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FEDERAL MARITIME COMMISSION

DOCKET NO. 98-28

LICENSING, FINANCIAL RESPONSIBILITY REQUIREMENTS, AND GENERAL DUTIES FOR OCEAN TRANSPORTATION INTERMEDIARIES - PETITIONS OF THE AMERICAN SURETY ASSOCIATION AND KEMPER NATIONAL INSURANCE COMPANIES FOR RECONSIDERATION OF THE FINAL RULE

ORDER DENYING PETITION IN PART AND GRANTING PETITION IN PART

On March 29, 1999, the American Surety Association ("ASA") and Kemper National Insurance Companies ("Kemper") (jointly "Petitioners") filed Petitions for Reconsideration of the Final Rule in Docket No. 98-28, Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries. ASA is an association of surety companies and agents which provide insurance products and services, and Kemper is a provider of ocean freight forwarder and non-vessel-operating common carrier ("NVOCC") bonds through its wholly owned subsidiary, American Motorists Insurance Company.

On March 8, 1999, the Federal Maritime Commission published a final rule and interim final rule to add new regulations at 46 CFR part 515 to implement changes made by the Ocean Shipping Reform Act of 1998 ("OSRA"), Pub. L. 105-258, 112 Stat. 1902, to the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. § 1701 et seq., relating

to ocean freight forwarders and NVOCCs as ocean transportation intermediaries ("OTIs"). 64 Fed. Reg. 11156-11183. Pursuant to Rules 261 and 51 of the Commission's Rules of Practice and Procedure, 46 CFR §§ 502.261 and 502.51, Petitioners are seeking reconsideration of the procedure for collecting on a court judgment obtained against an OTI, the "consents to be sued" language in Bond Form FMC-48, and the definitions of "freight forwarding services," "NVOCC services" and "transportation-related activities." A reply to the Petitions was filed by the Ocean Carrier Working Group Agreement ("OCWG"). The final rule has since gone into effect on May 1, 1999. Errata to the Petitions were filed by ASA and Kemper on May 17, 1999 and May 19, 1999, respectively.

POSITIONS OF THE PARTIES

A. Petitioners¹

1. Section 515.23(b)

Petitioners object to § 515.23(b)(2), which sets forth the procedures for collecting on a court judgment obtained against an OTI after attempts to settle the claim have failed to produce a resolution. They argue that the rule does not adequately protect sureties from default judgments. Specifically, they contend that the language of section 19(b)(3) of OSRA, which states that the Commission shall promulgate regulations to protect "the interests

¹ Petitioners set forth essentially the same arguments; therefore, we will address them together, and delineate when their arguments diverge.

of claimants, ocean transportation intermediaries, and surety companies with respect to the process of pursuing claims against ocean transportation intermediary bonds, insurance or sureties through court judgments," was meant to protect sureties from default judgments, i.e., judgments that are not defended.

Petitioners argue that, in order to protect the financial responsibility providers, the regulations should require claimants to notify the financial responsibility provider of any lawsuit commenced against its principal OTI. Kemper contends that such a requirement is appropriate because a "surety would have the right to raise the defenses of the bond principal in any action, especially pursuant to its contractual relationship with that bond principal in the event the bond principal fails to respond to notice of the claim." Kemper Petition at 8. ASA points out that the Commission's failure to include such a requirement denies the financial responsibility provider the ability to intervene in a lawsuit as it is happening, "which increases the risks to sureties, which increases potential costs to sureties, [and] which ultimately increases costs to the OTI." ASA Petition at 13. Kemper agrees, arguing that any attempt to open a default judgment in order to contest it would place a substantial administrative burden on a financial responsibility provider, a burden which ultimately would be passed on to the OTI. Kemper even suggests that the Commission make such a notice requirement a condition precedent to the

financial responsibility provider's liability under the instrument of financial responsibility. Such a requirement, Petitioners assert, would afford the financial responsibility provider the opportunity to be heard and contest any invalid claims in court, thus protecting itself from a default judgment.

Kemper further argues that the Commission's rationale in the supplementary information, that requiring notice of a complaint is "onerous and unenforceable," is incorrect. Kemper Petition at 9. The cost of supplying notice of a complaint is neither expensive nor burdensome, Kemper contends, and a notice requirement is "no more unenforceable than the FMC's requirement that a claimant shall provide written notice of the claim to the OTI and its surety by certified mail, return receipt requested." Kemper Petition at 9.

Furthermore, ASA argues that the Commission has failed to provide financial responsibility providers adequate protection from the running of the statute of limitations to challenge a default judgment obtained against an OTI. The lack of a timely notice requirement, ASA contends, denies the financial responsibility provider the ability to contest a default judgment that is obtained by a claimant who does not notify the financial responsibility provider of the default judgment until after the statute of limitations to challenge a default judgment has run. The financial responsibility provider, ASA asserts, "may be foreclosed from pursuing any process to vacate that default judgment." ASA

Petition at 5.

Petitioners also specifically object to the second sentence of § 515.23(b)(2),² arguing that it is inconsistent with a floor amendment by Senator Hutchison which they contend states that "any claim based upon a judgment shall be payable subject to the limitation that the damages claimed arise from the transportation-related activities of the insured ocean transportation intermediary as defined by the Commission." ASA Petition at 5; Kemper Petition at 12. They assert that Congress intended for this language to protect the sureties from default judgments by allowing them to review the claims underlying such judgments to determine if they are transportation-related. Petitioners argue, however, that the rule as written prevents the financial responsibility providers from doing so because § 515.23(b)(2) prohibits the financial responsibility providers from "requiring further evidence related to the validity of the claim."

In addition, Petitioners assert that because Senator Hutchison's floor amendment was added to OSRA after the issuance of the Senate Report, S. Rep. No. 105-61, 105th Cong., 1st Sess.

² That sentence reads:

"The financial responsibility provider shall pay such judgment for damages only to the extent they arise from the transportation-related activities of the ocean transportation intermediary ordinarily within 30 days, without requiring further evidence related to the validity of the claim; it may, however, inquire into the extent to which the judgment for damages arises from the ocean transportation intermediary's transportation-related activities."

(1997) ("Senate Report"), it thus modifies certain statements of the Senate Report. Specifically, they contend that the language in the Senate Report limiting a financial responsibility provider's ability to review the "validity" of a claim underlying a judgment is superseded by the Hutchison floor amendment and, therefore, is improperly relied on by the Commission.

Petitioners further assert that reading OSRA to allow financial responsibility providers the opportunity to review the validity of the claims underlying a judgment is consistent with the process afforded financial responsibility providers under section 19(b)(2)(B) of OSRA. That section, they aver, provides the financial responsibility provider the ability to deem a claim valid after the OTI has failed to respond to a claim. Petitioners thus assert that Congress must have intended for the financial responsibility provider to have the right to deem a claim underlying a judgment valid as well. A different reading, Petitioners argue, would negate the requirement that the damages claimed arise from the transportation-related activities of the OTI. As ASA contends, the financial responsibility provider purportedly could not "determine if the 'claim based upon a judgment' and the 'damages claimed' are subject to payment or fall within the scope of the bond if [it] is not able to review the 'validity' of the claim or the 'damages claimed.'" ASA Petition at 7; accord Kemper Petition at 12.

