

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 05-0005
)	
ARCTIC SOLE SEAFOODS, INC.,)	DECISION
Appellant)	
)	November 29, 2006
_____)	

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on February 11, 2005, that approved the Appellant's application under the North Pacific Groundfish and Crab license limitation program (LLP) for an LLP groundfish license with a Bering Sea area groundfish fishery endorsement, based on the Appellant's ownership of the fishing history of the catcher/processor vessel, the F/V TREMONT (ADF&G No. 55466).¹ The Appellant purchased the vessel's fishing history from the vessel's previous owner, Halvor Ostebovik, on August 17, 1994.² Mr. Ostebovik is no longer living.

The IAD denied the Appellant's other requested LLP groundfish license area endorsements for the Aleutian Islands, Western Gulf of Alaska, and Central Gulf of Alaska groundfish fisheries, based on the fishing history of the same vessel. The length overall of the F/V TREMONT was 131 feet on June 17, 1995.³

The Appellant filed a timely appeal of the IAD. The Appellant appeals only the denial of the Central Gulf area groundfish license endorsement.⁴ Appellant can file an appeal because the IAD directly and adversely affects its interests. [50 C.F.R § 679.43(b)] An oral telephonic hearing was held on March 20, 2006. Mr. Eric Swenson, the captain and operator of the F/V TREMONT in 1993, was the only witness at the hearing. Attorney John Casperson represented the Appellant at the hearing.

ISSUE

Does the Appellant qualify for an LLP groundfish license with a Central Gulf area groundfish endorsement, based on the fishing history of the F/V TREMONT?

¹ The F/V TREMONT is now known as the F/V ALASKAN ROSE.

² Copy of Bill of Sale for the F/V TREMONT, August 17, 1994.

³ Appellant's Application for an LLP groundfish license, at 2.

⁴ Appellant's letter of appeal, April 14, 2005, and Appellant's letter from Attorney John E. Casperson to this Office, April 21, 2005.

SUMMARY

The IAD that is the subject of this appeal is affirmed. The Appellant claims on appeal that the Appellant qualifies for Central Gulf area LLP groundfish license endorsement based on a documented harvest of groundfish by-catch that the F/V TREMONT made while fishing for shrimp in the state waters of Lower Resurrection Bay, Alaska, in 1993.

The LLP regulations require that the Appellant use a state fish ticket, Federal Weekly Production Report, or “other valid documentation” to prove its claim.

The Appellant’s state fish ticket shows that the F/V TREMONT harvested shrimp which is not LLP groundfish, and caught “trawl waste fish” which, as discarded fish, cannot be considered a commercial harvest of fish and therefore not a documented harvest of groundfish. An oral hearing was held to determine whether the “trawl waste fish” was incorrectly recorded on the fish ticket. The captain of the F/V TREMONT testified that some of the “trawl waste fish” consisted of red rockfish, but his testimony lacked sufficient detail and corroboration to show that the vessel retained and sold, and therefore commercially harvested, the fish. Even so, the fish ticket is not a valid fish ticket. The fish ticket is not signed by a fish buyer or receiver of fish, or imprinted with a State of Alaska commercial fishing permit card, as required by State of Alaska commercial fishing regulations.

The Appellant produced an affidavit from the vessel’s captain, a declaration from a fish buyer/broker, and a bill of lading for an ocean vessel that transported shrimp and “honmenuke” (known as red rockfish) to Japan. The affidavit and declaration are not contemporaneous to the harvesting activities of the F/V TREMONT in 1993, nor were they written in the performance of one’s duties to record. The bill of lading does not mention the name of the F/V TREMONT, the gear type used to harvest fish, and the date of harvesting, landing, or reporting of the fish by the vessel. As a result, none of the Appellant’s documents can be considered “other valid documentation” of an LLP groundfish harvest. The Appellant did not produce a Federal Weekly Production Report, but a WPR was not required for fish harvested and processed in state waters.

The Appellant does not have a state fish ticket, Federal Weekly Production Report, or “other valid documentation” that shows the F/V TREMONT made a documented harvest of Central Gulf area groundfish in 1993. Therefore, the Appellant does not qualify for an LLP groundfish license with a Central Gulf area groundfish endorsement.

