



Operation: Get Paid

Make sure the deck
you're working is
stacked in your favor

By Nick Rahaim

Commercial fishing is a brutal industry. Whether in Alaska, the Gulf of Mexico or the North Atlantic, sleep deprivation, harsh conditions and strained muscles are routine. Those of us dealing with the ferocity of the job are usually in it for more than just the love of the fishing life. There's got to be a financial reward that comes with getting beat up for a living. The last thing a deckhand should have to worry about is getting their wallet beat up by captains looking to improve their own bottom line.

There is no shortage of stories of deckhands getting ripped off by captains: shares lower than agreed to, inflated expenses and manipulated costs.

As a greenhorn, I got on the wrong boat for three weeks, got zapped by faulty wiring numerous times, and never got paid — that is, until I showed up to the skipper's house nearly a year later, more than 1,000 miles away, and demanded my pay. He gave me 500 bucks and told me if I wanted more I'd have to take him to court. There also are many cases of deckhands making spurious claims against skippers for both pay and injury.

While we hear these stories of skippers and deckhands getting the better of each other, one thing is clear: Too few have a solid grasp of what rights deckhands on commercial fishing vessels have under federal law.

Legally, deckhands are in a unique po-

sition. Most fishing crew receive a share of the catch as opposed to standard wage or salary. A share in no way implies partnership. This is an important distinction when it comes to boat owners charging crew for capital expenditures. Most deckhands are also independent contractors for tax purposes, and for other purposes they are employees. As employees, departments of labor in certain states will help deckhands collect outstanding wages, and to do so, these states (like Alaska) consider deckhands to be employees.

The U.S. judicial system has long recognized the unique position of seamen, including deckhands. A court ruling in favor of an ill deckhand, *Joncich v. Vitco* (1955), paraphrased a U.S. Supreme

Deckhands Brook Bourn and Arturo Miranda wait to off-load salmon from a seiner in Prince of Whales Island, Alaska.



NICK RAHAM

Court decision from 1897, saying the “employment contract of the seaman is treated as an exceptional one, involving to a certain extent the surrender of his personal liberty during the life of the contract.” Translation: A deckhand has little recourse if they feel they were forced to work too much or not given enough leave. While under contract, a captain is within his rights to dictate nearly every aspect of a deckhand’s life.

There is no more important way for captains and deckhands to protect themselves than a written contract signed by both parties. After both parties read, agree to and sign a contract, there should be no question about pay, duration of employment, expenses and a deckhand’s

responsibilities. Unfortunately, if and when these contracts are signed, these terms aren’t always clear.

Over the years, I have signed good, bad and mediocre crew contracts, and at times I have gone without signing contracts at all. Working without a contract could actually be more advantageous than signing a bad one.

“Unscrupulous vessel owners get very creative when trying to stiff deckhands on their wages. No deckhand should sign a contract when the space for the crew share percentage is blank, to be filled in later,” says John Merriam a private practice maritime lawyer based out of Fishermen’s Terminal in Seattle. “It is important that deductions from crew shares — such as food, fuel and bait — be specifically stated, as well as the exact method for calculating the value of the catch, so that deckhands don’t get pencil whipped on their settlement sheets by the owner’s bookkeeper.”

Deckhands on share are required to have a written contract. If they don’t, they are entitled to make claim of the highest wage paid in their port of engagement. These contracts aren’t just advisable, they’re legally mandated for fishing vessels of 20 gross tons or more.

“Highest wages in port of engagement’ means geographic port — e.g., Ketchikan. But the type of boat and fishery should be as similar as possible,” Merriam says. “For example, a deckhand on a gillnetter out of Ketchikan might get a lay of 10 percent, but there’s no way a processor on a longliner would even get 1 percent.”

But the fact remains, if a deckhand works on an average grossing boat without a contract, he or she is legally entitled to make a claim for the compensation a deckhand received on a highliner.

Many captains use standardized con-

tracts provided by their insurance pools. Some have taken the standard contract, tweaked it to clarify some of the ambiguous points, at times to the benefit and other times to the detriment of the deckhand. Most contracts I have encountered are composed of roughly a dozen numbered sections and typically start with defining the parties and duration of contract.

There is no legal benchmark for compensation. Industry standards have no bearing when a contract is signed for a specific percentage. An experienced deckhand normally has options and typically has the clout to expect the standard full share of 8 to 12 percent. If you sign a contract for 4 percent, then you don’t have a claim to a higher percentage in most circumstances.

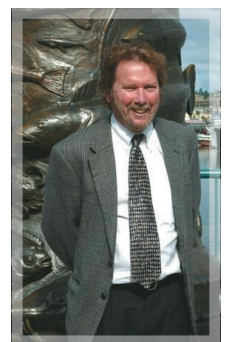
Some skippers like to give an optional performance bonus. One of my favorite contracts included a base rate of 8 percent and an optional 2 percent. That two percent, worth thousands of dollars, was a performance booster and made me bite my tongue a few times.

The worst contract I signed was for a guaranteed 4 percent and a bonus up another 4 percent if the season was completed and duties performed to the “satisfaction” of the skipper. The word satisfaction is highly subjective, and it’s too easy for experienced deckhands to get paid less than they deserve over petty disputes that have nothing to do with work performance. Deckhands would be well advised to stay away from contracts of this kind.

Also listed in the compensation section of the contract, and almost as important as percentage, is adjusted gross earnings. What a boat owner does and doesn’t include when adjusting the gross stock could quickly make a deckhand’s 8 percent look more like 5. Food, supplies,

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— John Merriam,
SEATTLE-BASED MARITIME LAWYER



Don't add insult to injury

Commercial fishing forces one to go above and beyond what is perceived as the physical limit of pain, fatigue, strength and endurance. Injuries will happen: strains, sprains, fractures, contusions and lacerations are all part of the game. Most minor injuries, while painful, are usually considered manageable enough to continue working.