Petitioners maintain that the "limited" review of a judgment afforded by the rule, i.e., "to the extent to which the judgment for damages arises from the [OTI's] transportation-related activities," and for finality, does not sufficiently protect the financial responsibility providers from default judgments. By denying the ability to review default judgments, Petitioners contend, the Commission is in effect recognizing default judgments as binding and "conclusive on the merits," in favor of the minority position delineated in Restatement (Third) of Suretyship and Guaranty. ASA Petition at 8; Kemper Petition at 13. ASA further avers that the Commission misunderstood section 67(c) of the Restatement (Third) of Suretyship and Guaranty regarding a surety's common law protections from default judgments when it stated in the supplementary information that "'OSRA's reliance on court judgments as determinative does not envision that a financial responsibility provider decide to proclaim a judgment invalid.'" [sic]³ ASA Petition at 8 (quoting 64 Fed. Reg. at 11161). ASA argues that a surety does not "proclaim" a judgment invalid, but rather reviews the facts underlying a default judgment and applies them to the applicable law that would have been applied by the court but for

³ ASA omitted part of the Commission's statement, which actually reads: "OSRA's reliance on court judgments as determinative does not envision that a financial reswonsibility wrovider's obligations may be averted should the financial responsibility provider decide to proclaim a judgment invalid." 64 Fed. Reg. at 11161 (emphasis added).

the default of the OTI, and then "determines whether a claim is valid and takes appropriate legal action, if necessary." ASA Petition at 9. The invalidity of claims, ASA contends, may be based on the fact that the default judgment did not consider any limitations of liability, that the damages fell outside the scope of the bond, or that the damages were not caused by the OTI's activities.

Moreover, ASA argues that the Commission's position on default judgments will have the greatest negative impact on OTIs. The Commission, ASA asserts, states that financial responsibility providers can protect themselves by refusing to underwrite a bond for an OTI who has an unstable background with respect to default judgments. ASA contends, however, that the Commission incorrectly assumes that default judgments are only a result of financial instability, lack of experience, or the unscrupulous activities of an OTI. This is unfair to OTIs, ASA avers, who default because they were improperly served, overlooked or lost the summons and complaint, or "forgot" to timely respond to a summons and complaint. Because the Commission finds such default judgments binding and conclusive, ASA asserts, financial responsibility providers will not be able to review those judgments, and as a result will have to charge prohibitive bond premiums to OTIs to cover such losses.

Finally, ASA argues that § 515.23(b) should require claimants

to timely submit all pertinent documents to financial responsibility providers and cooperate in good faith during the 90 day claim review period and the 30 day judgment review period.⁴

⁴ ASA proposes the following language:

(b) Payment pursuant to a claim. (1) If a party does not file a complaint with the Commission pursuant to section 11 of the Act, but otherwise seeks to pursue a claim against an ocean transportation intermediary bond, insurance, surety, or other financial responsibility provider for damages arising from transportation-related activities, it shall attempt to resolve its claims with the financial responsibility provider prior to seeking payment on any judgment for damages obtained. As a condition precedent to seeking payment under this section, a claimant must send a copy of its claim against the ocean transportation intermediary, along with supporting documentation, to the financial responsibility provider by certified mail, return receipt requested, at the same time as, or by no later than ten (10) days after, it files or is required to file its claim with the ocean transportation intermediary. If already filed, the documents submitted with the claim shall include a copy of the complaint filed in any action to enforce the claim; if filed after the claim is submitted to the surety, the claimant shall provide a copy of the complaint at the same time that it is filed. Thereafter, the claimant shall provide to the financial responsibility provider, in a timely fashion, such other documents or information as may be reasonably requested by the financial responsibility provider for the purpose of evaluating the claim or protecting its rights in any legal action to enforce the claim. The bond, insurance, or other surety instrument shall be available to pay such claim if:

(i) the ocean transportation intermediary consents to payment, subject to review and approval by the financial responsibility provider; or

(ii) the ocean transportation intermediary fails to respond within 45 days from the date of notice of the claim to address the validity of the claim, and the financial responsibility provider deems the claim valid based on documentary evidence provided by the claimant at the request of the financial responsibility provider within 30 days of the financial responsibility provider's request therefor.

Kemper proposes the following language:

2. "Consents to be sued" language in Bond Form FMC-48

Petitioners oppose the inclusion of language in Bond Form FMC-48, Appendix A to subpart C of the rule, that states that the surety "consents to be sued directly in respect of any bona fide claim." This language, ASA argues, in conjunction with the Commission's refusal to require claimants to provide notice to financial responsibility providers of a lawsuit commenced against an OTI, denies the sureties "effective process with respect to bond

(b) Payment pursuant to a claim. (1) If a party does not file a Complaint with the FMC pursuant to section 1 [sic] of the Act, but otherwise seeks to pursue a claim against an ocean transportation intermediary bond, insurance, surety or other financial responsibility provider prior to seeking payment on any judgment for damages obtained. Prior to seeking wayment under this section, a claimant must send a copy of its claim against the ocean transwortation intermediary to the financial reswonsibility provider by certified mail, return receipt requested, at the same time as, or by no later than ten days after, it files or is required to file a claim with the ocean transwortation provider, along with documentary evidence of its claim and a copy of any comwlnaint filed prior to the sending of the claim to the suretv. The claimant shall thereafter send to the surety, in a timely fashion, a copy of any comwlnaint filed wrrior to the sending of the claim to the suretv. The claimant shall thereafter send to the suretv, in a timely fashion, a copy of any complaint filed after notification of the claim any other documents of information which may reasonably be requested by the suretv. The bond, insurance, or other surety instrument shall be available to pay such claim if:

(i) the ocean transportation intermediary consents to payment, subject to review and approval by the financial responsibility provider; or

(ii) the ocean transportation intermediary fails to respond within 45 days from the date of notice of the claim to address the validity of the claim, and the financial responsibility provider deems the claim valid.

claims pursued through court judgments."⁵ ASA Petition at 12-13.

ASA further contends that

[s]uch a rule not only encourages unnecessary litigation on claims denied in good faith (because all claimants think they have a bona fide claim), but also ignores pre-existing administrative process, and denies a surety the ability to deny, short of litigation, a claim that, for example, may be fraudulent, contains a mistake or error, or is based on a default judgment that may be invalid or awards damages that are beyond the scope of the bond.

ASA Petition at 13. Kemper agrees, arguing that the language will only invite a claimant to prematurely sue the surety notwithstanding OSRA's "alternative dispute resolution" procedures.⁶

Petitioners further maintain that the Commission's justification for including the "consents to be sued" language is arbitrary and capricious. Kemper argues that the "consents to be sued" language does not appear in OSRA, but was taken merely from the language of the guaranty and insurance forms. However, Kemper asserts, the "relationships and commitments" made under a surety agreement are distinct and separate from those made under an insurance agreement or guaranty, which Kemper contends the

⁵ ASA asserts that "[a]ll sureties provide in their contracts with bond principals a provision setting forth the surety's right to defend, compromise, settle, or defend [sic] any claim or legal action." ASA Petition at 13.

