NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	Appeal No. 94-0010
	)	
RONALD J. SEATER,	)	Consolidated with
Appellant	)	
	)	Appeal No. 95-0006
and	)	
	)	
SEATER & SEATER	)	DECISION
PARTNERSHIP,	)	
Appellant	)	June 6, 1995
_____	)	

STATEMENT OF THE CASE

Both Ronald J. Seater and Lee N. Seater applied for Quota Share ["QS"] under the Pacific halibut and sablefish Individual Fishing Quota ["IFQ"] program. Ron Seater applied individually as a lessee (for halibut operations) of the vessel F/V Anna Marie. Lee Seater applied on behalf of the Seater & Seater Partnership (which consists of herself and Ron Seater), which owned the vessel. Because of conflicting claims as to the existence of a lease, both applications were denied in an initial administrative determination ["IAD"] issued by the Restricted Access Management ["RAM"] Division ["Division"] on January 25, 1995.

Both parties timely appealed, each making the requisite statement that the determination of denial had a direct and adverse effect on their interests. Ron Seater requested an oral hearing; counsel for Lee Seater requested (if deemed necessary) a written or oral hearing. However, upon reviewing the administrative record, which includes numerous affidavits and documents, it is the judgment of the Appeals Officer that the matter can be decided on the basis of what are essentially undisputed facts, and that no useful purpose would be served by holding either a written or oral hearing. The parties were so advised on May 2, 1995, and the record was thereupon closed. The parties declined to participate in any alternative dispute resolution proceedings.

ISSUES

1. Is an oral or written hearing either necessary or advisable?

2. Was Appellant Ron Seater's operation of the F/V Anna Marie during the Pacific halibut seasons in 1988, 1989, and 1990 on behalf of the Seater & Seater Partnership or on his own behalf as a lessee of the partnership?

FINDINGS OF FACT

1. Seater & Seater has operated as an Alaska partnership since 1962. The original partners were Ron Seater and his brother, Fred Seater. Lee Seater, the widow of Fred Seater, became a partner upon her husband's death in 1979. The principal business activity of the partnership during the years in question has been commercial salmon fishing involving two drift gillnet boats, as well as beach sites in Cook Inlet. Family members have been employed in the partnership's salmon operations for many years. Lee Seater and her brother-in-law, Ron Seater, each own 50 percent of the partnership.

2. During the halibut and sablefish IFQ qualifying years, 1988 through 1990, the partnership owned the F/V Anna Marie. (The partnership remains in existence, at least nominally; however, the two vessels previously owned by the partnership were "split off" in 1991; the F/V Anna Marie to Ron Seater and the F/V Clara Lee to Lee Seater.) The F/V Anna Marie had been purchased in 1982, with each partner paying one-half of the purchase price. Additional funds were expended by the partnership in late 1982 and 1983 for items such as "gearmatic, reel, loran and generator," which Lee Seater contends were purchased primarily to allow the boat to fish for halibut.

3. Ron Seater took the F/V Anna Marie halibut fishing in 1983 in the Kodiak area. Lee Seater initially disapproved because her consent had not been sought, no members from her side of the family had been invited to take part in the operation, and because halibut fishing in the Kodiak area would place the vessel (which was uninsured) at a greater risk than the salmon fishing operations in Cook Inlet. After that fishery was over, he took the vessel to Cook Inlet to participate in the partnership's customary salmon operations. In June of 1983 the partnership paid a $589 repair bill (presumably for damage suffered while the vessel was halibut fishing) and in August of 1983 paid for a winch, which was installed to benefit the halibut operations. None of the income from the halibut operations for 1983 was received by the partnership.

4. No written lease was ever executed by the parties. In February of 1984, Lee Seater proposed a 33 1/3 percent lease fee. The proposal was rejected by Ron Seater, who stated that he would rather disband the partnership. The parties thereupon agreed to a 10 percent fee. Lee Seater characterizes it as an "annual maintenance fee" to reimburse the partnership for the cost of vessel repairs, equipment replacement, and general wear and tear. Ron Seater characterizes it as a "lease fee."

