

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:)
)

SANG YEOL KIM and)
KIM FISHING COMPANY, INC.,)

Respondents.)
_____)

Docket No. PI0902568

INITIAL DECISION AND ORDER

Issued:

July 26, 2011

Issued By:

Hon. Dean C. Metry
Presiding

Appearances:

For the National Oceanic and Atmospheric Administration

Alexa A. Cole, Esq.
NOAA Office of General Counsel
1601 Kapiolani Boulevard, Suite 1110
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For the Respondent

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STATEMENT OF THE CASE

The National Oceanic and Atmospheric Administration (NOAA or Agency) initiated this administrative proceeding for assessment of civil penalty under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) as amended and codified at 16 U.S.C. §§ 1801-1882 and its underlying regulations found at 50 C.F.R. Part 600. On December 29, 2009, NOAA issued and served a Notice of Violation and Assessment (NOVA) alleging Respondents Sang Yeol Kim and Kim Fishing Co., Inc. violated 16 U.S.C. § 1801 *et seq.*, as applied through 50 C.F.R. § 600.725(t). Specifically, Respondents were charged with intimidation of a NOAA-approved observer. The NOVA proposed a monetary civil penalty of two thousand five hundred dollars (\$2,500) for the above named violation of the Magnuson-Stevens Act and its underlying regulations.

Respondents made a timely request for a hearing in accordance with 15 C.F.R. § 904.102(a) and (e). NOAA forwarded this matter to the U.S. Coast Guard Administrative Law (ALJ) Docketing Center for assignment of an impartial ALJ.¹ The ALJ Docketing Center forwarded this matter to the undersigned for adjudication on February 18, 2010. The Agency filed and served on Respondents their Preliminary Positions on Issues and Procedures (PPIP) on March 9, 2010. Respondents filed their PPIP on March 19, 2010.

A hearing was held on July 22-23, 2010 in Honolulu, Hawaii. At the hearing, all the parties were present and prepared to proceed. Mr. Sang Yeol Kim and Kim Fishing Co., Inc. appeared through Counsel Mr. Michael G.M. Ostendorp, and the Agency was

¹ Title 15 U.S.C. § 1541 provides that the United States Coast Guard may perform all adjudicatory or judicial functions required by Chapter 5 of Title 5 of the United States Code to be performed by a U.S. Administrative Law Judge for any marine resource conservation law or regulation administered by the U.S. Secretary of Commerce acting through the National Oceanic and Atmospheric Administration.

represented by Counsel Ms. Alexa A. Cole. The Agency offered nine (9) exhibits and presented the testimony of two (2) witnesses. Respondent offered two (2) exhibits and two (2) witnesses. The list of witnesses and exhibits is contained in ATTACHMENT I.

EVIDENCE PRESENTED

At the hearing, the Agency argued in its opening statement that NOAA observers must “feel free to fulfill their role on board, without fear or encumbrances” in order to effectively carry out their prescribed duties. (Tr. at 7). In the instant case, while working as the observer aboard the F/V Grace, Jane Birkinbine felt threatened by the actions of Captain Sang Yeol Kim such that a \$2,500 civil penalty is appropriate. Mr. Ostendorp, counsel for Respondent, chose to reserve his opening statement.

The Agency presented the testimony of NOAA Special Agent Brandon Jim On. (See Tr. at 8). Agent Jim On explained that he and his partner, Agent Take Tomson, interviewed Ms. Birkinbine shortly after she returned from serving as the observer aboard the F/V Grace. (Tr. at 7, 21, 31, Agency Ex. 1). During the interview, Ms. Birkinbine recounted “a possible intimidation incident” that occurred on June 29, 2009. (Tr. at 16).

Specifically, Ms. Birkinbine relayed to Agent Jim On that Mr. Kim had “intimidated her with a knife.” (Tr. at 16, Agency Ex. 1). She explained that, prior to the incident, swordfish had tangled the lines on the deck of the vessel, creating a large mess. (Tr. at 16-17). The captain grew angry at the situation and stated that money was being wasted. (Tr. at 17). He referred to the swordfish that tangled the line as “troublemakers,” then called Ms. Birkinbine a troublemaker. (Tr. at 17).

