solicitations means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

(i) The subscriber's seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.

(ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

(6) The term *established business relationship* for purposes of paragraph (a)(4) of this section on the sending of facsimile advertisements means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(7) The term *facsimile broadcaster* means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

(8) The term *prior express written consent* means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

(ii) The term ''signature'' shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(9) The term *seller* means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(10) The term *sender* for purposes of paragraph (a)(4) of this section means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.

(11) The term *telemarketer* means the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(12) The term *telemarketing* means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(13) The term *telephone facsimile machine* means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(14) The term *telephone solicitation* means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

(15) The term *unsolicited advertisement* means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(16) The term *personal relationship* means any family member, friend, or acquaintance of the telemarketer making the call.

* * * * *

[FR Doc. 2012–13862 Filed 6–8–12; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 386

[Docket No. FMCSA–2003–14794]

Notice of Final Revision to Guidance for the Use of Binding Arbitration Under the Administrative Dispute Resolution Act of 1996

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final revision to guidance.

SUMMARY: Under existing guidance, FMCSA must use a form of arbitration known as ''Night Baseball'' for its civil penalty forfeiture proceedings in which the only issues remaining to be resolved are the amount of the civil penalty owed and/or the length of time in which to pay it. On March 21, 2011, FMCSA proposed to revise the Guidance to eliminate the ''Night Baseball'' format, and to replace it with a format in which the Arbitrator determines the final civil penalty and the amount of time in which to pay it. The Arbitrator would no longer be bound by the closest suggested penalty submission of the parties. The Notice provided the public with 30 days to comment on the proposal. The Agency received no comments and is therefore revising the Guidance by eliminating the ''Night Baseball'' format. The Agency is also revising the Guidance to incorporate typographical and other minor changes.

DATES: The revised Guidance is effective June 11, 2012. It will apply to all cases in which an order assigning a matter to binding arbitration is issued from June 11, 2012 forward.

FOR FURTHER INFORMATION CONTACT: Steven B. Farbman, Adjudications

Counsel, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590, (202) 385–2351. Office hours are from 8:30 a.m. until 5:00 p.m., e.t., Monday through Friday, except Federal holidays. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: On March 4, 2004, FMCSA published in the **Federal Register** (69 FR 10288) its Guidance for the use of binding arbitration as an alternative dispute resolution technique in Agency civil penalty forfeiture proceedings in which the only issues remaining to be resolved are the amount of the civil penalty owed and/or the length of time in which to pay it. Under the Guidance's ''Night Baseball'' format, telephonic hearings were held, during which each party presented to the Arbitrator evidence supporting the penalty it considered appropriate for the case without divulging its proposed penalty. Following the hearing, each party provided the Arbitrator and the opposing party with a sealed envelope containing the amount of the total proposed civil penalty for the case and, if desired, a proposed payment plan. Before opening the envelopes, the Arbitrator issued to the parties an initial written determination of the total civil penalty and payment plan. The Arbitrator then opened the envelopes and selected the proposed civil penalty and payment plan that was closer to his or her determination. The final penalty amount and payment plan were distributed to the parties in a final written decision.

On March 21, 2011, FMCSA published in the **Federal Register** its proposal to eliminate the ''Night Baseball'' format from the Guidance (76 FR 15359). Several years of experience with this format have revealed that final civil penalties are rarely identical to the Arbitrator's determination, and occasionally not close at all. In addition, the ''Night Baseball'' format requires each party to persuade the Arbitrator to accept the wisdom of its position without being able to reveal the civil penalty it is proposing. The Agency sought comment on a new procedure, in which the Arbitrator would determine the amount of the civil penalty following a hearing. The comment period has closed, and FMCSA received no comments. Accordingly, FMCSA is eliminating ''Night Baseball'' from all proceedings assigned for binding arbitration from this day forward. Following the presentation of evidence by the parties, the Arbitrator will determine the amount of the civil penalty and the payment plan. The maximum civil penalty will be the penalty set forth in the Notice of Claim; there will be a minimum civil penalty in only those cases in which there is a statutory minimum.

