NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	Appeal No. 95-0049
	)	
F/V DETERMINED PARTNERSHIP,	)	
Appellant	)	
	)	DECISION
and	)	
	)	
BIG BLUE, INC.,	)	
Respondent	)	October 22, 1996
_____	)	

STATEMENT OF THE CASE

Bruce Nelson, of Determined Partnership, and Tim Abena, of Big Blue, Inc., applied for Quota Share [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program. Mr. Abena claims as owner of the F/V BIG BLUE. Mr. Nelson claims as a lessee of that vessel.[1] At issue are 102,349 pounds of halibut landed from the F/V BIG BLUE on April 30, 1985, and May 30, 1985.

Mr. Abena/Big Blue, Inc., was awarded the Quota Share resulting from those landings in an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on March 17, 1995. Mr. Nelson filed a timely appeal on behalf of Determined Partnership on the grounds that he was directly and adversely affected by the IAD's failure to find that he leased the vessel for those two openings.

The Chief Appeals Officer issued a Notice and Order joining Big Blue, Inc. [Mr. Abena], as a respondent on June 21, 1995, and forwarded to him the relevant documents from Mr. Nelson's file. Mr. Abena was afforded an opportunity to file a response to the appeal. He did so on July 24, 1995,

[1]The Request for Application for Quota Share [RFA] relating to the qualifying pounds in question in this appeal was made by Mr. Nelson under the name of BDN, Inc., of which he is the sole shareholder. The RFA lists the lessee as Bruce D. Nelson, presumably as an individual, not as a corporation and not as a partner in the F/V Determined Partnership. The partners are BDN, Inc.; LTD, Inc.; and OWL, Inc. It is not clear from the record when this partnership was formed. Evidence in the record indicates that in 1985 Mr. Nelson operated as a sole proprietorship, BDN Enterprises. Mr. Nelson's claim to QS based on a lease of the F/V BIG BLUE derives from his corporation's membership in the partnership. Neither Mr. Nelson nor BDN, Inc., nor BDN Enterprises is a qualified person under 50 C.F.R. § 679.40(a)(2) independent of the partnership. Thus, the proper party Appellant is F/V Determined Partnership. For convenience, however, the body of this Decision refers to the Appellant as Bruce Nelson.

via facsimile transmission.[2] A copy of Mr. Abena's application file was forwarded to Mr. Peter Powers, counsel for Mr. Nelson, in late June of 1995.

Telephonic scheduling, motion, and pre-hearing conferences were held on July 7, July 14, July 28, and August 21, 1995.

After due and proper notice, an oral hearing was convened in Seattle, Washington, on Wednesday, August 23, 1995. Mr. Abena appeared pro se, representing himself and his corporation, Big Blue, Inc. Determined Partnership (Mr. Nelson) was represented by Mr. Peter L. Powers, attorney at law, Minor & Boone, P.C., of Newport, Oregon. Oral presentations were completed that day. Closing briefs were mailed on September 5, 1995.[3]

ISSUE

Whether a valid vessel lease was in effect between the parties when halibut landings were made from the F/V BIG BLUE on April 30, 1985, and May 30, 1985.[4]

BACKGROUND

The 88-foot (LOA) F/V BIG BLUE was built by, and at the direction of, Mr. Abena and was completed in 1979. During the relevant time period it was owned by Big Blue, Inc., an Alaska corporation, of which Mr. Abena is president and 100 percent stockholder. The vessel was moored in

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[2]At that same time he also filed a facsimile letter asserting a right to question Mr. Nelson's "entrance into this quota share program" (i.e. whether Mr. Nelson met the threshold requirement of being a "qualified individual" within the meaning of the regulations). His letter was deemed a motion; it was denied in an order issued on July 17, 1995, on the grounds such was not at issue in the IAD and that he was not "directly" affected by such preliminary administrative actions.

