

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 96-0003
)
BRADLEY V. PADON,) DECISION
Appellant)
_____) January 16, 1997

STATEMENT OF THE CASE

Appellant Bradley Padon has filed an appeal of an Initial Administrative Determination [IAD], issued on March 20, 1995, by the Restricted Access Management Division [Division].¹ The IAD denied Mr. Padon's application for halibut QS under the Individual Fishing Quota [IFQ] program on grounds that he had failed to show that he had owned or leased a commercial fishing vessel, and made landings from the vessel, during the QS qualifying period: 1988, 1989, or 1990. Mr. Padon's appeal was timely filed on May 19, 1995.

Mr. Padon claims that he leased the F/V NESTEBY in June 1990 from Mr. Henry Oksvoll, the vessel's owner. Mr. Padon has adequately shown that his interest is directly and adversely affected by the IAD. A telephonic hearing was held on January 9, 1996, on the question of whether Mr. Padon leased the F/V NESTEBY in June 1990. Participating in the hearing were Appeals Officers Edward H. Hein and Randall J. Moen; the Appellant's attorney, Peter Putzier; the Appellant, Bradley Padon; and the vessel's owner, Mr. Henry Oksvoll.

ISSUE

Whether Mr. Padon leased the F/V NESTEBY in June 1990 from Mr. Henry Oksvoll.

SUMMARY

Mr. Padon held an oral lease of the F/V NESTEBY for the June 1990 halibut opener. The arrangement between Mr. Padon had several essential features consistent with a vessel lease. Mr. Padon had complete control of the vessel, hired and paid the crew, directed the vessel's fishing activities and navigation, arranged for the marketing of the vessel's fish, had exclusive use and control of the vessel for a set period of time, and assumed all risks and paid all of the vessel's operating expenses. Mr. Oksvoll, the vessel's owner, could not recall whether he had let Mr. Padon use the vessel for the

¹The IAD appealed here was a reconsideration of two earlier IADs that had both been issued on March 20, 1995. One IAD dealt with Mr. Padon's claim for sablefish QS; the other dealt with his halibut claim. This appeal decision deals only with that portion of the reconsideration IAD relating to the halibut claim. The portion dealing with the sablefish claim will be dealt with in Appeal No. 95-0074.

June 1990 opener, but he did not deny that he had done so. Mr. Oksvoll was not aboard the vessel during the opener, but was fishing on his other vessel, the F/V AVONA. Mr. Oksvoll acknowledged that he had let Mr. Padon use the F/V NESTEBY for the May 1991 halibut opener under substantially the same terms and price as that for the June 1990 opener, as alleged by Mr. Padon.

BACKGROUND

Mr. Bradley Padon filed a timely RFA for halibut QS, claiming that he leased the F/V NESTEBY from the vessel's owner, Mr. Henry Oksvoll, in 1988, 1989, and 1990. As proof that he had leased the vessel, Mr. Padon submitted to the Division: (1) a State of Alaska fish ticket, dated June 7, 1990, which showed landings on Mr. Padon's fish permit of approximately 9,000 pounds of halibut at Pelican Seafoods, Inc.; and (2) his own personal affidavit of February 2, 1995. On December 19, 1995, Mr. Padon's application for halibut QS was denied by the Division on the basis of insufficient evidence.

Mr. Padon filed a timely appeal of the denial of his application on grounds that he had orally leased the F/V NESTEBY from Mr. Henry Oksvoll during the June 1990 halibut opener.² In support of his appeal, Mr. Padon submitted the affidavits of the vessel's crew members, Dennis and Josh Houston; a June 7, 1990, receipt for groceries, fuel, bait, and ice, charged to Pelican Seafoods, Inc.; receipts from Terry's Marine and Pelican Seafoods, Inc., for cash paid for repairs of the F/V NESTEBY; and the affidavit of Mr. Padon, in which he claimed that he had leased the vessel in 1990 and 1991.

Mr. Henry Oksvoll also filed a timely RFA for halibut QS, claiming that he owned two vessels during the QS qualifying period, the F/V NESTEBY and the F/V AVONA; that he never leased the F/V NESTEBY; and (3) that he sold the F/V NESTEBY in 1991. Mr. Oksvoll was issued QS on the basis of his ownership of the two vessels during the QS qualifying period. He did not, however, receive QS for landings made in 1990 because the year was not one of the best of the five of seven years for calculating halibut QS.³ As a result, Mr. Oksvoll was not made a party to Mr. Padon's appeal.

