed to the customer (such as Lance Quam, had this had been an order-buying situation) rather than the buyer (such as Respondent Syverson). Tr. 363-64.

46. In his transactions with Lance Quam in 2002 and 2003, Respondent Syverson was *not* operating as a marketing agency or "order-buyer"; he was operating as a cattle dealer. Lance Quam was not locked into buying any of the cows Respondent Syverson offered to sell him. Lance Quam chose which cows to buy, and whether he wanted to buy any cows, *after* he had an opportunity to inspect the cows and after he knew what the price would be. Lance Quam had no claim on any of the animals Respondent Syverson brought home until Respondent Syverson sold them to him. Respondent Syverson had other customers besides Lance Quam. The cattle Respondent Syverson owned could have been kept by Respondent Syverson and could have been sold to customers other than Lance Quam.

47. During 2002 and 2003, when Respondent Syverson bought the cows at issue here, he was *not* buying them for his neighbor Lance Quam; he was buying them for himself. Respondent Syverson certainly must have formed the expectation that Lance Quam would buy the cows, based on the fact that Lance Quam did keep buying the cows, but there was no guarantee.

48. Even if the form Respondent Syverson used to commemorate his sales of cows to Lance Quam made the sales to Lance Quam *appear* to be market agency transactions, that is, transactions in which Respondent Syverson bought the cows on Lance Quam's behalf, as Lance Quam's agent, owing Lance Quam a fiduciary duty, such was not the case; Respondent Syverson bought the cows on his own behalf, as a cattle dealer.

49. The use of the word "commission" on Respondent Syverson's invoices (RX 3, RX 7) is one factor to consider in evaluating whether each of Respondent Syverson's transactions with Lance Quam was a market agency transaction. I conclude that each such transaction lacks the attributes of market agency transactions. Respondent Syverson was buying for himself, not for Lance Quam. Lance Quam was not obligated to buy any cows from Respondent Syverson's inventory. No cow went from Respondent Syverson's place to Lance Quam's place until and unless Lance Quam said so or at least had the opportunity to say "yea" or "nay." A more accurate description of the \$15 per head that Respondent Syverson added would be "service charge" rather than "commission."

50. The buy-sell contract between Lance Quam and Respondent Syverson was not formed *before* Respondent Syverson acquired the cows that he ultimately sold to Lance Quam, but *after*. After Respondent Syverson bought cows and brought them home, Lance Quam bought them. The price Respondent Syverson offered to sell the cows for, was the price on the invoice he

showed Lance Quam, plus veterinarian costs, plus trucking charges, plus a \$15 per head service charge (labeled “commission” on the form but not truly a commission); the price Lance Quam agreed to buy the cows for, was the price on the invoice Lance Quam was shown, plus veterinarian costs, plus trucking charges, plus a \$15 per head service charge.

51. The Zumbrota invoices Respondent Syverson showed Lance Quam were true. There was nothing false about the invoices. The invoices showed truly the prices that Respondent Syverson paid at auction. For cows that Respondent Syverson had bought from himself, he had added value to the cows by obtaining evaluations of the cows by the veterinarian, thus ruling out certain defects that would have been detected in such evaluations, and getting shots for the cows. What Respondent Syverson failed to disclose to Lance Quam, were those Zumbrota invoices showing that Respondent Syverson had earlier paid an even lower price at auction for the same cow, sometimes only the day before. How much value did a cow gain in one day? - - quite a bit, actually, by being evaluated by a veterinarian and having some potential problems ruled out.

52. Tom Webster testified credibly to explain how value can be added to a cow by replacing some of the unknowns. Tr. 372-80.

Mr. Spicknall: Now, Mr. Webster, a question about your appearance here today. Are you here voluntarily today or pursuant to subpoena?

Mr. Webster: Voluntarily.

Mr. Spicknall: Why did you want to voluntarily come and give testimony today?

Mr. Webster: I think that it's important that we protect the public auction as we know it. People can come and purchase livestock out of consignment and it makes for a healthy auction.

Mr. Spicknall: So you understand the government's case to be that no one can purchase livestock at their own consignment?

