

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 95-0028
)
DARIUS BALTZ,) DECISION
Appellant)
_____) January 30, 1996

STATEMENT OF THE CASE

Darius Baltz filed a timely appeal of an Initial Administrative Determination [IAD] of the Restricted Access Management Division [Division] issued January 5, 1995. In his application for Quota Share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish, the Appellant claimed halibut landings from the vessel F/V VONNIE MARIE for the period August 1 through October 30, 1985. The Appellant claimed that he had held an oral lease of the vessel from its owner, Vonmar Trawlers, Inc. (Bruce Gnad), during that period. The IAD denied the Appellant's claim to those landings on the grounds that he did not sufficiently prove that he had held a lease.

Mr. Gnad also had claimed credit for the landings in question based on his ownership of the vessel. The IAD stated that neither the Appellant nor Mr. Gnad would receive credit for the qualifying pounds from the landings in question "pending the exhaustion of all administrative processes." In fact, the qualifying pounds and the resulting QS were awarded to Mr. Gnad. Mr. Gnad does not have a financial interest in the outcome of this appeal, however, because he has transferred that QS to another person and, as a matter of policy, the Division does not revoke such QS in the hands of an innocent third party. Thus, Mr. Gnad was not made a party to this appeal. An oral hearing was held July 19, 1995, before me. Mr. Gnad was notified of the hearing and had expressed his intention to testify in opposition to the Appellant's lease claim, but he did not appear at the hearing. The Appellant appeared at the hearing through his attorney, Paula Jacobson.

ISSUE

Was the Appellant's operation of the F/V VONNIE MARIE from August to October 1985 under a lease?

DISCUSSION

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. 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 IAD, as well as any additional evidence submitted during the appeal.

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...¹

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. See O'Rourke v. Riddle, Appeal No. 95-0018, May 18, 1995, *aff'd* May 23, 1995; Seater v. Seater & Seater, Appeal No. 94-0010, June 6, 1995, *aff'd* June 9, 1995.

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. 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.²

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.³

¹*Newsletter* (North Pacific Fishery Management Council) No. 6-91, December 19, 1991, at 13-14.

²*Id.*, at 14.

³Application Information: Pacific Halibut and Sablefish Individual Fishing Quota Program, at 7.

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.⁴ 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.

As stated in O'Rourke v. Riddle,⁵ in deciding whether a vessel lease existed between the parties, an Appeals Officer should consider a variety of factors. These include, but are not limited to:

- (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 the instant case, although Mr. Gnad verbally advised that the Appellant was only a deckhand, and although Mr. Gnad refused to sign the affidavit that the Appellant was a lessee, the only testimony under oath (by the Appellant) is that the Appellant directed the boat in the halibut fishery as he saw fit. Mr. Gnad, the owner of the vessel, navigated the vessel, per the instruction of Appellant, and the costs of fuel and bait were shared equally and were taken off the top of the gross before the Appellant received his 55% and Mr. Gnad received his 45%. Mr. Gnad apparently retained the ownership of the vessel for the Coast Guard license and also helped with conversion of the boat from a salmon boat to a halibut boat and made recommendations on the hiring of the crew. Appellant did not retain his 1985 tax returns. However, the Appellant directed the conversion of the boat to a halibut boat.

The boat could not have fished for halibut without the conversion. Mr. Gnad initially contacted the Appellant because Mr. Gnad was not familiar with the areas in question. The Appellant hired and paid

⁴Webster's II New Riverside University Dictionary 436 (1988).

⁵Appeal No. 95-0018 at 13.

the crew, provided mostly his own gear and leased additional gear in his name. The Appellant had a halibut permit in his name and was experienced in fishing the areas. The Appellant directed the fishing operation, and decided where, when, and how to fish. The Appellant also leased other vessels in a similar manner in other years.

Although Mr. Gnad verbally contended the Appellant was only a deckhand, the Appellant testified that a deckhand does not have any financial obligation, does not pay for crew and gear, does not receive 55% of the gross, and does not direct the boat. Accordingly, I find that Appellant has carried his burden of proof and demonstrated by a preponderance of the evidence that he held a lease of the vessel within the meaning of the IFQ regulation.

FINDINGS OF FACT

I find, by a preponderance of the evidence, that:

1. Bruce Gnad owned the vessel VONNIE MARIE during the pertinent periods and that Bruce Gnad contacted the Appellant about an arrangement by which he could learn more about the halibut fishing areas.
2. The Appellant held a halibut permit for the areas and was familiar with the halibut fishing areas.
3. Bruce Gnad has verbally represented that the Appellant was only a deckhand.
4. Bruce Gnad navigated the vessel, shared the costs of fuel and bait equally with Appellant which costs were taken off the top of the gross; that Bruce Gnad helped in the conversion of the vessel from a salmon tender to a halibut boat and made recommendations on crew hiring.
5. The Appellant directed the vessel as he saw fit; that he directed the conversion of the vessel from a salmon tender to a halibut boat; that the boat could not have fished for halibut without the conversion.
6. The Appellant hired and paid the crew and provided mostly his own gear and leased additional gear in his name; that the Appellant directed where, when and how to fish; that the Appellant had leased other vessels on similar terms in other years.
7. The Appellant received 55% of the gross, and Bruce Gnad received 45% of the gross, after the fuel and bait costs were taken off the top.

CONCLUSION OF LAW

Appellant's operation of the F/V VONNIE MARIE during the Pacific halibut season of August to October 1985 was on his own behalf as a lessee.

DISPOSITION AND ORDER

The Division's Initial Administrative Determination withholding qualifying pounds to either party is VACATED. The RAM Division is ORDERED to allocate qualifying pounds derived from halibut landings from the F/V VONNIE MARIE during the period August 1 through October 30, 1985, to Darius Baltz individually, and to issue to him the resultant quota share and IFQ for 1996. This decision takes effect on February 28, 1996, unless, by that date, the Regional Director orders review of the decision.

James C. Hornaday
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.

In order to ensure that QS and Individual Fishing Quota [IFQ] is issued to the Appellant for the 1996 season, 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. I also request that the Division immediately place in the appropriate reserve pool all QS that the Appellant will receive if this decision is affirmed.

Edward H. Hein
Chief Appeals Officer