[3]Mr. Abena included an affidavit with his closing brief, to which objection was taken by Mr. Powers. An examination of the affidavit indicates that, in part, it is a summary of evidence previously proffered by Mr. Abena, but that in some respects it goes beyond that evidence. To the extent that it does so it has been disregarded. [Mr. Abena prefaced his affidavit with the statement: "I . . . supplement my testimony as requested by Appeals Officer James Cufley at the hearing . . .. " In actual fact, the Appeals Officer's instructions to Mr. Abena were that the written summation was "not to give new evidence, but to point out to me the critical factors that we have discussed today that each of you think is critical to your case."]

[4]In the RFA, Mr. Nelson listed the period of the lease as approximately April 25, 1985, through approximately June 5, 1985. The Division used these specific dates as the beginning and ending dates of the claimed lease period.

Kodiak, Alaska, where both Mr. Abena and Mr. Nelson then resided. Early in 1985 Mr. Nelson was engaged by Mr. Abena to serve as captain of the vessel in the tanner crab fishery, which ended on or about February 15, 1985. During that fishery, Mr. Nelson received a captain's crew share of 15 percent (after trip expenses). He was issued an IRS form 1099 at the end of that season by Big Blue, Inc. Both parties agree that Mr. Nelson was not a lessee of the vessel during that fishery.

During the early Spring of 1985, Mr. Abena and Mr. Nelson discussed the possibility of Mr. Nelson's operating the F/V BIG BLUE for two halibut openings, one in late April and the other in late May. Each opening was to last two or three days, with an additional one or two days to travel to the grounds, and usually one day to return. The agreement, negotiated during the course of several conversations, was entirely oral. The terms "lease" and "charter" were not used by either party. The parties are in general accord[5] that the agreement provided that Mr. Nelson was to:

- serve as captain of the vessel;
- provide approximately 60 tubs of halibut gear he had from the previous year, as well as flags, buoys, and anchors;
- be responsible for "all the paperwork";
- receive 60 percent of the gross amount, from which he was to pay for fuel, bait, crew groceries, and the crew shares, and pay Mr. Abena/Big Blue, Inc., an amount to offset insurance costs (the particulars of the insurance agreement are in some dispute and are more fully covered below);

and that Mr. Abena/Big Blue, Inc., was to:

- receive 40 percent of the gross amount[6] of each landing;
- provide approximately 20 tubs of halibut gear, to be purchased from him by Mr. Nelson at the end of the season;
- arrange for the market.

Unlike the crew members, Mr. Nelson was to be guaranteed no specific share percentage. However,

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[5]The events at issue occurred 10 years ago and the parties have not spoken to each other about what transpired (or anything else) since. To a limited extent the pre-hearing documents and the testimony at the hearing "jogged" memories such that the parties modified portions of their earlier stands. Mr. Nelson no longer claims that Mr. Abena supplied none of the fishing gear. Mr. Abena acknowledges that Mr. Nelson likely supplied his own power block (hauler).

[6]Mr. Abena had been advised in 1984, when the vessel was first used for halibut, that the industry standard was approximately 30 percent. He insisted on 40 percent in part to help offset capital costs in preparing the vessel for halibut operations. He retained the 40 percent requirement for 1985.

he anticipated earning at least the 15 percent (after expenses) he had earned while employed as captain for the tanner crab fishery.

DISCUSSION

Burden of Proof

In Smee v. Echo Belle, Inc.,[7] we stated that because our appeals are *de novo*, the parties to an appeal should begin on an equal footing. To the extent that an appellant has the burden of production, that burden is minimally met by filing an appeal that complies with requirements of the IFQ regulations. In this appeal, I find that the Appellant has met its burden of production because his appeal complies with requirements of the IFQ regulations. As we also stated in Smee,[8] each party to an appeal has the same burden of persuasion that the evidence supports the party's position.

Analysis of whether Mr. Nelson leased the F/V BIG BLUE

Under 50 C.F.R. § 679.40(a)(2),[9] a person who 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, is a "qualified person." Such a vessel lessee will receive QS that would otherwise go to the owner of the vessel.