5. For the years 1984 through (insofar as is relevant here) 1990, Ron Seater's operation of the vessel in the halibut fishery was as a sole proprietorship. Tax returns for the halibut operation were filed in his own name. For the halibut fishery he had sole direction and control of the vessel's operations; chose, hired, and paid the crew; purchased halibut licenses; maintained accounts in his own name for fuel and gear purchases; and tendered payment of the 10 percent fee to the partnership. When the halibut

season was over, he took the vessel to Cook Inlet for use in the partnership's customary salmon operations.[1]

6. None of Ron Seater's halibut operations were reflected as income or expenses in the partnership's tax returns, save for an indication of receipt of the 10 percent fee. On some partnership returns, Lee Seater labeled it as a "lease" fee. She contends: That such was an error and that she never actually considered it as anything other than a maintenance fee; that the fee was similar to one instituted in some of the Cook Inlet herring operations in 1985, and that none of the parties to that operation considered it to be a lease; and that she was intimidated into agreeing to the 10 percent fee, in part, because she feared Ron Seater would otherwise disband the partnership. She further contends that over the years (including 1988 through 1990), the partnership partially "underwrote" Ron Seater's halibut operations because it paid for : crewmember transportation costs from Oregon to Alaska in connection with the salmon operations; federal marine mammal permits and Alaska vessel licenses; vessel fixed gear, such as an SSB radio and a power roller, which either primarily or partially benefitted the halibut operations; and vessel maintenance expenses attributable (by pro rata calculations based on the relative fuel expenses for each fishery) in large part to the halibut operations, which exceeded the partnership's 10 percent fee. (For reasons amplified in the conclusions, below, I find that these contentions are irrelevant.)

CONCLUSIONS OF LAW

1. An oral or a written hearing is neither necessary nor advisable. Federal regulation 50 C.F.R. § 676.25(f) and (g) states in relevant part:

> (f). . . . If the applicant requests a hearing on any issue presented in the appeal, such request for hearing must be accompanied by a concise written statement raising genuine and substantial issues of adjudicative fact for resolution and a list of available and specifically identified reliable evidence upon which the factual issues can be resolved. The appellate officer will limit his/her review to the issues stated in the appeal; all issues not set out in the appeal will be waived.
>
> (g) Decision Whether to Order a Hearing. The appellate officer will review the applicant's appeal and request for hearing, and has discretion to proceed as follows:
>
> (1) Deny the appeal;

---

[1] The partnership did not engage in salmon operations in Cook Inlet in 1989 due to the Exxon Valdez oil spill.

(2) Issue a decision on the merits of the appeal if the record contains sufficient information on which to reach final judgment; or

(3) Order that a hearing be conducted. The appellate officer may so order only if the appeal demonstrates the following:

(i) There is a genuine and substantial issue of adjudicative fact for resolution at a hearing. A hearing will not be ordered on issues of policy or law;

(ii) The factual issue can be resolved by available and specifically identified reliable evidence. A hearing will not be ordered on the basis of mere allegations or denials or general descriptions of positions and contentions;

(iii) The evidence described in the request for hearing, if established at hearing, would be adequate to justify resolution of the factual issue in the way sought by the applicant. A hearing will not be ordered if the evidence described is insufficient to justify the factual determination sought, even if accurate; and

(iv) 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.

In this case, the relevant facts are essentially uncontested and, therefore, the requirements of 50 C.F.R. § 676.25(g) are not met. There is no need to hold a hearing to determine factual questions that are not relevant to the resolution of this appeal. A number of such questions have been raised by Lee Seater. Examples include: (1) What did Lee Seater have in mind when she wrote "lease" fee on income tax forms? (2) What did other parties understand by a "maintenance fee" charged to them? (3) Was the "lease" consideration inadequate due to "intimidation"? (4) What percentages of annual maintenance and capital expenditures were attributable to the halibut operations versus the salmon operations?

2. Appellant Ron Seater's operation of the F/V Anna Marie during the Pacific halibut seasons

of 1988, 1989, and 1990 was on his own behalf as a lessee of the partnership.
The Division has administratively established a presumption that a vessel owner, as opposed to a claimed lessee, is entitled to the Quota Share that results from verified legal landings made from the vessel. This presumption in favor of the vessel owner is nowhere explicitly stated in the IFQ regulations. The presumption arises from the requirement that data regarding a lease supplied by an applicant must be compared with data compiled by the NMFS Regional Director. 50 C.F.R. § 676.20(d)(1). These compiled data are found in the Division's database, which initially contained no information regarding vessel leases; rather, the database was compiled from records of vessel ownership, permit ownership, and landings. The Division presumed that its database information was correct unless proven otherwise. Because the Division had no information about vessel leases, any vessel-owner applicant who stated that the vessel had not been leased during the period in question would be presumed correct. Any claim to the contrary by a competing applicant would be inconsistent with the Division's database information. Therefore, during the application phase, the Division initially places the burden of proof on the applicant who claimed a lease.

