UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 143-126

LORING R. HOOVER, et al.,

Plaintiffs

v.

GEORGE E. ALLEN, et al.,

Defendants

SUPPLEMENTAL MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

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SUPPLEMENTAL MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

PRELIMINARY STATEMENT

The basic issue before the Court on defendants' motion for partial summary judgment is their contention that ". . . American-Hawaiian's status as an ICC certificated water carrier has alone rendered the company subject to regulation under the Interstate Commerce Act from 1942 to the present time"[1/] and therefore exempt from the Investment Company Act of 1940 ("1940 Act" or "Act"). Mere possession of the certificate, even after extended non-operation, is said to entitle the company to exclusion from the 1940 Act under

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1/ Defendants' Memorandum in Support of Motion, p. 10. (Emphasis added). The Interstate Commerce Commission is referred to herein as the "ICC."

Sec. 3(c)(9) thereof, as a company "subject to regulation under the Interstate Commerce Act." At the Court's request the Securities and Exchange Commission ("SEC" or the "Commission") submitted a memorandum amicus curiae on this issue dated September 4, 1964. Simply stated, it is our view that mere possession of a certificate of convenience and necessity alone was never sufficient to render American-Hawaiian "subject to regulation" within the meaning of Sec. 3(c)(9). To have been excluded American-Hawaiian must have been a water carrier under the Interstate Commerce Act, not merely a non-operating, dormant certificate holder.

This supplemental memorandum is necessitated by defendants' answering memorandum ("Defs. Ans. Memo.") dated January 19, 1965, in which defendants submerge the principle issue upon which they originally rested their motion. They now raise a series of arguments based mainly on a distorted view of the SEC's 1959 legislative proposals, which included an amendment of Sec. 3(c)(9) of the 1940 Act, and also now raise other arguments, involving alleged concessions and attempts to amend judicially Sec. 3(c)(9), which rest on wholly unwarranted inferences and suppositions.

ARGUMENT

I. THE SEC's 1959 LEGISLATIVE PROPOSAL TO AMEND SEC. 3(c)(9) IS CONSISTENT WITH ITS POSITION IN THIS CASE - THAT MERE POSSESSION OF AN ICC CERTIFICATE OF OPERATING AUTHORITY DOES NOT EXCLUDE THE HOLDER FROM THE INVESTMENT COMPANY ACT UNDER SEC. 3(c)(9) THEREOF.

In their discussion of the Commission's legislative program of 1959, particularly its proposal to amend Sec. 3(c)(9), defendants seek to place American-Hawaiian in the same category with Alleghany Corp. and then proceed to the conclusion that Sec. 3(c)(9) required amendment if either Alleghany or American-Hawaiian were to be subject to the Investment Company Act. While this is clearly true with respect to Alleghany - it is equally clear that the proposed amendment of Sec. 3(c)(9) was not necessary with regard to American-Hawaiian.

The very materials so heavily relied upon by defendants demonstrate that the Commission's position has always been, as it is now, that American-Hawaiian was not entitled to claim a Sec. 3(c)(9) exclusion merely by virtue of its retention of its certificate.

Defendants (at pp. 18-19) partially cite Chairman Gadsby's testimony before the House Subcommittee. In pertinent part and more fully quoted Mr. Gadsby stated: 2/

2/ House Hearings, Subcommittee of the Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess., June 3, 1958, pp. 140-41. (Emphasis added)

"Section 3(c)(9) of the act now excludes from regulation as an investment company, a company subject to regulation under the Interstate Commerce Act.

Section 7 of the bill would eliminate this exception if our Commission finds, and by order declares, that such company is primarily an investment company.

It was intended by section 3(c)(9) to avoid subjecting a railroad or a railroad holding company to dual regulation. However, as the section is written it provides an excuse for corporations which are essentially investment companies to escape regulation under the Investment Company Act by subjecting themselves to regulation under the Interstate Commerce Act.

* * *

In any event, we believe that it is inappropriate for a corporation which is primarily engaged in the business of investing, reinvesting, owning, holding and trading in investment securities, to be excluded from the Investment Company Act, and that its investors be deprived of the protections and safeguards which Congress has considered essential, simply because the company has acquired, with some small fraction of its assets, common carriers, or to some minor extent directly engages in the business of an interstate carrier.

