NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

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| In re Applications of | ) | Appeal No. 95-0104 |
| | ) | |
| CHARLES W. TREINEN, | ) | |
| Appellant | ) | |
| | ) | DECISION |
| and | ) | |
| | ) | |
| BRADFORD C. SCUDDER, | ) | October 11, 1995 |
| Respondent | ) | |
| _____ | ) | |

## STATEMENT OF THE CASE

The Appellant filed a timely appeal on July 6, 1995, of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division]. The IAD, dated May 10, 1995, found that Bradford C. Scudder had demonstrated that he held a lease of the F/V FRED J for the period August 26, 1985, through May 15, 1986. The IAD allocated qualifying pounds of halibut landed from the vessel during that period to Mr. Scudder. The IAD also denied the same qualifying pounds to the vessel's owner, Charles W. Treinen.

Mr. Scudder wrote to the Division on June 2, 1995, requesting the allocation of additional pounds of halibut for the landings he made from the F/V FRED J during the period May 16, 1986, through August 29, 1986, based on a continuation of a lease with Mr. Treinen after the end of the term specified in their written lease. This period was not considered in the IAD. As a result, the Division issued a second IAD, dated July 19, 1995, which found that Mr. Scudder's written lease with Mr. Treinen had been extended by mutual agreement through August 31, 1986. The second IAD allocated to Mr. Scudder the qualifying pounds of halibut landed from the vessel in two regulatory areas during the period in question. The second IAD also determined that Quota Shares [QS] resulting from these pounds had been erroneously awarded to Mr. Treinen and, therefore, revoked them.

The Appellant's request for a hearing was denied and the record in this appeal was closed by an order dated September 29, 1995.

## ISSUES

1. Was there was a valid vessel lease in effect between the parties?

2. If so, when was it in effect?

## BACKGROUND

On his Request for Application [RFA], Form D (Vessel Information Form), dated February 23, 1994, the Respondent stated that the F/V FRED J had been leased to him beginning in 1985, but he did not indicate a lease end date. He listed the Appellant as the owner of the vessel. In support of that claim, the Respondent submitted the original signed copy of a document entitled "BARE BOAT CHARTER." The document was signed by Charles W. Threinen, Jr. and Jane E. Threinen[1] as owners of the vessel, and by Bradford C. Scudder as charterer. It was executed on August 24, 1985. The document provides that the owner "lets" and the charterer "charters and takes for hire" the vessel and "all its gear, equipment and appurtenances" for the period August 26, 1985, to May 15, 1986, "or as otherwise agreed upon by both parties." Rent (charter hire) is specified as 40 percent[2] of the charterer's gross proceeds from commercial fishing operations during the term of the charter. Other provisions in the document specify that:

> (1) the owners are authorized access to all of the charterer's records pertaining to commercial fishing during the term of the charter;
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> (2) the charterer would serve as master of the vessel;
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> (3) owners would maintain insurance on the vessel for the remainder of 1985, but charterer would pay for any increase due to participation in the September 1985 halibut opening, and would maintain the insurance for the first quarter of 1986, plus a pro rata share for "the length of time he charters the vessel after March 31, 1986";
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> (4) the charterer would assume liability for all claims within the deductible under the insurance;
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> (5) the charterer would pay for or replace gear lost during the term of the charter;
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> (6) the charterer would keep the vessel seaworthy and pay for routine maintenance; owners would pay for major, non-maintenance repairs;
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> (7) the charterer would pay for stores, fuel, and supplies on board the vessel;

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[1]The Threinens are husband and wife. They now go by the names Charles W. Treinen and Jane E. Sauer. There is no explanation in the record for the change in spelling from Threinen to Treinen.

[2]The document submitted by the Respondent has the number "35" written in blue ink over the number "40", but the word "forty" has not been changed. In a photocopy of this document submitted by the Appellant, the number "40" is unchanged.

(8) the charterer could not incur maritime liens or encumbrances on the vessel, except for salvage;

(9) the charterer would indemnify the owners against all claims and liabilities resulting from use of the vessel during the term of the charter that are not paid by the owners' insurers.

In support of his claim of a lease, the Respondent also submitted to the Division other documents, including a 1986 federal income tax return, Schedule C, showing itemized expenses for a vessel lease, fuel and oil, food, fishing gear, and licenses; receipts and copies of cancelled checks for fishing expenses, including lease payments; and several IRS form 1099s showing payments to crew members and to the Appellant.

