

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of)
)
WILLIAM C. GATES,)
Appellant,)
)
)
and)
)
)
B-BOATS, INC., and)
DELLA MARLYNE, INC.,)
Respondents)
_____)

Appeal No. 95-0137

DECISION

August 2, 1996

STATEMENT OF THE CASE

Dale Chesnut (as principal of B-Boats, Inc., and DELLA MARLYNE, Inc.) and William Gates each applied for Quota Share (QS) under the halibut and sablefish Individual Fishing Quota (IFQ) program. Mr. Chesnut, through the corporations, claims as owner of the F/V CHINA B and the F/V DELLA MARLYNE during the relevant time periods. Mr. Gates claims as an oral lessee of those vessels.

At issue are 715,892 pounds of sablefish and 194,495 pounds of halibut landed aboard the F/V CHINA B during 1987 and 1988 (February 26 through October 13, 1987, and March 20 through October 12, 1988), and 76,125 pounds of sablefish and 38,129 pounds of halibut landed aboard the F/V DELLA MARLYNE during 1990 (March 21 through September 18, 1990).

B-Boats, Inc., and Della Marlyne, Inc., were awarded the contested qualifying pounds in a July 18, 1995, Initial Administrative Determination (IAD). Mr. Gates filed a timely appeal on September 18, 1995, on the grounds he was directly and adversely affected by the IAD's failure to find that he had leased the vessel for the relevant time periods.

The Chief Appeals Officer issued an order joining B-Boats, Inc., and Della Marlyne, Inc., as parties to the proceeding on March 6, 1996.

After due and proper notice, an oral hearing was convened in Seattle, Washington, on Friday, April 26, 1996, and completed on Wednesday, May 1, 1996. Mr. Chesnut was represented by Mr. Shane Carew of the Carew Law Office of Seattle. Mr. Gates was represented by Mr. Jess Webster, of Mikkelborg, Broz, Wells & Fryer of Seattle.

ISSUE

Whether William G. Gates held valid oral vessel leases of the F/V CHINA B and the F/V DELLA MARLYNE during the periods of time in question.

BACKGROUND

Circumstances prior to and between the agreements

The F/V CHINA B, a vessel of approximately 50 feet, was built by Richard Huff in 1981. Mr. Chesnut, who was a business partner of Mr. Huff's from approximately 1985 through 1991,¹ served as skipper of the F/V CHINA B in 1985 and 1986. Mr. Chesnut hired Mr. Gates, who had limited prior longline experience, as a crewmember for the fall 1985 longline season. Mr. Gates was re-hired for the 1986 longline season and given extensive training by Mr. Chesnut. Although the matter is disputed, I find as fact that Mr. Gates served as "deck boss" during the 1986 season. During this season, the parties discussed the possibility that Mr. Gates would operate the F/V CHINA B in 1987, while Mr. Chesnut operated another vessel which Mr. Huff planned to purchase. Although Mr. Gates asserts that at the time of the 1986 discussions he assumed they were talking about a lease situation, both parties agree that neither the word "lease" nor the term "bare boat charter" was used at that time by either party.

By early 1987 Mr. Huff had acquired a larger vessel, the 75-foot F/V DELLA MARLYNE, and Mr. Chesnut had acquired a part ownership interest in the F/V CHINA B. Mr. Huff typically delegated all the fishing activity decisions to Mr. Chesnut while he concentrated on vessel maintenance and repairs. Accordingly, Mr. Chesnut made arrangements with Mr. Gates to operate the F/V CHINA B during the 1987 longline season, while Mr. Chesnut operated the F/V DELLA MARLYNE for Mr. Huff.

Although the owners deny that there was ever any discussion of a bare boat charter or lease, at the oral

¹Mr. Huff's and Mr. Chesnut's own conflicting claims were settled in an agreement approved by the RAM Division on July 13, 1995. As background, the agreement indicates that: (a) during the years 1985 through 1991, the F/V CHINA B was owned at various times in the name of Richard Huff individually, B-Boats Inc., an Oregon corporation (since dissolved), and B-Boats, Inc., a Washington Corporation, with both Mr. Huff and Mr. Chesnut having interests in the corporations; and (b) during the years 1987 through 1991, the F/V DELLA MARLYNE was owned at various times in the name of Richard Huff and Della Marlyne, Inc., a Washington corporation, with both Mr. Huff and Mr. Chesnut having interests in the corporation. The settlement appears to have no bearing on the claim of Mr. Gates. For purposes of clarity I have referred to the two principals in the corporations, Mr. Huff and Mr. Chesnut, rather than the corporate entities, as "owners."

appeal hearing (but not before)² Mr. Gates asserted that during the 1987 discussions with Mr. Chesnut, he (Mr. Gates) said words to the effect: "Oh, it's like a lease, then," but Mr. Gates does not assert there was any affirmative response.