The desirability of this amendment is demonstrated by the situation which has existed in the case of Alleghany Corp., and the American-Hawaiian Steamship Co.

In 1945, the Interstate Commerce Commission determined in effect, that Alleghany was subject to certain provisions of the Interstate Commerce Act on the basis of the control which Alleghany then had of the Chesapeake & Ohio Railroad.

In view of this order, Alleghany's registration under the Investment Company Act was terminated by virtue of section 3(c)(9) of the act. The activities of Alleghany at that time were essentially those of a railroad holding company and 86 percent of its assets consisted of railroad securities.

> Consequently, there is little doubt as to the propriety of this action at the time. Over the course of the next 9 years, however, the nature of the company changed and it gradually disposed of its C. & O. stock. Although it thereafter acquired control of the New York Central Railroad Co., it actually had only 16 percent of its assets invested in railroad securities.
>
> During this period it had acquired a variety of investments, engaged in joint ventures and trading activities, and in general carried on business as an investment company. Nevertheless, since it was subject to ICC regulation, it continued to be free from regulation under the Investment Company Act.
>
> In the other case in point, American-Hawaiian Steamship Co., a shipping company for many years, held a certificate of convenience and necessity from the ICC. Over a period of years, it liquidated all of its investment in maritime facilities and by 1958 its assets consisted almost entirely of securities.
>
> Notwithstanding the fact that its activities were undeniably in the nature of an investment company, it continued to claim an exemption under section 3(c)(9) because it held an irrevocable certificate of convenience and necessity from the ICC and was therefore required to file reports with that agency.
>
> It was only after we had instituted judicial proceedings that the company registered as an investment company, but it still does not concede that it is required to do so under the statute."

The discussion of the Alleghany situation (represented by * * * in defendants' answering memorandum) clearly shows the distinctions between the Alleghany and American-Hawaiian situations. Though the amendment would have affected any company in possession of an ICC certificate of operating authority, and any other company specifically subject to ICC regulation, not all would have been affected in the same way. Alleghany, a clearly excluded company at the time,

would have been subject to the Act under the amendment despite the fact that it was subject to ICC regulation; American-Hawaiian, not subject to ICC regulation, in the SEC's view and therefore not excluded from the 1940 Act, would simply have been more clearly prevented from claiming exclusion under Sec. 3(c)(9). The testimony clearly indicates that this distinction was put before the Committee and that the Congress knew that the SEC had taken action against American-Hawaiian on the basis of its position that Sec. 3(c)(9) was unavailable to such dormant certificate holders. The Congress was also told that as a consequence of the SEC's action American-Hawaiian had registered. 3/

3/ See testimony of Joseph C. Woodle, Director, Division of Corporate Regulation, SEC, before the Subcommittee of the Senate Committee on Banking and Currency, 86th Cong., 1st Sess., June 18, 1959, pp. 130-33; Testimony of David Wallace, vice president, Alleghany Corp., House Hearings, supra, p. 272. See also SEC Memorandum submitted to both the House and Senate Subcommittees (quoted at pp. 20-21 of Defs. Ans. Memo.) in which the purpose of the amendment with respect to American-Hawaiian was made clear:

> "* * *Several instances can be cited, however, in which Commission jurisdiction would have been clearly established had the proposed amendment been the law.
>
> * * *
>
> The Company holds an irrevocable certificate of convenience and necessity granted by the Interstate Commerce Commission, and is required only to file reports with the ICC. For

Footnote Continued.

In short the main thrust of the proposed 1959 amendment of Sec. 3(c)(9) involved situations where companies, which were essentially investment companies, were excluded from the 1940 Act as railroad holding companies even though their railroad activities had become a minor part of their business (e.g., Alleghany Corp.). It would also have set to rest an argument which had been made regarding dormant certificate holders, although the SEC did not regard that argument as valid and had indeed acted successfully to obtain registration in such cases under the existing Sec. 3(c)(9). Since the SEC's position on dormant certificate holders had been challenged it was thought that the amendment would serve to end any doubt on the matter--the unavailability of the Sec. 3(c)(9) exclusion to American-Hawaiian would be put beyond question. The amendment certainly was not an "admission" that the SEC thought it could not vindicate its position in court should the circumstances

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3/ Footnote Continued.

