

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 03-0008
)
YAKUTAT, INC.,) DECISION
Appellant)
) November 26, 2007
_____)

STATEMENT OF THE CASE

Yakutat, Inc., (Yakutat) appeals the Initial Administrative Determination (IAD) that the Restricted Access Management Program (RAM) issued on March 27, 2003, under the North Pacific Groundfish and Crab License Limitation Program (LLP).¹ The IAD determined that the fishing history of Yakutat's catcher/processor vessel, the F/V BLUE NORTH (ADFG 41977), qualifies Yakutat for an LLP groundfish license (LLG 2959) endorsed for the Bering Sea and Aleutian Islands groundfish fisheries. The IAD determined that the license could be used on a catcher/processor vessel to harvest Pacific cod with hook-and-line gear, and on a catcher vessel to harvest Pacific cod with pot gear.

The IAD denied Yakutat's application for an endorsement to use Pacific cod pot gear on a catcher/processor vessel.² Yakutat's claim to that endorsement was based on an alleged hardship or unavoidable circumstance under 50 C.F.R. §679.4(k)(9)(v)(B). Yakutat reasserts this claim on appeal.

Yakutat can appeal the IAD because it directly and adversely affects its interests.³ Yakutat did not request an oral hearing. An oral hearing would not be authorized in any event because there are no material facts in dispute in this appeal. 50 C.F.R. §679.43(g)(3)(I).⁴ The record contains

¹ The LLP is located in 50 C.F.R. § 679. Specifically: 50 C.F.R. § 679.1(j) (purpose and scope); 50 C.F.R. § 679.2 (definitions); 50 C.F.R. § 679.4(a)(6) (definition of harvesting privilege); 50 C.F.R. § 679.4(k)(requirements for licenses); 50 C.F.R. § 679.7 (prohibitions); 50 C.F.R. § 679.43 (appeals). These regulations are on the NMFS Alaska region website: <http://www.fakr.noaa.gov/regs/summary.htm>

² The IAD also determined that Yakutat's groundfish license could not be endorsed for the Central Gulf, Western Gulf, and Southeast Alaska Outside areas, but Yakutat does not appeal that portion of the IAD.

³ 50 C.F.R. § 679.43(b)

⁴ (g) The appellate officer will review the applicant's appeal and request for hearing, and has discretion to proceed as follows: * * *

(3) Order that a hearing be conducted. The appellate officer may so order only if the appeal demonstrates the following: (I) There is a genuine and substantial issue of adjudicative fact for resolution
(continued...)

sufficient information to decide this appeal, and therefore the record is now closed. 50 C.F.R. §679.43(g)(2).

ISSUE

Does Yakutat qualify for a BSAI Pacific cod catcher/processor vessel pot gear endorsement to its LLP groundfish license based on an unavoidable circumstance claim under 50 C.F.R. §679.4(k)(9)(v)(B)?

ANALYSIS

To qualify for a BSAI Pacific cod catcher/processor vessel pot gear endorsement, an applicant must demonstrate that its vessel harvested 300,000 pounds of Pacific cod in the BSAI with pot gear in each of any two years from 1995 through 1998.⁵

The NMFS official LLP record shows that the F/V BLUE NORTH harvested 300,000 pounds (136 metric tons) round weight of Pacific cod in the BSAI with pot gear during only one of those years, 1997.⁶ Yakutat does not dispute this, but [it] claims that an unavoidable circumstance prevented the F/V BLUE NORTH from harvesting 300,000 pounds of Pacific cod in the BSAI with pot gear during the summer of 1998. Yakutat's unavoidable circumstance claim is based on the crew's decision to quit the vessel and not fish for cod during the summer of 1998, and the inability of Yakutat to find a suitable replacement crew. Yakutat states that in April 1998 its Seattle headquarters office and the vessel's crew began

⁴(...continued)

at a hearing. A hearing will not be ordered on issues of policy or law. (ii) The factual issue can be resolved by available and specifically identified reliable evidence. A hearing will not be ordered on the basis of mere allegations or denials or general descriptions of positions and contentions. (iii) The evidence described in the request for hearing, if established at hearing, would be adequate to justify resolution of the factual issue in the way sought by the applicant. A hearing will not be ordered if the evidence described is insufficient to justify the factual determination sought, even if accurate. (iv) Resolution of the factual issue in the way sought by the applicant is adequate to justify the action requested. A hearing will not be ordered on factual issues that are not determinative with respect to the action requested.