ANALYSIS

To qualify for an LLP groundfish license with a Central Gulf area endorsement, the Appellant must demonstrate that its qualifying vessel (the F/V TREMONT) made (1) at least one documented harvest of groundfish in the Gulf of Alaska or the Bering Sea/Aleutian Islands (BSAI) during the general qualifying period (GQP), January 1, 1988, through June 27, 1992;⁵

⁵ 50 C.F.R. § 679.4(k)(4)(i)(A) and (B).

and (2) one documented harvest of Central Gulf of Alaska groundfish in each of any two years during the endorsement qualifying period (EQP) for the fishery, January 1, 1992, through June 17, 1995.⁶

The LLP regulations define a “documented harvest” of LLP groundfish as a “lawful harvest [of groundfish] that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting.”⁷ “Harvesting or to harvest” means the catching and retaining of any fish.⁸ Therefore, the term “documented harvest” can be reasonably defined as “a lawful catching and retaining of LLP groundfish that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting.”

In several decisions,⁹ this Office has ruled that to be considered a “documented harvest” of groundfish under the LLP, the harvest of the fish must have been a lawful *commercial* harvest (as the result of a commercial fishing of groundfish); and that to be considered a commercial harvest of groundfish the groundfish must have been, or intended to be, sold, bartered or traded.

In Application of Williard S. Ferris, we stated:

A “documented harvest” is defined as a “lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at time of harvesting.” Implicit in this definition is the idea that the lawful harvest must be a lawful *commercial* harvest. Otherwise it would make no sense to require that the harvest be recorded in compliance with commercial fishing regulations. ...

This view – that a documented harvest must result from commercial fishing – is consistent with the LLP’s purpose of regulating commercial fishing of LLP groundfish and crab. Section 3 of the Magnuson-Stevens Fishery Conservation and Management Act defines “commercial fishing” as “fishing in which the fish harvested, either in whole or part, are intended to enter commerce or enter commerce through sale, barter, or trade.”¹⁰ [footnotes omitted]

LLP regulation 50 C.F.R. § 679.4(k)(4) provides that evidence of a “documented harvest” must

⁶ 50 C.F.R. § 679.4(k)(4)(ii)(H).

⁷ 50 C.F.R. § 679.2.

⁸ 50 C.F.R. § 679.2.

⁹ See, e.g., *Willard S. Ferris*, Appeal No. 00-0004 (Jan. 18, 2002); *Paula J. Brogdon*, Appeal No. 00-0011, (Feb. 26, 2002); *Ronald J. Tennison*, Appeal No. 00-0012 (April 5, 2002); *Darjen, Inc.*, Appeal No. 00-0015 (Dec. 31, 2002); and *Stephen L. Lovejoy*, Appeal No. 02-0023 (Feb. 26, 2003).

¹⁰ *Willard S. Ferris*, *supra*, at 1-2.

be demonstrated by a state fish ticket, Federal Weekly Production Report, or other valid documentation that indicates the amount of license limitation groundfish harvested, the vessel and gear type used to harvest the license limitation groundfish, and the date of harvesting, landing, or reporting.

The phrase “other valid documentation” is not defined in the LLP regulations. However, its language and placement in the regulation suggests that “other valid documentation” is documentation similar or equivalent to a state fish ticket or Federal Weekly Production Report.

A properly recorded state fish ticket and Federal Weekly Production Report provide information relating to the harvesting activity of a commercial fishing vessel. Because both documents are written at or near the time of the harvesting of the fish, by persons responsible for the recording of the fishing activities of a commercial fishing vessel, they are inherently reliable and trustworthy. I presume that the data on a properly recorded fish ticket are correct, unless there is evidence in the record to the contrary or there is an obvious error.

The IAD in this case provides that the F/V TREMONT satisfies the GQP requirement, but not the EQP requirement, for a Central Gulf area groundfish license endorsement.¹¹ The official LLP record shows that the vessel made documented Central Gulf groundfish harvests in 1992, and again in July 1995, but not in any other EQP year.

