NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	
	)	Appeal No. 95-0091
RICHARD H. GILLMAN,	)	
Appellant	)	
	)	DECISION
and	)	
	)	
ORLANDO B. BELL,	)	August 2, 1996
Respondent	)	
_____	)	

STATEMENT OF THE CASE

Richard H. Gillman appeals an initial administrative determination [IAD] of the Restricted Access Management Division [Division], dated April 12, 1995. The IAD denied him Quota Share [QS] under the halibut and sablefish Individual Fishing Quota [IFQ] program for the periods June 17, 1986 through August 12, 1986 and May 8, 1987 through September 8, 1987. Mr. Gillman claims that during those periods he was the lessor of the F/V LINDY, a vessel owned by Orlando B. Bell, and accordingly is entitled to the QS caught on the F/V LINDY during the term of such claimed lease. The RAM Division found that Mr. Gillman had failed to prove the existence of an oral lease of the F/V LINDY, and awarded the QS at issue to Mr. Bell.

ISSUE

Whether Appellant Richard H. Gillman held a lease of the F/V LINDY during the relevant periods.

BACKGROUND

The following background facts are uncontroverted: Mr. Bell owns a fishing vessel, the F/V LINDY, and gear for longlining halibut and sablefish. For several years, Mr. Bell has operated the F/V LINDY, taking responsibility for all aspects of its fishing ventures, including maintenance, repair, gear, crew, and other expenses.

At one point in the early 1980's, prior to the time periods at issue in this appeal, Mr. Gillman and Mr. Bell negotiated an option for Mr. Gillman to purchase another of Mr. Bell's vessels, the F/V ALOHA. Mr. Bell and Mr. Gillman entered into a written lease with an option to buy the F/V ALOHA. The lease was for a set term, and a set lease fee was due each month, regardless of the success of the fishing venture. Mr. Gillman fished the F/V ALOHA under the written lease, but ultimately did not

exercise the option to buy. During the time that Mr. Gillman leased the F/V ALOHA, Mr. Bell did not direct his fishing operations, and Mr. Gillman hired his own crew. After the termination of the lease of the F/V ALOHA, Mr. Gillman crewed for Mr. Bell on the F/V LINDY. Mr. Gillman crewed on the F/V LINDY for several years, although he also longlined using his own smaller boat.

Before the opening of the halibut and sablefish seasons in 1986, Mr. Bell contacted Mr. Gillman and proposed that Mr. Gillman crew for him for most of the season and run the F/V LINDY for him for some of the season. At the beginning of that season, Mr. Bell operated the F/V LINDY, and Mr. Gillman crewed. In mid-June, 1986, Mr. Bell left the F/V LINDY, and Mr. Gillman took over its operation until mid-August. Mr. Gillman fished two halibut openings in the Bering Sea, in areas not previously fished by Mr. Bell. The boat was then returned to Mr. Bell, who took it to Chatham Strait for halibut openings. Mr. Gillman crewed on those final trips of 1986.

Under the terms of the arrangement, when Mr. Gillman started to run the F/V LINDY it was fully supplied with gear, fuel, spare parts, groceries, and other items necessary for its longlining operations. These items were to be replaced or paid for, as appropriate, to the extent they were lost or consumed in the venture. In addition, it was expected that Mr. Gillman would maintain the vessel and return it to Mr. Bell in the condition received, save for normal wear and tear. In exchange, Mr. Gillman received one half of the 30% boat share[1] and a crew share. More details of the arrangement are discussed below in Discussion section of this Decision.

The same agreement was in effect during 1987. Mr. Bell ran the F/V LINDY for the opening of the longlining season, and Mr. Gillman then ran it between May 8 and September 8, 1987. Mr. Gillman did not crew the last runs of that season after returning the vessel to Mr. Bell. However, Mr. Gillman delivered the last load of fish and the boat to Seattle at the end of the season. Mr. Gillman leased out his own boat during the 1986 and 1987 seasons, and did not claim the QS caught on his boat during the periods at issue in this case.

Mr. Bell and Mr. Gillman did not refer to their arrangement in 1986 and 1987 as a "lease" or a "charter." The pivotal issue in this appeal is whether the arrangement nevertheless constituted an unwritten lease for the purpose of the IFQ regulations, and thus whether the quota shares during the term of such alleged lease should be awarded to Mr. Gillman.