⁵ 50 C.F.R. § 679.4(k)(9)(ii)(D). For background and comments on the Pacific cod endorsement regulation, see Final Rule, 72 Fed. Reg. 18,129, 18,129 - 18,138 (Apr. 15, 2002).

⁶ The official LLP record contains "the information prepared by the Regional Administrator about vessels that were used to participate in the groundfish or crab fisheries during qualified periods for the groundfish and crab LLP specified at §679.4(k) and in the scallop fisheries during the qualifying periods for the scallop LLP specified at §679.4(g). Information in the official LLP record includes vessel ownership information, documented harvests made from vessels during the qualification periods, and vessel characteristics." 50 C.F.R. §679.2 definition of "Official License Limitation Program (LLP) record".

exchanging telex messages about switching to the pot cod fishery in June, following directed fishing for turbot. In early June, the vessel's cook began planning a food order for the pot cod crew, but by June 10 the crew had lost interest in fishing Pacific cod with pot gear. Yakutat President Mike Burns decided to postpone cod fishing until July and ordered the vessel to return to Seattle. He was unable to obtain a qualified crew to return for the summer pot gear fishery.⁷

Yakutat points out that the F/V BLUE NORTH was built in 1945 as a Navy oiler and was modified in 1996 so it could participate in the summer pot cod fishery. Yakutat asserts that the vessel, which exceeds 200 gross tons, has a tendency to roll when fully laden with pot gear and is generally unstable in the rough weather typically associated with the fall and winter fishery. Because of the vessel's large size, it is required by Coast Guard regulations to have at least one licensed master, mate, and engineer on board. Yakutat states that its vessel is one of only seven out of 80 vessels in the pot cod fishery subject to these crew requirements. Yakutat asserts that, despite its best efforts, it was unable to find a licensed crew in time for the remainder of the summer pot cod fishery.⁸

The LLP regulations provide for an applicant to qualify for a BSAI Pacific cod catcher/processor vessel pot gear endorsement based on an unavoidable circumstance as long as it can satisfy all of the requirements in the unavoidable circumstance/hardship provision under 50 C.F.R. §679.4(k)(9)(v)(B).

LLP regulation 50 C.F.R. § 679.4(k)(9)(v)(B) provides:

(B) Hardship provision. A license holder may be eligible for a Pacific cod endorsement because of unavoidable circumstances if he or she meets the requirements in paragraphs (k)(9)(v)(B)(1) - (4) of this section. For purposes of this hardship provision, the term license holder includes the person who [sic] landings were used to meet the eligibility requirements for the license holder's groundfish license, if not the same person.

(1) The license holder at the time of the unavoidable circumstance held a specific intent to conduct directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in the table at paragraph (k)(9)(ii) of this section but that this intent was thwarted by a circumstance that was:

(i) Unavoidable.

(ii) Unique to the license holder, or unique to the vessel that was used at the basis of eligibility for the license holder's groundfish license; and

(iii) Unforeseen and reasonably unforeseeable to the license holder.

(2) The circumstance that prevented the license holder from conducting directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in paragraph (k)(9)(ii) actually occurred;

⁷ Yakutat appeal at 2-3 (July 25, 2003).

⁸ *Id.*

(3) The license holder took all reasonable steps to overcome the circumstance that prevented the license holder from conducting directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in paragraph (k)(9)(ii) of this section; and

(4) Any amount of Pacific cod was harvested in the BSAI aboard the vessel that was used at the basis of eligibility for the license holder's groundfish license after the vessel was prevented from participating by the unavoidable circumstance but before April 16, 2000.