Appellant claims that the F/V TREMONT satisfies the EQP requirement based on a documented harvest of groundfish by-catch that the vessel made in the state waters of Lower Resurrection Bay, Alaska, on February 13, 1993, while trawling for shrimp.

To prove its claim, the Appellant produced (1) a State of Alaska shellfish fish ticket for the harvest of shrimp and catch of trawl waste fish by the F/V TREMONT on or about July 13, 1993; (2) an April 12, 2005, affidavit from the vessel’s captain, Eric Swenson; (3) a May 31, 2006, declaration from fish buyer/broker, Hitoshi Otatsume; and (4) a July 13, 1993, bill of lading from the ocean vessel GOLDENGATE BRIDGE. The Appellant did not produce a Federal Weekly Production Report, but a WPR would not have been required for groundfish harvested and processed in *state* waters.

The Appellant’s Shellfish State Fish Ticket

The Appellant’s fish ticket does not show that the F/V TREMONT commercially harvested any groundfish. The ticket does not contain a fish buyer’s signature, a species code, a delivery code, or a price or dollar amount for groundfish harvested and sold by the vessel. The fish ticket shows that the F/V TREMONT harvested shrimp, but shrimp is not considered LLP

¹¹ IAD, at 5-6.

groundfish.¹² The fish ticket also shows that the vessel caught “trawl waste fish,”¹³ but trawl waste fish is fish that were discarded at sea.¹⁴ As discarded fish, the “trawl waste fish” cannot be considered a commercial harvest of fish, and therefore a documented harvest of groundfish.¹⁵

The Appellant claims on appeal that some of the “trawl waste fish” in the Appellant’s fish ticket were not discarded at sea, but offloaded and sold as “rockfish” to the Japanese Company, T.M.G., Co., Ltd.

In several decisions, this Office has held that an incorrectly recorded fish ticket can be corrected on appeal. In *Roderick Dexter*,¹⁶ we used vessel log book entries to correct the statistical area in a sablefish fish ticket. In *Charles A. Adamonis*,¹⁷ we used vessel log book entries to supply the missing gear type in a Pacific halibut state fish ticket. In *S.Y.B Fisheries*,¹⁸ we used the pilot log of a vessel to supply the missing statistical area for a sablefish fish ticket. And, in *Brian Merritt*,¹⁹ we used the testimony of the vessel’s owner and the owner’s partner, both of whom who had fished together, an affidavit from the processor of the fish, and corroborating information in the fish ticket itself, to correct the vessel name on the fish ticket. In each of those cases it was obvious, based on the circumstances and evidence produced by the Appellant, that an error was made in the recording of the harvest of fish in an otherwise valid fish ticket.

¹² See the definition of “License Limitation Groundfish” at 50 C.F.R. § 679.2.

¹³ The State of Alaska requires the weight of fish discarded at sea to be recorded on a state fish ticket. See, e.g., Alaska Department of Fish And Game Groundfish Reporting Requirements, 2001.

¹⁴ There is no delivery code for the “trawl waste fish” in the Appellant’s shellfish fish ticket, but State of Alaska fishing records for the F/V TREMONT show that the state assigned delivery code “98” to the “trawl waste fish” in the Appellant’s shellfish fish ticket. According to the “Fish Ticket System Codes” for the State of Alaska, delivery code 98 is considered fish that are discarded at sea.

¹⁵ Fish that are discarded at sea cannot be considered a “documented harvest” for two reasons. First, to constitute a “harvest” under the LLP, the fish must be caught and retained. See definition of *harvest* at 50 C.F.R. § 679.2. Fish that are discarded at sea are not fish that are retained by the fisherman, and therefore cannot be considered a documented harvest. Second, a documented harvest must be the result of commercial fishing. If fish are discarded at sea, they do not enter commerce, and therefore cannot constitute a documented harvest.

¹⁶ Appeal No. 95-0089, January 25, 1996.

¹⁷ Appeal No. 95-0133, April 5, 1996.

¹⁸ Appeal No. 95-0141, April 7, 1998.

¹⁹ Appeal No. 95-0132, March 12, 1997.