> this reason it claimed that it was excepted from the definition of an investment company under section 3(c)(9) and refused to register. Only after the Commission instituted action in the Federal district court to prevent a continued violation of the Investment Company Act did it register thereunder on February 24, 1959. Its counsel stated that in his opinion the company was entitled to the exception of section 3(c)(9) but would register to avoid further litigation." House Hearings, at 405, Senate Hearings, at 557. (Emphasis added)

warrant; its complaint against American-Hawaiian makes that amply clear. The SEC has consistently regarded Sec. 3(c)(9) as unavailable to a dormant, non-operating certificate holder such as American-Hawaiian, whose extended non-operating status by that time had been clearly established.

As defendants' exhibits 71-76 disclose, as early as 1957 the staff seriously questioned the availability of Sec. 3(c)(9) to American-Hawaiian, and on May 28, 1958 (exhibit 74) again wrote American-Hawaiian clearly indicating the unavailability of that exclusion. The filing of the Commission's complaint[4/] on November 10, 1958 against American-Hawaiian for failure to register under the 1940 Act was based on that position. In fact, on February 24, 1959 American-Hawaiian filed a notice of registration under the 1940 Act and thereby became a registrant thereunder and on the same day stipulated to the discontinuance of the action. This stipulation was based on American-Hawaiian's registration. All of the foregoing, which resulted from the Commission's complaint demanding American-Hawaiian's registration under the Act, should serve to put to rest any doubt which defendants may have raised

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4/ Securities and Exchange Commission v. American-Hawaiian S.S. Co., Civ. Act. No. 139-351 (S.D. N.Y., Nov. 10, 1958), amended Nov. 24, 1958.

respecting the Commission's position on the availability of Sec. 3(c)(9) to American-Hawaiian. The Commission could not have filed its complaint in 1958 and demanded American-Hawaiian's registration if it did not believe that existing Sec. 3(c)(9) was unavailable to the company.

In summary it clearly appears from the legislative history contained in the appendix to defendants' memorandum that the primary purpose of the proposed amendment to Sec. 3(c)(9) was to deal with the problem presented by Alleghany which, although in the Commission's view primarily an investment company, was also a railroad holding company and as such exempt under Sec. 3(c)(9). Secondarily, the proposal would also lay to rest the contention made by defendants that mere possession of a certificate from the ICC excluded them from regulation under the 1940 Act. What emerges clearly from the legislative history is that defendants then contended (as they do here) that possession of a certificate alone was sufficient to give them an exclusion, that the Commission rejected that contention then, as it rejects it now, and that the only relation of the legislative proposal to these facts was that its enactment would, among other and more significant effects, have foreclosed defendants' claim to an exclusion under Sec. 3(c)(9). The entire consistency of the Commission's position is therefore readily apparent. Equally apparent is the misleading character of denfendants'

effort to equate its position in connection with the proposed legislation with that of Alleghany and to assume that the Commission regarded the two situations as identical, although the Commission's statements and actions clearly indicated the contrary.

II. THE SEC HAS MADE NO "CONCESSION" WHICH ESTABLISHES THE LEGITIMACY OF AMERICAN-HAWAIIAN'S CLAIM TO A SEC. 3(c)(9) EXCLUSION.

In support of their position that American-Hawaiian was excluded from the 1940 Act under Sec. 3(c)(9) as a company "subject to regulation" under the Interstate Commerce Act solely by reason of its possession of an ICC water carrier certificate of operating authority and regardless of non-operation, defendants in their moving papers cite only three cases - General Transportation Co. v. United States, 65 F. Supp. 981 (D. Mass., 1946), aff'd per curium, 329 U.S. 688 (1946); Trailerships, Inc. Certificate Transfer, ICC Finance Docket No. 19624 (9-12-57); and Quaker City Bus Co. - Purchase - Blackhawk Line, Inc., 38 M.C.C. 603 (1942). Analysis of these cases shows however, that when read in their proper context they, and other relevant cases which defendants did not originally discuss,[5/] merely stand for the proposition that the ICC has jurisdiction over the transfer of a certificate of

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5/ See discussion in our memorandum of September 4, 1964, at pp. 27-35.