The purpose of the unavoidable circumstance provision is to grant relief to a license holder who likely would have made the additional required harvests (during the endorsement period) but for an unavoidable circumstance.⁹

The term "unavoidable circumstance" is found in three parallel provisions in the LLP regulations: the unavoidable circumstance provision for the groundfish and crab endorsement qualification (EQP);¹⁰ the unavoidable circumstance provision for the crab recent participation period (RPP);¹¹ and the unavoidable circumstance provision for the Pacific cod endorsement. Although these provisions were adopted at different times, the meaning of the term "unavoidable circumstance" in the unavoidable circumstance provision for the Pacific cod endorsement regulation is no different than the term "unavoidable circumstance" in the other two LLP unavoidable circumstance provisions at 50 C.F.R. § 679.4(k)(8)(iv) and 50 C.F.R. § 679.4(k)(5)(v).¹²

When the North Pacific Fishery Management Council (Council) adopted the original unavoidable circumstance provision, at 50 C.F.R. § 679.4(k)(8)(iv), the Council intended for the "unavoidable circumstance" to be a "catastrophic" circumstance involving an applicant's vessel.¹³ The Council considered "catastrophic" to be "something on the order of a major fire that resulted in the disablement of the ship and made it totally inoperable in the fishery for quite some time;" something "severe rather than something minor;" something "totally out of one's control, an act of God;" and something "extraordinary and severe."¹⁴

⁹ Final Rule, 67 Fed. Reg. 18,129, 18,131 (2000).

¹⁰ 50 C.F.R. § 679.4(k)(8)(iv).

¹¹ 50 C.F.R. § 679.4(k)(5)(v).

¹² *Wizard Fisheries, Inc.*, Appeal No. 03-0004, at 11 (Mar. 3, 2005).

¹³ Transcript of the Council's meeting at 69-71, 151-152 (June 15-18, 1995).

¹⁴ Transcript of the Council's meeting at 69, 70, and 151 (June 15-18, 1995).

In *Wizard Fisheries, Inc.*,¹⁵ we concluded that a “vessel-related unavoidable circumstance” must involve loss, damage, or breakdown of the vessel or its gear or equipment.¹⁶ This conclusion is consistent with (1) the Council’s intent that an “unavoidable circumstance” be “catastrophic;” (2) NMFS’ explanation that an “unavoidable circumstance” is for vessels that were lost, damaged, or otherwise unable to participate” in the crab and groundfish LLP fisheries;”¹⁷ and (3) the text of the Pacific cod endorsement unavoidable circumstance provision, which requires that an unavoidable circumstance be “unique to the license holder or *unique to the vessel.*”¹⁸ As this office explained in *Alaska Trojan Partnership*,¹⁹ the Council conceived of an unavoidable circumstance as involving substantial and sudden damage or loss, such as a vessel sinking or grounding, a catastrophic fire, a catastrophic engine failure, or similar disastrous events or acts of God.²⁰

We also said in *Wizard Fisheries, Inc.*,²¹ that an unavoidable circumstance can pertain to the impairment or physical disability of the vessel owner, skipper, or crew. In another decision,²² we concluded that an applicant could qualify for an LLP groundfish license endorsement under the unavoidable circumstance provision based on the skipper’s illness from cancer.

Our recognition that an applicant can obtain an LLP license based on an unavoidable circumstance involving the condition of a vessel’s owner, skipper, or crew, is consistent with the requirement that an unavoidable circumstance be “*unique to the license holder.*”²³

The Council originally adopted the original unavoidable circumstance provision to address those “instances” where vessels were “lost or damaged” or where “some other factor” caused the vessel to leave the fishery and was beyond the control of the vessel owner.²⁴ In light of that concern, NMFS wrote the unavoidable circumstance provision to qualify applicants for an LLP license

¹⁵ Appeal No. 03-0004, at 12 (Mar. 3, 2005).

¹⁶ A “vessel-related unavoidable circumstance” would be an unavoidable circumstance involving the condition of the applicant’s vessel.

¹⁷ *Wizard Fisheries, Inc.*, Appeal No. 03-0004, at 10-12, footnotes 46 and 48, (Mar. 3, 2005)

¹⁸ 50 C.F.R. § 679.4(k)(9)(v)(B)(1)(ii).

¹⁹ Appeal No. 01-0001 at 32-33 (Oct. 20, 2003).

²⁰ Transcript of Council’s meeting at 69-71, 151-152 (June 16-17, 1995).

²¹ Appeal No. 03-0004, at 12, footnotes 46 and 48, (Mar. 3, 2005).

²² *Raymond Bellamy*, Appeal No. 02-0004 (June 14, 2005).

²³ 50 C.F.R. § 679.4(k)(9)(B)(1)(ii).

