

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 95-0070
)	
ROBERT A. CARLSON,)	DECISION
Appellant)	
_____)	February 12, 1996

STATEMENT OF THE CASE

Robert A. Carlson filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on March 20, 1995. The Appellant had filed a Request for Application [RFA] for Quota Share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish. He claimed eligibility for halibut QS based on a sublease of a vessel in 1989. The IAD denied his application on the grounds that he did not supply sufficient evidence of the claimed lease. The Appellant has sufficiently shown that his interests are directly and adversely affected by the IAD. An oral hearing was held January 30, 1996.

ISSUE

Did the Appellant hold a valid lease (sublease) of a vessel from which halibut was legally landed in 1989?

BACKGROUND

The Appellant claims to have held an oral sublease of the vessel F/V DAILY BREAD during the time halibut landings were made from the vessel in September and October 1989. The Appellant claims that he subleased the vessel from Michael L. DeVaney, who, in turn, held an oral lease at that time from the owner of the vessel, Bob L. Clarke. In support of his claims, the Appellant submitted on appeal a notarized statement signed by Mike DeVaney¹ and himself on February 20, 1995. The statement said that the Appellant had subleased the F/V DAILY BREAD from the DeVaneys during the fall of 1988 and the complete 1989 season. It also said that the DeVaneys were leasing the vessel at that time from the owner, Mr. Clarke, but that the DeVaneys did not need to use the vessel. They entered into an agreement with the Appellant, which, during testimony at the oral hearing, they referred to as a "handshake" agreement. Under this oral agreement, the Appellant had complete possession and use of the vessel for fishing. In return, the Appellant was responsible for paying for crew shares, bait, fuel, boat maintenance, gear loss and maintenance, fishing permits, and any other "basic operating expenses." The

¹The actual signature of Mike DeVaney was executed by his wife, Karen S. DeVaney, under a written power of attorney, which was also submitted with the appeal.

Appellant paid a percentage of the catch proceeds to the DeVaneys, who, in turn, paid this amount to Mr. Clarke. The DeVaneys testified that they did not make a profit from the Appellant's use of the vessel; rather, they merely covered their obligations to Mr. Clarke.

During testimony, the DeVaneys acknowledged that they had been somewhat confused about the dates of the sublease. They stated that, in fact, they had subleased the vessel to him only during the fall of 1989. The DeVaneys testified that neither of them was on the vessel during the times it was used by the Appellant. The record shows that halibut landings were made from the vessel with the Appellant's permit on September 8, 1989, and October 11, 1989, both in area 3A. The record also shows that halibut landings were made from the vessel with Mr. DeVaney's permit in October 1988, also in area 3A. The Appellant submitted photocopies of fish tickets for his two landings. He also submitted:

P three receipts for ice and bait, two dated September 2, 1989, and one dated "10-6" with no year specified

P an inspection sheet from Seward Fisheries in Homer, showing a delivery of approximately 2,000 pounds of halibut on September 8, 1989

P photocopies of IRS Form 1099s for tax year 1989, showing payment of crew shares to nine persons, including four people who the Appellant has testified served as crew members during one or both of the periods when he made the 1989 landings.

The Appellant also submitted a photocopy of a five-page bareboat charter between Mr. Clarke and Mr. DeVaney for the vessel F/V DAILY BREAD. Page five of the document specified that the charter was for the period January 1, 1988, through December 31, 1988. These dates were lined through, however, and initialed by both parties. No other term was indicated on that page. The document was signed by both parties at the bottom of page four and at the top of page five. Subsequently, the DeVaneys supplied three additional pages [Exhibit 1], each signed by Mr. DeVaney and Mr. Clarke, which appear to be additions to Part II of the bareboat charter, and which are incorporated by reference in ¶ 13 of the charter. Another page [Exhibit 2], on which Mr. DeVaney assigns 25 percent of the gross catch proceeds from the F/V DAILY BREAD to Mr. Clarke pursuant to the charter. The assignment is signed by Mr. DeVaney and the date of September 2, 1988, is initialed by both parties. A letter accompanying these additional pages [Exhibit 3] shows that the bareboat charter was prepared by C. Kent Roberts, an attorney in Portland, Oregon, on behalf of Mr. Clarke, and that a one-year charter term was contemplated.