operating authority even if the holder has not operated thereunder. So far as we have been able to determine, no case has extended the principle, that a company in possession of an ICC certificate continues subject to ICC jurisdiction regardless of non-operation, beyond the context of an application for approval of the transfer of the certificate. As the ICC itself stated in its memorandum amicus curiae, with reference to the three cases relied upon by defendants, "[n]one of these however, considers whether the regulation which still exists over a dormant certificate is sufficient for 'subject to regulation' under Section 3(c)(9) of the Investment Company Act of 1940."[6/]

Perhaps the clearest expression of the rule of these cases can be found in the opinion of the ICC's Division 5 in Lane, Revocation of Permit, 52 M.C.C. 427 (1951), discussed in some detail in our memorandum of September 4, 1964, at pp. 33-35. Commenting on the Quaker City case, the leading ICC decision in point and one of the three cases relied upon by defendants, the ICC in Lane stated:

> "[a]ll that the Commission meant, in our opinion, was that . . . the certificate is in existence and the symbol of a motor carrier 'for purposes of transfers under section 5.' [This] was the only purpose in connection with which the statement was made." (52 M.C.C., at 432-433) (Emphasis added)

6/ ICC Memorandum, amicus curiae, pp. 7-8.

Defendants should not be permitted to bury this exposure of the fallacy of their reliance on these cases by a footnote comment that Lane "adds nothing to the similar holding the Quaker City Bus Co. case."[7/]

In the face of this clear-cut limitation on the applicability of the rule of these cases to certificate transfer situations only, defendants attempt to read into the SEC's discussion an "implicit concession" that American-Hawaiian's possession of a certificate alone was enough to subject it to regulation in the Sec. 3(c)(9) sense. This argument assumes the conclusion and ignores the real point at issue.

Defendants urge that the SEC impliedly concedes that American-Hawaiian was subject to regulation for purposes of Sec. 3(c)(9), because (1) the ICC's jurisdictional base in these cases is Sec. 5(2) of the Interstate Commerce Act,[8/] (2) Sec. 5(13)[9/] defines a water carrier, for Sec. 5 purposes, as "subject to chapter 12 [Part III] of this title," and (3) we do not challenge the holding of these cases. As we make abundantly clear in our original memorandum, we disagree not with the holding of these cases but with the strained construction defendants would put on them. All that these cases establish is that the ICC, in

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7/ Defs. Ans. Memo., p. 25, n. 11.

8/ 49 U.S.C., Sec. 5(2).

9/ 49 U.S.C., Sec. 5(13).

attempting to administer the Interstate Commerce Act in a manner consistent with the National Transportation Policy of "developing, coordinating, and preserving a national transportation system by water, highway and rail,"[10/] deems it essential under Sec. 5 to retain jurisdiction over the transfer of a certificate of operating authority even if the holder has been dormant. However, this jurisdiction has never been one of general application. As we pointed out in our original memorandum, and as the ICC agrees in its memorandum (at pp. 3, 8), jurisdiction merely over the transfer of a certificate is insufficient to support an exclusion under Sec. 3(c)(9).[11/] Therefore, it is obvious that by citing these transfer cases the SEC does not concede that jurisdiction for Sec. 5 purposes is "regulation" within the meaning of Sec. 3(c)(9).

10/ National Transportation Policy, Preamble, 49 U.S.C.

11/ This distinction between ICC jurisdiction over Sec. 5 transactions and the regulation necessary to support a claim of exclusion under Sec. 3(c)(9) was highlighted by the 1959 legislative proposal. As defendants' memorandum stresses (Defs. Ans. Memo., p. 16), what they term the "modified amendment" also contemplated a new Sec. 6 (f)(1) of the 1940 Act "to preserve [for the ICC] the exclusive and plenary jurisdiction" over transactions subject to Sec. 5. The significance of Sec. 6(f)(1), however, is that it separated jurisdiction over transactions involving "combinations and consolidations of carriers" under Sec. 5 from the type of general regulation over internal affairs which justifies exclusion under Sec. 3(c)(9).

III. TO BE EXCLUDED FROM THE INVESTMENT COMPANY ACT UNDER SEC. 3(c)(9), A COMPANY IN POSSESSION OF AN ICC WATER CARRIER CERTIFICATE MUST AT THE VERY LEAST BE SUBJECT TO THE FULL SCOPE OF THE REGULATORY PROVISIONS OF PART III OF THE INTERSTATE COMMERCE ACT APPLICABLE TO OPERATING CARRIERS.