Both Mr. Bell and Mr. Gillman applied for QS for fish caught on the F/V LINDY during the term of the claimed lease. Both parties submitted extensive documentary evidence, including sworn testimony of witnesses, to the Division. The Division, having found that Mr. Gillman did not prove the existence of

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[1]In the longline fishing industry, the "boat share" is a percentage, usually between 25-35%, that is taken off the top prior to other distributions from a voyage's gross proceeds. In this case, Mr. Bell received 15% and Mr. Gillman received 15% prior to any other distributions.

an unwritten lease, awarded the QS to Mr. Bell. Mr. Gillman timely appealed. The parties supplemented the record with considerable new documentary evidence not previously considered by the Division.

Having determined that oral testimony by the parties and their witnesses would shed light on the nature of the business relationship between the parties, I ordered an oral hearing. *See* 50 C.F.R. § 679.43(g)(3)[2] . The hearing was held in Petersburg, Alaska, on September 18-19, 1995. The parties presented the testimony of several witnesses. These witnesses included the parties themselves, several crew members, the parties' accountants, and others with knowledge of relevant facts.

DISCUSSION

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)[3] (Emphasis added).

Here, there is no conclusive evidence of a lease, either in the form of a written lease agreement or a notarized statement. Mr. Gillman contends that he has presented sufficient "other evidence" of an oral lease to establish that he was the lessee of the F/V LINDY during the relevant periods.

In Smee v. Echo Belle, Inc.[4] , we recently 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

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[2]Formerly 50 C.F.R. § 676.25(g)(3). 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.

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

[4]Appeal No. 95-0076, August 1, 1996, at 7-8.

v. Riddle[5] and Kristovich v. Dell,[6] and expressly added as a separate 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 noninclusive factors[7] 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

Mr. Gillman does not contend that the parties ever characterized their relationship as a lease, either in discussion with each other or with others.

2. Did Mr. Gillman have possession and command of the vessel and control of navigation of the vessel?

As discussed in Kristovich, at 9, whether the person operating the longline vessel is designated a hired skipper or a lessee, that person typically has possession and control of the vessel and its navigation. A longline vessel may travel thousands of miles from its home port. However, to the extent that the owner

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

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

[7]"[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.

places significant limitations on the possession and command of the vessel, such limitations would appear to be inconsistent with a finding of an unwritten lease.

The evidence established that, by and large, during the periods at issue, Mr. Gillman had possession and command of the F/V LINDY. Mr. Bell provided some guidance to Mr. Gillman in Mr. Gillman's operation of the F/V LINDY. Some of this guidance was conveyed to Mr. Gillman over time during the years Mr. Gillman crewed for Mr. Bell. Some of the guidance may have immediately preceded the fishing runs that are the subject of this appeal. Some of the guidance was in the form of valuable logs and charts that accompanied the F/V LINDY. Mr. Bell also discussed with Mr. Gillman good places to try to find fish. None of the above would appear inconsistent with Mr. Gillman's claim of a lease.

Nevertheless, it appears that Mr. Bell's direction of operations in some respects went beyond the norm of a lessor/lessee relationship. The testimony strongly suggested that Mr. Bell's guidance and directions regarding the operation of the F/V LINDY were always a consideration for Mr. Gillman and members of the crew. Mr. Bell's testimony that he maintained as much control as was practical given his distance from the boat is well supported by the testimony of others.

Mr. Gillman apparently felt that Mr. Bell was in control, at least in some respects. For example, in discussing why alcohol was not allowed on the boat, Mr. Gillman testified: "It wasn't allowed; I knew that from Orrie; in all our past experience it was totally forbidden." [Tape 9, Side 1, at 486]. Mr. Gillman testified that he attempted to run the engine at the RPMs that Mr. Bell wanted. [Tape 10, Side 2, at 154]. Mr. Bell and a crewmember testified that Mr. Bell asserted some control even over the wheel watches by requiring two crew members to be on watch during times of danger. Of course, forbidding alcohol and excessive speed, and requiring particular care in navigating dangerous passages, are restrictions wholly consistent with any owner's interests. These examples simply illustrate that Mr. Gillman and members of the crew believed that they needed to comply with Mr. Bell's rules, of which there apparently were many.

