

§ 502.407

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;

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(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.

(5) The arbitrator shall interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.

(d) The provisions of § 502.11 regarding *ex parte* communications apply to all arbitration proceedings. No interested person shall make or knowingly cause to be made to the arbitrator an unauthorized *ex parte* communication relevant to the merits of the proceeding, unless the parties agree otherwise. If a communication is made in violation of this subsection, the arbitrator shall ensure that a memorandum of the communication is prepared and made a part of the record, and that an opportunity for rebuttal is allowed. Upon receipt of a communication made in violation of this subsection, the arbitrator may, to the extent consistent with the interests of justice and the policies underlying this subchapter, require the offending party to show cause why the claim of such party should not be resolved against such party as a result of the improper conduct.

(e) The arbitrator shall make an award within 30 days after the close of the hearing, or the date of the filing of any briefs authorized by the arbitrator,

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whichever date is later, unless the parties agree to some other time limit.

§ 502.409 Arbitration awards.

(a)(1) The award in an arbitration proceeding under this subchapter shall include a brief, informal discussion of the factual and legal basis for the award, but formal findings of fact or conclusions of law shall not be required.

(2) Exceptions to or an appeal of an arbitrator's decision may not be filed with the Commission.

(b) An award entered in an arbitration proceeding may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding. Such an award also may not be used as precedent or otherwise be considered in any factually unrelated proceeding.

§ 502.410 Representation of parties.

(a) The provisions of § 502.21 apply to the representation of parties in dispute resolution proceedings, as do the provisions of § 502.27 regarding the representation of parties by nonattorneys.

(b) A neutral in a dispute resolution proceeding may require participants to demonstrate authority to enter into a binding agreement reached by means of a dispute resolution proceeding.

§ 502.411 Mediation and other alternative means of dispute resolution.

(a) Parties are encouraged to utilize mediation or other forms of alternative dispute resolution in all formal proceedings. The Commission also encourages those with disputes to pursue mediation in lieu of, or prior to, the initiation of a Commission proceeding.

(b) Any party may request, at any time, that a mediator or other neutral be appointed to assist the parties in reaching a settlement. If such a request is made in a proceeding assigned to an Administrative Law Judge, the provisions of § 502.91 apply. For all other matters, alternative dispute resolution services may be requested directly from the Federal Maritime Commission Alternative Dispute Resolution Specialist, who may serve as the neutral if the parties agree or who will arrange for the appointment of a neutral acceptable to all parties.

(c) The neutral shall convene and conduct mediation or other appropriate dispute resolution proceedings with the parties.

(d) *Ex parte Communications.* Except with respect to arbitration, the provisions of § 502.11 do not apply to dispute resolution proceedings, and mediators are expressly authorized to conduct private sessions with parties.

Subpart V—Implementation of the Equal Access to Justice Act in Commission Proceedings

SOURCE: 52 FR 28264, July 29, 1987, unless otherwise noted.

§ 502.501 General provisions.

(a) *Purpose.* The Equal Access to Justice Act, 5 U.S.C. 504 ("EAJA"), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before the Federal Maritime Commission ("the Commission"). An eligible party may receive an award when it prevails over an agency, unless the agency's position was substantially justified or special circumstances make an award unjust. The rules in this subpart describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that the Commission will use to make them.

(b) *When EAJA applies.* EAJA applies to any adversary adjudication:

(1) Pending or commenced before the Commission on or after August 5, 1985;

(2) Commenced on or after October 1, 1984, and finally disposed of before August 5, 1985, provided that an application for fees and expenses, as described in § 502.502 of this subpart, has been filed with the Commission within 30 days after August 5, 1985; or

(3) Pending on or commenced on or after October 1, 1981, in which an application for fees and other expenses was timely filed and was dismissed for lack of jurisdiction.

(c) *Proceedings covered.* (1)(i) EAJA applies to adversary adjudications conducted by the Commission under this part. These are adjudications under 5 U.S.C. 554 in which the position of this