As we noted in our original memorandum, 12/ in the particular case of a water carrier certificate, a persuasive argument can be made that the exclusion under Sec. 3(c)(9) is unavailable to holders of water carrier operating authority, regardless of whether they operate and thereby become subject to ICC regulation or not.

From the holding in Brown v. Bullock, 194 F. Supp. 207 (S.D. N.Y., 1961), aff'd., 294 F. 2d 415 (C.A. 2, 1961) and the discussions in Securities and Exchange Commission v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959), and Prudential Ins. Co. of America v. Securities and Exchange Commission, 326 F. 2d 383 (C.A. 3, 1964), certiorari denied, 377 U.S. 953 (1964), it is clear that the protections of the Investment Company Act are to be broadly applied. Exclusions under Sec. 3(c), on the other hand must not be extended beyond what Congress actually intended. To effectuate the purpose of the Act, as set out in Sec. 1(b), the exclusionary provisions of Sec. 3(c) should not be read, where reasonable interpretation of the statute will permit,

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12/ SEC Memorandum amicus curiae, pp. 23-24, n. 29.

to exclude investment companies, not otherwise regulated, and thus deprive investors of at least some meaningful protections.

Applying this rationale to companies holding water carrier certificates of operating authority, as distinct from railroads and motor carriers under Titles I and II of the Interstate Commerce Act, it is very doubtful that Congress actually intended to make available to them the Sec. 3(c)(9) exclusion. The regulatory provisions of Part III applicable to such companies pertain only to the rates, schedules and practices employed in their operation of a transportation business. Unlike the regulatory sections applicable to railroads and motor carriers, there is no provision for the regulation of the means of financing or the issuance of securities.

Furthermore, S. 2903, 76th Cong., originally introduced as S. 2610, 76th Cong., cited in the Investment Company Act hearings as the basis for the suggested addition of the Sec. 3(c)(9) exclusion, would only have extended the ICC's jurisdiction over railroads and their subsidiaries.[13/] Therefore, notwithstanding the broadly worded but inconclusive explanation of Sec. 3(c)(9) found in the statement of Mr. Schenker in the House Hearings on the Investment Company Act,[14/]

13/ See, statement of Fletcher, Hearings on S. 2610, Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess., (1939), pp. 43, 49.

14/ Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce of the House of Representatives, 76th Cong., 3d Sess., on H.R. 10065, p. 103.

it appears that holders of water carrier certificates of operating authority probably were not within the group of companies Congress intended to exclude under Sec. 3(c)(9).

Finally, although it is for the ICC to regulate the issuance of securities by railroads (Interstate Commerce Act, Sec. 20(a), 49 U.S.C. 206) and motor carriers (Interstate Commerce Act, Sec. 214, 49 U.S.C. 314), Congress has specifically denied the ICC equivalent regulatory authority over the issuance of securities by water carriers. Early drafts of the Transportation Act of 1940 would have included such a provision in Title III.[15/] Over the objection of the ICC this provision was omitted from the final bill.[16/] An identical provision had been included in drafts of proposed regulation of water carriers dating back to 1934.[17/] While the omission of this provision from

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15/ See, Sen. Rept. No. 433 on S. 2009, 76th Cong., 1st Sess. (1939), p. 25.

16/ See, letter of the Chairman of the Legislative Committee of the Interstate Commerce Commission Transmitting a Report Relative to Omnibus Transportation Legislation, S. 2009, House Committee Print, 76th Cong., 3d Sess. (1-29-40), p. 55.

17/ See; Eastman, Regulation of Transportation Agencies, Second Report of Federal Coordinator of Transportation, Senate Doc. No. 152, 73d Cong., 2d Sess. (1934), pp. 43, 344 and S. 1632, 74th Cong., 1st Sess. (1935).

Title III as ultimately enacted in 1940 is not clearly explained in the legislative history of S. 2009, it may reasonably be inferred that Congress accepted the objections made to such a provision in the earlier bills, that the existing federal securities laws provided "ample protection" for investors in the securities of water transportation companies.[18/] Thus, while investors in securities of railroads or motor carriers which also are investment companies are protected by ICC regulation of both the issuance of securities by such companies and the conduct of their financial affairs, the ICC affords no safeguards to investors in the securities of water transportation companies. In the issuance of securities by such a company then, the Securities Act of 1933, administered by the SEC, is the bulwark of investor protection. And, if a water transportation company is also an investment company, in the absence of regulation substantially equivalent to the regulation of railroad or motor carrier securities under the Interstate Commerce Act, it should reasonably not be excluded from the Investment Company Act under Sec. 3(c)(9).