²⁴ Transcript of Council’s meeting at 69 (June 15-18, 1995).

based on unavoidable circumstances involving “vessels that were lost, damaged, or otherwise unable to participate” in the crab and groundfish LLP fisheries.²⁵

The ordering and wording of the language of the phrase “vessels that were lost, damaged, or otherwise unable to participate” suggests that an “unavoidable circumstance” must involve physical harm or damage *to a vessel* to keep the vessel from participating in an LLP fishery. However, when the phrase is read within the context of the text of the regulation, which requires that the unavoidable circumstance be “*unique to the license holder or unique to the vessel*,”²⁶ the phrase can be logically read to pertain to an unavoidable circumstance that involves physical harm or injury *to the owner, skipper, or crew member of a vessel*. The reason for that is because the vessel would not be able to functionally operate without one or more of those persons. To require that some physical harm, damage, or injury occur to a vessel, or to the owner, skipper or crew member of a vessel, is consistent with the Council’s intent to grant relief only under “catastrophic” circumstances.²⁷

a. The crew’s decision to quit the vessel and not fish for cod during the summer of 1998.

In this case, the crew’s decision not to fish for cod with pot gear in the BSAI during the summer of 1998 cannot be considered an “unavoidable circumstance” within meaning of the unavoidable circumstance or hardship provision in the BSAI Pacific cod endorsement regulation at 50 C.F.R. §679.4(k)(9)(v)(B) for at least three independent reasons. First, the crew’s choice not to fish was a [business] decision that was completely within their control and, therefore, not unavoidable. Second, there was no sudden, catastrophic event that disabled the crew and made them incapable of fishing. Third, the crew lacked the specific intent to conduct directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements for the endorsement sought by the Appellant.

Yakutat cannot successfully argue under the unavoidable circumstance provision that it was victimized by the crew’s decision not to fish because under agency principles the actions and intentions of the crew (agents) are imputed to the owner (principal). Thus, the crew’s decision not to fish is the owner’s decision not to fish. The crew’s lack of a disability is the owner’s lack of a disability. The crew’s lack of specific intent is the owner’s lack of specific intent.

This office applied agency principles to the elements of an owner’s claim of unavoidable circumstances in our decision in *Bellamy*, where we concluded that the intent and actions of the

²⁵ *Wizard Fisheries, Inc.*, Appeal No. 03-0004, at 12 (Mar. 3, 2005).

²⁶ 50 C.F.R. § 679.4(k)(9)(v)(B)(1)(ii).

²⁷ Transcript of the Council’s meeting at 69, 70, 71 (June 15-18, 1995).

vessel's skipper could be attributed to the vessel owner.²⁸ We allowed the owner to claim the disability (cancer) of the skipper as his own for purposes of meeting the requirements of the unavoidable circumstances regulation. Conversely, actions and intent of crew members which run counter to an unavoidable circumstances claim are likewise attributable to the owner. Claimants under 50 C.F.R. §679.4(k)(9)(v)(B) may receive the burden, as well as the benefits, of their crew member's actions and intentions.

b. The inability of Yakutat to find a suitable replacement crew for the F/V BLUE NORTH during the summer of 1998.

Yakutat's claimed inability to find a qualified replacement crew despite making reasonable efforts to do so is also not an unavoidable circumstance under 50 C.F.R. §679.4(k)(9)(v)(B) because it was not unique to the owner. Rather, a limited supply of qualified and available crew members is a market condition to which all owners are potentially subject. This is simply a case of Yakutat failing to secure a dependable, qualified crew in time for the fishery – a problem that other vessel owners in the fishery apparently were able to solve.

The fact that the F/V BLUE NORTH was suited for pot cod fishing only in the summer months, and the fact that the vessel's large size necessitated a licensed master, mate, and engineer on board, do not constitute unavoidable circumstances under 50 C.F.R. §679.4(k)(9)(v)(B). The vessel's large size was not unique, as Yakutat states that it is one of seven such vessels subject to the Coast Guard licensed crew requirements.²⁹ Yakutat's use of the F/V BLUE NORTH was its own choice, not an unavoidable circumstance beyond its control. And having used the vessel in 1997, Yakutat was well aware in 1998 of the modifications and limitations of the vessel, so it cannot be said that those conditions were both unforeseen and reasonably unforeseeable by the license holder.³⁰

Based on all of the above, I conclude that an unavoidable circumstance under 50 C.F.R. §679.4(k)(9)(v)(B) did not prevent the F/V BLUE NORTH from making harvests of 300,000 pounds of BSAI Pacific cod with pot gear in 1998. Therefore, I conclude that Yakutat does not qualify for a BSAI Pacific cod catcher/ processor vessel pot gear endorsement to its LLP groundfish license based on the unavoidable circumstance provision of 50 C.F.R. §679.4(k)(9)(v)(B).