The regulations do not define "lease," but discuss the evidence that will establish the existence of a lease:

> 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.*

50 C.F.R. § 679.40(a)(3)(iii)[10] (Emphasis added).

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[7]Appeal No. 95-0076, August 1, 1996, at 5, *aff'd,* August 20, 1996.

[8]*Id.*

[9]Formerly 50 C.F.R. § 676.20(a)(1). Effective July 1, 1996, 50 C.F.R. Part 676 was removed and the regulations thereunder were renumbered. However, there have not been any changes material to the issues in this appeal.

[10]Formerly 50 C.F.R. § 676.20(a)(1)(iii).

Here, there is no conclusive evidence of a lease, either in the form of a written lease agreement or a notarized statement. Mr. Nelson contends that he has presented sufficient "other evidence" of an oral lease to establish that he held a lease of the F/V BIG BLUE during the relevant period.

In Smee,[11] we readdressed the factors an Appeals Officer should consider in making a case-by-case determination of whether a business relationship will be recognized as a lease when there is no written lease document. In Smee, we considered the factors developed in O'Rourke v. Riddle[12] and Kristovich v. Dell,[13] and expressly added a factor: "how the parties characterized their business arrangement at the relevant times." That factor was renumbered as the first factor to consider. I will accordingly consider the following nonexclusive factors[14] in order to determine whether the unwritten arrangement between the parties was a lease:

(1) how the parties characterized their business arrangement at the relevant times.

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

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

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

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

(6) 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; and

(7) whether the claimed lease had a set or guaranteed term.

1. The parties' characterization of the arrangement

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[11]Appeal No. 95-0076, August 1, 1996, at 5-7, *aff'd,* August 20, 1996.

[12]Appeal No. 95-0018, May 18, 1995, *aff'd* May 23, 1995.

[13]Appeal No. 95-0020, March 20, 1996, at 10, *aff'd* March 27, 1996.

[14]"[T]hese are not exclusive factors. Appeals Officers have discretion to consider other factors that, in their judgment, help in determining whether a lease existed between the parties." Smee, at 7.

Although Mr. Nelson submitted affidavits from former crew members that they understood he was leasing the vessel, the only live testimony on the subject was from a former crew member who said he had a discussion with Mr. Nelson in which he stated the arrangement was "like a lease." It is clear, however, that neither Mr. Nelson nor Mr. Abena used the terms "lease" or "charter" (or, for that matter, "hired skipper") among themselves in describing their arrangement.

Although the term "vessel lease payment" appeared next to the boat share figure on the copy of the two 1985 trip settlement sheets presented to NMFS in 1994 by Determined Partnership, this notation was not contained on the original settlement sheet or the conformed copy of the settlement sheet supplied to Mr. Abena in 1985. At the hearing, Mr. Nelson testified that a current associate of his had added the notation to the copy presented to NMFS, purportedly to "clarify" matters.

Although the matter is contested, upon considering the testimony of the parties and witnesses, and weighing their respective credibility and powers of recollection, I find that after the second (May 30, 1985) landing, Mr. Abena, after finding what he believed was the remnant of a marijuana cigarette in the wheelhouse of the F/V BIG BLUE, told Mr. Nelson that he was "fired" and that Mr. Nelson subsequently used this term when speaking with a crew member in describing how the working relationship had ended. Although this incident occurred at about the same time the working relationship was to end of its own accord (i.e., the two contemplated landings had been completed), there was still some customary "clean-up" work to be completed on the vessel. I find that the use of such a term by the parties is somewhat inconsistent with the existence of a lease, and accordingly I weigh this factor slightly in favor of Big Blue, Inc.

2. Possession and command of the vessel and control of the navigation

Although Mr. Abena asserts that he placed certain restrictions on where Mr. Nelson was to take the vessel (which Mr. Nelson either denies or does not recall), in particular, that passage through a certain strait was prohibited, he acknowledged that once the vessel left the dock, he had little control over where Mr. Nelson took it. However, it must be noted that while the vessel was in Kodiak, immediately prior to the first trip, in the approximately three and one-half weeks between trips, and immediately after the second trip, Mr. Abena was on board the vessel, actively engaged in modifications and repairs, and exercising management and control over all on board.