On his own RFA, dated May 4, 1994, and signed by his wife as attorney-in-fact, the Appellant indicated that he had leased the vessel, but stated that the lessee's name and address were "unknown at this time." The beginning and ending dates of the lease were not indicated. With his appeal, the Appellant submitted his own affidavit, dated July 14, 1994, which previously had been submitted to the Division during the application process. In the affidavit, the Appellant states that he had a written agreement with the Respondent "to run my vessel," but he argues that the agreement (and the underlying relationship between the parties) does not constitute a "vessel lease" as intended by the North Pacific Fishery Management Council. In particular, the Appellant states that the document is not a true bareboat charter. Rather, he says, the parties really had a "hired skipper" arrangement. In apparent contradiction, however, the Appellant states in his affidavit that "I could have easily hired Mr. Scudder as a skipper . . .."[3] This statement suggests that the Appellant recognizes that he did not have a hired skipper arrangement with the Respondent.

## DISCUSSION

Under the IFQ program, as implemented by the Division, an applicant for an initial issuance of QS may receive credit only for legal landings of Pacific halibut or sablefish that were made from a vessel owned or leased by the applicant at the time of the landings. See 50 C.F.R. § 676.20. Under § 676.20(a)(1)(iii), a written vessel lease is conclusive evidence of the existence of a vessel lease between the parties. To be conclusive evidence, a written lease must identify the leased vessel, the name of the lease holder, and the period of time during which the lease was in effect. Where, as in this case, an applicant has submitted a written document said to be a vessel lease, the appropriate inquiry on appeal is whether that document on its face actually constitutes a vessel lease for purposes of the IFQ program.

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[3]Appellant's affidavit, July 14, 1994, at 1.

The inquiry begins with an examination of the provisions in the document itself, rather than with other evidence concerning the intent or actual conduct of the parties. In the absence of evidence challenging the validity of the agreement, a document that contains provisions consistent with a vessel lease is conclusive evidence of the existence of a vessel lease between the parties, and the inquiry on that question need go no further. However, evidence that the agreement was invalid (void) *ab initio*, such as evidence of fraud, duress, coercion, or incapacity, is always relevant and should be considered.[4] If the Appeals Officer determines that a valid vessel lease existed, then the next question is to determine when the lease was in effect. In examining that question, the Appeals Officer will presume that the lease was in effect for the term stated in the lease, unless contrary evidence is presented.

The IFQ regulations do not define "vessel lease," nor do they prescribe the minimum requirements for, or essential elements of, a vessel lease. Recognizing that commercial fishermen and vessel owners enter into a considerable variety of business arrangements relating to fishing operations, this office has chosen not to establish a single, narrow definition of a vessel lease. Rather, we have identified a number of factors that should be considered in deciding whether a vessel lease existed.

In two published decisions involving claimed oral vessel leases,[5] we reviewed the regulatory history of the vessel lease provisions and concluded that the North Pacific Fishery Management Council intended to allocate Quota Shares to those who "acted like entrepreneurs in controlling and directing the fishing operations that produced the legal landings in question."[6] We pointed to five factors that should be considered, but stated that this was not intended to be an exclusive or exhaustive list. These factors are:

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

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[4]If the Appeals Officer finds that a written document does not constitute conclusive evidence of a vessel lease, but does constitute a valid agreement between the parties, the document may still be considered as relevant evidence of the relationship between the parties, along with other evidence of the parties' actual conduct and intent.

[5]O'Rourke v. Riddle, Appeal No. 95-0018, May 18, 1995, affirmed May 23, 1995; Seater v. Seater & Seater, Appeal No. 94-0010 [consolidated with Appeal No. 95-0006], June 6, 1995, affirmed June 9, 1995.

[6]O'Rourke at 13.

(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.

Since issuing O'Rourke and Seater, we have reviewed several other appeals involving conflicting claims about the existence of a vessel lease. As a result, it has become clear that some of the factors, which are appropriate to consider in an oral lease situation, might not be relevant in a written lease situation. For example, while it might be useful when reviewing a claimed oral lease to consider how the parties treated the fishing operations for tax purposes, one would not expect a written lease to address this question. Thus, a flexible approach is needed. Therefore, each claimed lease, whether written or oral, must be reviewed on its own merits. Whatever factors are relevant in a particular case will be considered and given appropriate weight.