During the course of the 1987 season the owners proposed that in return for a long-term commitment from Mr. Gates to operate the F/V CHINA B he could acquire a 15 percent equity interest in the vessel at the rate of 5 percent per year; however, the discussion never proceeded past a preliminary stage.

The basic arrangement was renewed for 1988, but there is some dispute regarding the preliminaries to that arrangement. In his pre-filed direct testimony, Mr. Gates for the first time asserted that his accountant, upon preparing his 1987 tax return, suggested that the arrangement resembled a bare boat charter and that he should consult with an attorney. Mr. Gates thereupon conferred with attorney Henry Haugen and according to the attorney's bill, paid him \$84 on April 19, 1988, for a matter captioned "RE: F/V CHINA B Charter." Mr. Gates asserts that the attorney advised that him the arrangement was a bare boat charter and that he should obtain an agreement in writing. He further asserts that he thereupon discussed the matter with Mr. Richard Huff, but that the latter rebuffed him with a statement to the effect that oral agreements were good enough for him. Mr. Huff denies any discussion then (or ever) regarding a bare boat charter or lease.

At the end of the 1988 season the owners offered Mr. Gates an opportunity to purchase an owner-financed 50 percent interest in the F/V CHINA B. He declined the offer and chose not to longline in 1989, so the owners made arrangements with another skipper to operate the F/V CHINA B while Mr. Chesnut again ran the F/V DELLA MARLYNE.

By 1990, Mr. Chesnut had become a part owner (with Mr. Huff) of the F/V DELLA MARLYNE. They made an agreement with Mr. Gates for him to operate the F/V DELLA MARLYNE for the 1990 longline season. (For this season Mr. Chesnut ran the recently acquired F/V JASON B while the F/V CHINA B was operated by another person.) The basic agreement between Mr. Gates and the owners remained the same as in 1987 and 1988.

The basic arrangement for 1987, 1988 and 1990

Subject to the exceptions noted, the parties are in general accord that the agreement was essentially the same for all three years and provided that Mr. Gates was to:

²Such was not even asserted in his pre-filed direct testimony which was submitted just a few days before the oral hearing.

- # serve as captain of the vessel from the spring of each year until the fall Chatham Strait sablefish opening;
- # pay a "boat share" of 38 percent of the gross from each landing to the owners;
- # hire and fire the crew and set crew shares (hiring arguably subject to veto by owners, but the matter never arose to be tested);
- # arrange for payment of all trip (including between trip) operating expenses such as fuel, ice, bait, crew groceries, and crew shares;
- # after receiving payment for the gross from the fish buyer, transmit a check for the owners' boat share to either the owners or their accountant;
- # return the vessel to the owners fully fueled, in the same condition as it was in at the start of the season, and with all lost or condemned gear replaced or accounted for.

and that the owners were to:

- # provide the vessel at the start of the season fully fueled and ready to fish;
- # pay for major repairs;
- # provide the insurance (both vessel hull and P & I).

Additional matters

Although not necessarily part of the agreement between the parties, the manner in which they dealt with the following circumstances is instructive as to the particulars of the arrangement.

Crew Shares: Mr. Gates had the sole authority to set the mechanics of the percentage crew share for each crew member. After the owner's 38 percent was deducted from the gross, all the trip expenses (fuel, ice, lost gear, groceries, moorage, etc.) were subtracted.³ The remainder was divided by nine. Each of the four crew members received two ninths and Mr. Gates received three ninths. In essence, then, Mr. Gates "paid" one fifth (20 percent) of the operating expenses and received one and one half crew shares, or 30 percent of the amount left after the boat share and trip expenses were subtracted from the gross.