I, therefore, find that Mr. Nelson's possession and command of the vessel and control of the navigation was confined to the periods of the two relatively brief fishing trips he made from Kodiak. However, since a hired skipper would likewise be expected to exercise this authority, the existence of such command and control does not significantly weigh in favor of a lease even for those periods. This factor would achieve critical importance only if it were established that the putative lessee did not entirely exercise possession and command of the vessel and control of the navigation during the relevant

period(s). Accordingly, no significant weight is attached to this factor.

3. Direction of the fishing operations

There is no dispute that Mr. Nelson directed the actual on-site fishing operations. The existence of this fact alone, however, does not significantly weigh in favor of a lease, as a hired skipper would likewise be expected to control the on-site fishing operations.[15] Of more importance in this instance is who was in control of the disposition of the catch, which we have previously included as part of this factor relating to direction of the overall fishing operations.[16]

Pursuant to the agreement, upon returning from a trip, Mr. Nelson advised Mr. Abena of the amount of product. Mr. Abena, after negotiating with the several fish buyers in and near Kodiak, directed Mr. Nelson to offload at International Seafoods, Inc., of Kodiak, with whom he was able to obtain the best price. Pursuant to the instructions of Mr. Abena, the fish buyer directly paid Big Blue, Inc., 40 percent of each gross landing. The 60 percent remainder of each gross landing was paid directly to Mr. Nelson by the fish buyer.

The fact that Mr. Abena/Big Blue, Inc., selected the market for the fish has significant weight. Although Mr. Nelson maintains that it was a mutual decision, in fact, Mr. Abena did all the negotiating with the potential buyers and directed Mr. Nelson where to deliver at the time he came into port after a trip.

4. The right to hire, fire, and pay the crew

The parties disagree about who had the final authority to hire and fire the crew. One of the crew members, Mr. Thissen, who had been hired previously by Mr. Abena, continued as engineer for the halibut season. Mr. Nelson had worked with Mr. Thissen in the past and valued his services as well. Mr. Nelson hired the remainder of the four "share" crew members. The vessel also carried three "day" crew members.[17] For the first trip, one of the day crew was sent to Mr. Nelson by Mr. Abena. There is a dispute as to whether Mr. Nelson was required to hire him or not; in any event he did. The

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[15]Accordingly, as is the case with factor #2, above, this factor would achieve critical importance only if it were established that the putative lessee did *not* entirely control the on-site fishing operations.

[16]*See,* Weikal v. Cole, Appeal No. 95-0054, September 16, 1996, at 12.

[17]"Share" crew members typically each receive a percentage of the catch (the exact percentage being dependent on skill level), subject to deductions for trip expenses such as fuel, bait, and groceries, etc., while "day" crew members are paid a flat daily rate (typically between $100 and $150).

remainder of the "day" crew members for each trip were hired by Mr. Nelson. Although there was a dispute on the point, I find as fact that Mr. Nelson discharged one of the "share" crew after the first trip and hired a replacement.

Mr. Nelson had the final authority to set the percentage crew share for each crew member**.** All the crew were paid by Mr. Nelson with checks drawn on his own account. As to advances, Mr. Abena personally advanced $50 to a crew member, which amount was withheld from that crew member's settlement check by Mr. Nelson and re-paid by him to Mr. Abena. Mr. Nelson personally advanced $1,100 to another crew member, which amount was withheld from that crew member's settlement when Mr. Nelson prepared the checks.

Mr. Abena had some degree of control or influence with respect to hiring at least a portion of the crew. To that degree, Mr. Nelson did not have exclusive control over the hiring and firing of the crew. Nonetheless, on the whole Mr. Nelson handled matters relating to the crew and, therefore, his level of control is not inconsistent with the existence of a vessel lease.

