

Federal Maritime Commission

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functions specifically to aid the parties in resolving the controversy; and

(h) *Person* has the same meaning as in 5 U.S.C. 551(2).

§ 502.403 General authority.

(a) The Commission intends to consider using a dispute resolution proceeding for the resolution of an issue in controversy, if the parties agree to a dispute resolution proceeding.

(b) The Commission will consider not using a dispute resolution proceeding if—

(1) A definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) Maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) The matter significantly affects persons or organizations who are not parties to the proceeding;

(5) A full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) The Commission must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the Commission's fulfilling that requirement.

(c) Alternative means of dispute resolution authorized under this subpart are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.

§ 502.404 Neutrals.

(a) A neutral may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties

to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

(b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.

(c) With consent of the parties, the Federal Maritime Commission Dispute Resolution Specialist will seek to provide a neutral in dispute resolution proceedings through Commission staff, arrangements with other agencies, or on a contractual basis.

(d) *Fees.* Should the parties choose a neutral other than an official or employee of the Commission, fees and expenses shall be borne by the parties as the parties shall agree.

§ 502.405 Confidentiality.

(a) Except as provided in paragraphs (d) and (e) of this section, a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless—

(1) All parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) The dispute resolution communication has already been made public;

(3) The dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) A court determines that such testimony or disclosure is necessary to—

(i) Prevent a manifest injustice;

(ii) Help establish a violation of law;

or

(iii) Prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future

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cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication, unless—

(1) The communication was prepared by the party seeking disclosure;

(2) All parties to the dispute resolution proceeding consent in writing;

(3) The dispute resolution communication has already been made public;

(4) The dispute resolution communication is required by statute to be made public;

(5) A court determines that such testimony or disclosure is necessary to—

(i) Prevent a manifest injustice;

(ii) Help establish a violation of law; or

(iii) Prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

(6) The dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

(7) Except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of paragraph (a) or (b) of this section shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(d) (1) The parties may agree between or amongst themselves to alternative confidential procedures for disclosures by a neutral, and shall inform the neutral before commencement of the dispute resolution proceeding of any modifications to the provisions of paragraph (a) of this section that will govern the confidentiality of the dispute

resolution proceeding, in accordance with the guidance on confidentiality in federal proceedings published by the Interagency ADR Working Group and adopted by the ADR Council (<http://www.financenet.gov/financenet/fed/iadrwg/confid.pdf>). If the parties do not so inform the neutral, paragraph (a) of this section shall apply.

(2) To qualify for the exemption under paragraph (j) of this section, an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Paragraphs (a) and (b) of this section shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Paragraphs (a) and (b) of this section shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Paragraphs (a) and (b) of this section shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.

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(j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under 5 U.S.C. 552(b)(3).

§ 502.406 Arbitration.

(a)(1) Arbitration may be used as an alternative means of dispute resolution whenever all parties consent, except that arbitration may not be used when the Commission or one of its components is a party. Consent may be obtained either before or after an issue in controversy has arisen. A party may agree to—

(i) Submit only certain issues in controversy to arbitration; or

(ii) Arbitration on the condition that the award must be within a range of possible outcomes.

(2) The arbitration agreement that sets forth the subject matter submitted to the arbitrator shall be in writing. Each such arbitration agreement shall specify a maximum award that may be issued by the arbitrator and may specify other conditions limiting the range of possible outcomes.

(b) With the concurrence of the Federal Maritime Commission Dispute Resolution Specialist, binding arbitration may be used to resolve any and all disputes that could be the subject of a Commission administrative proceeding before an Administrative Law Judge. The Federal Maritime Commission Dispute Resolution Specialist may withhold such concurrence after considering the factors specified in § 502.403, should the Commission's General Counsel object to use of binding arbitration.

(c)(1) The Federal Maritime Commission Dispute Resolution Specialist will appoint an arbitrator of the parties' choosing for an arbitration proceeding.

(2) A Commission officer or employee selected as an arbitrator by the parties and appointed by the Federal Maritime Commission Dispute Resolution Specialist shall have authority to settle an issue in controversy through binding arbitration pursuant to the arbitration agreement; provided, however, that decisions by arbitrators shall not have precedential value with respect to decisions by Administrative Law Judges or the Commission. Administrative Law Judges may be appointed as arbitrators

with the concurrence of the Chief Administrative Law Judge.

(d) The arbitrator shall be a neutral who meets the criteria of 5 U.S.C. 573.

§ 502.407 Authority of the arbitrator.

An arbitrator to whom a dispute is referred may—

(a) Regulate the course of and conduct arbitral hearings;

(b) Administer oaths and affirmations;

(c) Compel the attendance of witnesses and production of evidence at the hearing under the provisions of 9 U.S.C. 7 only to the extent the Commission is otherwise authorized by law to do so; and

(d) Make awards.

§ 502.408 Conduct of arbitration proceedings.

(a) The arbitrator shall set a time and place for the hearing on the dispute and shall notify the parties not less than five days before the hearing.

(b) Any party wishing a record of the hearing shall—

(1) Be responsible for the preparation of such record;

(2) Notify the other parties and the arbitrator of the preparation of such record;

(3) Furnish copies to all identified parties and the arbitrator; and

(4) Pay all costs for such record, unless the parties agree otherwise or the arbitrator determines that the costs should be apportioned.

(c)(1) The parties to the arbitration are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(2) The arbitrator may, with the consent of the parties, conduct all or part of the hearing by telephone, television, computer, or other electronic means, if each party has an opportunity to participate.

(3) The hearing shall be conducted expeditiously and in an informal manner.

(4) The arbitrator may receive any oral or documentary evidence, except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded by the arbitrator.