Further, the agent reported that, according to Ms. Birkinbine, shortly after the swordfish tangle, the captain approached her while carrying a knife, called her a

“troublemaker,” told her she “should look out,” then placed the knife on the board directly behind where she was seated. (Tr. at 18, 57-58, 83-85). After this incident, Agent Jim On opined that Ms. Birkinbine “kind of stepped away...[b]ecause she probably feared for her life,” and just let the crew work. (Tr. at 18, 75). While this opinion was not objected to, the undersigned takes note that it is not an expert opinion or testimony based on first hand knowledge, but rather a statement of the agent’s belief. While Ms. Birkinbine had access to a satellite phone, she did not use it. (Tr. at 86).

Agent Jim On acknowledged that, in deciding to bring charges in this case, he considered the fact that Ms. Birkinbine was female. (Tr. at 77). The undersigned finds that this determination based on the sex of the observer is a proper consideration for the Special Agent. Since a reasonable person standard is a flexible standard, it contemplates a reasonable person in the situation Ms. Birkinbine found herself in.

Agent Jim On also interviewed Mr. Kim shortly after the F/V Grace returned to port. (Tr. at 23). During the interview, Mr. Kim explained that Ms. Birkinbine may have thought he acted in a threatening manner, but he was “just joking with her.” (Tr. at 24). Mr. Kim explained that he has a daughter the same age as the observer and likes to joke around with her. (Tr. at 24). However, Mr. Kim stated that he thought observers were bad luck, and that he thought female observers were “just troublemakers.” (Tr. at 24). Mr. Kim stated that he “never handles a knife on board the vessel at any time.” (Tr. at 24). Agent Jim On testified that while “there was quite a language barrier” present during his interview of Mr. Kim, the communication was “comprehensible.” (Tr. at 25). Agent Jim On further stated that he recalled Mr. Kim not being credible given his “understanding of Asians.” (Tr. at 87-88). Lastly, Agent Jim On specifically

remembered his partner, Agent Giaretto, telling Respondent he did not believe him. (Tr. 88). The undersigned puts no credence in the statement of either Agent Jim On indicating that Mr. Kim was not credible for the stated reason or the opinion of Special Agent Giaretto as to the truthfulness of the Respondent. Questions of credibility are for the undersigned to decide.

On September 16, 2009², Agent Jim On interviewed Mr. Kim a second time in the presence of an attorney and a *translator* (emphasis added). (Tr. at 27-28, Agency Ex. 1). During the interview, Mr. Kim again stated that “he would never handle a knife on board,” explaining that “he only drives the vessel, whereas his crew members handle all the equipment...[and] do everything else related to fishing.” (Tr. at 28). However, Mr. Kim subsequently acknowledged that he sometimes handles line-cutters, which are specifically designed to cut fishing lines. (Tr. at 28). Mr. Kim again stated he was just joking with Ms. Birkinbine when he called her a “troublemaker.” (Tr. at 28).

The Agency next presented the testimony of Ms. Birkinbine. Ms. Birkinbine explained that after a few weeks of not catching anything, the trip grew tense. (Tr. at 116). She further testified that, on the morning of the incident, she had questioned whether or not the captain had been engaging in proper bird mitigation procedures, which involve blue-dyeing the bait. (Tr. 118). Later that day, when the crew was engaged in catching swordfish, she testified that the captain appeared angry after she noted the vessel was near its swordfish quota. (Tr. at 122). Ms. Birkinbine further instructed crew members to properly dispose of monofilament line instead of throwing it overboard. (Tr. at 123).

² The hearing transcript indicates that the interview took place on December 16, 2009; however, Agent Jim On’s Investigative Report indicates that interviewed occurred September 16, 2009. (Tr. at 27-28, Agency Ex. 1).

