

August 20, 2003, that we keep the “official record open for a reasonable time to permit submission of additional materials ...”⁴ This Office has not received additional materials in support of Blue Gadus’ appeal. The record contains sufficient information to decide this appeal, and therefore the record is now closed. 50 C.F.R. §679.43(g)(2).

ISSUE

Does Blue Gadus qualify for a BSAI Pacific cod catcher/processor vessel pot gear endorsement to its LLP groundfish license based on the hardship/unavoidable circumstance provision in 50 C.F.R. § 679.4(k)(9)(v)(B)?

ANALYSIS

To qualify for a BSAI Pacific cod catcher/processor vessel pot gear endorsement, Blue Gadus must demonstrate that the FV BLUE ATTU harvested 300,000 pounds of Pacific cod in the BSAI with pot gear *in each of any two years* from 1995 through 1998.⁵

The NMFS official LLP record⁶ shows that the F/V BLUE ATTU did not harvest at least 300,000 pounds of Pacific cod in the BSAI with pot gear during any of the qualifying years for a Pacific cod pot gear endorsement.⁷ Blue Gadus does not dispute this, but claims that an “unavoidable circumstance” (which consisted of engine malfunctions in 1997) prevented the F/V BLUE ATTU from making sufficient harvests in 1997 and 1998 to qualify for a Pacific cod pot gear endorsement.⁸

The LLP regulations provide for Blue Gadus to qualify for a Pacific cod pot gear endorsement based on an unavoidable circumstance as long as it can satisfy the criteria in the Pacific cod

Resolution of the factual issue in the way sought by the applicant is adequate to justify the action requested. A hearing will not be ordered on factual issues that are not determinative with respect to the action requested.

⁴ Appellant’s appeal by R. Shawn Griggs, Appellant’s attorney, at 1 (Aug. 20, 2003).

⁵ 50 C.F.R. § 679.4(k)(9)(ii)(D). For background and comments on the Pacific cod endorsement regulation, see Final Rule, 72 Fed. Reg. 18,129, 18,129 - 18,138 (April 15, 2002).

⁶ The NMFS official LLP record is “the information prepared by the NMFS Alaska Region Regional Administrator about vessels that were used to participate in the groundfish or crab fisheries during qualified periods for the groundfish and crab LLP specified at § 679.4(k).” 50 C.F.R. § 679.2.

⁷ See IAD at 5, and the copy of the NMFS official LLP record for the F/V BLUE ATTU sent to Administrative Judge, Randall Moen, from Mukhya Khalsa, NOAA, August 9, 2005.

⁸ Appellant’s appeal by R. Shawn Griggs, Appellant’s attorney, at 4 and 5 (Aug. 20, 2003).

endorsement unavoidable circumstance provision.⁹ The provision provides:

(B) Hardship provision. A license holder may be eligible for a Pacific cod endorsement because of unavoidable circumstances if he or she meets the requirements in paragraphs (k)(9)(v)(B)(1) - (4) of this section. For purposes of this hardship provision, the term license holder includes the person who [sic] landings were used to meet the eligibility requirements for the license holder's groundfish license, if not the same person.

(1) The license holder at the time of the unavoidable circumstance held a specific intent to conduct directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in the table at paragraph (k)(9)(ii)¹⁰ of this section but that this intent was thwarted by a circumstance¹¹ that was:

(I) Unavoidable.

(ii) Unique to the license holder, or unique to the vessel that was used at the basis of eligibility for the license holder's groundfish license; and

(iii) Unforeseen and reasonably unforeseeable to the license holder.

(2) The circumstance that prevented the license holder from conducting directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in paragraph (k)(9)(ii) actually occurred;

(3) The license holder took all reasonable steps to overcome the circumstance that prevented the license holder from conducting directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in paragraph (k)(9)(ii) of this section; and

(4) Any amount of Pacific cod was harvested in the BSAI aboard the vessel that was used as the basis of eligibility for the license holder's groundfish license after the vessel was prevented from participating by the unavoidable circumstance but

⁹ 50 C.F.R. § 679.4(k)(9)(v)(B).

¹⁰ The table in paragraph (k)(9)(ii) shows that the landing requirements for a BSAI Pacific cod catcher/processor vessel pot gear endorsement are 300,000 pounds of BSAI Pacific cod harvests with pot gear in each of any *two* years between 1995 and 1998.