⁶ Kemper notes that although the current regulations and bond form state that a claim is not ripe until it is predicated on a judgment or order for reparations, a claimant unfamiliar with the Commission's regulations will prematurely sue the surety, resulting in additional administrative and judicial costs.

Commission acknowledged in its rulemaking.

Moreover, Petitioners aver that such language conflicts with the Department of Treasury ("Treasury") procedures, at 31 CFR §§ 223.18 - 223.22, for reporting sureties who fail to honor their bonds. ASA disagrees with the Commission's position that the language does not conflict with Treasury regulations "since federal agencies, not private claimants, can only make a complaint to the [Treasury]." ASA Petition at 14 (citing 64 Fed. Reg. at 11165). The Commission misinterpreted the regulations, ASA argues; it claims that the Commission "fail[ed] to recognize that the relevant Treasury rules provide that an agency may make a complaint on the basis of complaints it receives from private claimants at the Commission," and therefore private claimants can avail themselves of the Treasury procedures. ASA Petition at 14; accord Kemper Petition at 5. Thus, ASA contends, retaining the "consents to be sued" language would undermine the Treasury procedures.⁷

Petitioners therefore request that the Commission delete the "consents to be sued" language from Bond Form FMC-48. However, ASA

⁷ ASA also maintains that the Commission contradicts itself by stating, in reference to § 515.31(d), that it is sufficient notice to have the Federal Register publish quarterly the Commission's list of those persons whose OTI licenses have been revoked, while concurrently stating that notice of the claims procedure in § 515.23 by publication in the Federal Register is inadequate and thus "the Commission excuses 'claimants who are unfamiliar with the instant Commission regulations at the time they seek judicial recourse.'" ASA Petition at 15 & n.8 (quoting 64 Fed. Reg. at 11161).

requests in the alternative that, should the Commission decline to remove such language, it should at the very least require a claimant to notify the surety of any lawsuit commenced against its bond principal.

3. The definitions of "freight forwarding services," "NVOCC services" and "transportation-related activities"

ASA commends the Commission's adoption of separate definitions of the terms "freight forwarding services," "NVOCC services," and "transportation-related activities" and separate instruments of financial responsibility for freight forwarders and NVOCCs in the final rule; however, ASA argues that the Commission has not sufficiently clarified that non-freight forwarding services and non-NVOCC services will not be covered by the freight forwarder's or NVOCC's financial responsibility, respectively. The rule, ASA contends, exposes the financial responsibility providers to liability for activities that are not "necessary or customary" OTI services. Since the list of transportation-related activities in § 515.2(w), freight forwarding services in § 515.2(i), and NVOCC services in § 515.2(l) "include, but are not limited to" the services listed, ASA argues that when those sections are read together as directed by the Commission, a freight forwarder's or an NVOCC's liability is not limited only to freight forwarding services or NVOCC services respectively. In addition, ASA contends that the use of such language in all three definitions is redundant. ASA requests that the Commission remove the offending

language and rewrite § 515.2(w) as follows:

Transportation-related activities which are covered by the financial responsibility obtained pursuant to this part include, to the extent involved in the foreign commerce of the United States, any activity performed by an ocean transportation intermediary that is necessary or customary in the provision of its transportation services to a customer as those services are defined for forwarders in § 515.2(i) and for NVOCCs in § 515.2(l).

ASA Petition at 19-20.

4. Payment of claims on final judgments

Although the Commission stated in the supplementary information to the final rule that only final judgments, i.e., judgments after appeal, are subject to payment against financial responsibility, ASA asserts that the Commission failed to add the word "final" in § 515.23(b)(2) as it did in the financial responsibility forms. ASA contends that because the Commission intended to require that payment be made only on final judgments, the term "final" should be added to § 515.23(b)(2) to prevent confusion.

B. OCWG

1. Section 515.23(b)

OCWG urges the Commission to decline to adopt Petitioners' proposed changes to § 515.23(b). OCWG argues that Petitioners' suggested language to amend § 515.23(b) would make it more difficult for claimants to collect on judgments for damages, contravening the purpose of the financial responsibility requirement to protect shippers and carriers who engage the

services of an OTI.

In fact, OCWG contends that the final rule "materially prejudice[s] claimants by putting them to an extraordinary expense to recover damages incurred by them." OCWG at 3. OCWG argues that the Commission should adopt a rule that would eliminate the requirement that the claimant attempt to settle the claim with the OTI and financial responsibility provider prior to seeking payment, and rather, simply require a claimant to name the financial responsibility provider as a defendant in any lawsuit it commences against an OTI. The financial responsibility provider, OCWG avers, would therefore be able to defend the claim in the event the OTI fails to do so. OCWG thus requests that the Commission adopt this language to amend § 515,23(b):

If a party does not file a complaint with the Commission pursuant to section 11 of the Act, but otherwise seeks to pursue a claim against an ocean transportation intermediary bond, insurance or other surety for damages arising from its transportation related activities, it may commence suit before a court of competent jurisdiction, naming as parties both the financial responsibility provider and the ocean transportation intermediary.

OCWG at 3.

2. "Consents to be sued language" in Bond Form FMC-48

OCWG opposes Petitioners' request to remove the "consents to be sued" language from Bond Form FMC-48. The Commission, OCWG argues, fully considered and rejected these arguments by Petitioners in the proposed and final rule, and Petitioners fail to

advance a new argument or identify any mistake of law or fact which would warrant such removal. Therefore, OCWG asserts, the request must be denied.

DISCUSSION

A. Standards of law

Petitioners filed their Petitions for Reconsideration pursuant to Rule 261 of the Commission's Rules of Practice and Procedure, 46 CFR § 502.261.⁸ Sections § 502.261(a)(1) and (a)(3) are plainly inapposite to Petitioners' arguments because they do not contend that there has been a change in material fact or in applicable law since the issuance of the final rule, nor do they address a finding, conclusion or other matter upon which they did not have the opportunity to comment or which was not addressed in the comments of any party. Petitioners' arguments can only be based on § 502.261(a)(2), which requires Petitioners to prove that there is a substantive error in material fact in the final rule. We will

⁸ That section reads in part:

(a) . . . A petition will be subject to summary rejection unless it:

(1) Specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order;

(2) Identifies a substantive error in material fact contained in the decision or order; or

(3) Addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party. Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received.

address Petitioners' arguments under this standard.

Petitioners request, in the alternative, that if the Commission finds that their Petitions would have been more appropriately filed under Rule 51 of the Commission's Rules of Practice and Procedure, "Initiation of procedure to issue, amend, or repeal a rule," 46 CFR § 502.51,⁹ then the Commission should consider- their Petitions filed as such and evaluate them accordingly. Rule 51 necessarily assumes that the rule upon which the Petition is filed is in effect. ASA and Kemper filed their Petitions on March 29, 1999, but the rule did not go into effect until May 1, 1999. As a matter of course, the Commission could reject the Petitions because the issue was not ripe for review at the time the Petitions were filed. However, since the rule is now in effect we will assume, arauendo, that the issue is ripe for review and consider the Petitions under Rule 51 as seeking to amend a valid rule.