On appeal, factual issues are reviewed *de novo*. The Appeals Officer will review the evidence that the Division considered in reaching the initial administrative determination, as well as any additional evidence submitted during the appeal. In two-party cases in which the IAD has denied one party and made an award to the other, the burden of proof on appeal will be on the party who seeks to change the status quo -- the party whose claim was denied in the IAD. That burden includes both a burden of production and a burden of persuasion. In cases such as this one, in which the Division has determined that the claimed lessee met the burden of proof, the burden of proof shifts to the vessel owner during the appeal. To meet this burden, the vessel owner must produce evidence that the business relationship between the parties was something other than a lease and must persuade the Appeals Officer of this fact by a preponderance of the evidence.

Federal regulation 50 C.F.R. § 676.20(a)(1) provides in relevant part that QS may be awarded to a person:

> . . . that owned a vessel that made legal landings of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year. A person is a qualified person also if (s)he leased a vessel that made legal landings of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year. A person who owns a vessel cannot be a qualified person based on the legal fixed gear landings of halibut or sablefish made by a person who leased the vessel for the duration of the lease.

Federal regulation 50 C.F.R. § 676.20(a)(1)(iii) provides as follows:

> Conclusive evidence of a vessel lease will include a written vessel lease agreement or a notarized statement from the vessel owner and lease holder attesting to the existence of a vessel lease agreement at any time during the QS qualifying years. Conclusive evidence of a vessel lease must identify the leased vessel and indicate the name of the lease holder and the period of time during which the lease was in effect. Other evidence, which may not be conclusive, but may tend to support a vessel lease, may also be submitted.

In order to determine whether a lease existed, it is necessary to establish the elements or at least describe the characteristics of a "vessel lease" as that term is used in the regulation. The term "lease" is not defined in the IFQ regulations. Some documents from the regulatory history of the IFQ program shed light on the intent of the North Pacific Fishery Management Council in providing for the allocation of Quota Share to vessel lessees. "The Council's rationale for this particular allocation [to vessel owners and lessees as opposed to processors and crew members] is that vessel owners and lease holders are *the participants who supply the means to harvest fish, suffer the financial and liability risks to do so, and direct the fishing operations*." 58 Fed. Reg. 59,378 (November 9, 1993) (emphasis added). The language of the motion that the Council approved as part of the IFQ Management Plan included the following:

> (1) Initial assignments of Quota Shares shall be made to:
> (i) a qualified person who is a vessel owner who meets the requirements in this section; or
> (ii) a qualified person who meets the requirements of this section engaged in a lease of a fishing vessel (written or verbal) or other "bare-boat charter" arrangement in order to participate in the fishery. . . .[2]

According to this regulatory history, the Council intended that both written and oral vessel leases be recognized. In addition, while a bareboat charter would definitely constitute a vessel lease, an arrangement in the nature of a bareboat charter but which does not necessarily meet all the elements of a bareboat charter could, under the Council's language, also constitute a vessel lease for purposes of the IFQ program.

A typical definition of a bareboat charter is a contract or agreement that involves "the transfer of full possession and control of the vessel for the period covered by the contract. The charterer obtains the right to run the vessel and carry whatever cargo he chooses. The ship is manned and supplied by the charterer as well. The legal test of a demise [bareboat charter] is whether the owner of the vessel

---

[2] *Newsletter* (North Pacific Fishery Management Council) No. 6-91, December 19, 1991, at 13-14.

'completely and exclusively relinquished possession, command and navigation to the demisee [charterer].'" [Footnotes omitted.] 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 11-1, at 169-170 (2d ed. 1994).