FINDINGS OF FACT

²⁸ *Raymond Bellamy*, Appeal No. 02-0004 at 4 (June 14, 2005).

²⁹ Yakutat appeal at 3 (July 25, 2003).

³⁰ *See Wizard Fisheries, Inc.*, Appeal No. 03-0004 at 10 (Mar. 3, 2005), in which we stated that “Uniquely large and deep” fish holds were a design feature of the vessel and were not unavoidable, unforeseen, or reasonably unforeseeable by the Appellant.

I find by a preponderance of the evidence that:

1. The F/V BLUE NORTH crew's choice not to fish BSAI Pacific cod with pot gear in the summer of 1998 was a [business] decision that was completely within their control.
2. There was no sudden, catastrophic event that disabled the crew of the F/V BLUE NORTH and made them incapable of fishing BSAI Pacific cod with pot gear in the summer of 1998.
3. The crew of the F/V BLUE NORTH lacked the specific intent to conduct directed fishing for BSAI Pacific cod in the summer of 1998 in a manner sufficient to meet the landing requirements for the endorsement sought by the Appellant.
4. Yakutat's claimed inability to find a qualified replacement crew despite making reasonable efforts to do so is also not an unavoidable circumstance under 50 C.F.R. §679.4(k)(9)(v)(B) because it was not unique to the owner.
5. The large size of the F/V BLUE NORTH was not unique, as Yakutat states that it is one of seven such vessels subject to the Coast Guard licensed crew requirements.
6. Yakutat's use of the F/V BLUE NORTH was its own choice, not an unavoidable circumstance beyond its control.
7. Having used the F/V BLUE NORTH in 1997, Yakutat was well aware in 1998 of the modifications and limitations of the vessel, so it cannot be said that those conditions were both unforeseen and reasonably unforeseeable by the license holder.

CONCLUSIONS OF LAW

1. Under the unavoidable circumstance provision at 50 C.F.R. §679.4(k)(9)(v)(B), a license holder (owner) cannot claim to be victimized by the business decisions of its crew.
2. Under agency principles, the actions and intentions of the crew (agents) are imputed to the owner (principal).
3. Actions and intent of crew members which run counter to an unavoidable circumstances claim are attributable to the owner.
4. Claimants under 50 C.F.R. §679.4(k)(9)(v)(B) may receive the burden, as well as the benefits, of their crew member's actions and intentions.
5. The F/V BLUE NORTH crew's decision not to fish for cod with pot gear in the BSAI during the summer of 1998 is not an "unavoidable circumstance" within meaning of the unavoidable circumstance or hardship provision in the BSAI Pacific cod endorsement regulation at 50 C.F.R.

§679.4(k)(9)(v)(B).

6. Yakutat's claimed inability to find a qualified replacement crew despite making reasonable efforts to do so is not an unavoidable circumstance under 50 C.F.R. §679.4(k)(9)(v)(B).]

7. The fact that the F/V BLUE NORTH was suited for pot cod fishing only in the summer months, and the fact that the vessel's large size necessitated a licensed master, mate, and engineer on board, do not constitute unavoidable circumstances under 50 C.F.R. §679.4(k)(9)(v)(B).

8. An unavoidable circumstance under 50 C.F.R. §679.4(k)(9)(v)(B) did not prevent the F/V BLUE NORTH from making harvests of 300,000 pounds of BSAI Pacific cod with pot gear in 1998.

9. Yakutat does not qualify for a BSAI Pacific cod catcher/ processor vessel pot gear endorsement to its LLP groundfish license based on the hardship provision of 50 C.F.R. §679.4(k)(9)(v)(B).

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect on December 26, 2007, unless by that date the Regional Administrator takes further action pursuant to 50 C.F.R. §679.43(o).

The Appellant or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, December 6, 2007. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Administrative Judge, and must be accompanied by a written statement in support of the motion. immediately.

Randall J. Moen
Administrative Judge