Insurance: The insurance broker who handled the account for both vessels during the relevant years had a standard practice of inquiring of the owners whether there were a bare boat charter involved. The owners never represented to either their insurance carrier or their bank that the vessel

³The parties anticipated that fishing trip expenses and crew shares would be paid from the fishing proceeds after the "boat share" was deducted. Fishing trip expenses (which were shared equally by all on board) included a fine for possession of marijuana on board the vessel in 1987 and a fine for undersize halibut in 1988.

was leased or chartered. If the vessel had been leased or chartered, their insurance coverage would have been voided. Mr. Gates would be covered under the P & I policy only if he were a "hired skipper."⁴

Fish Sales: Prior to the start of the 1988 season the owners and Mr. Gates met with principals of Dory/Anderson Seafoods. Dory offered an attractive bonus plan. Although it appears to have been assumed by the parties that Mr. Gates would deliver to Dory when possible, I am not persuaded that he was directed by the owners to deliver to them or any other specific buyers. In practice, Mr. Gates delivered to a variety of fish buyers.

Financing of Trip Operating and Related Expenses: (a) 1987: Prior to departing Washington, Mr. Gates opened a bank account in Seattle under his name, c/o the F/V CHINA B. He deposited approximately \$10,000 of his own funds in that account, of which he immediately tendered \$5,163 to Seattle Ship Supply for additional longline gear. Although the owners dispute that the gear was needed, they allowed Mr. Gates to reimburse himself for this amount from their otherwise due "boat share" at the end of the season. Of note is the fact that though the owners had a credit account at Seattle Ship Supply and had advised Mr. Gates he could use it, he instead issued his own check. For unknown reasons, but apparently at Mr. Huff's request, he made the check payable to both Seattle Ship Supply and Mr. Huff. After arriving in Kodiak Mr. Gates opened a similar account with an Alaska bank to facilitate his payment of crew shares and trip operating expenses. Of interest is the fact that though the basic agreement was that the owners were to receive 38 percent off the top as their "boat share," when fishing was poor off the Oregon coast in 1987 and resulted in two or three "hole" trips, the owners voluntarily and unilaterally reduced their 38 percent boat share to 30 percent to somewhat ease the operating expense burden on Mr. Gates and his crew.

(b) 1988: The owners advanced \$5,000 to Mr. Gates at the start of the season. Mr. Gates contends he did not request these funds and they were intended solely to fund mechanical repairs, which were the owner's responsibility. The owners contend it was also to assist Mr. Gates in purchasing supplies, making advances to crew for crew licenses, and so forth. It is difficult to now track what the money may have been used for. However, a fall 1988 letter from Mr. Gates to Mr. Huff (Exhibit #308) thanks him for having supplied the funds and remarks that the money "helped a lot this spring," thereby leading me to conclude the funds were used at least in part to fund "start up" operating expenses. Additionally, prior to the start of the 1988 season, Mr. Chesnut arranged for both himself and Mr. Gates to attend a diesel training class at Seattle Central Community College. The owners paid tuition for Mr. Gates in the amount of \$124.

⁴ Hull insurance premiums for the F/V CHINA B for the period June 10, 1987 to June 10, 1988 were \$7,125. For the period March of 1990 to March of 1991, the overall (Hull and P & I) premium for the F/V DELLA MARLYNE amounted to approximately \$29,000.

(c) 1990: The owners advanced \$6,500 to Mr. Gates at the start of the season. Mr. Chesnut also made a \$1,000 personal loan to Mr. Gates. During this season an observer was required to be on board. The observer fee was subtracted from the gross landings prior to the calculation of the 38 percent boat share, and was thereby shared between the owner and Mr. Gates and his crew.

Control of the overall fishing operation: (a) In the early summer of 1987, the Gulf of Alaska longline season shut down. Mr. Chesnut, one of the owners of the F/V CHINA B, was running the F/V DELLA MARLYNE in more or less loose radio association with Mr. Gates on the F/V CHINA B. Both Mr. Chesnut and Mr. Richard Huff decided that the F/V DELLA MARLYNE should go to Oregon, in part so that Mr. Huff could perform maintenance. They contend that they directed Mr. Gates to take the F/V CHINA B to Oregon because he was a relatively inexperienced skipper, and the owners did not want him operating independently too far distant.⁵ Although both vessels did sail to Oregon, Mr. Gates contends he had a free choice in the matter. He asserts that he could have fished the open season in the Aleutians if he wanted, but that he freely chose to go to Oregon because his home was there, his daughter lived there, and his crew could use Oregon shore leave. Though there may have been some elements of mutuality in that decision, I find as fact that the owners were the primary moving party in making the decision that the F/V CHINA B accompany the F/V DELLA MARLYNE to Oregon.