The DeVaneys testified that they leased the vessel from Mr. Clarke under the terms of this charter until late 1989. They submitted a photocopy of a letter they sent to Bob Clarke, dated December 11, 1989 [Exhibit 4]. The letter states that the DeVaneys "are unable to continue leasing the boat and have turned it back to you" effective December 1, 1989. The DeVaneys also submitted photocopies of

cancelled checks [Exhibit 5] made out to and endorsed by Bob Clarke for the period May 7, 1989, through November 14, 1989. On each check is a notation, such as "Daily Bread lease", "boat lease", or specified dates in 1989.

In a recorded telephone conversation with this Appeals Officer on February 8, 1996, Mr. Clarke stated that Mr. DeVaney did have a bareboat charter of the F/V DAILY BREAD from him in 1989; and that he was aware that the DeVaneys were allowing the Appellant to fish with the vessel, and he had approved of that arrangement.

The Appellant was the only person to claim credit for landings from the F/V DAILY BREAD during the period 1988 through 1989. The RFA and application of Mr. DeVaney did not mention that vessel. Mr. Clarke did not submit an RFA or application for QS.

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 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 (1988-1990) is conclusive evidence of the existence of a vessel lease between the parties. To be conclusive evidence, the notarized statement must identify the leased vessel, the name of the lease holder, and the period of time during which the lease was in effect.

In this case, the Appellant is claiming a sublease of a vessel. A sublease is a lease of property executed by the lessee to a third person, conveying the same interest that the lessee enjoys, but for a period of time shorter than the lease. A sublease is the legal equivalent of a lease between the owner and the sublessee for the period of the sublease.² Although the IFQ regulations do not mention subleases, one who holds a valid sublease of a vessel should be considered as holding a lease of the vessel for purposes of the IFQ program. If the sublease was in effect at a time when legal landings of halibut or sablefish were made from the vessel during the QS qualifying years, the sublessee should be deemed a "qualified person" under the 50 C.F.R. § 676.20(a)(1).

To qualify on the basis of a claimed sublease of a vessel, the Appellant must establish that he held a valid sublease during the period in question. As a prerequisite to establishing a valid sublease, the Appellant must show that the sublessor held a valid lease of the vessel during the period of the sublease. I am satisfied that Mr. DeVaney held a valid lease of the F/V DAILY BREAD from Bob Clarke during

²The sublessee "stands in the shoes" of, or substitutes for, the lessee in relation to the owner, although the lessee still remains liable to the owner for non-performance by the sublessee.

the period September 2, 1988, until December 1, 1989. The written bareboat charter; the December 11, 1989, letter from Mike DeVaney to Mr. Clarke; and the testimony of the DeVaneys and Mr. Clarke all combine to support this aspect of the Appellant's claim by a preponderance of the evidence.

As to the sublease, the notarized statement executed by the Appellant and Mike DeVaney initially appeared on its face to be conclusive evidence of the sublease for the period of fall 1988 through the end of the halibut season in 1989, although the exact dates of the sublease term were not specified.³ The existence of the October 1988 halibut landings from the vessel on Mr. DeVaney's permit, however, raised questions about the accuracy of the notarized statement because normally one would not expect the lessee to be using a vessel while it was being subleased to another person. When asked about this during the oral hearing, Karen DeVaney, who handled most of the bookkeeping and paperwork concerning the F/V DAILY BREAD lease for her husband, stated that she made an error as to the dates specified in the notarized statement. "I think I did this too fast, and that's not quite right . . . because during the fall of '88 and [all of] '89 would have been when we leased it, and then Rob [Robert Carlson] subleased it from us, and I think I left out part of that sentence."