DISCUSSION

²The June 1990 halibut opener was for a 24 hr. period from noon, June 5, 1990, to noon June 6, 1990.

³*See*, 50 C.F.R. § 679.40(a)(4)(i), formerly, 50 C.F.R. § 676.20(b), which provides that halibut QS must be calculated on the basis of a qualified person's best of any five of seven years from 1984-1990. All IFQ regulations were renumbered, effective July 1, 1996. *See*, 61 Fed. Reg. 31,270 (1996). The wording of the regulation in question was unchanged by the renumbering.

Whether Mr. Padon leased the F/V NESTEBY in 1990 from Mr. Henry Oksvoll.

Under 50 C.F.R. § 679.40(a)(2),⁴ 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 (1988, 1989, or 1990) is a "qualified person." Proof of an oral lease may be used to qualify a person for QS under the IFQ regulations.⁵ Given the absence of a written vessel lease in this case, the question in this appeal, therefore, is whether Mr. Padon has presented sufficient evidence of an oral lease of the F/V NESTEBY.

The regulations do not define what constitutes a lease. This office has identified seven factors⁶ that 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 agreement. The factors, include, but are not limited to:

- (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 the navigation of the vessel;
- (3) whether the claimed lessee directed the 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 business for federal tax purposes and other purposes; and
- (7) whether the claimed lessee had a set or guaranteed term.

As a guideline in weighing the factors, we stated in O'Rourke v. Riddle⁷ that the North Pacific Fishery

⁴See, 50 C.F.R. § 679.40(a)(2); formerly, 50 C.F.R. § 676.20(a)(1).

⁵See, 50 C.F.R. § 679.40(a)(3)(iii); formerly, 50 C.F.R. § 676.20(a)(1)(iii).

⁶See, e.g., F/V Determined Partnership v. Big Blue, Inc., Appeal No. 95-0049, October 22, 1996, *aff'd*, November 5, 1996; Smee v. Echo Belle, Inc., Appeal No. 95-0076, August 1, 1996, August 20, 1996; Kristovich v. Dell, Appeal No. 95-0010, March 20, 1996, *aff'd*, March 27, 1996.

⁷Appeal No. 95-0018, May 18, 1995, *aff'd*, May 23, 1995.

Management Council [Council] intended to award QS to persons who could prove an oral lease, and who had supplied the means to harvest the fish, suffered the financial and liability risks to do so, and directed the fishing operations. In short, the Council intended QS for persons who, as lessees, had acted like entrepreneurs.⁸

I shall now consider the factors to determine whether the unwritten arrangement between Mr. Padon and Mr. Oksvoll was a lease.

1. Mr. Padon's and Mr. Oksvoll's characterization of their arrangement at relevant times.

Mr. Padon testified that a week or so before the June 1990 halibut opening he and Mr. Oksvoll agreed to the lease of the F/V NESTEBY. Mr. Padon testified that their agreement was a "just normal lease" - a handshake arrangement, under which Mr. Padon would do everything, and pay Mr. Oksvoll 30 percent of the vessel's proceeds, for the one-day opener. Mr. Padon stated that no restrictions were placed on his use of the vessel. He testified that it was understood that he would skipper and prepare the vessel, use the vessel only for the June opener, have complete control and possession of the vessel, pay all vessel operating expenses, be responsible for vessel damages, hire and fire the crew, and make all fishing and marketing decisions. He further testified that he was not a hired employee of Mr. Oksvoll, and would have not allowed himself to be one, given his 30 years of fishing experience; and that Mr. Oksvoll could not reclaim the vessel during the period covered under their agreement. Mr. Padon also testified that he used the word *lease* at the time of his agreement with Mr. Oksvoll, but that he did not use the word when he paid Mr. Oksvoll for use of the vessel. Mr. Padon added that he and Mr. Oksvoll had a similar lease arrangement for the use of the vessel during the spring 1991 halibut opener. The Division's records show that halibut landings were made from the vessel on Mr. Padon's permit in June 1990 and in May 1991; and that Mr. Oksvoll made landings during that same time from his other vessel, the F/V AVONA.