In this case, the Appellant's fish ticket is not a valid fish ticket. The fish ticket is not signed by the buyer or receiver of the fish, or imprinted with Mr. Swenson's commercial fishing permit card, as required by state regulations.²⁰ But even so, it is not apparent from the evidence produced by the Appellant that the "trawl waste fish" in the Appellant's fish ticket were incorrectly recorded.

The Appellant did not produce a contemporaneously written document to show that the F/V TREMONT harvested, delivered, or sold any rockfish or groundfish in 1993. Eric Swenson (the person who wrote the fish ticket and who was the captain of the F/V TREMONT) testified at the hearing that some of the "trawl waste fish" on the fish ticket consisted of red rockfish,²¹ but his testimony lacked sufficient detail to show that the vessel retained and sold, and therefore commercially harvested, the fish. Mr. Swenson did not know how much of the rockfish were caught and offloaded; the name of the person or company to whom he delivered the fish;²² or if the fish were sold.²³ Mr. Swenson did not produce any documentary evidence (such as a vessel

²⁰ The State of Alaska commercial fishing regulations in 1993 required that a catcher/processor vessel record its groundfish harvests in state waters on a state fish ticket, and submit the fish ticket to the State of Alaska within seven days of the offload. The regulations also required that the fisherman's (Commercial Fisheries Entry Commission) commercial fishing permit card be imprinted on the fish ticket and that the fish ticket be signed by both the fisherman and buyer of the fish. 5 AAC 39.130(a) and (b).

²¹ Mr. Swenson testified that he knew "trawl waste fish" meant discarded fish when he signed the fish ticket, but that he was "new at the job" and did not know how to record the "details of the catch." [Mr. Swenson's testimony: tape 1, sides A and B] Mr. Swenson testified that his pay was based in part on a percentage of the vessel's catch, and his primary objective in the recording of the fish ticket was to record the number of pounds of fish that the vessel had caught. [Mr. Swenson's testimony: tape 1, sides A and B]

²² Mr. Swenson recorded the name "T.G.M. CO. LTD. TOKYO JAPAN" on the fish ticket as the receiver of the fish, but the fish ticket was not signed by a representative of the company.

²³ Mr. Swenson testified that some or all of the 3,010 pounds of trawl waste fish in the Appellant's shellfish ticket consisted of red rockfish (which he referred to as "honmenuke") and that the F/V TREMONT packaged and froze the fish aboard the vessel, and delivered the fish to a refrigeration truck in Seward, Alaska. [Mr. Swenson's testimony: tape 1, sides A and B] From there, (he believes) the fish were "warehoused" in cold storage. [Mr. Swenson's testimony: tape 1, side A] Mr. Swenson testified that he did not know to whom the vessel delivered the rockfish, but he thinks it was a "joint venture" which the owner of the F/V TREMONT, Hal Ostebovik, was a member. [Mr. Swenson's testimony: tape 1, side B] Mr. Swenson knew that the shrimp (in the fish ticket) were going to be shipped to Japan by the way the vessel "had processed it." [Mr. Swenson's testimony: tape 1, side B] However, he has "no idea" what the joint venture did with the groundfish because he "was not in sales." [Mr. Swenson's testimony: tape 1, sides A and B]

log) to corroborate his testimony that the vessel harvested red rockfish. While it is clear in this case that the vessel harvested shrimp, it is not so clear that it harvested rockfish. Based on the evidence before me, I find that an error was not made in the recording of the trawl waste fish on the Appellant's fish ticket.

Mr. Swenson's Affidavit and Mr. Otatsume's Declaration

Mr. Swenson's affidavit states that the F/V TREMONT harvested and sold "rockfish" to a Japanese Company, T.M.G., Co., Ltd.²⁴ Mr. Otatsume states in his declaration²⁵ that his "recollection" is that his company (Pacific Ocean Crest) purchased 20 kilograms of rockfish from JCA, Inc., and that JCA, Inc., had acquired the fish from Homeport Fisheries, Inc., whose vessel, the F/V TREMONT, had caught and produced the fish in 1993.²⁶ Mr. Otatsume does not

²⁴ Mr. Swenson's affidavit provides in relevant part:

On February 13, 1993, the vessel harvested approximately 27,700 pounds of shrimp and 3,000 pounds of groundfish in Lower Resurrection Bay, which is within the territorial waters of the State of Alaska. ...