B. The errata

As an initial matter, we will address ASA and Kemper's errata to their Petitions. Petitioners filed virtually identical errata,

⁹ This section reads in part:

Any interested party may file with the Commission a petition for the issuance, amendment, or repeal of a rule designed to implement, interpret, or prescribe law, policy, organization, procedure, or practice requirements of the Commission. The petition shall set forth the interest of the petitioner and the nature of the relief desired, shall include any facts, views, arguments, and data deemed relevant by petitioner, and shall be verified.

almost two months after they initially filed their Petitions, to correct a citation for certain language they rely on throughout their Petitions. Kemper and ASA cited the following language in their Petitions as being from section 19(b)(2)(C) of OSRA:

The Commission shall prescribe regulations for the purpose of protecting the interests of claimants, ocean transportation intermediaries, and surety companies with respect to the process of pursuing claims against ocean transportation intermediary bonds, insurance or sureties through court judgments. Any claim based upon a judgment shall be payable subject to the limitation that the damages' claimed arise from the transportation-related activities of the insured ocean transportation intermediary, as defined by the Commission.

See ASA Petition at 6 n.4; Kemper Petition at 11 (emphasis added).

In their errata they claim that this language was actually from Senator Hutchison's March 4, 1998 floor amendment' to section 19(b)(2)(C), which they attached as an exhibit. ASA and Kemper argue in their Petitions that this is relevant because this amendment, which is significantly different from the original version of the bill, was made after the Senate Report was issued, and therefore the Commission incorrectly relied on the Senate Report in drafting the rule. Petitioners assert that this language was then further amended, resulting in the final version of OSRA as section 19(b)(3), which they argue only differs in the second sentence as follows:

The Commission shall prescribe regulations for the purpose of protecting the interests of claimants, ocean transportation intermediaries, and surety companies with respect to the process of pursuing claims against ocean transportation intermediary bonds, insurance or sureties

through court judgments. The regulations shall provide that a judgment for monetary damages may not be enforced except to the extent that the damages claimed arise from the transportation-related activities of the insured ocean transportation intermediary, as defined by the Commission. (emphasis added).

While Petitioners are correct that the amended language is the final version of section 19(b)(3) adopted by Congress, their claim that their originally offered language was the March 4 floor amendment of section 19(b)(2)(C) by Senator Hutchison, is erroneous. The language they rely on was never presented as part of the bill or as an amendment at any stage of the legislative process.¹⁰ The floor amendment, number 1689, presented by Senator Hutchison on March 4, 1998, was ultimately passed by the Senate on April 21, 1998, and is the final version of section 19(b)(3) of OSRA. Therefore, inasmuch as Petitioners' arguments are based on what they mistakenly believe is the floor amendment, but is actually draft language, they are without merit. This issue will be further addressed, infra, as such arguments are considered.

C. The merits

With the passage of OSRA on October 14, 1998, the Commission published a notice of proposed rulemaking for, inter alia, the financial responsibility requirements of OTIs. 63 Fed. Reg. 70710-

¹⁰ The language they rely on was actually the March 4, 1998 draft redline version of the bill, as presented by the Senate Committee on Commerce, Science, and Transportation; however, such language was not incorporated into Senator Hutchison's floor amendment number 1689, or any other amendment.

70727 (December 22, 1998). The Commission received 28 comments from the industry, including from Petitioners ASA and Kemper. The Commission considered all of the comments and amended the rule in accordance with many of them, thus creating the final rule which is the basis of ASA's and Kemper's Petitions. Petitioners primarily oppose § 515.23(b) and Bond Form FMC-48, while ASA also objects to the definitions of "freight forwarding services," "NVOCC services" and "transportation-related activities."

1. Section 515.23(b)

Section 19(b)(2) of OSRA sets forth the process by which claimants may make a claim against a bond, insurance or other surety, and collect on a claim or judgment obtained, for damages arising from the transportation-related activities of an OTI. In section 19(b)(3) of OSRA, Congress also directed the Commission to establish rules to effect section 19(b)(2); the rules are to protect the interests of claimants, OTIs, and financial responsibility providers in the process of pursuing claims against an OTI's financial responsibility through court judgments, and are to provide that a "judgment for monetary damages" can be enforced only to the extent the "damages claimed" arise from the transportation-related activities of the OTI. The Senate Report supplements this directive from OSRA, by requiring the Commission to "add an alternative process for resolving claims against" an OTI's financial responsibility, to be used in addition to a

claimant's obtaining a court judgment. Senate Report at 26. The Senate Report mandates that the financial responsibility cover judgments and valid claims arising from the transportation-related activities of the OTI, and that the financial responsibility provider is expected to pay on a court judgment "without requiring further evidence of bills of lading or other documentation going to the validity, rather than the subject matter, of the claim." Id. As a result, the Commission implemented § 515.23(b):

Payment pursuant to a claim. (1) If a party does not file a complaint with the Commission pursuant to section 11 of the Act, but otherwise seeks to pursue a claim against an ocean transportation intermediary bond, insurance or other surety for damages arising from its transportation-related activities, it shall attempt to resolve its claim with the financial responsibility provider prior to seeking payment on any judgment for damages obtained. When a claimant seeks payment under this section, it simultaneously shall notify both the financial responsibility provider and the ocean transportation intermediary of the claim by certified mail, return receipt requested. The bond, insurance, or other surety may be available to pay such claim if:

(i) the ocean transportation intermediary consents to payment, subject to review by the financial responsibility provider; or

(ii) the ocean transportation intermediary fails to respond within forty-five (45) days from the date of the notice of the claim to address the validity of the claim, and the financial responsibility provider deems the claim valid.

(2) If the parties fail to reach an agreement in accordance with paragraph (b)(1) of this section within ninety (90) days of the date of the initial notification of the claim, the bond, insurance, or other surety shall be available to pay any judgment for damages obtained from an appropriate court. The financial responsibility provider shall pay such judgment for damages only to the extent they arise from the transportation-related

activities of the ocean transportation intermediary ordinarily within 30 days, without requiring further evidence related to the validity of the claim; it may, however, inquire into the extent to which the judgment for damages arises from the ocean transportation intermediary's transportation-related activities.

Petitioners contend that the Commission has failed to write regulations to correctly implement the intention of Congress, either by requiring that a claimant provide financial responsibility providers notice of any lawsuit brought against its OTI, or by allowing financial responsibility providers the ability to review the validity of the claims underlying a judgment for damages against its OTI.