The Agency is also revising the Guidance to incorporate typographical corrections and other minor changes, changes necessary to resolve inconsistencies, and changes needed to describe actual practice. For example, although the Chief Safety Officer is the FMCSA Assistant Administrator, the Agency is changing ''Chief Safety Officer'' to ''Assistant Administrator'' because that is the term used to describe the decisionmaker in 49 CFR part 386, which includes binding arbitration as one of the options for a Reply to a Notice of Claim.

The Guidance contains ''Questions and Answers on FMCSA's Use of Binding Arbitration,'' set forth as Issues and Responses. The Responses to Issues 2 and 9 in the 2004 Guidance were inconsistent with each other. The Response to Issue 2 said that ''[t]he decision to arbitrate is strictly that of the parties'' and that ''arbitration must be a completely voluntary process.'' On the other hand, the Response to Issue 9 said that if a carrier opted for binding arbitration, the Field Administrator had the burden to demonstrate why the matter should not be so assigned, and the Chief Safety Officer would decide whether the matter should be arbitrated.

In *In the Matter of New Metro Trucking Corp.,* Docket No. FMCSA–2009–0376, Order on Binding Arbitration, May 23, 2011, the Assistant Administrator found that the language in the Response to Issue 9 trumped the language in the Response to Issue 2, thereby limiting the Field Administrator's discretion in objecting to binding arbitration. The Assistant Administrator found that, based on the Guidance as it was then written, the Field Administrator could prevent binding arbitration in only those cases in which binding arbitration had been determined to be inappropriate, as described in the Response to Issue 1: maximum civil penalty cases issued pursuant to section 222 of the Motor Carrier Safety Improvement Act of 1999, or any cases that deal with an interpretation of the regulations or with important policy issues.

Therefore, the Response to Issue 9 effectively removed the voluntariness set forth in the Response to Issue 2. Under the Response to Issue 9, the Chief Safety Officer could assign a matter for binding arbitration if the Field Administrator did not meet his burden, even if the Field Administrator did not wish the matter to be arbitrated. Accordingly, the Agency is eliminating the inconsistency, merging both Responses into Issue 2, and deleting the previous Issue 9 and its Response. Under the Guidance that becomes effective today, the Field Administrator's objection will not be limited. To make meaningful the Response to Issue 2 that the decision to arbitrate is strictly that of the parties, the Agency is permitting the Field Administrator to prevent binding arbitration by objecting to it for any reason. This change is consistent with the Administrative Dispute Resolution Act of 1996 (ADRA) (Pub. L. 104–320, 110 Stat. 3870, October 19, 1996) (now codified at 5 U.S.C. 571–584), which authorizes the use of arbitration ''whenever all parties consent.'' 5 U.S.C. 575(a)(1).

Finally, the statements in the previous Responses to Issues 2 and 9, concerning the issuance of a Notification of Arbitration, were not accurate. Those two Responses, which stated that if the Chief Safety Officer determined that a case was appropriate for binding arbitration, he or she would notify the parties by issuing a Notification of Arbitration, did not mirror actual practice. The previous Response to Issue 9 provided that the Notification would require each party to return the Notification form indicating agreement or objection. In actual practice, the Chief Safety Officer did not issue a Notification of Arbitration to the parties. As a result, the Agency is eliminating the Notification of Arbitration in the revised Response to Issue 2 to mirror actual practice. If, in its Reply to a Notice of Claim, a respondent requests binding arbitration, the Field Administrator may consent or object. If the Field Administrator objects, the matter will not be referred to binding arbitration; if the Field Administrator consents, the Assistant Administrator will decide whether the case is to be referred to binding arbitration. The Assistant Administrator will inform the parties of his or her decision in an Order on Binding Arbitration.

Issued on: May 31, 2012.

Anne S. Ferro,

Administrator.