(b) In the early fall of 1987 the owners decided to run both vessels from Oregon directly across the Gulf of Alaska to Dutch Harbor for some Aleutian openings. Mr. Gates was reluctant because he questioned whether he would have a sufficient fuel safety margin on a direct run. He would have preferred to refuel at Sitka, but that by the time the decision was made, a direct run was the only option if they were to make the opening. Upon considering all the circumstances, I find as fact that the owners were the primary moving party in this decision as well.

(c) Though Mr. Gates was acknowledged to have been responsible for the day-to-day fishing operations and navigation of the vessel, the owners directed him to proceed to a Chatham Strait blackcod opening in the fall of 1987 (and again in the fall of 1988) to pick up a person selected by the owners who held a permit for that fishery (Mr. Gates did not have the requisite permit). In 1987, it was Walter Huff, brother of Richard Huff; in 1988, it was apparently Richard Huff himself, though Mr. Gates is inconsistent on this point.⁶ The permit holder did not supplant Mr. Gates and run the fishery operation, but as he (whether Walter Huff or Richard Huff) was highly experienced in that fishery, his

⁵Mr. Gates had been largely responsible for a major mechanical breakdown early in the 1987 season which had greatly upset Mr. Huff.

⁶In his pre-filed written direct testimony, Mr. Gates stated it was Walter Huff during both years. At the oral hearing, however, he stated it was Richard Huff in 1988.

advice as to locations was heeded, if not prized.⁷ Although Mr. Gates maintains this was an especially desirable fishery and he considered the arrangement as an "inducement" for him to lease the vessel, I find as fact that the owners were the moving party in this operation.

(d) In 1990, when Mr. Gates was running the F/V DELLA MARLYNE, the longline season was very poor. The owners and Mr. Gates had anticipated this possibility and had previously discussed chartering the boat out to a processor for tendering. Though it appears both may have been looking around for a chartering contract, it was the owners who secured the contract and told Mr. Gates of its particulars. I do not accept as credible Mr. Gates assertion that he had the option of skippering the vessel for the tender charter or of continuing to longline. The charter was to commence in the Sitka area, but the vessel was in Kodiak. There was a dispute as to who should pay for the fuel. As a compromise the owners split the fuel costs with Mr. Gates (and his crew). Once the contract was entered into, Mr. Gates was put on a daily wage.⁸ Upon considering all the circumstances, I conclude that the owners were the primary moving party in this operation.

Tax Records: (a) Mr. Gates listed the gross receipts and all the operating expenses and crew shares on his federal tax return for each of the three years. The owners' "boat share" was listed under the rent classification. Mr. Gates caused (through his accountant) 1099s to be issued to each crewmember. They bore Mr. Gates Social Security Number as the Employer's Identification Number (EIN).

(b) The owners listed only the boat share (of \$118,465) as gross income and listed \$79,824 as cost of operations, for a gross profit of \$38,641 for 1987. For 1988 they listed the gross receipts and expenses, but it is unclear how they derived those figures. The owners did not submit any tax return for the operation of the F/V DELLA MARLYNE in 1990.⁹

DISCUSSION

⁷Though there is some dispute as to whether the permit holder was paid solely by the owners or was (as I consider more likely) paid "off the top" directly from the fish buyer, I find the dispute immaterial.

⁸Although Mr. Gates initially claimed that his 1990 lease ran through the period of the tender charter operations, he since acknowledged that he was a "hired skipper" during that tender charter.

⁹It should be noted that counsel for Mr. Gates made a discovery request that the owners be required to produce complete tax records (as well as numerous other documents), which request was denied on the grounds that IFQ appeals officers were granted no authority to issue subpoenas or compel discovery.

Under 50 C.F.R. § 679.40(a)(2),¹⁰ 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, is a "qualified person." Such a vessel lessee will receive QS that would otherwise go to the owner of the vessel.

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)¹¹ (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. Gates contends that he has presented sufficient "other evidence" of an oral leases to establish that he was the lessee of both the F/V CHINA B and the F/V DELLA MARLYNE during the relevant periods.

In Smee v. Echo Belle, Inc.¹², 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 v. Riddle¹³ and Kristovich v. Dell,¹⁴ 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 factors¹⁵ in order to determine

¹⁰Formerly 50 C.F.R. § 676.20(a)(1). 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.

¹¹Formerly 50 C.F.R. § 676.20(a)(1)(iii).

¹²Appeal No. 95-0076, August 1, 1996, at 7-8.

¹³Appeal No. 95-0018, May 18, 1995, *aff'd* May 23, 1995.

¹⁴Appeal No. 95-0020, March 20, 1996, at 10, *aff'd* March 27, 1996.

¹⁵"[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.