Congress intended, Petitioners argue, to protect financial responsibility providers from default judgments uncontested by their OTI principals. By not requiring claimants to give notice of lawsuits to financial responsibility providers as well as OTIs, Petitioners assert that the Commission has failed to protect financial responsibility providers from the process of pursuing claims "through court judgments" as required by Congress in section 19(b)(3) of OSRA. Without notice of a lawsuit, Petitioners contend, the financial responsibility providers will not be able to intervene and defend against the actions should the OTIs fail to defend themselves. Furthermore, attempting to open a default judgment after the fact, Petitioners argue, would place an administrative burden on the financial responsibility providers that would be passed on to the OTIs. OCWG agrees that the

Commission should require a claimant to name the financial responsibility provider as a defendant in any lawsuit it brings against the OTI, but argues that such a requirement should be in lieu of the requirement that claimants attempt to settle claims with the OTI and financial responsibility provider prior to seeking payment.¹¹

We disagree with Petitioners' contention that the provision complained of violates Congress' intent to protect the interests of the financial responsibility providers. Rather, § 515.23(b) represents the statutorily mandated balancing among the interests of the claimants, OTIs, and financial responsibility providers. As the Commission explained in the final rule, it does not have the authority to place any limitations on a claimant's right to commence a lawsuit against an OTI prior to attempting to settle such a claim with the financial responsibility provider and the OTI. 64 Fed. Reg. at 11161. Not only could such a restriction prevent a claimant from filing its action within an applicable statute of limitations, but "the Commission could not provide for any recourse if the claimant failed to comply" because it "cannot nullify a valid court judgment." Id.

We further disagree with Kemper's argument that the Commission

¹¹ OCWG's request to repeal the requirement that claimants attempt to settle claims with the OTI and financial responsibility provider prior to seeking payment would contravene the statutory mandate of section 19(2)(b) of OSRA.

incorrectly found that such a notice requirement would be onerous and unenforceable. Kemper asserts that supplying notice to the financial responsibility provider is inexpensive and that a notice requirement is "no more unenforceable than the FMC's requirement that a claimant shall provide written notice of the claim to the OTI and its surety by certified mail, return receipt requested." Kemper Petition at 9. However, in describing the burden of providing notice of a lawsuit to a financial responsibility provider as "onerous," the Commission was not referring to cost, but rather to the burden of having to attempt to settle a claim before the running of the statute of limitations. Moreover, requiring notice of commencement of a lawsuit against an OTI to the financial responsibility provider is not analogous to the requirement in § 515.23(b)(1), that when a claimant seeks payment on a claim or judgment it shall notify the financial responsibility provider and the OTI by certified mail, return receipt requested. In the latter instance, the Commission is simply assuring that the notice made by a claimant in seeking payment on a claim or judgment is actual, whereas in the former instance, the Commission would be attempting to dictate what constitutes adequate notice or service of process with respect to a claimant's lawsuit and resulting judgment. This is within the jurisdiction only of the court where such a suit is filed and judgment obtained, not the Commission.

The Commission also does not have the authority to require

timely notification to the financial responsibility provider of a default judgment that has been obtained against an OTI, as ASA requests. ASA argues that without a requirement that the claimant notify the financial responsibility provider of a default judgment within a certain period of time from receipt of that judgment, the claimant can withhold notification until the statute of limitations to challenge default judgments has expired, thus barring the financial responsibility provider from "pursuing any process to vacate that default judgment." ASA Petition at 5. While the Commission would not want to encourage claimants from withholding such notification, it does not have the authority to interfere in state court procedural matters or limit a claimant's right to pursue a claim.

The Commission is charged with protecting the interests of claimants, OTIs and financial responsibility providers, not simply the OTIs and financial responsibility providers. Furthermore, it is imperative that the Commission be careful not to place oppressive burdens on the claimants, because many are shippers who are not regulated entities and would not necessarily be aware of the claim procedures in the shipping statutes or Commission regulations. The claimant may very well be oblivious even to the existence of a bond, in which case it would likely take the only expected course of action, i.e., suing the OTI in state court. In contrast, the sureties willingly avail themselves of the

Commission's, and Treasury's, regulations in order to participate in the Commission's financial responsibility program. If the Commission were to add a notice requirement, claimants who are unaware of the regulations and obtain a judgment without notifying the financial responsibility provider would be foreclosed from collecting on a valid judgment. Congress did not intend OSRA to further hinder a claimant's ability to obtain relief. The procedure in § 515.23(b) balances the interests of the claimants, OTIs and financial responsibility providers and fully complies with OSRA.

Petitioners have not argued a mistake of fact. Furthermore, there is no evidence that Congress intended the rules to require claimants to give notice to financial responsibility providers of any lawsuit commenced against an OTI. If financial responsibility providers have the legal ability to represent their OTI principals in court, as Petitioners suggest, then financial responsibility providers can require their OTIs to either provide them notice of any lawsuits or make them agents for service of process as part of their agreement to provide financial responsibility. While the Commission will not dictate how the financial responsibility providers conduct their business, neither will we penalize claimants because financial responsibility providers refuse to take reasonable action to protect their own interests. Therefore, Petitioners' request to amend § 515.23(b) to require that claimants

provide an OTI and financial responsibility provider notice of any lawsuit commenced against an OTI is denied.

Petitioners also argue that Congress intended to further protect financial responsibility providers from default judgments by allowing them to review the claims underlying default judgments. At the direction of OSRA and the Senate Report, the Commission prohibited a financial responsibility provider from "requiring further evidence related to the validity of the claim" when reviewing a judgment for damages except for the extent to which it "arises from the ocean transportation intermediary's transportation-related activities." 46 CFR § 515.23(b)(2); see also Senate Report at 26. Petitioners contend that the rule is inconsistent with the intent of Congress based on what they present as the floor amendment of Senator Hutchison.

As discussed, supra, the statement Petitioners attribute to Senator Hutchison was never presented as part of the bill or any other amendment to OSRA and is improperly relied on by Petitioners. Furthermore, while section 19(b)(3) of OSRA was added after the Senate Report was issued, it remains consistent with the Senate Report and the intent of Congress in requiring the Commission to create an alternative claim procedure, and directing that a judgment for damages be enforced only to the extent it arises from the transportation-related activities of the OTI. As Senator Hutchison stated when S. 414, as amended by floor amendment number

1689, was adopted and passed by the Senate: .

Although a substitute amendment to the Commerce Committee reported version of S. 414 has been adopted by the Senate, the legislative history for section 6(g) and other sections of the 1984 Act affected by S. 414 contained in the Committee report remains intact, to the extent that the Committee reported provisions of S. 414 are not substantively amended by the substitute amendment, or the Committee report legislative history is not superseded by the below comments.

144 Cong. Rec. S3306, S3319 (daily ed. April 21, 1998) (statement of Sen. Hutchison). The section on OTIs in the Senate Report was not superseded by any of the comments which followed; therefore, the Commission properly relied on the Senate Report in prohibiting financial responsibility providers from conducting de novo reviews of the validity of claims underlying a court judgment.