As seamen, deckhands are not entitled to workers compensation, but the ancient customs of maintenance and cure are actually — don't tell the insurance companies — more generous. These common law rights date back to the Crusade-era Rolls of Oléron around the year 1160, and were adopted into U.S. maritime law by the Supreme Court in 1823. These are no-fault remedies, when there is fault, further rights and remedies are available.

Maintenance is a daily rate paid to an injured or ill deckhand intended to cover food and lodging. Cure represents all medical costs incurred from treatment. Medical expenses are paid until a deckhand reaches "maximum cure," which is the point at which one has fully recovered or additional treatments no longer aid recovery.

An injured deckhand is also entitled

to receive all unearned wages for the duration of the contract. If someone breaks their arm in the beginning of the season, they are legally owed what they would have earned had they not been injured on the job.

The Jones Act (1920) mentions nothing about maintenance and cure. What the law grants to fishermen, and seamen in general, is the right to make claims for additional damages if one can prove negligence of the employer or unseaworthiness of the vessel. Legally, negligence and unseaworthiness are broad, ranging from failure to maintain equipment to overly slippery surfaces.

Also, as stated, many contracts include a fixed rate of daily maintenance in the event of injury. While a deckhand can sign away their retro, they legally can't sign up for a daily rate of maintenance that will leave them in the poorhouse.

"Contractual maintenance on seamen is not binding," said Jim Beard, a partner at Beard, Stacey and Jacobsen, a Seattle-based firm that specializes in maritime personal injury. "I can't board my dog for 35 bucks a day, never mind live on it."

Whether injured on a company boat

or a sole proprietorship, insurance companies are typically risk adverse. They'll often pay out with no questions, but will just as often low-ball the settlement and withhold details on the rights and remedies available for deckhands. So it's often a toss-up for crew: Hire a lawyer who will take 25 to 40 percent of the settlement, or accept what the boat's insurance adjuster has offered. If punitive damages allowed under the maritime law apply, then getting a lawyer will probably work out best. Either way, many maritime lawyers offer free consultations.

In specific cases when a "callous or willful and wanton withholding of maintenance and cure" can be proven, a seaman is not only entitled to collect punitive damages but can also collect attorney fees. This was discussed in 2012 in the Clausen v. Icicle case. The plaintiff, Dana Clausen, was left destitute and incapacitated after severely injuring his back on an Icicle vessel. He received \$20 a day in maintenance and was denied coverage for proper medical treatment. The court considered this "callous," "willful and wanton." Clausen collected nearly \$1.8 million in damages and more than \$400,000 for legal fees and other costs. — N.R.

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taxes and fuel off the top are a given. In-season moorage, lube oil, bait, ice... OK. But in listing what is deducted from the gross stock to make the adjusted gross earnings, many contracts include wording that allows captains to incorporate a range of borderline expenses.

Be cautious when you read, "and other expenses customarily deducted" and "include, but are not limited to." These phrases could lead to your paying for a good chunk of your captain's Hawaiian vacation.

My least favorite and often illegal expense is paying for a boat's capital expenses out of the crew share. This includes paying for the autobaiter, lost gear and other equipment. These capital expenses are not only bought well before and used well after the duration of the contract, but can often be a hefty tax write-off. If a deckhand signs a contract that specifically states these kinds of expenses then there's no illegality. But when they aren't listed, a boat owner does not have a right to deduct these items from a crew member's pay. Just because deckhands earn a share doesn't make them a partner in the operation.

Also normally included in the compensation section of the contract is a line or two about retroactive price adjustments — these "retros" are usually associated with salmon fishing in Alas-

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Deckhands Marlon Mountjoy (left) and Seth Cooke work the deck on a seiner near Baranof Island, Alaska.

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ka. By and large if a contract mentions the retro, it’s only to state that the deckhand is not entitled to it. A deckhand can sign away their right to the retro, but if they are not mentioned, deckhands are legally entitled to their percentage of the adjustment.

Some contracts also stipulate the daily rate of maintenance in the event a deckhand is injured. The contractual rates are typically low. I’ve signed off on a daily rate of \$20 in the past. Suffice it to say, contractual maintenance is not binding.

Finally, don’t be Shanghaied: See the contract first. Contracts legally must be presented to the crew and signed “be-

fore proceeding on a voyage” (46 U.S. Code, section 10601). It’s much harder for a deckhand to take issue with unacceptable points of a contract when the boat is underway to the fishing grounds.

If, as a deckhand, you are not paid what you were contractually due, first consult the department of labor in your state. They may or may not have power to intervene. In Alaska, the Department of Labor will take claims of deckhands up to \$20,000. Unfortunately, their scope is limited. They are not in the practice of interpreting subtleties of contracts, so their help is only in cases of a gross failure to pay.

If your state does not have institu-

tional means to help deckhands collect unpaid wages, it’s best to get a lawyer.

As independent contractors, we’re in business for ourselves — at least where the IRS is concerned. Captains are just as much businessmen as they are fishermen, and on a smaller scale, so are deckhands. Treat choices about whom to work for, where to work and when to make a legal claim as business decisions. Examine the costs and benefits of the outcomes.

Use your best judgment, which is only best if you know your rights. **NF**

Nick Rahaim is a commercial fisherman and journalist. Check out his blog at outside-in.me or follow him on Twitter @nrahaim.



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