18/ See Statement of American Merchant Marine Institute, Inc. Hearings Before Senate Committee on Interstate Commerce on S. 2009, 76th Cong., 1st Sess. (1939) at p. 634. See also Statement of Maritime Association of the Port of New York, Joint Hearings of Committee on Interstate Commerce and Merchant Marine Subcommittee of Senate Committee on Commerce on S. 1632, 74th Cong., 1st Sess. (1935) at p. 946.

In this case however, as we noted in our earlier memorandum, it is unnecessary to reach this point. Nevertheless, it is helpful to have this background in mind in turning to defendants' contentions that something substantially less than the full scale regulation contemplated by Title III for an operating carrier is enough to entitle a certificate holder to the Sec. 3(c)(9) exclusion.

Defendants urge that American-Hawaiian is subject to regulation, even while not operating, in two ways: first, because of the ICC's continuing jurisdiction over certificate transfers subject to Sec. 5 and second, because of the reporting and record keeping requirements of Title III with which American-Hawaiian has continuously complied. This second area of so-called regulation was discussed at length in our original memorandum at pp. 41-44. On the first point, it is sufficient to note that whether it is called - "jurisdiction" or "regulation" - the ICC's interest under Sec. 5 comes into play only when a company holding a certificate desires to transfer it. Without the proposed transfer there is no jurisdiction or regulation under Sec. 5 over a dormant certificate holder.[19/] By defendants' construction of

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19/ As we have noted at p. 13 above, ICC jurisdiction over "combinations and consolidations of carriers" under Sec. 5 is far different from the regulation over a company's internal affairs necessary to support exclusion under Sec. 3(c)(9). That Sec. 5

Footnote Continued.

Sec. 3(c)(9), all such a holder need do to evade the Investment Company Act and deprive investors of the protection afforded by that statute is to remain continuously in possession of its ICC certificate, and under the applicable law such possession may go on forever.[20/]

Consequently, it is clear that the nature of the "regulation" to which American-Hawaiian maintains it has been subject is minimal, the ICC's broad statement that "it has regulated and will continue to regulate the activities of [American-Hawaiian] to the fullest extent provided by the Interstate Commerce Act,"[21/] notwithstanding. In fact the ICC's regulation "to the fullest extent provided by the Interstate Commerce Act" is threadbare indeed, even by the most generous standards.

19/ Footnote Continued.

jurisdiction cannot be equated with general corporate or financial regulation is made clear by the Lane case, supra, and by the inclusion of the proposed Sec. 6(f)(1) in the modified amendment. Indeed the whole purpose of retention of Sec. 5 jurisdiction over dormant certificate holders, as expressed in Lane and the other transfer cases, by the ICC, is to prevent the transfer of certificates through the medium of consolidations and mergers without approval of the ICC.

20/ In the case of a water carrier certificate, there is no difficulty at all in achieving this result since once issued, such certificates cannot be revoked by the ICC. United States v. Seatrain Lines, Inc., 329 U.S. 424 (1947).

21/ ICC Memorandum, p. 9.

This is made clear in a letter dated June 10, 1958 by Mr. Ginnane, the General Counsel of the ICC to the staff of the SEC in which he states with respect to American-Hawaiian's situation:

> "At the present time, because it is not actually engaged in the water carrier operations, the only regulatory requirement of the Interstate Commerce Act applicable to American-Hawaiian is the annual reporting requirement of Section 313 (49 U.S.C. 913). As you know, Part III of the Act does not subject the issuance of securities by water carriers to regulation by the Interstate Commerce Commission."22/

22/ See Attachment A.

IV. THE COMMISSION'S POSITION RESPECTING THE MEANING OF SECTION 3(c)(9) IS BASED ON A FAIR READING OF THE STATUTE IN THE LIGHT OF ITS EXPLICIT STATUTORY PURPOSE, RELEVANT LEGISLATIVE HISTORY AND APPLICABLE CASE LAW.

A. The Commission's position does not involve judicial amendment of the statute to accomplish what Congress refused to do in 1959.