**1. Was there a valid vessel lease in effect between the parties?**

The Appellant does not argue that the document in question in this appeal is invalid, nor is there any such evidence in the record. Therefore, we need look only to the provisions of the document itself to determine whether it constitutes conclusive evidence of a vessel lease.

The title of the document and the terminology used in the document can be relevant evidence of whether the parties intended the document to constitute a vessel lease. In this appeal, the document is entitled "BARE BOAT CHARTER" and the parties are referred to as "owner" and "charterer." The document provides for "rent" or "charter hire" to be paid by the charterer. Such language, while not in itself determinative, is consistent only with a bareboat charter or similar vessel lease and indicates the intent of the parties to create a vessel lease.[7]

The document provides that the charterer was responsible for such operating expenses of the vessel as stores, fuel, supplies, lost gear, and routine maintenance. The charterer also was required to indemnify the owner for uninsured loss. During the term of the agreement, the charterer was to be the sole master of the vessel. The charterer also was responsible for maintaining insurance on the vessel during the first quarter of 1986 and for the increased cost of insurance resulting from participation in the September 1985 halibut opening.

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[7]The Appellant states in his appeal that it was not his or his wife's intent to create a bareboat charter or a vessel lease. Although he drafted the agreement, he states that he and his wife did not at the time realize the significance of the title "bareboat charter" and, in fact, had never heard of a bareboat charter before that time. But even if the Appellant did not intend to lease his vessel, as the drafter of the agreement he cannot now complain that the language chosen did not reflect his actual intent.

The Appellant argues that the agreement does not constitute a bareboat charter and was not intended to be a bareboat charter. This argument misses the point. As stated in O'Rourke, "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." Nor does a written agreement need to be a bareboat charter in order to constitute conclusive evidence of a vessel lease.

The document in question in this appeal does not explicitly provide that the charterer would have exclusive possession, control, and command of the vessel for the duration of the charter or, conversely, that the owner would retain no control, possession, or command.[8] On the other hand, the document provides that the charterer takes the vessel for the term stated and at the rental rate stated. The document does not restrict the charterer's use of the vessel, other than that it would be used for commercial fishing operations and that the charterer could not assign another person to serve as master without the written consent of the owner. Looking at the document as a whole, all the provisions are consistent with the existence of a lease, and none of the provisions are inconsistent with a lease. As required to be conclusive evidence, the document identifies the leased vessel, the name of the lease holder, and the period of time during which the agreement was in effect. Therefore, it must be concluded that the document on its face constitutes conclusive evidence of a vessel lease between the parties.

**2. When was the vessel lease in effect?**

The written vessel lease provides that the "term of this charter is from August 26, 1985, to May 15, 1986, or as otherwise agreed upon by both parties." The lease also provides that the charterer shall pay a pro rata share of the cost of vessel insurance for "the length of time he charters the vessel after March 31, 1986." The parties also foresaw the possibility that the agreement might be terminated early, as evidenced by the following provision: "In the event that Charterer does not complete the term of this Charter, he shall be responsible for properly docking the vessel and storing the gear and other equipment in a reasonable manner." These provisions show that the parties intended that their agreement would last until at least May 15, 1986, but that they contemplated that the agreement might be terminated early or extended if both parties agreed.

The Appellant does not allege that the lease terminated before May 15, 1986, nor is there any evidence in the record that it did so. Therefore, it is presumed that the lease was in effect at least for the term specified in the document. The only question remaining is whether the written vessel lease was extended by the parties beyond March 31, 1986. Having determined as a matter of law that the written agreement between the parties was conclusive evidence of a vessel lease, the question of whether it was extended beyond its stated term turns not on how the parties' conduct after March 31 is

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[8]The Appellant states in his appeal that such a provision was contained in the bareboat charter form which was adapted for this agreement, but that he deleted the provision.

characterized; rather, the key is whether and to what extent such conduct differed from their conduct during the stated term of the lease.