The testimony of the DeVaneys and the Appellant at the oral hearing was clearly that the sublease did not begin until the fall of 1989, after Mike DeVaney completed his contract with Exxon Corporation, in which he used the F/V DAILY BREAD in oil spill clean-up operations. As to the October 1988 landings by Mike DeVaney, Karen stated that she hadn't recalled that anyone had made any landings with that vessel until the crab season of January 1989. For his part, the Appellant testified that the parties had intended that he would sublease the vessel beginning with the spring 1989 halibut and Dungeness crab seasons, but that those plans were cancelled because of the EXXON VALDEZ oil spill. The Appellant stated that he did not have any sublease during the oil spill cleanup, during which time he served as the hired skipper of the vessel and was paid a daily rate by the DeVaneys.

Because of the inaccuracy in the notarized statement, I do not accept it as conclusive evidence of the existence of a sublease. It is, nonetheless, some evidence of a sublease and should be considered along with testimony and other evidence in determining whether a valid sublease existed.⁴ The testimony was

³50 C.F.R. § 676.20(a)(1)(iii) specifies that the notarized statement must be signed by the *owner* and the *lease holder*. Because the legal relationship between a sublessee and owner is the same as between the lessee and owner, a notarized statement signed by the lessee and the sublessee should be deemed to meet the requirements of this regulation, so long as the lessee had the legal authority to enter into the sublease. In this case, the owner stated that he approved the sublease.

⁴In 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:

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

that the Appellant had possession and command of the F/V DAILY BREAD and control of navigation of the vessel for the period covering the two fall 1989 halibut landings made with his permit; that he directed fishing operations of the vessel; that he hired and paid the crew; and that he was responsible for the operating expenses of the vessel. Neither the DeVaney's nor the Appellant submitted tax records to show how they treated the fishing operations. In light of the fact that neither the DeVaneys nor Mr. Clarke contest the Appellant's sublease claim (in fact, their testimony and all the evidence submitted supports it), the lack of tax return evidence (other than the 1099 forms) does not negate the weight of the evidence establishing that the Appellant held a sublease of the F/V DAILY BREAD at the time he made the 1989 landings from the vessel. Therefore, I conclude that Appellant did hold a valid sublease of the vessel during the period in question.

FINDINGS OF FACT

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

1. Mike DeVaney executed a written bareboat charter of the F/V DAILY BREAD from its owner, Bob L. Clarke, which was in effect for the period September 2, 1988, through December 1, 1989.
2. The Appellant had possession and command of the F/V DAILY BREAD and control of navigation of the vessel for the period covering the two fall 1989 halibut landings made with his permit.
3. The Appellant directed fishing operations of the F/V DAILY BREAD, hired and paid the crew, and was responsible for the operating expenses of the vessel for the period covering the two fall 1989 halibut landings made with his permit.
4. The Appellant made legal halibut landings from the F/V DAILY BREAD on September 8, 1989, and October 11, 1989, during which times neither the owner nor the lessee of the vessel were in possession, control, or present on 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.

O'Rourke v. Riddle, Appeal No. 95-0018, May 18, 1995; *aff'd* May 23, 1995, at 13.

5. The Appellant operated the F/V DAILY BREAD as a sublessee under an oral agreement with the lessee of the vessel for the period covering the two fall 1989 halibut landings made with the Appellant's permit.

CONCLUSIONS OF LAW

1. One who holds a valid sublease of a vessel should be considered as holding a lease of the vessel for purposes of the IFQ program. If the sublease was in effect at a time when legal landings of halibut or sablefish were made from the vessel during the QS qualifying years, the sublessee should be deemed a "qualified person" under the 50 C.F.R. § 676.20(a)(1).
2. The Appellant had a valid sublease of the F/V DAILY BREAD for the period covering the two fall 1989 halibut landings made with his permit, and this sublease constituted a "vessel lease" under 50 C.F.R. § 676.20(a).

DISPOSITION AND ORDER

The Division's IAD denying Appellant's application for failure to establish eligibility to receive QS is VACATED. The Division is ORDERED to process Appellant's IFQ application in accordance with the findings and conclusions of this decision. This decision takes effect on March 13, 1996, unless by that date the Regional Director orders the review of the decision.

Edward H. Hein
Chief Appeals Officer