Mr. Oksvoll testified that he could not recall, but that he could not deny, that he ever made an agreement for the F/V NESTEBY with Mr. Padon for the June 1990 opener; or that Mr. Padon ever used or paid Mr. Oksvoll for the use of F/V NESTEBY during that time period. Mr. Oksvoll acknowledged that he and Mr. Padon did have an agreement in 1991 for Mr. Padon to *run* the F/V NESTEBY for the spring halibut opener; that he was received a check for landings from the 1991 opener from Mr. Padon for approximately \$4,000, issued by Pelican Seafoods, Inc.; and that Mr. Padon was not his employee under the 1991 arrangement.

The record is void of settlement sheets, check receipts, tax returns, a lease affidavit, or other written

⁸According to WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 436 (1988), an "entrepreneur" is one who organizes, manages, and assumes the risks of a business venture in the expectation of gaining the profit.

proof that could shed light on how the parties characterized their arrangement. The only evidence as to how the parties characterized their arrangement is Mr. Padon's testimony that he told Mr. Oksvoll that their arrangement was a *lease* at the time of their agreement. Given the lack of evidence, I find that how the parties may have characterized their June 1990 arrangement is of little consequence in the determination of the existence of a vessel lease. This finding is not dispositive of the existence of a lease, and other factors must be analyzed to determine whether the arrangement was, in substance, a lease for purposes of the IFQ program.

2. Whether Mr. Padon possessed and commanded the vessel, and controlled the vessel's navigation.

Mr. Padon testified that during the June 1990 opener (1) he was the vessel's skipper; (2) he was under no restrictions or subject to orders from Mr. Oksvoll; (3) he had no radio contact with Mr. Oksvoll; and (4) Mr. Oksvoll was not aboard the vessel. The affidavits of the vessel's two crew members, Dennis and Josh Houston, state that Mr. Padon had sole command of the vessel. Mr. Padon also testified that he had witnessed Mr. Oksvoll fish Mr. Oksvoll's other vessel, the F/V AVONA, during the opener. The Division's records show that halibut landings were made on Mr. Padon's permit from the F/V NESTEBY on June 6, 1990;⁹ and that halibut landings were also made on Mr. Oksvoll's permit from the F/V AVONA on the same day. For the above reasons, I find that the greater weight of the evidence shows that Mr. Padon, and not Mr. Oksvoll, was the person in command of the F/V NESTEBY, including the vessel's navigation, for the June 1990 halibut opener.

3. Whether Mr. Padon directed the fishing operations of the vessel.

Mr. Padon testified that there were no restrictions on his use of the F/V NESTEBY; and that he was the one who decided when and where to fish, and where to market the fish. Mr. Padon testified that he had his "own spots to fish" and that he it was his practice to have "no contact with anyone" when he fished. The affidavits of the vessel's two crew members support Mr. Padon's testimony. One of the affidavit's also states that Mr. Oksvoll was not aboard the vessel, and I find that he was not, as the Division's records show that he made landings in his name from his other vessel [the F/V AVONA] the day of the opener. While Mr. Oksvoll states that he does not recall Mr. Padon's June 1990 activities with regard to the F/V NESTEBY, there is nothing in the record to suggest that Mr. Padon was not the one responsible for the vessel's fishing operations during that halibut opening. Consequently, I find that the preponderance of the evidence shows that Mr. Padon was the person who directed the fishing

⁹The state fish ticket for the landings is dated June 7, 1990.

operations of the vessel.

4. Whether Mr. Padon had the right to hire, fire, and pay the crew.

Mr. Padon testified that it was his responsibility to hire, fire, and pay the crew. The affidavits of the vessel's two crew members state that they were hired by Mr. Padon. Mr. Padon testified that he was the one who did the settlements and paid the crew via checks written by Pelican Seafoods, Inc. While Mr. Oksvoll states that he does not recall Mr. Padon's June 1990 activities with regard to the F/V NESTEBY, there is nothing in the record to suggest that Mr. Padon was not the one responsible for the crew for that halibut opening. Consequently, the weight of evidence shows that Mr. Padon had the right to hire, fire, and pay the crew.