Mr. Webster: No.

Mr. Spicknall: Okay. What do you understand this case to be about?

Mr. Webster: I understand this case to be about the ability to purchase cattle and resell them or take them home and background them or do whatever you want to do with them, but it comes down to my understanding is that you can -- whether you can buy cattle, add value, resell them, make a profit and go about your business.

Mr. Spicknall: Okay. And when you say buy cattle and add value, what do you mean by that?

Mr. Webster: If you buy cattle and increase their value as in taking -- if we're talking about these cows, you take a cow that is of an unknown quality, she's not been represented in any form or fashion, she's sold with no guarantees, warranties, et cetera, you buy that cow, have her pregnancy-examined, have her brucellosis-tested and find that that cow is only open, she was consigned to the auction because she was open, she didn't fit that producer's breeding schedule, not because she was sick, not because she was maimed, only because she was open, you buy that cow, you determine that that is the reason that she was for sale, which makes her more desirable to another buyer, thus increasing her value.

Mr. Spicknall: So, as I understand what you're saying, for instance, someone might bring a cow to the Monday sale where it would be tagged with a slaughter tag but it could be an open animal, is that sort of along the lines of what you're suggesting?

Mr. Webster: Yes, she could be. She wouldn't have to be. She could be bred in five months too. She wouldn't have to be open. She could be -- but at the time she's had this tag applied she's of an unknown quantity.

Mr. Spicknall: And does the majority of cattle have that tag applied to simply get them through for slaughter?

Mr. Webster: They go through an auction that it's not specifically for slaughter. Those cattle can be bought. It's a public auction. They can be bought by anybody.

Mr. Spicknall: No, I understand that. All right, let me ask you this: When you see those cattle that come in that someone consigned for the Monday sale, do you ever suggest as the consignee that they hold those cattle over to the Tuesday sale because it would improve their return on those animals?

Mr. Webster: It wouldn't be a common practice because it requires much more time and effort than I guess than we could put in. We would take the producer's request. If he said that the cow be sold in the market sale or as an unknown quantity, we did that.

Mr. Spicknall: So you mentioned taking the animal home and putting it out in pasture would probably increase its value if it was open and bred and that it would become more valuable as a dairy animal, is that --

Mr. Webster: You didn't have to take her home to do that. You could increase her value overnight if she was -- if she became a known commodity that had more value. You could increase her value overnight. You didn't have to take her home.

But you could increase her value maybe additionally by taking her home. Maybe she goes home and gets sick and dies. I don't know. We don't know that.

But one point I want to make before we get off the subject too is all cattle consigned to a dairy auction are not destined for the milk department tomorrow. Those cattle -- there's a whole large industry or large segment of the industry which Mr. Quam was part of, Mr. Syverson is part of, that does purchase cattle out of the dairy auction and increase their value additionally. They also buy open heifers, small calves and grow them up.

I don't want the perception that a dairy auction includes only cattle that are destined for the milk department tomorrow and these are an oddity. These are not. These are a part of the dairy industry, a very viable part and a very well-attended segment of that industry.

Mr. Spicknall: So what would be the qualifications for an animal to go into the dairy sale would be, as I believe you stated earlier, that a veterinarian would have to qualify them as a dairy animal?

Mr. Webster: He would have to brucellosis-test them, he would have to pregnancy-examine them, and he would have to confirm the condition of the udder. Then it becomes the owner, that person, it becomes the owner's choice as to whether that animal is consigned to the dairy auction or not.

The veterinarian has deemed that she qualifies, but does the owner wish to consign her to the dairy auction or does he wish her to go back to market or does he wish to take her home? That's the current owner's decision.

Mr. Spicknall: You mentioned the udder. So if someone purchased a cow with a four-digit number at the Monday sale, had the vet look at it, turned out it was open or somewhere along in pregnancy and thought the value was better and they reconsigned it to the Tuesday sale and

purchased it from themselves at the Tuesday sale, ownership would have never changed hands for that animal, is that correct?