The revised Guidance reads as follows:

Guidance for the Use of Binding Arbitration Under the Administrative Dispute Resolution Act of 1996

Dated: June 11, 2012.

Binding Arbitration

In binding arbitration, the parties agree to use a mutually selected decisionmaker to hear their dispute and resolve it by rendering a decision or award that is binding on the parties. Like litigation, binding arbitration is an adversarial adjudicative process designed to resolve the specific issues submitted by the parties. Binding arbitration differs significantly from litigation, however, in that it does not require conformity with the legal rules of evidence, and the proceeding is conducted in a private rather than a public forum. Binding arbitration awards typically are enforceable by courts, absent defects in the arbitration procedure. The grounds for appeal from arbitration awards, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1–16, are generally limited to fraud or misconduct in the proceedings. *See* 9 U.S.C. § 10.

The process for reaching the final award will be as follows: Each party will present evidence it considers appropriate for the case as a whole. Evidence will be presented in accordance with the procedures established by the parties within the Arbitration Agreement. No evidence shall be offered or accepted concerning whether the violation(s) occurred, because the parties concede the violations as a condition of arbitration. Following the hearing, the arbitrator will determine, in writing, the total civil penalty and, if necessary, a payment plan.

As discussed later in this Guidance, the civil penalty amount may not be set lower than the statutory minimum for any violation, if there is a statutory minimum, or higher than the amount proposed in the Notice of Claim. Because the ADRA requires the parties to agree on a maximum award, FMCSA provides that the maximum award be set at the amount proposed in the Notice of Claim.

Statutory Considerations for Not Using Arbitration

The ADRA states that Agencies shall consider not using any form of alternative dispute resolution (ADR), including binding arbitration, 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; or

(6) The agency 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 agency's fulfilling that requirement. *See* 5 U.S.C. § 572(b).

Accordingly, unless the Assistant Administrator determines that the use of binding arbitration will be in the best interests of the government, a case will not be submitted to binding arbitration under the circumstances set forth above.

Other Statutory Considerations

The ADRA includes a number of provisions relating to arbitration. FMCSA's use of binding arbitration will be modeled on these provisions.

Authorization of Arbitration

1. The decision to arbitrate must be voluntary on the part of all parties to the arbitration (*See* 5 U.S.C. § 575(a)(1).)

2. An agreement to arbitrate must be in writing. It must set forth the subject matter submitted to the arbitrator, and must specify the maximum award that may be granted by the arbitrator. (*See* 5 U.S.C. § 575(a)(2).)

3. FMCSA shall not require anyone to consent to arbitration as a condition of entering into a contract or obtaining any other benefit. (*See* 5 U.S.C. § 575(a)(3).)

4. The Field Administrator who offers to use arbitration has the authority to enter into a settlement concerning the matter after the Assistant Administrator has consented to the use of arbitration. (*See* 5 U.S.C. § 575(b)(1) and (2).)

Enforcement of Arbitration Agreements (5 U.S.C. § 576)

Arbitration agreements are enforceable pursuant to 9 U.S.C. § 4.

Arbitrators (5 U.S.C. § 577)

1. The parties to an arbitration are entitled to participate in selecting an arbitrator. (*See* 5 U.S.C. § 577(a).)

2. An arbitrator shall not have an official, financial, or personal conflict of interest with respect to the issue in controversy, unless that interest is fully disclosed in writing and all parties agree that he/she may serve as the arbitrator. (*See* 5 U.S.C. §§ 573 and 577(b).)

Authority of the Arbitrator (5 U.S.C. § 578)

1. An arbitrator may regulate the course and conduct of the arbitration hearing. (*See* 5 U.S.C. § 578(1).)

2. An arbitrator may administer oaths and affirmations. (*See* 5 U.S.C. § 578(2).)

3. An arbitrator may compel the attendance of witnesses and the production of evidence only to the same extent the agency involved is otherwise authorized by law to do so. (*See* 5 U.S.C. § 578(3).)