5. Responsibility for operating expenses of the vessel

As with other factors, a flexible approach is needed when considering responsibility for operational expenses. Because of the great variety in commercial fishing business arrangements and in the way expenses and risks of fishing operations are allocated between the parties, no single expense or category of expenses is likely to determine whether the parties had a lease agreement or not. Whether or not they represent a capital investment in the vessel, operating expenses should be considered only to the extent that they shed light on the question of whether a vessel lease existed. The question is not which party invested more money in the fishing operation; rather, it is whether the payments, responsibilities, risks, and method of operation -- as evidenced by the handling of expenses -- were more consistent with a lease than some other arrangement, and whether they, therefore, tend to show that there was a lease. "Operating expenses of the vessel" are those expenses that are attributable to, and necessitated by, the fishing operations in question. Smee, at 12-14.

Boat and Gear Expenses

Beginning in 1983, and extending to the 1985 halibut openings, Mr. Abena expended substantial sums and personal labor in outfitting the vessel for halibut operations, including several customized items such as tables, a halibut line roller and a deck steering station.[18] This work, including replacing half of the deck, continued until the first 1985 halibut opening. Mr. Thissen, the engineer, was his primary helper. Mr. Abena paid Mr. Thissen for such "boat" work. Between the two openings, Mr. Abena resumed

[18]Big Blue, Inc., charged the improvement costs against the crew shares for 1984.

work on the vessel, replacing the other half of the deck. Pursuant to customary practice, Mr. Nelson (as well as "share" crew members and, possibly, some day workers) worked on the vessel for approximately 30 days prior to the first halibut opening, and between the openings. This work primarily involved rigging the tubs or repairing fishing gear.

During the outfitting and overhaul, Mr. Nelson and other crew members charged numerous items on the Big Blue, Inc., account at various establishments in Kodiak, which items were subsequently paid for by Big Blue, Inc. These items were primarily, if not exclusively, "boat" items rather than "fish gear" items. Mr. Nelson charged fish gear items on his own account (BDN enterprises) and paid bills and invoices on such items as gear, gear repairs, bait, and crew groceries. Each party reimbursed the other for those purchases made on his behalf. Although it was not required (because Mr. Abena already had one), Mr. Nelson provided his own power block (also known as a "hauler") for retrieving the gear.

Mr. Nelson purchased his Alaska halibut license from the Commercial Fisheries Entry Commission for $150. Mr. Abena obtained the Alaska vessel license for $20 and the IPHC license, which is issued without charge.

Although there had been an understanding that Mr. Nelson was to purchase Mr. Abena's 20 tubs of halibut gear (which had cost Mr. Abena approximately $2,100) at the end of the second opening, he subsequently declined to do so.

Insurance Coverage

Mr. Abena asserts that he would never have leased the F/V BIG BLUE because the P & I policy would not have provided coverage if the vessel had been leased. He also asserts that because the vessel sailed with a crew of eight, rather than the maximum of five set forth in the insurance document, he and/or Big Blue, Inc., would have been liable if any claims were brought. He presents this to establish that he bore a significant risk of loss.[19]

Big Blue, Inc., arranged for and paid for both vessel hull insurance and P & I insurance. The crew, through Mr. Nelson, was to provide partial reimbursement to Big Blue, Inc., for the P&I insurance costs. There is a degree of conflict as to whether the insurance partial reimbursement agreement was to be a total of $800, or $800 for each of the two trips. Upon considering all the facts and circumstances, and paying due heed to the demeanor, credibility, and powers of recollection of the

[19]A representative of Big Blue, Inc.'s current carrier testified that the industry standard policy then in effect [in 1985] precluded coverage if the vessel were leased or chartered without notice to (and, presumably, the approval of) the carrier, or if there were more than five in the crew. However, he stated that in actual practice the insurer might exercise some flexibility, at least as to the number of crew members. Additionally, the thrust of his testimony was that the company would not be obligated under the policy, not necessarily that Big Blue, Inc., would be liable.

parties, I adopt Mr. Abena's recollection as controlling: that the original agreement was that it was to be $800 for each trip, based on a figure of $100 per man per trip.