Regarding the knife incident, Ms. Birkinbine testified that, shortly after the swordfish created the tangle, Mr. Kim walked up to her with a knife in his hand while she was sitting next to the ball cage, told her to “look out,” then returned to cutting the tangle. (Tr. at 124, 142, 156). She opined that the statement was made “...not [for her]...to be careful, or not get hurt, because there was really nothing around [her] that was threatening except for the knife in his hand.” (Tr. at 124). Ms. Birkinbine recorded the incident in her documentation notebook while it was fresh in her mind. (Tr. at 153, See Agency Ex. 5). However, in her documentation notebook, Ms. Birkinbine indicated that, after telling her to “look out,” the captain had placed the knife on the board above her. (Tr. at 154, Agency Ex. 5). When questioned why she testified that the captain walked away still holding the knife but wrote down that he placed the knife above her, Ms. Birkinbine explained that “[she] was going through a lot that night,” and may not have correctly recorded the incident. (Tr. at 160). However, she later clarified that the Incident Report, which states that the captain walked away with the knife in his hand, is the correct version of events. (Tr. at 184, Agency Ex. 4).

In her documentation notebook, Ms. Birkinbine wrote that, after the knife incident, “[she] began to wonder if [the captain] meant [what he said] as a threat. The captain [was] normally good-hearted and friendly, but the past couple of days [he had] been very stressed because he still was not catching any fish.” (Agency Ex. 5, See Tr. at 127, 155). Ms. Birkinbine acknowledged that it “hit her a split second later than it should have” that the captain may have been threatening her, as she initially thought the captain was coming over to chit chat or joke. (Tr. at 127). She further explained that she did not think that there was a language barrier that could have caused her to misinterpret the

incident, as she had been at sea for long enough to understand how the captain spoke. (Tr. at 124-125).

The observer testified that she was wary for the remainder of the trip, so she tried to “stay out of the way.” (Tr. at 128). She rationalized that “if that was the worst day on the trip, then [she] didn’t think...[her] safety was going to be jeopardized. But if things got worse, then it had the potential to getting to a bad place.” (Tr. at 129). Ms. Birkinbine explained that she did not use the satellite phone she was provided because “[she] believed [she] could handle it, and...get back to shore safely,” noting that “[there are] different degrees of threats.” (Tr. at 131, 164).

While she was upset about the incident at the time it happened, she tried to keep it together. However, when she re-read what she had written regarding the incident, it began to bother her. (Tr. at 132). While Ms. Birkinbine kept her distance from the captain and crew, “[she] wasn’t worried about eating with them or socializing or anything.” (Tr. at 170-171). However, once she reached shore, her reaction to the incident intensified. (Tr. at 132).

Respondent’s counsel introduced the testimony of NOAA Special Agent Roy Take Tomson, who interviewed F/V Grace crew members Askar Ehmes and Iobena Mourongo. (Tr. at 189-191, Resp. Ex. A). Both crew members indicated that they did not witness the captain intimidating the observer. (Tr. at 191). However, Mr. Mourongo did indicate that he heard the captain call the observer a “troublemaker.” (Tr. at 192).

Mr. Kim then testified, explaining that the F/V Grace is seventy-two feet long from bow to stern. (Tr. at 210, 224, See Agency Ex. B). At the time of the incident in question, Ms. Birkinbine was sitting port side aft on a bucket next to the ball cage. (Tr. at

238, 259). A knife holder was attached to the ball cage. (Tr. at 260). Mr. Kim testified that he asked Ms. Birkinbine to watch out so that he could “Get the knife up there,” explaining that “[the] whole deck [was] almost full...”. (Tr. at 260). He later testified that it was actually a mono-cutter, and not a knife, that he placed in the knife-holder. (Tr. at 272). Mr. Kim also noted that at the time of the incident, Ms. Birkinbine was listening to an iPod. (Tr. at 273). Mr. Kim stated that, after the alleged incident, he noticed no difference in Ms. Birkinbine’s behavior. (Tr. at 274-275).