Most significantly, the arrangement between Mr. Bell and Mr. Gillman specifically provided that Mr. Bell would remain involved in the operation of the F/V LINDY through regular radio contact. Both parties testified that they had agreed to stay in radio contact, although this turned out not to be possible. In contrast, when Mr. Gillman leased the F/V ALOHA from Mr. Bell, he did not recall any radio contact with Mr. Bell.

In sum, Mr. Gillman did not have possession and command of the F/V LINDY that was any greater than would be expected in a hired skipper relationship. Although Mr. Bell placed great confidence in Mr. Gillman's abilities, he maintained as much control as he deemed practical, given his distance from the operations of the F/V LINDY.

3. Did Mr. Gillman direct the fishing operations of the vessel?

Mr. Gillman basically directed the fishing operations during the time he ran the F/V LINDY. He decided the areas to fish, when to set and pull the lines, and other details of the fishing operations. The arrangement with Mr. Bell allowed him to seek the best price for the fish.

On the other hand, Mr. Bell gave Mr. Gillman marketing advice and information, and told him his preferences for markets for the fish. Although he was distant from the F/V LINDY, Mr. Bell continued to have control over some aspects of its fishing operations. Several crew members testified to their belief that, even when Mr. Gillman was running the F/V LINDY, it was still Mr. Bell's operation, and that Mr. Bell could over-ride Mr. Gillman's orders. One crew member quit, in part due to the tension of having two masters.

As an example of Mr. Bell's directing fishing operations, two witnesses testified that, during the 1987 season, Mr. Bell told Mr. Gillman to train a crewman, Dean Rand, to run the roller. Running the roller on a longlining vessel is a dangerous task that demands a high degree of responsibility. The decision on which crew members were able to take on this task is significant.

Mr. Bell also contends that he directed the fishing operations to the extent that he would furnish the F/V LINDY with the appropriate gear depending on whether he decided to pursue halibut or sablefish. The testimony consistently established that every detail of the gear and how to use the gear was done in Mr. Bell's way, as it was Mr. Bell's operation and he had his way of doing things. [*See* Tape 6, Side 1, at 278].

In sum, Mr. Gillman did not direct the fishing operations to a degree that was any greater than would be expected in a hired skipper relationship. Although Mr. Bell placed great confidence in Mr. Gillman's abilities in this regard as well, Mr. Bell maintained considerable control. Many witnesses testified that they believed the fishing ventures to be, in essence, Mr. Bell's operation.

4. Did Mr. Gillman have the right to hire, fire, and pay the crew?

Mr. Bell's crew stayed on the F/V LINDY when Mr. Gillman operated the boat. Mr. Gillman admitted that the crew was hired by Mr. Bell. ["He hired these people." [Tape 9, Side 1, 404].]

Crewmember Shawn Foust testified that Orrie Bell had made a deal with the crew asking them to stay with Mr. Gillman and not quit. Mr. Foust also testified that he had been hired by Mr. Bell. He testified that when the vessel returned to Sitka in 1987, he went to Mr. Bell and told him he quit. Of the crew members who testified, most believed they were hired by Mr. Bell, except for two crew members hired in the middle of the 1987 season before Mr. Bell returned to the vessel.

The evidence, taken as a whole, suggests that Mr. Gillman had the right to hire replacement crew when needed, and to fire crewmembers when justified. However, the parties' expectation was that Mr.

Gillman would first attempt to contact Mr. Bell to receive his approval. When a crew member was injured, Mr. Gillman attempted to contact Mr. Bell about hiring a replacement. He told his chosen replacement to wait, and that he would be hired unless Mr. Bell disapproved. Only when Mr. Gillman was unsuccessful in contacting Mr. Bell did he proceed to hire the replacement. In the meantime, Mr. Bell had contacted another individual and had him go up to replace the injured crewman; thus two replacements were hired.

I find that the crew was, for the most part, hired by Mr. Bell, and that he had arranged for them to continue to fish with Mr. Gillman. It was expected that Mr. Bell had generally delegated further hiring and firing issues to Mr. Gillman, but that Mr. Bell could override Mr. Gillman's decisions.