5. Whether Mr. Padon was responsible for the operating expenses of the vessel.

Mr. Padon testified that he paid for all of the vessel's repairs and operating expenses for the June 1990 opener, which included fuel, ice, bait, and groceries; and that he would have been responsible for damages to the vessel, had there been any. As proof, Mr. Padon produced a receipt from Terry's Marine, dated June 3, 1990, for \$105.02 paid in cash for grid work; a receipt, dated June 4, 1990, from Pelican Seafoods, Inc. for \$32.86 paid in cash for tubs; and a receipt, dated June 7, 1990, from Pelican Seafoods, Inc. for \$1,000 paid on Mr. Padon's account for fuel, bait, and ice. Mr. Padon testified that the \$1,000 approximated his expenses for the opener, and that it came out of his share of the proceeds from the opener. The face of the fish ticket for the opener shows that Mr. Padon received a check for \$1,000, which Mr. Padon testified was the \$1,000 used to pay off his account. The fish ticket also shows that Mr. Oksvoll was paid \$4,078.40 [30 percent of the vessel's gross proceeds]. There is no evidence in the record that shows that Mr. Oksvoll provided credit or paid any of the vessel's expenses. Given the evidence, I find that Mr. Padon paid the vessel's operating expenses, and assumed the financial risks in the event of a "hole operation," for the June 1990 halibut opener.

6. Whether Mr. Padon treated the vessel's operation as a business for tax purposes.

Mr. Padon claims that he paid federal income taxes on the proceeds derived from F/V NESTEBY, and that the F/V NESTEBY's income was combined on his tax return with the income obtained from the F/V ORION, his own vessel, for tax year 1990. As proof, Mr. Padon submitted his 1990 federal income tax return. Mr. Dan MacCloud, the accountant who prepared the return, was unavailable for testimony at the time of the hearing. Mr. MacCloud's affidavit provides that the income from the F/V NESTEBY was included in Mr. Padon's 1990 tax return. Nonetheless, it is impossible to tell from Mr. Padon's tax return whether Mr. Padon treated the F/V NESTEBY as his business for tax purposes. Nor can it be assumed that he did, since the expenses claimed on his return may have been only for Mr.

Padon's vessel, the F/V ORION, which was used in 1990 for commercial fishing. Absent the testimony of Mr. MacCloud, I find the tax return inconclusive as to whether Mr. Padon treated the F/V NESTEBY as his business for tax purposes in 1990, and therefore, give little weight to this factor.

7. Whether the claimed lease had a set or guaranteed term.

Mr. Padon testified that he and Mr. Oksvoll agreed to the lease of the vessel "a week or so" before the June opener, and that it was understood that the vessel would be returned "a day or two" after the opener, and that Mr. Padon could not reclaim the vessel until it was returned by Mr. Padon. Mr. Oksvoll could not recall whether he had leased the vessel to Mr. Padon for the opener. He did not deny, however, that he had done so. Mr. Padon testified that he returned the vessel to Mr. Oksvoll a day or two after the opener and that Mr. Oksvoll seemed pleased with the money and the arrangement.

Mr. Padon also testified that he had also leased the vessel from Mr. Oksvoll during the 1991 spring halibut opener under the same terms as that in 1990, and that the agreement was executed in the same manner, as well. Mr. Padon submitted a state fish ticket, dated May 9, 1991, as evidence that he had landed the halibut in 1991 from the F/V NESTEBY. Mr. Oksvoll testified that he had only agreed to let Mr. Padon *run* his vessel in 1991, and that he had not *leased* it. Mr. Oksvoll did not dispute Mr. Padon's testimony concerning the terms of the 1991 arrangement or its execution.

Given that Mr. Padon's fish ticket for the June 1990 halibut shows that he used the vessel for a one-day opener, and that Mr. Padon also had the vessel for another one-day halibut opener in 1991, I find it more likely than not that the arrangement in 1990 for use of the F/V NESTEBY had a set or guaranteed term.

Summary of the evidence.