Mr. Kim further testified that he consistently maintained that he never used a knife in a threatening manner. (Tr. at 279). He further indicated that the interviewer accused him of lying and stated that all Vietnamese, Chinese, and Koreans lie. (Tr. at 279-280). Mr. Kim explained that he thought the swordfish, and not Ms. Birkinbine, were “troublemakers,” but acknowledged that he made a statement regarding losing money as a result of the swordfish tangle. (Tr. at 261, 304). On cross examination, Mr. Kim stated that, while the night of the alleged incident was a bad night, he was not angry at having to untangle the lines. (Tr. at 305).

During closing arguments, the Agency emphasized that Ms. Birkinbine was a responsible woman who coped with a stressful situation after she was “threatened or intimidated” by Mr. Kim. (Tr. at 331). Ms. Birkinbine now works for another organization, so she has no motive to be dishonest about the events aboard the F/V Grace. (Tr. at 332). Respondent’s counsel proffered that “intimidation” does not have a gender-specific definition. (Tr. at 336). Instead, the threshold for intimidation is whether a person of ordinary sensibilities would have been offended. (Tr. at 338). Counsel further noted that the captain has limited English-language skills. (Tr. at 339).

FINDINGS OF FACT

1. At all relevant times mentioned herein, Ms. Jane Birkinbine was the National Marine Fisheries Service (NMFS) observer aboard the F/V Grace. (See Agency Ex. 1).
2. At all relevant times mentioned herein, Sang Yeol Kim was captain of the F/V Grace. (See Agency Ex. 1).
3. Kim Fishing Company, Inc. owns the F/V Grace. (Agency Ex. 2, See Tr. at 29).
4. The F/V Grace left port June 13, 2009 and returned July 10, 2009 (Tr. at 21, 31, Agency Ex. 4).
5. Ms. Birkinbine testified that after a few weeks of not catching many fish, things on board became tense, and the captain grew more and more frustrated. (Tr. at 116, 118, 135-136).
6. On the morning of June 29, 2009, Ms. Birkinbine asked Mr. Kim whether he had blue-dyed the bait as required for bird mitigation. Ms. Birkinbine testified that this incident created tension with Mr. Kim. (Tr. at 118-119).
7. While fishing for swordfish on June 29, 2009, Mr. Kim asked Ms. Birkinbine how many more fish he was allowed to catch. After Ms. Birkinbine responded, Mr. Kim was unhappy and commented that they were throwing money away. (Tr. at 121-122, 261).
8. Ms. Birkinbine felt as though Mr. Kim was unhappy that she was onboard monitoring the catch. (Tr. at 122).
9. When two large swordfish became tangled in monofilament line, the crew began throwing the line overboard. Ms. Birkinbine informed the crew that they should throw the line in the trash, not overboard. (Tr. at 18-19, 123, 249-250, 253-256).
10. After Ms. Birkinbine told crew members to properly dispose of the monofilament line, one crew member, possibly joking, suggested that Ms. Birkinbine go to sleep. (Tr. at 123, 153, Agency Ex. 1, Resp. Ex. A).
11. Mr. Kim referred to the swordfish that tangled the line as “troublemakers,” then, according to Ms. Birkinbine, stated that she was a troublemaker. (Agency Ex. 4).
12. Shortly after the incident with the monofilament line, Ms. Birkinbine was sitting on a bucket port side aft when the captain approached her with either a knife or mono-cutter in his hand and told her to either “watch out” or “look out.” (Tr. at 124, 238-239, 260, 272, Agency Ex. 5, See Resp. Ex. B).