It is undisputed that Mr. Gillman paid the crew during the time periods at issue. When the F/V LINDY delivered fish to a fish processor and Mr. Gillman sold them on his gear card, a check was issued to Mr. Gillman. Mr. Gillman then prepared settlements and issued checks to the crew drawn on his account (which was in the name of the Gillmans and the F/V LINDY). Mr. Gillman issued 1099 forms to the crew in his own name. The sole exception was Mr. Bell's second cousin, Darin Peterson, who was 17 years old when he started crewing on the F/V LINDY. Mr. Gillman sent to Mr. Bell a check for Mr. Peterson's share, and Mr. Bell took care of paying Mr. Peterson.

Mr. Bell contends that Mr. Gillman took care of paying the crew only for the sake of practicality. In essence, Mr. Bell contends that Mr. Gillman paid the crew as Mr. Bell's agent. The issue of whether Mr. Gillman made payments of crew shares and other expenses in the course of his own business or as an agent of Mr. Bell is discussed more fully in Section 6, below.

I find that the manner in which the crew was paid is consistent with either a lessor/lessee relationship, in which case Mr. Gillman would be paying the crew as an expense of his own enterprise, but that it is also consistent with an owner/hired skipper relationship if Mr. Gillman had been acting as an agent of Mr. Bell in paying the crew. Which of these more accurately describes the relationship is explored more fully in the Section 6, below.

Notably, neither Mr. Bell nor Mr. Gillman determined the crew's wages. The full share members of the crew had the right to vote on the percentage of a full share received by each member of the crew.

5. Was Mr. Gillman responsible for the 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 operations; 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. These expenses fall into several categories. The first category is trip expenses (sometimes called crew expenses). Trip expenses typically are deducted prior to issuance of crew shares. The trip expenses include fuel, bait, ice, lost gear, and groceries.

Although Mr. Gillman contended that he bore the trip expenses, the evidence established that, in accordance with standard longline industry practice, the crew of the F/V LINDY bore those expenses. The crew understood that if there had been a "hole trip," in which the trip expenses exceed the value of the catch minus the boat share, the crew would have been liable for the trip expenses in proportion to their crew shares. They noted that, in this respect, their financial risk may have been greater than Mr. Gillman's risk, as he would have received a 15% boat share from which he could have paid his trip expenses even in the event of a "hole trip." Nor did Mr. Gillman, as a practical matter (recognizing that it may be difficult to recover trip expenses from crew in the event of a "hole trip") bear a greater risk than Mr. Bell in the trip expenses. Mr. Gillman frequently made the purchases for trip expenses on Mr. Bell's accounts and then reimbursed Mr. Bell after receiving payments for the fish caught. Mr. Bell would have been liable had Mr. Gillman, for any reason, been unable to repay him. Furthermore, the evidence suggested that the boat would have been liable for any unpaid debts, which would have been a lien on the boat.

The second category of operating expense is P&I insurance. The parties agreed that this expense would be split 50/50. However, Mr. Bell decided that they would not purchase the insurance in 1986. The insurance was ultimately purchased in the middle of the 1987 season, as Mr. Bell had concern that Mr. Gillman had hired a person he did not know, creating an increased risk. Although the parties had miscommunications about when the insurance should be purchased and the names to be listed on the policy, they agree as to their general intent to split the cost 50/50 and to protect both parties.[8]

A third category of operating expense was the cost of the gear, other than the lost gear (which is

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[8]The proper focus is on the actual agreement between the parties. If there were a dispute as to the terms of the agreement, it would be appropriate to resolve the issue by considering what actually happened with the consent and knowledge of the parties. If the parties are in accord as to the terms of their agreement, it is not relevant whether one of the parties may have failed to fully perform. Cf. O'Rourke, at 14 (failure to pay a lease fee does not negate the fact that the parties had a lease agreement).

considered a trip expense paid by the crew). This expense was borne wholly by Mr. Bell. In addition, Mr. Bell contends that he bore the expense of wear and tear on the gear.

A fourth category was repair and maintenance of the F/V LINDY. Nearly all the crew participated in maintaining the vessel, such as by scraping off its paint and making repairs and alterations to the vessel and gear during lay-ups in Washington State. Under the terms of the agreement, Mr. Gillman bore a heavier responsibility for maintenance of the F/V LINDY in relation to the rest of the crew. Part of his extra compensation, in the form of the one half boat share, was to take into account his extra work on the F/V LINDY during its winter lay-ups in Washington State. However, he bore none of the expenses of maintenance during the lay-ups.