4. An arbitrator may make awards. (*See* 5 U.S.C. § 578(4).)

Arbitration Proceedings (5 U.S.C. § 579)

1. The arbitrator shall set the time and place for the arbitration hearing and shall notify the parties of same at least five days before the hearing is to take place. (*See* 5 U.S.C. § 579(a).)

2. Parties are entitled to a record of the arbitration hearing. Any party wishing a record shall: (1) Make the arrangements for it; (2) notify the arbitrator and other parties that a record is being prepared; (3) supply copies to the arbitrator and the other parties; and (4) pay all costs, unless the parties have agreed to share the costs or the arbitrator determines that the costs shall be apportioned. (*See* 5 U.S.C. § 579(b)(1)–(4).)

3. At any arbitration hearing, parties are entitled to be heard, to present evidence, and to cross-examine witnesses. The arbitrator may, with the consent of the parties, conduct the hearing by telephone, television, computer, or other electronic means, if each party has the opportunity to participate. (*See* 5 U.S.C. § 579(c)(1) and (2).)

4. The arbitrator may receive any oral or documentary evidence. The arbitrator, however, may exclude any evidence that is irrelevant, immaterial, unduly repetitious, or privileged. (*See* 5 U.S.C. § 579(c)(4).)

5. The arbitrator shall interpret and apply any relevant statutes, regulations, legal precedents, and policy directives. (*See* 5 U.S.C. § 579(c)(5).)

6. No party shall have any unauthorized *ex parte* communication

with the arbitrator relevant to the merits of the proceeding, unless the parties agree otherwise. If a party violates this provision, the arbitrator shall ensure that a memorandum of the communication is included in the record, and that an opportunity for rebuttal is allowed. The arbitrator may require the party who engages in an unauthorized *ex parte* communication to show cause why the issue in controversy should not be resolved against that party for the improper conduct. (*See* 5 U.S.C. § 579(d).)

Arbitration Awards

1. An arbitration award shall include a brief informal discussion of the factual and legal bases for the award. Formal findings of fact and conclusions of law are not required. (*See* 5 U.S.C. § 580(a)(1).)

2. A final award is binding on the parties and may be enforced pursuant to 9 U.S.C. 9–13. (*See* 5 U.S.C. § 580(c).)

3. An arbitration award may not serve as an estoppel in any other proceeding and may not be used as precedent in any factually unrelated proceeding. (*See* 5 U.S.C. § 580(d).)

Judicial Review

1. Any action for review of an arbitration award must be made pursuant to sections 9 through 13 of title 9, U.S. Code. (*See* 5 U.S.C. § 581(a).) A court may vacate an award where the award was procured by corruption, fraud, or undue means; where there was arbitrator partiality, corruption, misconduct, or misbehavior; or where an arbitrator has exceeded his or her powers or so imperfectly executed the these powers that a mutual, final, and definitive award was not made. (*See* 9 U.S.C. § 10(a).)

2. A decision by an agency to use or not to use arbitration shall be committed to the discretion of the agency and shall not be subject to judicial review, except that if the agency uses arbitration, a court may vacate the award under section 10 of title 9, U.S. Code (*see* 5 U.S.C. § 581(b), if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

Questions and Answers on FMCSA's Use of Binding Arbitration

Issue 1: For what types of cases will FMCSA be willing to use binding arbitration?

Response: FMCSA is generally willing to use binding arbitration for the resolution of cases in which the only questions are the amount of the civil penalty and/or the length of time permitted to pay it. FMCSA is generally willing to arbitrate the length of time in which to pay a civil penalty, but not the civil penalty amount, in: (1) maximum civil penalty cases issued pursuant to section 222 of the Motor Carrier Safety Improvement Act of 1999, Pub. L. 106–159, 113 Stat. 1748 (December 9, 1999), 49 U.S.C. 521 note; (2) cases in which the statutorily mandated minimum amount has been assessed; or (3) any cases that deal with an interpretation of the regulations or with important policy issues.