In his letter to the Division, dated June 2, 1995, the Respondent stated that there was "absolute continuity" in his business relationship with the Appellant before and after May 15, 1986.[9] The Respondent refers in the letter to evidence he previously had submitted to the Division in support of his claim to qualifying pounds of halibut for landings made from the F/V FRED J on May 30, 1986; June 3, 1986; and August 27, 1986. The evidence included:

- Respondent's check register showing income and expenses of the F/V FRED J from August 24, 1985, through February 20, 1987;
- IRS form 1099s showing Respondent's payments to crew and to the Appellant after May 15, 1986;
- Respondent's IRS Schedule C return for 1986, which included expenses from the F/V FRED J after May 15, 1986;
- an affidavit of Todd Lenihan (dated November 22, 1994) stating that he worked for the Respondent aboard the F/V FRED J during halibut openings on September 9, 1985, and August 24, [sic] 1986; and that Respondent was responsible for hiring and paying the crew, for all decisions relating to the operation of the vessel, and that Respondent leased the vessel from the Appellant;
- an affidavit of Bill Young (dated November 22, 1994) stating that he worked aboard the F/V FRED J during the August 1986 halibut opening; that Respondent leased the vessel from the Appellant; and that Respondent was responsible for all aspects of the operation, maintenance, and upkeep of the boat and crew.

The record also contains a notarized letter from the Respondent to the Division (dated September 7, 1994) stating that the Respondent and the Appellant "agreed to extend the length of the Bare Boat Charter to include halibut trips" on the three dates mentioned above. The Respondent asserts in the letter that:

> "The business arrangement the boat owner and I agreed on was that I was the Master of the vessel. I was responsible for hiring a crew, paying insurance, gear loss, fuel, oil, repairs, and maintenance."
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> "I paid for food, fuel, bait, crew, maintenance, and vessel lease."

Respondent submitted cancelled checks paid to crew and to the Appellant; a State of Alaska

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[9]The Respondent twice cited the date as May 15, 1985, but it is apparent from other references in the letter that these are typographical errors and were intended to be 1986.

Commercial Fisheries Entry Commission halibut data sheet; crew settlement sheets; and receipts for fuel, gear, food, and bait. This evidence includes payments and landings data covering the claimed lease extension period.

The record contains no evidence that the business relationship and working arrangement between the parties was any different during the period of the claimed extension than it was during the stated term of the vessel lease. The Appellant has not provided any evidence or statements indicating that the parties' relationship changed during the extension period, nor does Appellant deny that he agreed to, or at least acquiesced in, an extension of the vessel lease.

During a September 26, 1995, status conference the Appellant proposed obtaining and submitting an affidavit from Larry Monroe. The Appellant stated that he had an oral agreement with Monroe under which Monroe watched the F/V FRED J while it was docked in Kodiak over the winter months during the term stated in the written agreement. The Appellant said that that was a period of time when the Respondent was not fishing the vessel and was at his home in Idaho. According to the Appellant, Mr. Monroe would have signed an affidavit showing that the Respondent "was not engaged in an ongoing business" during the period covered by the second IAD, and that the Respondent did not continue operating Appellant's vessel in the same fashion during this period that he had during the term stated in the agreement. The Appellant admitted, however, that Mr. Monroe has no personal knowledge concerning the Respondent's business affairs, Respondent's working arrangement with the Appellant, or Respondent's operation of the vessel.

Weighing all the evidence in the record, I find it more likely than not that the Respondent continued to operate the F/V FRED J during the period May 16, 1986, through August 29, 1986, in the same manner and under the same terms as he had during the period August 26, 1985, through May 15, 1986. I also find, therefore, that the parties at least implicitly agreed to an extension of their written agreement until at least August 29, 1986.

## FINDINGS OF FACT

I find by a preponderance of the evidence that:

1. The parties entered into a valid written agreement entitled "BARE BOAT CHARTER" and dated August 24, 1985.

2. The agreement was initially in effect for the period August 26, 1985, through May 15, 1986, and was extended by the parties until at least August 29, 1986.

## CONCLUSIONS OF LAW

1. The written agreement constitutes a vessel lease for purposes of the Pacific halibut and sablefish IFQ program.

2. The written agreement is conclusive evidence of the existence of a vessel lease between the parties.

3. The Respondent qualifies as the person to whom qualifying pounds resulting from legal landings of halibut made from the F/V FRED J during the period August 26, 1985, through August 29, 1986, should be allocated, based on his lease of the vessel from the Appellant during that period.

## DISPOSITION

The Division's Initial Administrative Determinations, dated May 10, 1995, and July 19, 1995, involving a conflict between the Respondent and the Appellant over the allocation of qualifying pounds of halibut landed from the F/V FRED J are AFFIRMED. This decision takes effect on November 10, 1995, unless by that date the Regional Director orders review of the decision.

Because the prevailing party in this appeal, Bradford C. Scudder, still has an opportunity to receive QS and the corresponding IFQ for the 1995 fishing 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.

Edward H. Hein
Chief Appeals Officer