¹¹ The commentary to the BSAI Pacific cod final rule states that the license holder must show that “[*b*]ut for the unavoidable circumstances, he or she could have made sufficient landings to meet the requirements for a particular Pacific cod endorsement from the vessel that was the basis for eligibility for his or her LLP groundfish license.” Final Rule, 67 Fed. Reg. 18,129, 18,131 (2000) (emphasis added).

before April 16, 2000.¹²

The purpose of the unavoidable circumstance provision is to grant relief to the license holder who likely would have made the required documented harvests of Pacific cod in the BSAI but for an unavoidable circumstance.¹³

Under the language of the Pacific cod endorsement unavoidable circumstance provision, even if the vessel's engine problems in 1997 could be construed as an "unavoidable circumstance," Blue Gadus must still demonstrate that it (or its predecessors) had a *specific intent* at the time of the vessel's engine problems to harvest at least 300,000 pounds of Pacific cod with pot gear in the BSAI in 1997 and 1998; and that its intent was *thwarted* by the vessel's engine problems in each of those years, to qualify for a Pacific cod pot gear endorsement.

The NMFS official LLP record shows that the F/V BLUE ATTU made numerous harvests of Pacific cod in the BSAI in 1997 and 1998 *after* the alleged unavoidable circumstance.¹⁴ Blue Gadus specifically states in its appeal that 1997 is the year "in which the alleged unavoidable circumstance occurred;"¹⁵ that the F/V BLUE ATTU lost sixteen days of fishing during that year due to the vessel's engine problems;¹⁶ and that the vessel's engine was repaired and returned to service on or about June 16, 1997.¹⁷ If all of that is true, the engine problems alleged by Blue Gadus could not have prevented (or thwarted) the F/V BLUE GADUS from making the required harvests in 1997 and 1998 for a Pacific cod pot gear endorsement.

In light of this, I find that even if Blue Gadus' claimed vessel engine problems in 1997 could be construed as an "unavoidable circumstance," the circumstance did not prevent (or thwart) the F/V BLUE GADUS from making the required Pacific cod harvests in 1997 and 1998 for a BSAI Pacific cod catcher/processor vessel pot gear endorsement.

I conclude that Blue Gadus does not qualify for a BSAI Pacific cod catcher/processor vessel pot gear endorsement to its LLP groundfish license based on the unavoidable circumstance provision

¹² 50 C.F.R. § 679.4(k)(9)(v)(B).

¹³ *Diamondback Seafoods, Inc.*, Appeal No. 03-0005 at 9-10 (Aug. 24, 2004).

¹⁴ The NMFS official LLP record shows that the F/V BLUE ATTU made documented harvests of Pacific cod in the BSAI in 1997 on Sept. 20; Oct. 4 and 25; Nov. 1, 8, 15, 22, and 29; and Dec. 6, 13, and 20. The vessel also made documented harvests of Pacific cod in the BSAI in 1998 on April 18 and 25; May 2 and 9; Sept. 19 and 26; Oct. 3, 10, 17, 24, and 31; Nov. 7, 14, 21, 28; and Dec. 5 and 12.

¹⁵ Appellant's appeal by R. Shawn Griggs, Appellant's attorney, at 1 (Aug. 20, 2003).

¹⁶ Complaint For Property Damage, United States District Court Western District of Washington At Seattle (Sept. 2, 1997).

¹⁷ Appellant's appeal by R. Shawn Griggs, Appellant's attorney, at 4 (Aug. 20, 2003).

in the Pacific cod endorsement regulation at 50 C.F.R. § 679.4(k)(9)(v)(B).

FINDINGS OF FACT

1. The F/V BLUE ATTU did not harvest 300,000 pounds of Pacific cod in the BSAI with pot gear in each of any two years between 1995 and 1998.
2. Even if Blue Gadus' claimed vessel engine problems in 1997 could be construed as an "unavoidable circumstance," the circumstance did not prevent (or thwart) the F/V BLUE GADUS from making the required Pacific cod harvests in 1997 and 1998 for a BSAI Pacific cod catcher/processor vessel pot gear endorsement.

CONCLUSION OF LAW

Blue Gadus does not qualify for a BSAI Pacific cod catcher/processor vessel pot gear endorsement to its LLP groundfish license based on the unavoidable circumstance provision in the Pacific cod endorsement regulation at 50 C.F.R. § 679.4(k)(9)(v)(B).

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on December 1, 2007, 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, on the tenth day after this Decision, November 12, 2007. 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