13. Ms. Birkinbine wrote in her documentation notebook that the captain had placed the knife he was using back on the board above where she was sitting and stated “look out.” In response, Ms. Birkinbine leaned away from the board and nodded. (Agency Ex. 5, Tr. at 154, 182-183).
14. Ms. Birkinbine explained at the hearing that she only thought Mr. Kim was putting the knife on the board. However, Mr. Kim actually walked away with the knife or mono-cutter still in his hand and continued to work on the tangle. (Tr. at 124, 156-157, 184).
15. The Incident Report, written by Ms. Birkinbine on July 10, 2009, indicated only that Mr. Kim walked away after telling Ms. Birkinbine she should “look out.” (Agency Ex. 4).
16. Ms. Birkinbine did not immediately perceive Mr. Kim’s actions as a threat. (Tr. at 127, Agency Ex. 5).
17. The captain testified that he did not use a knife to cut the tangle; instead, he used mono-cutters. (Tr. at 258-259).
18. In both of his interviews with NOAA special agents, Mr. Kim stated that he was just joking with Ms. Birkinbine and that he would never handle a knife onboard. In his second interview, Mr. Kim stated that he only handles “line cutters”, a tool safer than a knife. (Tr. at 24, 28).
19. Mr. Kim testified that he told Ms. Birkinbine to watch out because he wanted to “get the knife up there.” (Tr. at 260).
20. After Ms. Birkinbine thought about the incident, she determined that Mr. Kim’s actions constituted intimidation and that she should report it, not only for herself, but also for the sake of other observers. (Tr. at 101-103).
21. The more Ms. Birkinbine thought about the incident after she returned to shore, the more upset she became. (Tr. at 132, 169).
22. Ms. Birkinbine testified that this incident made her wary for the rest of the trip, and that the tone of the trip changed. However, she was able to continue her work. (Tr. at 128, See Tr. at 270-271, Agency Ex. 4).
23. Ms. Birkinbine did not feel her safety was compromised such that she needed to leave the ship, but she was aware that if something else happened, it might set the captain off again. (Tr. at 128-129).
24. Mr. Kim testified that he noticed no difference in Ms. Birkinbine’s behavior after the incident. (Tr. at 275).

25. Ms. Birkinbine testified that after this incident, she kept her distance from the captain and crew. (Tr. at 170-172, 174).
26. Ms. Birkinbine was provided with a satellite phone but did not use it while aboard the F/V Grace. (Tr. at 86, 130, 163).
27. Ms. Birkinbine believed she could handle the situation and could get back to the shore safely without having the Coast Guard remove her. (Tr. at 131).
28. On July 15, 2009, NOAA Special Agent Roy Take Tomson interviewed crew members Askar Ehmes and Iobena Mourongo. Both crew members indicated they did not witness the knife incident, however, Mr. Mourongo stated that he overheard the captain call Ms. Birkinbine “bad luck” and “a troublemaker.” (Tr. at 190-193, Resp. Ex. A).
29. Mr. Kim testified that he used the term “troublemaker” only to refer to the swordfish that caused the line tangle. (Tr. at 304, See Agency Ex. 6).
30. Mr. Kim stated that he thought female observers were bad luck. (Tr. 24).
31. When asked whether the swordfish tangle was frustrating, Mr. Kim stated that it was not, and that he was “not [an] angry person.” (Tr. at 305).
32. While Mr. Kim’s English is “comprehensible” he is not fluent and a language barrier exists. (See Tr. at 25).

OPINION

NOAA must prove the violations alleged in the NOVA by a preponderance of the evidence. See 5 U.S.C. § 556(d); Steadman v. Securities and Exchange Commission, 450 U.S. 91, 107 (1981); In the Matter of Cuong Vo, 2001 WL 1085351 (NOAA 2001). Preponderance of the evidence is proven when the agency illustrates through evidence presented in the record that it is more likely than not that the respondent committed the violation alleged in the NOVA. In the Matter of John Fernandez, III, 1999 WL 1417462 (NOAA 1999). Direct and circumstantial evidence may be relied upon to satisfy the burden of proof. In the Matter of Cuong Vo, 2001 WL 1085351 (NOAA 2001). The burden of producing evidence to rebut agency evidence shifts to the respondent after

NOAA proves the allegations contained in the NOVA by a preponderance of reliable, probative and substantial evidence. Id.