The fact that the owner held the hull and the P & I insurance premiums is not significant in itself, as any prudent property owner would be expected to insure it to protect his or her capital investment and assets. If the overall premiums could be prorated and allocated to the actual claimed lease period(s), such could constitute an operating expense. But even then, its significance would be diminished in this case by two facts: (a) the agreement required that Mr. Nelson (on behalf of the crew) reimburse the owner for a portion of the cost of the P&I insurance premium; and (b) the vessel sailed and fished with eight crew members (including Mr. Nelson), rather than the five specified in the policy and, thus, at least by its terms, the P&I policy would have provided no coverage whether or not the vessel was leased. Further, I note that Mr. Abena argued that Big Blue, Inc., bore the risk of loss because it would have been liable for any claims not paid by the insurance carrier due to a lease or because of excess crew members. I believe a more accurate statement, however, would be that the insurance carrier would not be obligated to provide coverage. It is an open question whether liability would fall upon Big Blue, Inc./Mr. Abena or Mr. Nelson, or both.

Trip Expenses, Including Crew Shares and Day Workers

The first trip was not particularly successful, the gross landings coming to approximately $29,000. Big Blue, Inc.'s 40 percent "off-the-top" share was paid directly to it by the fish buyer, and the remainder was paid to Mr. Nelson.

Typically in the industry, after each trip the owner's or "boat share" percentage is calculated directly from the gross sales. Although there are a variety of methods of calculating the amount due each share crew member, in one way or another they all usually provide for some pro rata sharing of the trip expenses. However, at the end of the first trip, Mr. Nelson calculated each member's share as a percentage of the gross landings, without accounting for trip expenses. Accordingly, the owner received 40 percent of the gross and the crew received a combined share of 25 percent of the gross (i.e. three 6 percent shares and one 7 percent share). Mr. Nelson received whatever was left after all the trip expenses were paid. As a result of using this procedure, the entirety of the trip expenses for the first trip was born solely by Mr. Nelson. These expenses included $2,748 for bait, $563 for groceries, $1,400 for the day crew, $800 for the P&I insurance, and $2,000 for fuel. Mr. Nelson accordingly ended up with $2,639 for himself, which is about 9.1 percent of the gross before trip expenses, or about 12 percent after trip expenses. This was less than the 15 percent (after-trip expenses) he had received in the preceding tanner crab fishery, and he expressed displeasure about this to Mr. Abena.

Although there was conflicting testimony, upon considering all the facts and circumstances, and paying due heed to the demeanor, credibility, and powers of recollection of the parties and witnesses, I conclude that Mr. Abena thereupon advised Mr. Nelson that he should have made the calculations in such a way that the crew shared in the trip expenses. Mr. Abena also decided to "forgive" the $800

insurance reimbursement due for the next trip. He also suggested (but did not require) that Mr. Nelson fish in a different, closer area on the next trip, thereby reducing fuel costs. Finally, he suggested that Mr. Nelson try to recoup some or all of his loss by retaining most or all of the bonus pay anticipated from the fish buyer at the end of the season, instead of distributing it among the crew members, as would be the usual practice. Whether, and to what extent, Mr. Nelson actually followed this latter advice is unclear. I find as fact that at least one of the crew members did receive a share of the "bonus" from Mr. Nelson.

For the second trip Mr. Nelson fished in the area Mr. Abena had suggested. This trip was more successful: the gross landings were approximately $43,500. Trip expenses included: groceries, $649; bait, $2,760; fuel, $1,291; and daily crew wages, $1,600. This time Mr. Nelson made the calculations in such a way that the food expenses were split up equally among the five share crew members; the other trip expenses were apportioned according to the amount of each member's crew share. Although this method did ease the trip operating expense burden somewhat, Mr. Nelson still bore the major burden (71 percent) for the non-food trip expenses. Mr. Nelson's earnings came to $9,341, which was about 21 percent of the gross, or about 25 percent of the amount left after the trip expenses.