On the other hand, Mr. Gillman bore the expenses of repairs and maintenance required during the time that he operated the F/V LINDY. Mr. Gillman and Mr. Bell both testified that part of Mr. Gillman's compensation was specifically for the purpose of compensating him for repairs that might be needed during the time he operated the boat. Mr. Gillman understood that it was his responsibility take good care of the F/V LINDY, and to return it to Mr. Bell in the same condition, save normal wear and tear. Mr. Bell, on the other hand, testified that this was a "hope" rather than an enforceable obligation.

Mr. Gillman testified that he bore the expense of an engine repair necessitated by water entering the engine. He testified that he bore this partly due to his arrangement with Mr. Bell, and partly because he felt he may have been at fault. Indeed, he was concerned about Mr. Bell attributing fault to him, and so he did not inform Mr. Bell of the situation right away. Mr. Gillman also testified that he paid to repair the refrigeration system and the autopilot. On the other hand, Mr. Gillman apparently did not ultimately pay for a repair to a marine sanitation device that was the subject of a Coast Guard citation. Mr. Gillman's testimony suggests that, although he was generally responsible for repairs to the vessel, the party who bore the cost of a repair might be determined by who was at fault.

Mr. Bell testified that there are several costs that he bore as owner of the F/V LINDY that do not fall into the above categories. These include the cost of his membership with Seafood Producers' Coop. This membership entitled him to have accounts with several vendors, upon payment of a 1% fee for amounts charged to the accounts. Mr. Gillman used those accounts for various trip expenses. In addition to maintenance of the F/V LINDY undertaken during the winter months, Mr. Bell paid various expenses necessary for the operation of the F/V LINDY without prorating and charging these to Mr. Gillman for the times at issue. These general expenses include moorage, freon for the refrigeration system, and hull insurance. Mr. Bell paid for the F/V LINDY's vessel licenses, although Mr. Gillman paid for his own gear card. Mr. Gillman testified that Mr. Bell explained to him that he would be reimbursed to the extent he paid for "boat expenses," such as moorage. [Tape 9, Side 1, at 526].

I find that both parties bore responsibility for the operational expenses of the F/V LINDY during the periods at issue. Although Mr. Gillman, along with the rest of the crew, was responsible for payment of

trip expenses, his overall responsibility for expenses does not clearly place him in a category other than that of a hired skipper. The most significant category of expense borne by Mr. Gillman was the expense of repairs and maintenance to the vessel that could not wait until the winter lay-ups. However, in light of the testimony that the parties considered whether Mr. Gillman was at fault before he would be charged with this expense, and the fact that most of the repairs and maintenance were routinely done after the vessel was returned to Mr. Bell, this expense should not be given excessive weight. Mr. Gillman's out-of-pocket expenses were not significant when compared with Mr. Bell, who bore the major expenses of the fishing operations, including all the gear and preparation of the vessel for the longline fishing seasons.

6. Did Mr. Gillman treat the fishing operations in which the vessel was used as his own business?

Several types of evidence illuminate the issue of whether the fishing operations on the F/V LINDY during the time it was operated by Mr. Gillman should be characterized as Mr. Gillman's business or Mr. Bell's business.

a. Tax documents.

Mr. Gillman treated the fishing operations at issue as his own business for the purposes of his income tax returns. He declared the income that he received from the fish processors when he sold the fish on his gear card. He also took the deductions for crew payments and other expenses, including the one half boat share that he sent to Mr. Bell. However, neither Mr. Gillman nor Mr. Bell indicated on their respective tax documents that the one half boat share that Mr. Gillman delivered to Mr. Bell was "rent" or characterized it as a lease payment.

As noted in Kristovich, at 11, the Council chose to alter its proposed regulations, which would have made tax documents dispositive. Accordingly, it is necessary to consider the tax documents in context to determine whether they illuminate whose business the venture was.

The testimony established that it made no substantive tax difference that Mr. Gillman claimed the income and expenses of the trips on his own tax return, Schedule C. If Mr. Bell had received all the proceeds of the voyage, he would have paid the crew and expenses and Mr. Gillman's one-half boat share, and then deducted these on Schedule C of his tax returns. Mr. Bell's taxable income would simply be what was left after those deductions: Mr. Bell's one half boat share. Mr. Gillman's taxable income would be his one-half boat share plus his crew share. When Mr. Gillman received all the proceeds, and then paid the crew shares and other expenses, as well as Mr. Bell's one-half boat share, the effect was the same.