Petitioners rely on what they erroneously believe is the floor amendment language to argue further that Congress must have intended for financial responsibility providers to review the validity of claims underlying a judgment for damages, because that would be consistent with the ability provided financial responsibility providers under section 19(b)(2)(B) of OSRA to deem a claim valid after the OTI has failed to respond to a claim. Petitioners contend that this is the only reading of OSRA that would allow the financial responsibility provider to "determine if the 'claim based upon a judgment' and the 'damages claimed' are subject to payment or fall within the scope of the bond." ASA Petition at 7; accord Kemper Petition at 12. We disagree that

Congress intended sections 19(b)(2)(B), 19(b)(2)(C) and (b)(3) of OSRA to be read as Petitioners claim. As discussed, supra, Congress did not intend for financial responsibility providers to review the validity of the claim underlying a judgment; the financial responsibility provider's role is limited to determining if the judgment arises from the transportation-related activities of the OTI. See Senate Report at 26.

Nor did Congress intend for the review procedures of sections 19(b)(2)(B), 19(b)(2)(C) and (b)(3) of OSRA to be fungible. In section 19(b)(2)(B), Congress provided an alternative claim procedure that would allow claimants to attempt to settle a claim against an OTI without having to obtain a court judgment. Id. That procedure provides that the financial responsibility provider may be available to pay a claim when the OTI fails to respond to notice of the claim and the financial responsibility provider deems the claim valid; thus, only that informal, pre-judgment settlement procedure envisions that the financial responsibility provider assess the validity of a claim. In contrast, the procedure set forth in section 19(b)(2)(C), as modified by section 19(b)(3), provides that the financial responsibility shall be available to pay a judgment for damages against an OTI, limited only to the extent that it arises from the transportation-related activities of the OTI. Congress drew a distinction between the review procedures for a claim and those for a judgment, and § 515.23(b) reflects that

distinction.

Petitioners further argue that by denying financial responsibility providers the ability to review default judgments for validity, and by limiting review of a judgment only to whether the damages claimed arise from the transportation-related activities of the OTI and for finality, the Commission is recognizing default judgments as binding and "conclusive on the merits," thus failing to protect financial responsibility providers. Such a position, ASA argues, is a virtual adoption of the minority position delineated in Restatement (Third) of Suretyship and Guaranty. However, Petitioners inaccurately interpret the Commission's language. In the supplementary information of the final rule, the Commission acknowledged the Restatement's discussion relating how jurisdictions vary in their treatment of default judgments as either conclusive, prima facie evidence, or inadmissible as to the liability of a secondary obligor (the surety). 64 Fed. Reg. at 11162. The Commission did not specifically adopt any position, but rather rejected as incorrect Petitioners' claim that as a matter of suretyship law, sureties are guaranteed the right to deny or limit liability in cases of default judgments.¹² Id. at 11161-62.

ASA further asserts that the Commission misunderstood section

¹² Moreover, beyond Petitioners' unsupported assertions, there is nothing in the Restatement to indicate which treatment of default judgments is the "minority" or "majority" position.

67(c) of Restatement (Third) of Suretyship and Guaranty regarding a surety's common law protections from default judgments. ASA contends that the Commission stated in the supplementary information that "'OSRA's reliance on court judgments as determinative does not envision that a financial responsibility provider decide to proclaim a judgment invalid.'" ASA Petition at 8 (purporting to quote 64 Fed. Reg. at 1161). Such a statement is inaccurate, ASA avers, because a surety does not proclaim a judgment invalid, but rather reviews the facts underlying a default judgment, applies them to the applicable law, then "determines whether a claim is valid and takes appropriate legal action, if necessary." ASA Petition at 9. The claim may be invalid, ASA asserts, based on facts not related to finality or the limitation of transportation-related activities.

Not only is ASA's argument unpersuasive and contradictory to the direct mandate of Congress, but it also misquotes the Commission. The Commission actually stated that "OSRA's reliance on court judgments as determinative does not envision that a financial responsibility provider's obligations may be averted should the financial responsibility provider decide to proclaim a judgment invalid." 64 Fed. Reg. at 11161 (emphasis added). Moreover, ASA fails to understand that the Commission is not limiting a surety company's ability to challenge default judgments; rather, a surety's ability to challenge default judgments is based

on state law. See Restatement (Third) of Suretyship and Guaranty § 67, reporter's note c (1996). We are prohibiting a surety company from delaying payment on a final judgment while it reviews that final judgment in order to make its own assessment of its validity. Congress specifically directed in sections 19(b)(2)(C) and 19(b)(3) of OSRA that a bond, insurance or other surety shall be available to pay any judgment for damages as long as the claimant has first attempted to resolve the claim under section 19(b)(2)(B) and it arises from the transportation-related activities of the OTI. The Commission cannot further limit a claimant's access rights to a surety bond by creating additional procedural barriers to payment.

ASA also objects to the Commission's contention that financial responsibility providers can protect themselves from default judgments by refusing to underwrite a bond for an OTI who has an unstable background. Such a position will have the greatest negative impact on OTIs, ASA maintains, because the Commission fails to realize that OTIs may default, not because they are financially unstable or unscrupulous, but because they were either improperly served, overlooked or lost the summons or complaint, or "forgot" to timely respond. Since financial responsibility providers will not be able to review such default judgments, ASA avers, they will have to charge prohibitive premiums to OTIs to cover for such losses.

ASA's concerns were previously addressed in the rulemaking process. The Commission recognized in the final rule that extraordinary circumstances, such as improper service, may exist which would prevent a financial responsibility provider from paying on a judgment in the allotted 30 day period. In such instances the Commission indicated its intention to be more flexible. However, overlooking or losing the summons, or "forgetting,, to respond, are the responsibility of a defendant, and neither the Commission nor the claimant should be responsible for protecting OTIs from their own negligence or incompetence.

Furthermore, even under the regulations in effect prior to issuance of the final rule, financial responsibility providers could not review default judgments for validity. Petitioners' argument that the final rule will compel financial responsibility providers to charge prohibitive premiums to OTIs is therefore unfounded. The Commission expects financial responsibility providers to factor what could give rise to a default judgment into its charges, because the costs can reasonably be expected to reflect the risks. 64 Fed. Reg. at 11161. Moreover, the cost of such financial responsibility instruments is not currently prohibitive, and the final rule does not impose greater financial risks or burdens on financial responsibility providers that would likely increase those costs. If anything, OSRA and the final rule help to prevent the advent of charging prohibitive premiums because

they encourage claimants and financial responsibility providers to settle claims out of court. The Commission has created a fair rule that protects the interests of claimants, OTIs, and financial responsibility providers with respect to the process of pursuing claims against an OTI's financial responsibility through court judgments, as mandated by OSRA. Thus, Petitioners' request to amend § 515.23(b) to allow financial responsibility providers to review the validity of a valid judgment is denied.

Finally, we disagree with ASA's request to amend § 515.23(b) to require claimants to timely submit all pertinent documents to financial responsibility providers and cooperate in good faith during the 90-day claim period and the 30-day judgment review period. It is implicit in section 19(b) of OSRA that a claimant must act in good faith when attempting to settle a claim and collect on a judgment. Therefore, Petitioners' request to add such language is denied.