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.

During the course of the proceeding, numerous issues were raised by the parties. All were considered. Those which were not accorded any substantial weight but which I feel are worthy of some comment, include the following:

(a) As noted, the owners arranged for and paid all the insurance. Although one might expect that a true entrepreneur (as Mr. Gates maintains he was) would be quite conscious of the risk factor and would have closely checked the insurance coverage (especially if, as he maintains, he received legal advice that the arrangement he had constituted a bare boat charter), his failure to do so does not necessarily disprove a lease arrangement.

(b) Although I am persuaded that Mr. Gates did consult with attorney Haugen in 1988, I am not necessarily persuaded that Mr. Gates discussed the matter with Mr. Huff, as alleged. (Mr. Gates' recollection was shown to be incorrect in other instances.) However, even if the matter was discussed, it is clear to me that there was no acknowledgement by Mr. Huff that the arrangement constituted a charter or lease.

(c) The fact Mr. Gates was twice offered, but declined, an interest in the F/V CHINA B, could possibly be construed as showing he lacked the entrepreneurial "spirit," and/or that he (in the sense of some of the language in the regulatory history) had no intent to acquire a capital investment stake. However, the regulations do not require that one be a part owner or evidence a desire for part ownership in order to be a "lessee."

(d) The significance to be afforded the fact that Mr. Gates had "hole" trips off the Oregon coast in 1987 is substantially diminished by the fact the crew equally shared the loss, the fact the loss was melded into the following more successful trips, and the fact that the owners reduced the "boat share" for those trips.

As to the determinative factors, those favoring Mr. Gates' position are not inconsequential. He hired and fired the crew, navigated the vessel, advanced funds for gear purchase in 1987, maintained his own account for paying operating expenses and crew, and treated the operation as a business for federal income tax purposes. The issue of whether the claimed lease had a set term is less clear. Although no finite date was specified, it would seem that an agreement that a lease would last until the vessel returned to either a particular port or home port at the completion of a particular opening or openings (the dates of which might not be known until well into the season) could be sufficient.

However, even if the set term issue were resolved in favor of Mr. Gates, I conclude that the facts favoring him are far outweighed by the fact that the owners had substantial (if not absolute) control of where the vessels were to fish as evidenced by: the Chatham Strait arrangements in 1987 and 1988; the passage from the Gulf of Alaska to Oregon in the early summer of 1987 and the transit from Oregon to Dutch Harbor in the late summer of 1987; the general oversight contact with the vessels Mr. Gates was operating through radio or telephone; and the fact it was the owners that decided the particulars of ending the longline activity in 1990 and converting to tender operations.

I also consider it significant that the owners voluntarily reduced the boat share to help compensate the skipper and crew for hole trips and advanced substantial operating funds in both 1988 and 1990; and (although to a lesser extent) arranged and paid for the diesel class.

In sum, I find the owners' involvement with both the control of the vessels and the trip operating expenses to be so substantial that the arrangement they had with the Appellant cannot properly be construed as a lease agreement within the meaning of the IFQ regulations.

FINDINGS OF FACT

1. The vessel owners and Mr. Gates had oral agreements wherein Mr. Gates was to captain the F/V CHINA B in 1987 and 1988 and the F/V DELLA MARLYNE in 1990. The owner(s) supplied the vessel and fishing gear and provided both hull and P & I insurance, and were responsible for major mechanical repairs, in return for which they received 38 percent "off the top."
2. Mr. Gates hired, fired, and paid the crew, arranged for payment of vessel trip operating expenses, and arranged for the purchase of some additional gear for the 1987 season, for which he was subsequently reimbursed by the owners.

3. The owners retained general, and sometimes specific, direction and control of where the vessels were to operate, advanced substantial "start up" funds in both 1988 and 1990, which were used for initial operating expenses as well as major mechanical repairs, and shared some of the trip operating expenses.

CONCLUSIONS OF LAW

The agreements did not constitute vessel leases for the purposes of the Pacific halibut and sablefish IFQ program. Accordingly, Mr. Gates does not qualify as a "lessee" of the F/V CHINA B in 1987 or 1988 or of the F/V DELLA MARLYNE in 1990.

DISPOSITION

The Division's Initial Administrative Determination dated July 18, 1995, involving a conflict between the Respondent and the Appellant over the allocation of qualifying pounds of sablefish and halibut landed from the F/V CHINA B in 1987 and 1988 and the F/V DELLA MARLYNE in 1990 is 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.

James Cufley
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