As stated earlier, determining which party had responsibility for the operating expenses of the vessel is not a matter of counting up how much each party invested in the operation and then deciding in favor of the party who invested more money. The question is whether the evidence regarding how expenses were handled tends to show that there was a lease. In this case, although both parties made substantial investments in the fishing operation, the manner in which they related to each other with respect to Mr. Nelson's income from the fishing operations suggest that their relationship was something other than a lessor-lessee arrangement.

Despite the fact that Mr. Nelson was primarily responsible for the tendering of payment of crew and trip expenses,[20] he complained to Mr. Abena about his lower-than-expected earnings after returning from the first trip. Such a complaint would not normally be expected of a person who views himself as an independent lessee. Mr. Abena's remedial action in response to Mr. Nelson's complaint included forgiving the insurance for the second trip and suggesting that for the second trip Mr. Nelson subtract the trip expenses before calculating crew shares. He also recommended that Mr. Nelson fish elsewhere. These responses by Mr. Abena suggest that he felt responsible for Mr. Nelson's income to a degree greater than would be expected of a mere lessor, and that Big Blue, Inc., shared in the financial burdens and control of the fishing operation. Taken as a whole, the evidence regarding the financial risks of the operation, and the parties' respective responsibilities regarding those risks, at least slightly favors the view that the parties' relationship was something other than lessor-lessee.

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[20]In resolving a dispute between an owner and a putative lessee, the fact the crew might share the expenses (as it clearly did for the second trip) with the putative lessee is not particularly relevant in view of the fact that in any event the owner is not responsible.

6. Treatment of the fishing operations for tax and other purposes

Mr. Nelson has been unable to locate his 1985 federal tax return, and his request to the IRS for a copy was unsuccessful. [Affidavit of Bruce Nelson, May 12, 1995] The IRS reported that it had already destroyed its 1985 returns. [IRS Letter to Bruce Nelson, April 19, 1995] However, as previously noted, the evidence establishes that Mr. Nelson paid the crew members from his own account. Although only one form 1099 issued by Mr. Nelson was entered into evidence, I find as fact that Mr. Nelson issued form 1099s to the crew members in his own name and using his own employer identification number. Although there was a conflict in the testimony, upon considering all the attendant facts and circumstances, and paying due heed to the credibility and powers of recollection of the parties, I find that the parties had no understanding that Mr. Nelson was to issue IRS Form 1099s to the crew in the name of Big Blue, Inc. Under these circumstances, I am persuaded that it is more likely than not that Mr. Nelson filed a Schedule C with his 1985 federal income tax return, and that it reflected the income and expenses of the 1985 halibut operation. Whether it contained an entry for a "lease" payment is unknown.[21] It is clear that, unlike the tanner crab operation, where Big Blue, Inc., issued form 1099s to the entire crew, including to Mr. Nelson, for the halibut operation Big Blue, Inc., did not issue any form 1099s.

Although I have given due consideration to the argument that Mr. Nelson's increased "paperwork" responsibilities in the halibut fishery, as compared to the tanner crab fishery, were adequately compensated for, I nevertheless conclude that this factor weighs in favor of Mr. Nelson.

7. Whether claimed lease had a set or guaranteed term

It is unclear whether the agreement had a set or guaranteed term. The parties seem to have anticipated that the agreement would last for two openings and would include the clean-up work following the second opening. Mr. Nelson fished with the vessel for the two openings, but after the second landing, while the residual clean-up work was still in progress, Mr. Nelson was "fired" and the parties' arrangement was abruptly terminated.

As we stated in Kristovich v. Dell,[22]

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[21] In any event, pursuant to the tax regulations then in effect, it would have made little difference whether Mr. Nelson entered 100 percent of the gross landings under gross receipts and listed the 40 percent "boat share" as a deduction under a lease or rent category, or whether he merely entered 60 percent of the gross landings under gross receipts, and made no deductions.

[22] Appeal No. 95-0020, March 20, 1996, at 9, *aff'd* March 27, 1996.