2. "Consents to be sued,, language in Bond Form FMC-48

In this rulemaking, the Commission revised the four financial responsibility forms for consistency and to comply with the new requirements of OSRA. The Commission, inter alia, added language to surety bond form, FMC-48, Appendix A to subpart C, already existing in both the insurance and guaranty forms, FMC-67 and FMC-68 respectively, stating that

[t]he Surety consents to being sued directly in respect of any bona fide claim owed by the Principal for damages,

reparations or penalties arising from the transportation-related activities under the 1984 Act of Principal in the event that such legal liability has not been discharged by the Principal or Surety after a claimant has obtained a final judgment (after appeal, if any) against the Principal from a United States Federal or State Court of competent jurisdiction and has complied with the procedures for collecting on such a judgment pursuant to 46 CFR § 515.23(b), the Federal Maritime Commission, or where all parties and claimants otherwise mutually consent, from a foreign court, or where such claimant has become entitled to payment of a specified sum by virtue of a compromise settlement agreement made with the Principal and/or Surety pursuant to 46 CFR § 515.23(b), whereby, upon payment of the agreed sum, the Surety is to be fully, irrevocably and unconditionally discharged from all further liability to such claimant; provided, however, that Surety's total obligation hereunder shall not exceed the amount set forth in 46 CFR § 515.21, as applicable.

64 Fed. Reg. at 11178.

Petitioners oppose the inclusion of this language in the surety bond form, FMC-48, arguing that it will deny sureties effective due process of default judgments, particularly in light of the Commission's refusal to require claimants to notify financial responsibility providers of lawsuits commenced against OTIs. ASA contends that this provision will encourage litigation of claims denied by sureties in good faith. Furthermore, ASA asserts, the language denies sureties "the ability to deny, short of litigation, a claim that, for example, may be fraudulent, contains a mistake or error, or is based on a default judgment that may be invalid or awards damages that are beyond the scope of the bond.,, ASA Petition at 13. Kemper agrees, asserting that claimants unfamiliar with Commission regulations may sue

prematurely despite OSRA's alternative claim procedure.

We disagree. The bond form sets forth the steps a claimant must follow in order to sue the surety if it has failed to pay on the bond. The procedure allows the claimant to sue the surety only after it has complied with all applicable Commission regulations, including the alternative claim procedures in § 515.23(b).¹³ Again, Petitioners incorrectly argue that they may deny claims based on default judgments. Petitioners may challenge default judgments in state court, but they can deny a claim based on a default judgment only if it is not final or the damages do not arise from the transportation-related activities of the OTI. All other arguments are not within the Commission's jurisdiction, but rather are for the state courts to decide. If a court determines that the activities of the OTI are transportation-related, and thus the claimant is entitled to damages, the financial responsibility provider cannot deny the claim because it independently decided the court was in error. Moreover, as the Commission explained in the supplementary information of the final rule, the language neither alters the surety's obligations arising under the bond nor grants claimants a heretofore nonexistent right. 46 Fed. Reg. at 11165.

Petitioners further argue that adding the "consents to be

¹³ While claimants may be ignorant of Commission regulations when seeking judicial redress against an OTI, the claimant will necessarily know about the bond if it is seeking payment on it and will in that instance be expected to comply with Commission regulations to collect on a bond.

sued,, language to Bond Form FMC-48 is arbitrary and capricious, considering that the language does not appear in OSRA and was merely copied from the insurance and guaranty forms. This is improper, Kemper contends, because of the distinct and separate relationships and commitments made under a surety agreement as opposed to an insurance or guaranty agreement. However, the Commission added the "consents to be sued,, language in order to provide claimants with information regarding their rights with respect to bonds, to the same degree as is provided with respect to insurance and guaranty forms. Moreover, as the Commission stated in the supplementary information of the final rule, the "consents to be sued,, language does not alter the different relationships and commitments of surety agreements. Such agreements do not prevent a claimant from suing a surety who does not honor a final court judgment. Id. In an attempt to argue that the differences between insurance agreements and surety agreements dictate that the "consents to be sued,, language should be excluded from FMC-48, ASA, in its comments to the proposed rule, claimed that while insurance is for the benefit of the insured and involves only two parties, a surety bond is for the benefit of third party claimants, and

[a]t no time does, or can, a bond principal receive any proceeds from a surety bond. Under a surety bond, the bond principal is not entitled to indemnity, and the surety is not obliged to defend the bond principal. . . . Moreover, the surety may compel the bond principal to pay an obligation when due, and is entitled to reimbursement of any claim paid under the bond, plus the expense of resolving the claim.

ASA Comments at 2 n.1. ASA's argument illustrates that a surety may be entitled to reimbursement of the bond amount from the principal should a claim be made against the bond; however, it does not support the argument that the relationships and commitments attendant to a surety agreement would prevent a claimant from being able to sue the surety company directly should it fail to honor its bond.

Petitioners finally contend that the "consents to be sued,, language conflicts with Treasury procedures, under 31 CFR §§ 223.18 - 223.22, for complaining against sureties who fail to honor their bonds. In their comments to the proposed rule, ASA and Kemper both argued that the language conflicts with the Treasury regulations, because there is already a procedure "in place that governs the complaint process against a sureties' [sic] failure to honor claims, and the Treasury Department's authority to remove a surety from the Treasury's approved list after an opportunity for the complainant and surety to be heard.,, ASA Comments at 38-39; Kemper Comments at 18, 21. Petitioners further averred that the Commission's concern about sureties failing to honor claims can be allayed because "state law bad faith claims, complaints pursuant to Treasury Department regulations, and the removal or possibility of being removed from the Treasury Department's approved list of sureties,, will provide adequate assurance that sureties will honor claims. ASA Comments at 40; Kemper Comments at 22. The Commission

found in the supplementary information of the final rule that the "consents to be sued,, language does not conflict with the Treasury regulations, because it does not subvert the process whereby a federal agency may make a report against a surety who fails to honor its bonds. 46 Fed. Reg. at 11165.

ASA claims that the Commission misinterpreted the regulations as allowing only federal agencies to make complaints to Treasury. ASA contends that private claimants can avail themselves of the Treasury procedures because the regulations provide that "an agency may make a complaint on the basis of complaints it receives from private claimants at the Commission.,, ASA Petition at 14; accord Kemper Petition at 5.

We reaffirm the position we adopted in the final rule, that the "consents to be sued,, language does not conflict with the Treasury procedures. 46 Fed. Reg. at 11165. In order to ensure that bond companies doing business with the United States Government meet their responsibilities, the Treasury regulations afford federal agencies the ability to report to Treasury when they are unable to collect on a bond to their satisfaction. Id. Upon receipt of such a report, Treasury gives the surety an opportunity to respond," and then makes a decision either to dismiss the complaint, or preclude renewal of or revoke the surety's

¹⁴ The regulations provide that the surety may respond in writing or may request an informal hearing. 31 CFR §§ 223.18(b) and 223.19(a).

certificate of authority, which is the certification that allows sureties to do business with the United States. 31 CFR § 223.20. This is not a process, however, whereby Treasury attempts to make a claimant whole by finding that the surety must honor its bond; the Treasury procedures are directed at maintaining a list of qualified sureties, not at resolving individual claims. Petitioners' argument that the Commission misinterprets the regulations because federal agencies can make a report to Treasury based on complaints from private claimants, not just the government, is therefore inapposite. A claimant suing a surety for its failure to honor a bond neither subverts nor duplicates Treasury's ability to revoke a surety's certificate of authority for its failure to keep and perform its contracts. See 31 CFR § 223.18.