The shrimp and groundfish were recorded on a State of Alaska fish ticket. ... The total weight of 3,010 pounds recorded as "trawl waste fish" under species code 101 does not reflect what we retained. Most of the fish was discarded. However, we retained some rockfish and black cod and later sold it. We included it in this particular entry on the fish ticket because there was no other place to record it on the fish ticket. This had been the practice of the prior master, and I continued it when I took the helm. ...

The shrimp and groundfish that were harvested on the TREMONT in February of 1993 were shipped to TMG Co. Ltd. in Japan in July of 1993. This bill of lading shows delivery of sablefish and honmenuke, which is rockfish. This fish is part of the miscellaneous trawl fish we landed as reflected in the fish ticket.

²⁵ Mr. Otatsume's declaration provides in relevant part:

Port 5. It is my recollection that in 1993, JCA, Inc., purchased a shipment of fish from Home Fisheries that had been caught and produced by the F/V TREMONT. This shipment included 19,140 kg of shrimp, 100 kg of sablefish (black cod) and 20 kg of honumenuke (rockfish).

²⁶ Neither the affidavit nor declaration describe the type of rockfish that was allegedly harvested by the F/V TREMONT, but, with some exceptions not relevant here, rockfish is generally considered LLP groundfish. See the various species codes for groundfish in the "Fish Ticket System Codes" pamphlet of the State of Alaska.

explain in the declaration how he knows that the 20 kilograms of rockfish that his company purchased from “JCA” came from the F/V TREMONT. Nor did he produce a business record to support his declaration.

Mr. Swenson’s affidavit and Mr. Otatsume’s declaration are not inherently reliable or trustworthy documents for purposes of showing that the F/V TREMONT made a documented harvest of groundfish in 1993. They were not written at or near the time of the alleged harvest, delivery, and sale of the rockfish by the F/V TREMONT. Nor were they written for the purpose of recording a commercial harvest of the fish. Instead, the documents were written several years after the alleged harvesting of fish, for the purpose of this appeal. Therefore, Mr. Swenson’s affidavit and Mr. Otatsume’s declaration cannot be “other valid documentation” of a documented harvest of LLP groundfish.

The Appellant’s Bill of Lading

The Appellant’s bill of lading shows that the ocean vessel GOLDENGATE BRIDGE transported 120 kilograms (approximately 44 pounds) of “honmenuke” to “T.M.G. Co., Ltd.,” in Japan on July 13, 1993. The document does not mention the name of the F/V TREMONT, the gear type used to harvest the fish, and the date of harvesting, landing, or reporting of the fish. Therefore, the bill of lading cannot be considered “other valid documentation” of a documented harvest of groundfish by the F/V TREMONT.

The Appellant does not have a state fish ticket, Federal Weekly Production Report, or “other valid documentation” that shows the F/V TREMONT made a documented harvest of Central Gulf area groundfish in 1993. Therefore, I conclude that the F/V TREMONT did not make a documented harvest of Central Gulf area groundfish in 1993. I conclude that the Appellant does not qualify for an LLP groundfish license with a Central Gulf area groundfish endorsement, based on the fishing history of the F/V TREMONT

FINDINGS OF FACT

1. The Appellant does not have a state fish ticket, Federal Weekly Production Report, or “other valid documentation” that shows the F/V TREMONT made a documented harvest of Central Gulf area groundfish in 1993.
2. The “trawl waste fish” in the Appellant’s fish ticket was correctly recorded as “trawl waste fish.”

CONCLUSIONS OF LAW

1. The F/V TREMONT did not make a documented harvest of Central Gulf area groundfish in 1993.
2. The Appellant does not qualify for an LLP groundfish license with a Central Gulf area groundfish endorsement, based on the fishing history of the F/V TREMONT

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect on December 29, 2006, unless by that date the Regional Administrator takes further action pursuant to 50 C.F.R. §679.43(o).

The Appellant or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, December 11, 2006, the tenth day after this Decision. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Administrative Judge, and must be accompanied by a written statement in support of the motion.

Randall J. Moen
Administrative Judge