Respondents are charged with an offense under the Magnuson-Stevens Act which contains a general prohibition that makes it illegal for a person to violate any of its regulations. See 16 U.S.C. § 1857(1)(A). Specifically, the Magnuson-Stevens Act, through its governing regulations, states it is unlawful to assault, oppose, impede, intimidate, or interfere with a NMFS-approved observer. 50 C.F.R. § 600.725(t).

The Magnuson-Stevens Act was enacted to protect, conserve, and manage the fishery resources of the United States and its adjacent waters. See 16 U.S.C. § 1801(b)(1)(A). To achieve this purpose, Congress empowered the Secretary of the Department of Commerce to assess civil penalties and/or impose permit sanctions against any person who violates the Magnuson-Stevens Act. See 16 U.S.C. § 1858; In the Matter of Corsair Corporation, F/V CORSAIR, 1998 WL 1277924 (NOAA 1998). Furthermore, it has consistently been held that conservation related violations under the Magnuson-Stevens Act are strict liability offenses. See In Re Northern Wind Seafood, Inc.; see also In the Matter of: Clarke A. Reposa; In Re Meredith Fish Co., 4 O.R.W. 66 (NOAA).

In order to sustain the Agency's burden of proof by a preponderance of the evidence that Respondent violated the aforementioned, it must be proven that: 1) Respondent is subject to the jurisdiction of this Court; 2) that the alleged victim was a NMFS approved observer; and 3) that Respondent did assault, oppose, impede, intimidate, or interfere with the approved observer.

Respondent's counsel did not contest the first two elements of the charge, and it is clear from the testimony, evidence, and exhibits submitted that those two elements are satisfied.

Regarding the third element, it is important to note that neither the statute nor the regulation speaks to a requirement that the intimidation must interfere with the observer's lawful duties. In this regard, no specific intent is required to establish a violation in the present case. Instead, the "reasonable person" standard will be applied to determine whether Ms. Birkinbine was intimidated by Mr. Kim's actions aboard the F/V Grace. The common meaning of intimidation is to place someone in fear. (BLACK'S LAW DICTIONARY (6th ed. 1991)).

Upon review of the record as a whole, the undersigned finds that the Agency has failed to prove by a preponderance of the evidence that a reasonable person in Ms. Birkinbine's situation would have been intimidated by Mr. Kim's actions aboard the F/V Grace.

Upon review of the record, the undersigned is not convinced that Mr. Kim intended to intimidate the observer. The evidence in the record suggests that, prior to the alleged incident, the two had a friendly working relationship. In fact, Mr. Kim stated that he had a daughter roughly Ms. Birkinbine's age who he likes to joke around with. (Tr. at 24). Ms. Birkinbine herself acknowledged this amicable relationship, recording in her documentation notebook that "the captain [was] normally good-hearted and friendly." (Agency Ex. 5). In fact, Ms. Birkinbine stated that, even as she saw Mr. Kim approach with the knife she thought the captain was coming over to chit-chat or joke. (Tr. at 127).

Furthermore, it is clear there was a significant language barrier present aboard the F/V Grace. (See Tr. at 25). Although Ms. Birkinbine testified that she “had been out there for enough time to understand his broken English, and the way he speaks...”, notably, the two had only been at sea together for approximately sixteen days. (Tr. at 21, 31, 125, Agency Ex. 4). It is questionable as to whether this is a sufficient amount of time for a captain and observer to truly understand the precise contours of each other’s communication styles. Further, Agent Jim On referred to Mr. Kim’s English-language skills only as “comprehensible,” and it is apparent from Mr. Kim’s hearing testimony that the captain has difficulty clearly articulating his thoughts in the English language. (Tr. at 25). As such, Respondent’s seemingly harsh diction may have been the result of his inability to otherwise communicate a danger to Ms. Birkinbine. Similarly, had Mr. Kim been attempting to joke with the observer, his attempt at humor may have been misconstrued do to a linguistic impediment. It is important to note that Ms. Birkinbine was aware of this communication barrier.