Nor does it appear that the parties or their accountants treated the 1099 form as anything other than a document showing payment of moneys from one source to another. Mr. Gillman issued 1099 forms to the crew for their crew shares; thus he was able to document these payments and receive proper income tax deductions. He also issued identical 1099 forms to Mr. Bell. Those forms showed all amounts that Mr. Gillman paid to Mr. Bell, including Mr. Bell's 15% boat share, Mr. Peterson's crew share, and reimbursement to Mr. Bell for expenses charged to Mr. Bell's accounts. [Tape 11, side 1, at 10].

b. Mr. Gillman's preparation of settlements.

Mr. Gillman prepared the settlements for the trips for which he ran the boat. In other words, he documented the amounts paid to him by the fish processors, calculated the boat share due to the parties, calculated the trip expenses, and then calculated the amounts due the crew. He took the responsibility, both for accuracy in these calculations and for making the payments to the crew, the suppliers, and Mr. Bell (including reimbursing him for charges to his accounts).

The testimony was in conflict as to whether it is a common practice for a hired skipper of a longline vessel to receive money from the fish processors, handle the settlements, issue checks and 1099 forms to the crew, list the fishing proceeds as income on Schedule C of his tax return, and list the voyage expenses, including the crew payments, as expenses on his tax return.

Mr. Bell's accountant, Dick Dapcevich, who has approximately 250 longline fishery clients, testified that this is common practice. He testified that, as a practical matter, the hired skipper will receive funds from the fish processor, and thus can promptly pay the crew and the various suppliers during the journey several thousand miles from where the owner may be located. Dale Chestnut, a fisherman experienced in the longline industry, testified that, for the sake of practicality, a skipper should receive the gross proceeds and pay the bills, as it is not practical for an absent owner to pay bills all over Alaska. Mr. Bell also testified that this is accepted practice, and that he did not know of other practical ways it could be done in a nomadic fishery.

Mr. Gillman's accountant, George Dewey, testified that a fish processor would not make payments directly to the hired skipper. He testified that, in a hired skipper situation, the owner would pay for supplies, fuel and other necessities. Robert Alverson, manager of the Fishing Vessel Owners' Association, also testified that owners would want to receive the payments from fish processors and make payments to crew and suppliers, as this protects owners from liens on their vessels in the event the skipper fails to make payments.

I find the testimony of Mr. Bell, Mr. Chestnut, and Mr. Dapcevich to be the more credible testimony for the following reasons: (1) They have considerable experience directly relevant in the longline fishery. (2) The arrangement for expense payment that they describe appears to be practical in light of

the need for fuel, bait, gear and other supplies wherever the boat might be and in light of the crew's interest in receiving prompt payment at the end of each voyage. (3) It is logical that a fish processor would pay the individual on whose card the fish are sold, unless directed to do otherwise. (4) Mr. Dewey's testimony was based on the assumption that the fish processor would not directly pay the skipper for the fish sold on the skipper's fish card, without any apparent first-hand knowledge that this is always the case. (5) Mr. Dewey and Mr. Alverson were unable to answer how, as a practical matter, the relationship they propose would work when the owner is distant from the vessel.

To a certain extent, all of the witnesses may have made assumptions about the meaning of the terms "hired skipper" and "lessor". These assumptions are not relevant to the determination of whether a lease, for the purposes of the IFQ program, existed in this case.[9] What is relevant is the fact that those most familiar with the industry reasonably believe it to be practical for an owner to permit a trusted hired skipper fishing in distant waters to receive payment for the fish and to take care of paying expenses. They do not believe that this responsibility changes the fundamental nature of the owner/hired skipper relationship.

I further find that Mr. Bell requested Mr. Gillman to take care of the accounting because it was the most practical procedure, was fairest to the crew in that they could receive prompter payment, and because Mr. Gillman was a trusted agent. Indeed, Mr. Bell documented the fact that he trusted Mr. Gillman with significant responsibilities relating to the F/V LINDY during time periods that Mr. Gillman admitted he was only a crew member.

c. Statements regarding whose business it was.