> A demise, or bareboat charter, has the practical and legal effect of shifting the possession and control of the vessel from the person of the owner to that of the demisee. It is true that the owner still has an interest in the vessel; but the principal interests that he has are in receiving the agreed hire and getting the vessel back at the end of the term. The demise is an interest for vesting in a specific person other than the owner of the vessel the faculties which are incidental to ownership without transferring the title of ownership itself.
>
> In this type of charter, the principal obligation of the demisor is to furnish the vessel in a seaworthy condition at the time of the beginning of the term of charter. (citation omitted) On the other hand, the demisee's obligations are to redeliver the vessel in as good a condition, ordinary wear and tear excepted, as that in which he received her, and to pay hire. (citation omitted)

Lopez v. Atlanta-Schiffahrts-G.M.B.H., 259 F. Supp. 949, 950 (D.P.R. 1966).

The apportionment of obligations between vessel owner and lessee under a bareboat charter can vary. For example, there seems to be no absolute requirement that the charterer, as opposed to the owner, pay for repairs, although the texts make such a provision highly advisable. An oral agreement wherein the owner was to pay for hull insurance and a major overhaul of the vessel's engine, if needed, did not convert what was otherwise a demise ["bareboat"] charter into a joint venture. Brophy v. Lavigne, 801 F.2d 521 (1st Cir. 1986). In Marr Enterprises, Inc. v. Lewis Refrigeration Co., 556 F.2d 951, 957 (9th Cir. 1977), the court assumed a bareboat charter existed where a handwritten lease provided in part that the skipper and crew would provide for the fuel and the groceries and the owner would supply the nets and pay for boat maintenance, and each would be entitled to 50 percent of the gross from the boat. See also O'Donnell v. Latham, 525 F.2d 650 (5th Cir. 1976), which held that where a fishing party had rented a fishing vessel for one day and was to furnish its own supplies and crew, and where the owner did not exercise possession or control of navigation, a demise ["bareboat"] charter existed.

As stated earlier, a business arrangement between the parties need not rise to the level of a bareboat charter in order to qualify as a vessel lease under the IFQ program. If a claimed lease could not be characterized as a bareboat charter, what evidence might be used to establish that it was, nonetheless, a vessel lease? The Council staff provided some guidance on this question in the clarifying language it added to the IFQ Management Plan motion mentioned above. (This language was before the Council when it approved the motion.) The staff specified that:

> Documentation proving such a lease existed will include the lease document itself if it exists, or other proof that the lessee did in fact control the disposition of the vessel, its gear, crew, and catch.[3]

The RAM Division, in its instructions to applicants, stated that persons claiming they were lessees should submit documents proving that they "shouldered the financial burdens and risks of the fishing operation." As examples of such documents the instructions listed:

> the receipt(s) for purchases of the license(s) used aboard vessel during the time period(s) for which you are claiming credit;
>
> tax returns that show that you claimed a business deduction for vessel lease expenses during the time period(s) for which you are claiming credit;
>
> tax returns or other documents that show that you paid the crew expenses during the time period(s) for which you are claiming credit; and/or
>
> other authentic and contemporary documents demonstrating the nature of your investment in the fishing operation during the time period(s) for which you are claiming credit.[4]

Having considered all of the above-mentioned views on what constitutes or demonstrates a vessel lease, it appears that the Council intended to allocate Quota Share to those who acted like entrepreneurs in controlling and directing the fishing operations that produced the legal landings in question. An entrepreneur is one who organizes, operates, and assumes the risk in a business venture in expectation of gaining the profit.[5] This is the kind of person the Council seems to have had in mind when it decided that vessel lessees, as well as vessel owners, could be "qualified persons." The RAM Division, too, appears to have envisioned a lessee as one who was an entrepreneur with respect to the fishing operations.

In deciding whether a vessel lease existed between the parties, an Appeals Officer should, therefore, consider a variety of factors. These include, but are not limited to:

---

[3] *Id.* at 14.

[4] Application Information: Pacific halibut and sablefish Individual Fishing Quota Program, at 7.

[5] Webster's II New Riverside University Dictionary 436 (1988)

(1) whether and to what extent the claimed lessee had possession and command of the vessel and control of navigation of the vessel;

(2) whether the claimed lessee directed fishing operations of the vessel;

(3) whether the claimed lessee had the right to hire, fire, and pay the crew;

(4) whether the claimed lessee was responsible for the operating expenses of the vessel; and

(5) whether the claimed lessee treated the fishing operations in which the vessel was used as his/her own business for federal income tax and other purposes.