The essential features of the arrangement between Mr. Padon and Mr. Oksvoll are consistent with a lease. For a stipulated price [30 per cent of vessel proceeds], Mr. Padon was permitted by the owner [Mr. Oksvoll] of the F/V NESTEBY to exclusively possess, use, and enjoy the vessel for a defined period of time [the June 1990 halibut opener]. The arrangement also satisfies at a minimum five of the seven factors used by this office to ascertain the existence of a vessel lease under the IFQ program. The remaining two factors were neither detrimental nor helpful in determining whether or not a lease existed.

Mr. Oksvoll's testimony that he could not recall whether he allowed Mr. Padon to use his vessel for the June 1990 opener is the only evidence against the existence of a lease. I find Mr. Oksvoll's testimony not persuasive, particularly in light of (1) Mr. Padon's fish ticket, which shows that he made halibut landings from the F/V NESTEBY on June 7, 1990, one day after the opener; and (2) the Division's

records, which show that Mr. Oksvoll participated in the same halibut opener, making halibut landings on the same day as Mr. Padon from Mr. Oksvoll's other vessel, the F/V AVONA.¹⁰ I also find it significant that Mr. Oksvoll did not deny that he had let Mr. Padon run his vessel for the June 1990 halibut opener; that he admitted that he never hired Mr. Padon; and that he let Mr. Padon *run* his vessel for the 1991 halibut opener, apparently under the same terms as those alleged by Mr. Padon in 1990.

Consequently, I am persuaded by a preponderance of the evidence that the arrangement between Mr. Padon and Mr. Oksvoll was a lease for purposes of the IFQ program.

FINDINGS OF FACT

1. Mr. Padon had possession and command, and control of the navigation of the F/V NESTEBY, directed the vessel's fishing activities, and hired and paid the crew of the vessel, for the June 1990 halibut opener;
2. Mr. Padon treated the operation of the F/V NESTEBY as his own business operation, paying all operating expenses, arranging for the marketing of the fish, readying the vessel for the opener, and assuming responsibility for vessel damages;
3. Mr. Padon's use of the vessel was for a definite term, which included the period of a few days prior to the June 1990 halibut opener, the one-day opener itself, and the few days after the opener;
4. Mr. Oksvoll did not hire Mr. Padon to skipper or crew the F/V NESTEBY for the June 1990 halibut opener;
5. Mr. Oksvoll did not affirmatively deny that he allowed Mr. Padon to use the F/V NESTEBY for the June 1990 halibut opener;
6. Mr. Oksvoll fished the June 1990 halibut opener from his other vessel, the F/V AVONA; and
7. Mr. Oksvoll and Mr. Padon entered into an arrangement for Mr. Padon's use of the F/V NESTEBY for the May 1991 halibut opener that was consistent of a lease.

CONCLUSIONS OF LAW

¹⁰The Division's records show that the landings of Mr. Padon and Mr. Oksvoll occurred on June 6, 1990. For reasons unknown, the landings do not square with Mr. Padon's fish ticket for the landings, which is dated June 7, 1990.

1. Mr. Padon leased the F/V NESTEBY from the vessel's owner, Mr. Henry Oksvoll, for the June 1990 halibut opener.
2. The qualifying pounds resulting from the landings of halibut from the F/V NESTEBY during the June 1990 halibut opening, should be allocated to Mr. Padon.

DISPOSITION AND ORDER

That portion of the Division's IAD (Reconsideration), dated December 12, 1995, which denied Mr. Padon's Application for halibut QS on the basis of insufficient evidence of the lease of the F/V NESTEBY is VACATED. The Division is ORDERED to amend the NMFS official record to reflect that Mr. Padon held a lease of the F/V NESTEBY for the June 1990 halibut opener. The Division is further ORDERED to allocate to Mr. Padon the qualifying pounds resulting from the June 7, 1990, halibut landing made from the vessel; and to issue to him any resultant QS and IFQ to which he may be entitled. This decision takes effect on February 18, 1997, 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 by this office not later than 4:30 p.m. Alaska Standard Time, on the tenth day after the date of this Decision, January 27, 1997. A Motion for Reconsideration must be in writing, must allege one or more specific, material matters of fact or law that were overlooked or misunderstood by the appeals officer, and must be accompanied by a written statement or points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.

Because Mr. Padon still has an opportunity to receive QS and the corresponding IFQ for the 1997 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.

Randall J. Moen
Appeals Officer