> If the arrangement could terminate any time the owner decides to board the vessel and take command, this would appear to be inconsistent with the interests of a claimed lessee operating a viable independent business. It would also be inconsistent with the normal definition of a "lease" . . ..

There is nothing in the record to suggest that Mr. Abena could not have unilaterally terminated the arrangement earlier, say, before the second opening. As it happened, however, the arrangement was terminated at about the time it was scheduled to terminate of its own accord.
Under these circumstances, it is difficult to find with any degree of assurance that Mr. Abena was free to terminate the agreement at will or that the agreement had no set or guaranteed term. The evidence on this point is not strong. Therefore, I do not give this factor any weight.

Summary of the evidence

Mr. Abena/Big Blue, Inc., was solely responsible for selecting the buyer; had a degree of influence in crew hiring; gave a draw to one crew member; gave counsel to the putative lessee as to where to fish and how to do the "trip" paperwork (especially as regards the second trip); exercised control of the vessel before, between, and immediately after the two trips; provided some of the gear; forgave an $800 insurance reimbursement for the second trip; "fired" the putative lessee at the end of the second trip; and was guaranteed 40 percent "off the top."

Mr. Nelson supplied the great bulk of the fishing gear; selected, hired and fired the crew (with the arguable exception of Mr. Thissen and one day-crew member); directed the on-site fishing operations with no direction or control from the owner while the vessel was at sea; was responsible for paying the crew's wages and trip expenses; bore all the expenses for the first trip himself, and 71 percent of the expenses of the second trip; issued the IRS form 1099s in his own name (and using his own employer tax identification number); and received as remuneration whatever was left after the owner, the crew, and the expenses were paid.

This is a very close case, but I am persuaded by a preponderance of the evidence that the relationship between the Appellant and Respondent was more indicative of a "hired skipper" arrangement, or even a joint venture operation, than an IFQ lease arrangement. I base this on my consideration of all the evidence in the record and, in particular, on the following: (1) the degree of control exercised by Mr. Abena over the fishing operation, especially in regard to his very active selection of the buyer; (2) Mr. Nelson's complaint to Mr. Abena about lower-than-expected earnings from the first fishing trip; (3) the counsel Mr. Abena gave to Mr. Nelson regarding how to perform crew share calculations for the second trip; (4) Mr. Abena's forgiving the insurance contribution for the second trip; (5) the advice Mr. Abena gave regarding where to fish for the second trip; and (6) the fact Mr. Nelson was "fired" during the clean-up phase after the second trip .

FINDINGS OF FACT

1. The parties had an oral arrangement wherein Mr. Nelson was to captain the vessel for two halibut openings in 1985.

2. The owner (Big Blue, Inc.) supplied the vessel, as specially converted for halibut operations, and Mr. Nelson supplied the bulk of the halibut gear.

3. Big Blue, Inc., was directly and actively involved in the overall operation, had a measure of influence over the hiring of the crew, selected the market, and fired Mr. Nelson at the end of the second trip.

4. Mr. Nelson's command and control of the vessel was confined to the two brief periods when the vessel was at sea.

5. Both parties made substantial investments in the fishing operations in question.

6. Mr. Nelson treated the fishing operation as his own business for tax purposes.

CONCLUSION OF LAW

The agreement between the parties did not constitute a vessel lease for the purposes of the Pacific halibut and sablefish IFQ program. Accordingly, the Appellant does not qualify as a "lessee" of the F/V BIG BLUE for the two trips which resulted in landings on April 30, 1985, and May 30, 1985.

DISPOSITION

The Division's Initial Administrative Determination, dated March 17, 1995, which allocated qualifying pounds of halibut landed from the F/V BIG BLUE to the Respondent, is AFFIRMED. This decision takes effect on November 21, 1996, unless by that date the Regional Administrator orders review of the decision. Any party, including the Division, may submit a Motion for Reconsideration, but it must be received at this office not later than 10 days after the date of this decision, November 1, 1996.

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 prevailing party in this appeal still has an opportunity to receive QS and the corresponding IFQ for the 1996 fishing season, I recommend that the Regional Administrator 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