Issue 2: How and by whom will the decision to arbitrate be made?

Response: The decision to arbitrate is that of the parties. As with any other form of ADR, arbitration must be a voluntary process. As a result, if either party objects for any reason, the matter will not be referred to binding arbitration. Even if both parties consent to binding arbitration, however, the Assistant Administrator may decline to refer the amount of the civil penalty to arbitration if he or she determines that it is one of the cases set forth in the Response to Issue 1, above, that FMCSA will not agree to arbitrate. The Assistant Administrator will issue an Order on Binding Arbitration indicating that a matter will or will not be referred to binding arbitration.

In accordance with 49 CFR 386.14(b)(3), a respondent may seek binding arbitration as part of its reply to a Notice of Claim. The Field Administrator in the service center in which the case resides will consent or object to the request for binding arbitration. If the Field Administrator objects, the matter will not be referred to binding arbitration; if the Field Administrator consents, the Assistant Administrator will decide whether the case will be referred to binding arbitration. Referral is contingent upon the respondent's admission of liability that the violation or violations occurred as charged.

Issue 3: Who will have authority to authorize arbitration?

Response: The Assistant Administrator will decide which cases are appropriate for ADR. Again, this class of cases will include only those that involve a monetary dispute and/or the time in which to pay a civil penalty, and do not fall within the category of cases excluded under Response 1, above. The Assistant Administrator has the discretion to delegate this authority to the FMCSA Adjudications Counsel.

Issue 4: Who has the authority to enter into settlement for FMCSA? May this authority be delegated?

Response: The Field Administrator has the authority to settle a case for FMCSA. This authority may be delegated to the Enforcement Program Manager.

Issue 5: How will a cap on the award be established?

Response: The maximum arbitration award will be set at the civil penalty amount assessed in the Notice of Claim, or amended Notice of Claim, if one is issued.

Issue 6: Is there a limitation on the length of time for a payment plan, if the arbitrator orders a payment plan?

Response: The maximum period that the Arbitrator may permit for a payment plan is 60 months from the date of the issuance of the Award.

Issue 7: Who will negotiate the rules and selection of the arbitrator?

Response: The parties must mutually agree upon the arbitrator and will have several options from which to choose, including: (1) Civilian Board of Contract Appeals Judges or representatives from other government agencies who have been trained in arbitration; (2) Uncompensated Neutrals from local communities; and (3) Compensated Neutrals from outside the government, whose costs are to be shared by agreement of the parties. For FMCSA, the decision regarding selection of the arbitrator will be that of the Field Administrator. The parties will establish the procedural rules that will govern any binding arbitration, with input from the selected arbitrator, and include the rules in the Arbitration Agreement.

Issue 8: Who will draft the Arbitration Agreement?

Response: The parties will draft the Arbitration Agreement, with substantive input from the selected arbitrator. A sample Arbitration Agreement is included in Appendix A.

Issue 9: How can FMCSA encourage the efficiency of the arbitration process?

Response: Only single arbitrators (rather than panels of arbitrators) will handle these cases. To ensure maximum efficiency of the arbitration process, subject to the consent and cooperation of the carrier, FMCSA will encourage:

A. The resolution of the controversy by means of document review or by arbitration via telephone conference in appropriate cases, with the consent of the carrier.

B. The arbitrator to establish reasonable deadlines for any hearing and rendering of an award. These timeframes will be incorporated into the Arbitration Agreement.

Issue 10: What is the arbitrator's role?

Response: Consistent with the ADRA, the arbitrator will have the authority to:

- Regulate the course and conduct of arbitration hearings;
- Administer oaths;
- Compel attendance of witnesses and production of evidence, to the

extent that the agency is authorized to do so by law;

• Issue awards.

The parties, as part of their Arbitration Agreement, may include any specific additional powers they wish the arbitrator to have and provide the arbitrator broad discretion in terms of efficient case management.