Even assuming *arguendo* (which the undersigned does not) that Mr. Kim intended to threaten Ms. Birkinbine, the undersigned is not convinced by a preponderance of the evidence that a reasonable person in Ms. Birkinbine’s position would have felt intimidated by his actions. Notably, Ms. Birkinbine herself did not initially react as though she had been threatened. (Tr. at 127). In fact, Ms. Birkinbine testified that she initially reacted by leaning back and nodding, that is, by simply getting out of Mr. Kim’s way. (Agency Ex. 5, Tr. at 154). This would indicate that she initially interpreted Mr. Kim’s statement more as a warning for her own safety than as a verbal or physical threat.

The observer only categorized the incident as intimidation after pausing to think about what transpired. (Tr. at 127, Agency Ex. 5). Ms. Birkinbine explained that after she returned to shore, the more upset she became over what had occurred. (Tr. at 132, 169). This would indicate to the undersigned that perhaps in hindsight, when memories of the incident were less fresh in her mind, she began to perceive the incident as progressively more threatening.

Notably, although Ms. Birkinbine contemporaneously documented that the captain had placed the knife in a holder directly above where she was sitting after telling her to “look out,” she indicated in her subsequent interview and testimony that Mr. Kim walked away with the knife still in his hand.³ (Agency Ex. 4, Agency Ex. 5, Tr. at 124, 154, 156-157, 183-184). This inconsistency is significant not only because it shows that Ms. Birkinbine may have begun to perceive the incident as increasingly more menacing after the fact, but also because what Mr. Kim did with the knife (line-cutter) is crucial to determining whether a reasonable person would have been intimidated by his actions. Had Mr. Kim placed the knife in the holder above Ms. Birkinbine as she initially indicated, then Mr. Kim had a clear purpose for walking towards the observer with a tool, namely, to store it in its proper place.

While Ms. Birkinbine stated that she was “wary” for the remainder of the trip and distanced herself from the captain and crew, she also stated that she “[wasn’t] worried about eating with [the captain and crew] or socializing or anything.” (Tr. at 128, 170-171). In fact, Ms. Birkinbine stated that “...if [the knife incident] was the worst thing

³ The undersigned acknowledges Mr. Kim’s statements regarding whether he used a knife or line-cutters while aboard the F/V Kim were contradictory. (See Tr. 24, 28, 258-260). However, since both knives and mono-cutters have the potential to be used in an intimidating manner, the undersigned finds that this issue is not dispositive.

that was [going to] happen, if that was the worst day on the trip, then [she] didn't think...[her] safety was going to be jeopardized." (Tr. at 129). This would indicate that Ms. Birkinbine was not fearful as a result of the June 29, 2009 incident, but merely questioned whether a future incident could possibly arise that might render her fearful. Considering that the legal definition of intimidation is "to place someone in fear," it appears that the threshold has not been met.

While the record indicates that Mr. Kim likely did refer to Ms. Birkinbine as a "troublemaker" and may have indicated he thought female observers were "bad luck," in all likelihood, these statements were symptoms of the captain's frustration and aggravation with the poor fishing haul, and not actions that were either intended to be intimidating or could reasonably be interpreted as such. (Tr. at 17, 24, See Tr. 128, Agency Ex 4). While perhaps impolite or unkind, these words do not amount to what a reasonable person aboard a longline fishing vessel would likely categorize as intimidation. The admitted exhibit of crew member Mr. Mourongo did state that he heard the captain refer to Ms. Birkinbine as a "troublemaker" but he believed the captain was joking when the captain made those comments. As such, the undersigned cannot find by a preponderance of the evidence that Mr. Kim attempted to intimidate Ms. Birkinbine as contemplated in the statutes.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a person within the meaning of the Magnuson-Stevens Act. (See 16 U.S.C. §1802(31)).
2. At all relevant times mentioned herein, Ms. Birkinbine was a National Marine Fisheries Service (NMFS) observer. (See Agency Ex. 1).