Most significantly, Mr. Gillman testified that he ran the F/V LINDY *for Mr. Bell*: "That's what I felt that Orrie wanted me to do was run the boat for him." [Tape 9, side 1, at 426]. Mr. Gillman's testimony at several other specific points indicated that he was supplying and running the F/V LINDY for Mr. Bell.[10]

As discussed above, most members of the crew and Mr. Bell believed that the operation of the F/V LINDY was Mr. Bell's operation, and that he maintained as much control as was practical.

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[9]Mr. Alverson testified as to the Council's understanding of the meaning of the term "lease." I have given no weight to that testimony, in part because the proper inquiry is the Council's intent as expressed in the regulations that it ultimately adopted.

[10]Mr. Gillman testified that he initially took over running the F/V LINDY in 1986 after taking it to Bellingham to deliver Mr. Bell's last run. In Bellingham, Mr. Gillman purchased the supplies for the F/V LINDY that Mr. Bell needed. [Tape 1, side 1, at 335]. These supplies needed by Mr. Bell were supplies used on the F/V LINDY during the time periods at issue.

In sum, I find that during the relevant time periods, Mr. Gillman was not operating the F/V LINDY as his own business, notwithstanding the impression created by his tax documents. To the contrary, he was operating the vessel on behalf of Mr. Bell as Mr. Bell's agent.

7. Was the claimed lease for a set term?

The parties, as well as the crew, understood that, at any point, if Mr. Bell were dissatisfied with Mr. Gillman's performance or decided he wished to resume running the F/V LINDY, he would simply reboard and resume operation of the F/V LINDY.

Mr. Bell testified: "I never felt that the vessel was out of my possession in that I could get aboard it at any time that I wanted and go anywhere that I wanted with it and that I did not give any commitment of lead time to when Rick would use the boat to fish when I wasn't aboard or any specific times that the boat was going to be used that way. It strictly remained in my possession and command in that there was no time restriction of when I could get aboard the vessel." [Tape 11, Side 1, at 128.]

Mr. Gillman admitted that the arrangement could end any time Mr. Bell chose to resume command of the F/V LINDY. He testified that Mr. Bell told him that he would run the boat during the times that Mr. Bell was off doing other things, such as moving. He testified that Mr. Bell told him that he had the option to come back aboard if he felt it necessary. Mr. Gillman testified in an affidavit: "Our agreement included the option for Mr. Bell to take the vessel whenever he felt the need." [Ex. 8, at 2].

After a careful review of all the evidence, I find that the preponderance of the evidence supports Mr. Bell's characterization of the relationship as not being a lease. The fact that the parties never characterized their relationship as a lease and the fact that the arrangement had no set term are strong factors that militate against a finding of a lease. The parties and the crew all believed that Mr. Gillman was running the vessel for Mr. Bell. Mr. Gillman has failed to produce evidence that would be inconsistent with an owner/hired skipper relationship, either with respect to his responsibilities or his payment of expenses.

FINDINGS OF FACT

Upon *de novo* review of the administrative record, I find that, during the time periods at issue, the preponderance of the evidence establishes that:

1. During the relevant times, the parties did not characterize their relationship as a lease.

2. Mr. Gillman operated and navigated the F/V LINDY under Mr. Bell's ultimate command and authority.

3. Mr. Gillman directed the fishing operations on the F/V LINDY under Mr. Bell's ultimate command and authority.

4. Mr. Bell, for the most part, hired the crew of the F/V LINDY.

5. Payments to the crew of the F/V LINDY by Mr. Gillman were made within the scope of his agency and were on behalf of Mr. Bell.

6. The crew of the F/V LINDY, Mr. Gillman, and Mr. Bell bore various operational and vessel expenses. The expense sharing was consistent with Mr. Bell and Mr. Gillman having an owner/hired skipper relationship.

7. The F/V LINDY was operated as Mr. Bell's business.

8. At any time Mr. Bell could have reclaimed possession of the F/V LINDY and resumed fishing operations.

9. Mr. Gillman did not hold a lease of the F/V LINDY during 1986 or 1987.

CONCLUSION OF LAW

The qualifying pounds of halibut and sablefish landed from the F/V LINDY during the relevant periods should be awarded to the Respondent.

DISPOSITION

The RAM Division's initial administrative determination awarding the qualifying pounds at issue to Orlando Bell is hereby AFFIRMED. This decision takes effect on September 3, 1996, unless by that date the Regional Director 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, August 12, 1996.

Rebekah R. Ross
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 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