Issue 11: Will FMCSA permit the use of a panel of arbitrators in some circumstances?

Response: Because of the costs of a panel of arbitrators and the lack of complexity in these cases, FMCSA will not agree to a panel of arbitrators.

Issue 12: What selection criteria will be considered in choosing an arbitrator?

Response: The primary criteria for selecting an arbitrator will be: (1) Overall reputation of the arbitrator in terms of competence, integrity, and impartiality; (2) availability of the arbitrator during the period most convenient for the parties; (3) relative cost; (4) the absence of any actual or potential conflict of interest; and (5) geographic proximity of the proposed arbitrator to the parties and to witnesses if the Arbitration Agreement calls for an in-person hearing.

Issue 13: Will FMCSA agree to allow non-attorneys to represent a party, or for a party to appear *pro se* at the arbitration?

Response: Yes. The Rules of Practice for Motor Carrier, Intermodal Equipment Provider, Broker, Freight Forwarder, and Hazardous Materials Proceedings, 49 CFR part 386, are designed to be readily accessible to small business enterprises and other entities. Carriers often respond to notices of claim without assistance of any counsel. Before approving any Arbitration Agreement entered into by an unrepresented carrier, the arbitrator shall require such carrier to execute a statement acknowledging the risks and limitations inherent in any arbitration.

Issue 14: What should an Arbitration Agreement include?

Response: The Agreement should include the following:

1. The names of the parties.

2. The issues being submitted to binding arbitration.

3. The maximum award that the arbitrator may direct.

4. Any other conditions limiting the range of possible outcomes, including, but not limited to, any statutory minimum for violations, such as the statutory minimum for violations of the Hazardous Materials Regulations, as set forth at 49 U.S.C. § 5123(a).

5. The scope of the arbitration. This will limit time and cost and give the arbitrator power to be a ''case manager.'' A sample case management provision might read:

''The Arbitrator is expected to assume control of the process and to schedule all events as expeditiously as possible, to ensure that an award is issued no later than ____ days from the date of this Agreement. The penalty will be due to FMCSA thirty (30) days after service of the Arbitration Award by the Arbitrator unless a payment plan is ordered by the Arbitrator.''

6. References to all provisions of the 49 CFR 386 rules regarding discovery and the conduct of hearings that the parties may wish to apply to the arbitration process.

7. The name of the arbitrator, the amount of compensation (if any) and how it will be paid. (Note: No Agreement shall provide for deposits in an escrow account to pay for expenses of the proceeding in advance of expenses being incurred.)

8. The date the arbitration will begin.

9. The types of remedies available.

10. A confidentiality provision referring to the ADRA and stating that neither the Arbitration Agreement nor the arbitration award will be considered confidential.

11. The bases for appeal.

12. A statement that the arbitration hearing is open only to parties, their representatives, and the arbitrator and that the hearing is not a public forum.

13. A statement that the arbitrator's decision will be issued in writing, and will state the factual and legal bases for, and the amount of, the penalty awarded by the arbitrator.

14. A statement that the carrier will have thirty (30) days from the date of service of the award to pay the amount awarded unless the arbitrator orders a payment plan.

15. A statement that the arbitration award is final and has the same force and effect as any final agency order and that the failure to pay the determined award triggers the same Agency remedies as would the failure to pay a civil penalty award entered by the Assistant Administrator.

A Sample Arbitration Agreement is included in Appendix A.

Issue 15: How will FMCSA pay the arbitrator?

Response: The ADRA allows an agency to use, with or without reimbursement, the services and facilities of other Federal agencies, State, local and tribal governments, public and private organizations and agencies, and individuals, with the consent of such agencies, organizations, and individuals, and without regard to the provisions of 31 U.S.C. § 1342 (regarding the acceptance of voluntary services). *See* 5 U.S.C. § 583. In addition, the ADRA permits selection of all ADR neutrals, including arbitrators, to be done non-competitively. *See* 41 U.S.C. § 253(c)(3). FMCSA and the carrier must agree on the selection of the arbitrator.