In reaching this decision, I have given considerable weight to the empirical evidence and relatively little or no weight to non-empirical evidence (such as subjective intent) and considerations that appear basically equitable in nature. Thus, I consider irrelevant the issue of whether Ron Seater's (arguably) below-market lease fee of 10 percent of the gross halibut landings was (arguably) gained through a form of "intimidation." In my view, the lease existed whether or not it was the result of hard bargaining, unequal negotiating positions, or particular personality characteristics. (I note in passing that Ron Seater's decision to forego terminating the partnership might well constitute additional "consideration" in any event.) Likewise, I have given no weight to the proposition that the parties involved with the herring operation considered the 10 percent fee imposed there to be a maintenance fee rather than a lease fee. I gave little weight to the fact that the term "lease fee" was listed on the income portion of some of the partnership's income tax returns. But the fact that all of the halibut operations were included in Ron Seater's Schedule C, while only the "fee" (by whatever name)was on the partnership's tax return, was significant.

I have considered Lee Seater's argument that the partnership bore the risk of loss of a substantial asset if the uninsured F/V Anna Marie had gone down or otherwise been lost during the halibut operations, and that therefore the partnership "shouldered the financial burdens and risk of the fishing operation." This argument is not a factor in this decision, however. An owner of a vessel always bears some risk of loss when the vessel is engaged in commercial fishing operations, whether the vessel is insured or not, and whether it has been leased or not. This risk is inherent to ownership, and a prudent owner will insure against such a loss. But the existence of this risk, and the fact that the vessel was insured or uninsured, are not relevant to the question of whether a lease existed for purposes of the IFQ program.

Additionally, that the partnership owned the boat and installed gear (some of which was arguably useful primarily for halibut operations), and provided maintenance for the boat (which was arguably more than its pro rata "fair share") is not inconsistent with a lease. The partnership's payment for some relatively nominal boat licenses was necessary for the partnership's salmon drift gillnet operations and only

incidentally benefitted Ron Seater's halibut operations. The cost of transporting crew members from Oregon to Alaska was more substantial, but again, was necessary for the partnership's salmon drift gillnet operations, and benefited the halibut operations only incidentally.

In the instant case, there is no dispute that (despite the acknowledged dismay of Lee Seater) Ron Seater operated the boat in the halibut fishery as only he saw fit. He was solely responsible for the operation, management, and navigation of the vessel throughout the halibut season. He decided when and where to fish for halibut; bought the halibut licenses; hired and paid the crew; paid for fuel, bait, and movable fishing gear on his own account; and otherwise ran the halibut operation as a sole proprietorship. Although Lee Seater obviously feels that the halibut portion of the business arrangement between herself and Ron Seater was highly unfavorable to her and to the partnership, it is not the purpose of the IFQ program to utilize resource allocations as a means to redress or make up for past business failings, disputes, or inequities between private parties. Accordingly, I conclude that Ron Seater held a lease of the vessel within the meaning of the IFQ regulation, and that all the quota shares in question are allocable solely to him.

DISPOSITION AND ORDER

The RAM Division's initial administrative determination withholding qualifying pounds to either party is VACATED. Ronald J. Seater is deemed to have had a lease of the F/V Anna Marie from the Seater & Seater Partnership during the halibut seasons of 1988, 1989, and 1990. The RAM Division is ORDERED to allocate qualifying pounds derived from landings aboard the F/V Anna Marie to Ronald J. Seater individually, and to issue to him the resultant quota share and IFQ for 1995. This decision takes effect on July 6, 1995, unless, by that date, the Regional Director orders review of the decision.

James Cufley
Appeals Officer

I concur in the factual findings of this decision and I have reviewed this decision to ensure compliance with applicable laws, regulations, and agency policies, and consistency with other appeals decisions of this office.

Because the QS to which Appellant Ron Seater is entitled has been assigned to the quota share reserve under 50 C.F.R. § 676.20(d)(3), he still has an opportunity to receive QS and the corresponding IFQ for the 1995 fishing season. Therefore, I recommend that the Regional Director expedite review of this decision and, if there is no substantial disagreement with it, promptly affirm the decision and thereby give it an immediate effective date.

Edward H. Hein
Chief Appeals Officer