Mr. Webster: I would say technically, no, but there was a service fee assessed to that animal by the market. Whether it was purchased back or not, there was a commission yardage service fee put on those cattle or a no-sale charge or whatever the fee might have been at the time would have been assessed to them technically whether ownership changed or not. I don't really know that. But she did have a service fee attached to her in between.

....

Mr. Spicknall: Mr. Webster, you mentioned there's a risk that something could happen pretty much at any time, is that correct?

Mr. Webster: Yeah.

Mr. Spicknall: So if someone consigned an animal on Monday, well, let's say someone purchased an animal at the Monday sale, it happened to die Monday night, the intent was to re consign it for the Tuesday sale, who bears the risk of loss for that?

Mr. Webster: The buyer.

Mr. Spicknall: The person who owned it as a result of purchasing it at the Monday sale . . .

Mr. Webster: Yup.

Mr. Spicknall: Okay. In the summer of 2002 were you aware of Mr. Syverson's practice of purchasing cattle at the Monday sale and re consigning the animals to the Tuesday sale and repurchasing them from his own consignment?

Mr. Webster: Yes.

Mr. Spicknall: What was your understanding of what he was doing with those animals?

Mr. Webster: I had no idea what he was doing with the animals. I produced a buyer invoice for him and I did not know where he was taking the cattle.

Mr. Spicknall: At some point did you learn what he was doing with at least some of those animals in the summer of 2002?

Mr. Webster: I don't think I would have known in the summer of 2002 but I found out when the cattle or a portion of the cattle came back to the auction at a later time. From Mr. Quam I found out that that's -- that he had purchased them from Mr. Syverson and had them in his possession for the summer and reconsigned them back to the auction.

Tr. 372-80.

53. Respondent Syverson's purchase price for cattle at auction, even when he was the seller as well as the buyer, was not shown to be inflated or higher than a fair market price for those cattle. There is no credible evidence that Respondent Syverson bid up the price of the cows he bought at auction to a price that was higher than reasonable fair market value.

54. Respondent Syverson operated to maintain some control over the price his cows brought at auction, bidding them in himself if they were bringing a lower price than what he considered to be fair market value. There is nothing wrong with this technique, which is used in all kinds of auctions, not just livestock auctions. Respondent Syverson testified credibly that he used the technique for his own business purposes. Tr. 524. Packers and Stockyards criticizes Respondent Syverson for this method of operating, suggesting sinister motives and that Respondent Syverson should instead have just "no saled" his livestock, as he did on occasion. Packers and Stockyards Brief at p. 11-12. I conclude that Packers and Stockyards, to ensure fair dealing, need not dictate the livestock dealer's choice between buying out of his own consignment or "no sale-ing."

55. Tom Webster testified that it was neither unusual nor uncommon for sellers to buy back their own livestock if they didn't get the price they wanted. Tr. 363.

56. Lance Quam did not get the cows he bought from Respondent Syverson at as low a price as he might have paid had he gone to the auction himself. The price Respondent Syverson paid was higher than any other bidder was willing to bid (obviously; otherwise the higher bidder would have gotten the cow instead of Respondent Syverson), and that is true whether Respondent Syverson bought the cow on Monday or whether Respondent Syverson bought the cow on Tuesday, either out of his own consignment or from another, but there is no credible evidence that the price Respondent Syverson paid was higher than a fair market price.

57. Whether Lance Quam got the cows he bought from Respondent Syverson at a good price, or a fair market price, is not at issue here. Lance Quam was required to exercise his own judgment as to what he was willing to pay for each cow offered to him. Lance Quam had been in the cattle industry before. Tr. 54. What is at issue regarding cows Respondent Syverson sold to Lance Quam, is whether, on those occasions when Respondent Syverson twice bought cows (buying them from himself after he first bought them), Respondent Syverson's disclosure of his second purchase of the cows, while not disclosing his first purchase of the cows, constitutes a violation of the fair dealing requirements of the Packers and Stockyards Act. A cattle dealer is not required to disclose his purchase price for cows he is selling. Respondent Syverson could have set his price for each cow without giving any basis or explanation for it. Respondent Syverson chose to show Lance Quam his Zumbrota invoice, though, and to base Lance Quam's price on it. For some of the transactions there was an earlier Zumbrota invoice, Respondent Syverson's first purchase invoice, which Respondent Syverson did not disclose to Lance Quam.