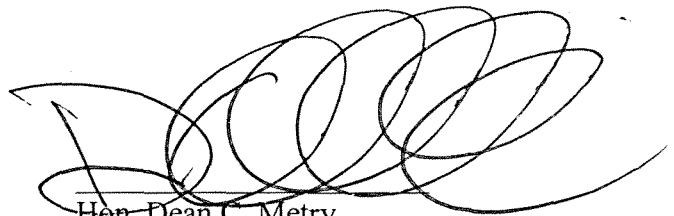
3. The Agency has not shown by a preponderance of the evidence that Respondent intimidated Ms. Birkinbine pursuant to 16 U.S.C. § 1801 *et seq.* and 50 C.F.R. § 600.725(t).

ORDER

IT IS HEREBY ORDERED that the Notice of Violation and Assessment of Administrative Penalty against Respondents Sang Yeol Kim and Kim Fishing Company, Inc., is **NOT PROVED**⁴.

Please be advised that any party may petition for administrative review of this decision. The petition for review must be filed with the Administrator of the National Oceanic and Atmospheric Administration within thirty (30) days from the day of this initial decision as provided in 15 C.F.R. § 904.273. Copies of the petition should also be sent to the ALJ Docketing Center, NOAA counsel, and the presiding judge. A copy of 15 C.F.R. § 904.273 is attached to this order. **See Attachment II.**

If neither party seeks administrative review within thirty (30) days after issuance of this order, this initial decision will become the final decision of the Agency.



Hon. Dean C. Metry
Administrative Law Judge
United States Coast Guard

Done and Dated on this 26th day of July 2011
Houston, Texas

⁴ Because I have found that the Agency has failed to prove the charge alleged, Respondent's financial ability to pay the proposed penalty is moot.

ATTACHMENT I
LIST OF WITNESSES AND EXHIBITS

AGENCY'S WITNESSES

1. Special Agent Brandon Jim On
2. Jane Evelyn Birkinbine

RESPONDENT'S WITNESSES

1. Special Agent Royce Take Tomson
2. Sang Yeol Kim

AGENCY'S EXHIBITS

1. Agent Brandon Jim On's Investigative Report
2. Certificate of Documentation
3. Hawaii Longline Limited Entry Permit
4. Incident Reports
5. Documentation Notebook
6. Statement Form
7. 50 C.F.R. § 600.725
8. Penalty Schedule
9. Financial Disclosure

RESPONDENT'S EXHIBITS

- A. Investigation Notes
- B. Vessel Diagram

ATTACHMENT II

PROCEDURES GOVERNING ADMINISTRATIVE REVIEW

15 C.F.R. § 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address:

Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse, modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

(c) Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for discretionary review, or review is timely undertaken on the Administrator's own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

(d) A petition for review must comply with the following requirements regarding format and content:

(1) The petition must include a concise statement of the case, which must contain a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;

(2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;

(3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations, and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;

(4) A copy of the Judge's initial decision must be attached to the petition;

(5) Copies of all cited portions of the record must be attached to the petition;

(6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and

(7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.

(f) No oral argument on petitions for discretionary review will be allowed.

(g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.

(h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.

(i) If the Administrator issues an order denying discretionary review, the order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.

(j) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be briefed and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified

mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

(l) An initial decision shall not be subject to judicial review unless:

(1) The party seeking judicial review has exhausted its opportunity for administrative review by filing a petition for review with the Administrator in compliance with this section, and

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section.

(m) For purposes of any subsequent judicial review of the agency decision, any issues that are not identified in any petition for review, in any answer in support or opposition, by the Administrator, or in any modifications to the initial decision are waived.

(n) If an action is filed for judicial review of a final agency decision, and the decision is vacated or remanded by a court, the Administrator shall issue an order addressing further administrative proceedings in the matter. Such order may include a remand to the Chief Administrative Law Judge for further proceedings consistent with the judicial decision, or further briefing before the Administrator on any issues the Administrator deems appropriate.