FMCSA uses three categories of potential arbitrators: (1) Judges from the United States Civilian Board of Contract Appeals (CBCA) or representatives from other government agencies who have been trained in arbitration; (2) Uncompensated Neutrals from local communities; and (3) Compensated Neutrals from outside the government, whose costs are to be shared by agreement of the parties. If the parties cannot agree on the no-cost option of either a CBCA judge or an Uncompensated Neutral, the parties must agree in advance to share any arbitrator fees and costs, the costs of any transcripts, or other costs, all of which will be paid after the award is issued. FMCSA will not escrow funds or pay in advance for any such costs.

Issue 16: Is FMCSA willing to use ''administered arbitration?''

Response: No. Because of the cost implications, FMCSA will not agree to ''administered arbitration,'' which is arbitration administered by an outside ADR organization.

Issue 17: What must the arbitration award include?

Response: The arbitration award need not be in the form of formal findings of fact and conclusions of law, but must be in writing and at least provide in summary form the monetary amount of the award, if any, and the factual and legal basis for the arbitrator's decision. The award will be subject to the amount set forth in the Notice of Claim as the maximum, to statutory minimums, if any, and to any other limitations agreed upon by the parties.

Arbitration awards are not confidential documents. Awards shall be entered into the FMCSA docket in regulations.gov for the case. Additionally, awards will be posted on FMCSA's Chief Counsel Web site.

Issue 18: Will FMCSA allow arbitration on the documents only, without a hearing?

Response: While the parties to the arbitration are entitled to be heard, to present evidence, and to cross-examine witnesses appearing at a hearing, FMCSA encourages arbitration on the documents only without a hearing. This would have the advantage of saving time and money, and avoiding scheduling conflicts. The Arbitration Agreement, however, should allow the parties to request a hearing either in-person or through telephonic, video-

conference, or computer-based means. The Arbitration Agreement should also allow the arbitrator discretion to call for an in-person hearing should the arbitrator determine that credibility may be a factor in the proceeding. The arbitrator may also conduct, with the consent of the parties, all or part of a hearing by telephone, video conferencing, or computer, so long as each party has an equal opportunity to participate.

Issue 19: May an arbitration award be used as a precedent in any other proceeding?

Response: No. The arbitration award may not be used as precedent consistent with 5 U.S.C. § 580(d). Nonetheless, by entering into arbitration, the carrier has admitted, or the Assistant Administrator has found that the carrier has admitted, violating the regulation(s) as charged in the Notice of Claim. These violation(s) may be considered in future enforcement actions by FMCSA.

Appendix A

Sample Agreement to Submit to Binding Arbitration

Section One—Parties and Controversy

The Federal Motor Carrier Safety Administration and _____ (''Carrier'') (collectively the ''Parties'') voluntarily agree to submit the following controversy arising from violations of the Federal Motor Carrier Safety Regulations, the Hazardous Materials Regulations, and/or the Federal Motor Carrier Commercial Regulations to binding arbitration: (briefly describe the controversy).

Section Two—Assignment of Arbitrator

We agree upon _____ as the Arbitrator.

Section Three—Issues of Arbitration

We agree that the Arbitration shall be limited to the following issues of fact and law: (Set forth each issue with specificity including the question of whether a payment plan is appropriate).

Section Four—Costs of Arbitration

____ We agree to pay the Arbitrator a fee of $ ____ (''the Fee'') for services as an arbitrator. The Fee is based on the issues specified in Section Three above.

We agree to reimburse the Arbitrator for all reasonable out-of-pocket expenses that the Arbitrator may incur for the arbitration. These expenses include, but are not limited to: Travel, lodging, and meals (consistent with Federal *per diem* standards), long-distance charges, printing and copying, postage and courier fees. There is no cost if the parties choose a Civilian Board of Contract Appeals Judge or an Uncompensated Neutral as the arbitrator.