58. Roughly 2/3 of the cows Respondent Syverson sold to Lance Quam had been “twice bought” by Respondent Syverson, although that fraction cannot be calculated with precision. Packers and Stockyards Brief at pp. 41-42. Respondent Syverson’s Brief at p. 13.

59. When Respondent Syverson showed Lance Quam Respondent Syverson’s Zumbrota invoices from his second purchase, leaving the impression that the second purchase was an arm’s length transaction without revealing that he, Respondent Syverson, was both buyer and seller in the second purchase, and without revealing that Respondent Syverson had already made a first purchase of the same cows, sometimes the day before, Respondent Syverson was not being deceitful (what he showed was true), but he was being unfair because he failed to disclose the whole truth.

60. The Packers and Stockyards Act prohibits unfair *or* deceptive practice by a livestock dealer or market agency. Section 312(a) of the Act, 7 U.S.C. § 213(a). On those occasions when Respondent Syverson did what is described in paragraphs 57 and 59, he violated the Packers and Stockyards Act by engaging in an unfair practice.

61. Respondent Syverson breached no fiduciary duty; he was not Lance Quam’s agent. Respondent Syverson did not engage in fraud, deceit or deception, or misrepresentation (what he presented was true, but he did not present the whole truth). Respondent Syverson did not violate the prior cease and desist order from “In re Todd Syverson, d/b/a Syverson Livestock Brokers,” P&S Docket No. D-99-0011 (June 12, 2001). CX-5, at pp. 2 -3. Respondent Syverson did engage in an unfair practice. Considering the evidence as a whole, suspension is not warranted, but a civil penalty is warranted. The following Order provides an appropriate, reasonable, and sufficient remedy.

Order

62. The following **cease and desist** provisions of this Order (paragraphs 62 and 63) shall be effective on the day after this Decision becomes final. [See paragraph 67.]

63. Respondent Syverson, individually or through any corporate or other device, in connection with his operations as a market agency or dealer subject to the Act, shall cease and desist from failing to comply with the fair dealing requirements of Section 312(a) of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181, *et seq.*), 7 U.S.C. § 213(a), and specifically Respondent Syverson shall not represent to any buyer that his higher, second, purchase price was his price for livestock while failing to disclose that he bought from his own consignment or failing to disclose his lower, initial, purchase price within the previous 90 days.

64. Respondent Syverson, individually or through any corporate or other device, in connection with his operations as a market agency or dealer subject to the Act, shall cease and desist from failing without good cause to produce for examination within a reasonable time when asked by Packers and Stockyards, all of the accounts, records, and memoranda as are required to be kept under Section 401 of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181, *et seq.*), 7 U.S.C. § 221, including, but not limited to, a purchase journal (recording, at minimum, the date of purchase; seller; number of head; description of livestock; purchase price(s); date(s) received; commission charges, if any; other fees or charges (optional); whether the livestock were purchased for the account of another, and if so, the identity of that person or firm); together with all invoices, buyer bills, consignment sheets and other records associated with individual livestock purchases and sales.

65. Respondent Syverson is assessed a civil penalty of **\$ 5,000.00**, in accordance with Section 312(b) of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181, *et seq.*), 7 U.S.C. § 213(b), which he shall pay by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States,**" **within 90 days** after this Decision becomes final.

66. Respondent Syverson shall reference **P&S Docket No. D-05-0005** on his certified check(s), cashier's check(s), or money order(s). Payments of the civil penalties **shall be sent by a commercial delivery service, such as FedEx or UPS**, to, and received by, Charles E. Spicknall, Esq., at the following address:

United States Department of Agriculture
Office of the General Counsel, Trade Practices Division
Attn.: Charles E. Spicknall, Esq., South Building
1400 Independence Avenue, S.W.
Washington, D.C. 20250

Finality

67. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 31st day of August 2007

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
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