Thus, we agree with OCWG that the Commission fully considered and rejected these arguments in the final rule, and that Petitioners did not present a mistake of fact as required by Rule 261. We are not persuaded by Petitioners' reiteration of their previous arguments and, thus, Petitioners' request to remove the "consents to be sued,, language from Bond Form FMC-48 is denied.

3. The definitions of "freight forwarding services," "NVOCC services," and "transportation-related activities"

The Commission, at the direction of OSRA with guidance from the Senate Report, and in accordance with the comments to the proposed rule, defined "freight forwarding services,,, 46 CFR §

515.2(i),¹⁵ "NVOCC services,,, 46 CFR §¹⁶ 515.2(l), and

¹⁵ The definition of freight forwarding services remains unchanged and continues as it was, pre-OSRA, as follows:

(i) Freight forwarding services refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier, which may include, but are not limited to, the following:

- (1) ordering cargo to port;
- (2) preparing and/or processing export declarations;
- (3) booking, arranging for or confirming cargo space;
- (4) preparing or processing delivery orders or dock receipts;
- (5) preparing and/or processing ocean bills of lading;
- (6) preparing or processing consular documents or arranging for their certification;
- (7) arranging for warehouse storage;
- (8) arranging for cargo insurance;
- (9) clearing shipments in accordance with United States Government export regulations;
- (10) preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;
- (11) handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;
- (12) coordinating the movement of shipments from origin to vessel; and
- (13) giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargoes' dispatch.

¹⁶ That section reads:

(1) Non-vessel-owertina common carrier services refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:

- (1) purchasing transportation services from a VOCC and offering such services for resale to other persons;
- (2) payment of port-to-port or multimodal transportation charges;
- (3) entering into affreightment agreements with underlying shippers;
- (4) issuing bills of lading or equivalent documents;
- (5) arranging for inland transportation and paying for

"transportation-related activities,,, 46 CFR § 515.2(w),¹⁷ in the final rule. As ASA notes, the Commission adopted separate definitions for freight forwarders and NVOCCs in recognition of the distinct activities performed by the individual entities. ASA Petition at 17; see also 64 Fed. Reg. at 11160. The Commission also adopted a definition of "transportation-related activities,, encompassing a broad enough range of freight forwarding and NVOCC services to ensure that those activities intended to be covered by the instrument of financial responsibility be fully covered. Id. However, the Commission reaffirmed that any non-OTI services would not be covered by the OTI's financial responsibility. Id.

ASA argues that by referring to "non-OTI services,,, rather than distinguishing between freight forwarding and NVOCC services,

inland freight charges on through transportation movements;
 (6) paying lawful compensation to ocean freight forwarders;
 (7) leasing containers; or
 (8) entering into arrangements with origin or destination agents.

¹⁷ That section reads: .

(w) Transwortation-related activities which are covered by the financial responsibility obtained pursuant to this part include, to the extent involved in the foreign commerce of the United States, any activity performed by an ocean transportation intermediary that is necessary or customary in the provision of transportation services to a customer, but are not limited to the following:

- (1) for an ocean transportation intermediary operating as a freight forwarder, the freight forwarding services enumerated in §515.2(i), and
- (2) for an ocean transportation intermediary operating as a non-vessel-operating common carrier, the non-vessel-operating common carriers services enumerated in §515.2(1).

the Commission failed to sufficiently clarify what would be covered by the freight-forwarder's or NVOCC's respective financial responsibility. By combining freight forwarding and NVOCC services under the definition of "transportation-related activities,,, and not limiting them, ASA contends that a freight forwarder's or NVOCC's financial responsibility will not be limited to freight forwarding or NVOCC services respectively. In addition, Petitioners aver that the language is redundant.

We agree with Petitioners that the result which they fear stems from the rule language is to be avoided, but we disagree that such an interpretation actually derives from the rule as promulgated. The financial responsibility forms in the rule, Appendix A to subpart C, require the applicant to identify whether it is operating as a freight forwarder or an NVOCC.¹⁸ By distinguishing which type of OTI the applicant is, a claimant will only be able to seek damages related to the transportation-related activities of the OTI as a freight forwarder or an NVOCC, in accordance with the applicant's delineation on the instrument of financial responsibility against which the claim is made. Even if the OTI is operating as both a freight forwarder and an NVOCC, the

¹⁸ In the proposed rule, the Commission set forth financial responsibility forms for OTIs that did not distinguish between freight forwarders and NVOCCs. In response to Petitioners' comments that freight forwarders and NVOCCs are distinct entities and thus need separate financial responsibility forms, the Commission changed the forms accordingly.

claimant, as a basis for recovery, will have to indicate in which capacity the OTI was providing services to the claimant. This will protect an OTI who operates as both a freight forwarder and an NVOCC and keep its instruments of financial responsibility separate.

As Petitioners did not present a mistake of fact, and we otherwise find their arguments unpersuasive, Petitioners' request to further clarify the distinction between the definitions of "freight forwarding services," "NVOCC services,, and "transportation-related activities,, is denied.

4. Payment of claims on final judgments

ASA asserts that, while the Commission stated in the supplementary information that payment against financial responsibility should only be made on "final,, judgments, it failed to include the word "final,, in § 515.23(b)(2). This was an oversight and Petitioners' request to add the word "final,, to § 515.23(b)(2) is granted. In order to preserve resources, this oversight will be corrected in Docket No. 99-10 - Ocean Common Carriers Subject to the Shipping Act of 1984, a rulemaking which is amending 46 CFR part 515, in other respects.

CONCLUSION

Petitioners have not presented any mistakes of fact. Petitioners' arguments to amend § 515.23(b), Bond Form FMC-48, or the definitions of "freight forwarding services,,, "NVOCC services,,

and "transportation-related activities" are unpersuasive. Therefore, the Petitions of ASA and Kemper are denied, except to add the word "final" as described above.

THEREFORE, IT IS ORDERED That the Petitions for Reconsideration of the Final Rule in Docket No. 98-28, Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries, are denied to the extent that American Surety Association and Kemper National Insurance Companies seek to amend the procedure for collecting on a court judgment obtained against an OTI, the "consents to be sued" language in Bond Form FMC-48, and the definitions of "freight forwarding services," "NVOCC services" and "transportation-related activities;" and

IT IS FURTHER ORDERED, That the Petitions are granted to the extent American Surety Association and Kemper National Insurance Companies seek to add the word "final" to § 515.23(b)(2).

By the Commission.


Bryant L. VanBrakle
Secretary