Section Five—Minimum and Maximum Award

We agree that the maximum award shall be (the amount demanded in the Notice of Claim). This amount is a total of the penalties for each of the individual violations as follows:

We also agree that the minimum award for violations will be those set forth in the statute or regulations.

Section Six—Management of the Proceeding

We further agree that the arbitration proceeding will be conducted in accordance with procedures established in 49 CFR part 386 for hearings. Additional rules and procedures for the arbitration may be negotiated and agreed upon by the Arbitrator and the Parties at any time during the arbitration process.

We further agree that we will faithfully observe this Agreement and the applicable procedural rules and we will abide by any award rendered by the Arbitrator.

_____ (''Carrier'') will pay to the Field Administrator the award determined by the Arbitrator.

We agree that the Arbitrator will assume control of the process and will schedule all events as expeditiously as possible, to ensure that an award is issued no later than ____ days from the date of this Agreement. The penalty, if any, will be due to FMCSA 30 days after service of the Arbitration Award by the Arbitrator unless the Arbitrator orders a payment plan.

Consistent with the Rules of Practice for Motor Carrier, Intermodal Equipment Provider, Broker, Freight Forwarder, and Hazardous Materials Proceedings, 49 CFR part 386, Carriers may be represented by a representative of their choice, including non-lawyers. Representatives and FMCSA counsel shall be responsive to the direction provided by the Arbitrator.

We understand that neither party shall initiate or participate in *ex parte* communication with the Arbitrator relevant to the merits of the proceeding, unless the parties agree. If a party or its representative engages in an unauthorized *ex parte* communication, the Arbitrator may resolve the case against the offending party. Before taking that action, however, the Arbitrator must allow the offending party to show cause why the issue in controversy should not be resolved against it for improper conduct.

Section Seven—Arbitrator's Award

We agree that the Arbitrator's decision will be issued in writing and will state the legal and factual bases and amount of the penalty awarded by the Arbitrator. We further agree that the arbitration award is final and has the same force and effect as any final agency order. We understand that there is no appeal to the Assistant Administrator of the Arbitrator's award. Thus, failure to pay the determined award triggers the same Agency remedies as would the failure to pay a civil penalty award entered by the Assistant Administrator.

Section Eight—Confidentiality of the Proceeding

We agree that the arbitration proceeding is not a public forum and will be restricted to the Parties, their representatives, and the Arbitrator. We acknowledge and agree that 5 U.S.C. 574 controls the confidentiality of the proceeding, and that neither the Arbitration Agreement nor the arbitration award may be considered confidential.

Section Nine—Judicial Review

____ The award shall be reviewable only under provisions of 5 U.S.C. § 581 and 9 U.S.C. §§ 9–13.

Section Ten—Governing Law

____ This Agreement is entered into consistent with 5 U.S.C. § 571 *et seq.,* and we agree that Federal law shall govern this Arbitration. The Arbitrator shall apply relevant statutory and regulatory requirements, legal precedents, and policy directives.

[FR Doc. 2012–14087 Filed 6–8–12; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 101202599–2122–02]

RIN 0648–BA52

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery Off the Southern Atlantic States; Amendment 24

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement Amendment 24 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP), as prepared by the South Atlantic Fishery Management Council (Council). This final rule establishes red grouper commercial and recreational sector annual catch limits (ACLs); establishes red grouper sector accountability measures (AMs); and removes the combined gag, black grouper, and red grouper commercial quota, and commercial and recreational sector ACLs and AMs. The intent of this final rule is to specify ACLs and AMs for red grouper while maintaining catch levels consistent with achieving optimum yield (OY) for the red grouper resource. Additionally, Amendment 24 implements a rebuilding plan for red grouper in the South Atlantic.

DATES: This rule is effective July 11, 2012.

ADDRESSES: Electronic copies of Amendment 24, which includes an environmental assessment, an initial regulatory flexibility analysis (IRFA), and a regulatory impact review, may be