Defendants' argument that the Commission is now seeking to establish by court decision what it could not obtain from Congress in 1959, that the Commission is proposing a "business activity test" for Section 3(c)(9) of the type rejected in 1959, is incredible. Under the 1959 proposed amendment a company, even if subject to regulation under the Interstate Commerce Act, would have been required to register under the 1940 Act, if it was primarily engaged in the investment company business. Thus, Alleghany Corp. would have been required to register, even though the ICC had specifically declared it to be subject to regulation as a railroad holding company, since the major part of Alleghany's activities did not involve its railroad investments. Under the present construction of Section 3(c)(9) Alleghany is clearly excluded from the 1940 Act, even though its exclusion is based on holdings which are a comparatively minor part of its portfolio.

In the case of American-Hawaiian, however, the "primarily engaged" language is unnecessary, since under the terms of the statute American-

Hawaiian is not subject to regulation within the meaning of Section 3(c)(9). The real issue is whether Congress intended that the mere retention of jurisdiction over transfer cases by the ICC would be sufficient to bring a dormant certificate holder within Section 3(c)(9) and thus afford it immunity from the 1940 Act. Defendants' once-a-carrier-always-a-carrier doctrine does not aid in finding the answer to that question. The relevance of American-Hawaiian's lack of carrier activity goes to whether it is regulated under the Interstate Commerce Act, for it is in that context that its dormancy and extended non-operation are important.[23/] Thus, if the nature of American-Hawaiian's business activity is such that it is not regulated under the Interstate Commerce Act, or the type of regulation involved is minimal and clearly not of the type Congress intended would afford exclusion from the 1940 Act under Section 3(c)(9), then those considerations are relevant in determining whether American-Hawaiian is within the scope of Section 3(c)(9). That this is far different from the "primarily engaged" test proposed in 1959 is clearly demonstrated by the exclusion of Alleghany.

23/ In this regard, we pointed out in our original memorandum that the so-called "Alleghany litigation" stands for the proposition that it is not the mere possession of a certificate which is important in determining whether a company is subject to ICC regulation but rather the nature of the company's activities in the transportation business (see, SEC memorandum, pp. 36-41). This rule of the Alleghany litigation remains uncontroverted in defendants' answering memorandum.

B. The legislative purpose and aids to construction discussed by the Commission are relevant herein.

The legislative history of the 1940 Act is clear that Congress intended to subject to regulation all forms of investment company business, however organized, except those specifically excluded in Section 3(c). Sections 3(c)(1)-(15) list specific exclusions from the definition of investment company.

Were it not for these specific exclusions, these companies would literally fall within the definition of investment company because of their investment activities. As we pointed out in our original memorandum, VALIC, supra, and Prudential, supra, indicate that exclusions under Section 3(c) should be construed in a manner consistent with the purposes of the 1940 Act expressed in Section 1(b). We there stated:

> ". . . although the VALIC and Prudential discussion comparing the nature of the regulatory schemes involved is not in itself directly analogous, since the exclusion under Section 3(c)(9) is cast in terms of a company 'subject to regulation' and the Section 3(c)(3) exclusion is phrased in terms of the type of company involved (insurance companies), there is nonetheless significant relevance in the approach followed by those courts. In construing the availability of Section 3(c)(3), the courts compared the kind and purposes of the two schemes of regulation. The reluctance to apply the exclusion is rooted in the conviction that Congress intended only to exclude those entities from regulation under the Investment Company Act which were elsewhere subject to regulation designed to protect public investors." 24/

24/ Commission Memorandum, pp. 19-20.

It is clear in this context that defendants' assumption that the SEC urges "that the exemption should be denied to any company primarily engaged . . ." in the investment company business is an inaccurate generalization which is not really relevant to the issues at hand. Prudential and VALIC are relevant in this case. Although they involve one branch of the Section 3(c) exclusion (based on the nature of the business activity) which, as we have said, is not entirely analogous, these cases cannot be cast aside. Together with Section 1(b), Brown v. Bullock and other cases discussed in our original memorandum, Prudential and VALIC provide a general framework which guides construction of the terms of the statute,[25/] particularly in cases involving the same general exclusionary section as is here involved, Section 3(c). If an examination of the legislative purpose and a comparison of the regulatory schemes is relevant in determining whether an insurance company sponsored fund is entitled to a Section 3(c)(3) exclusion, it is also clearly important to examine the nature and scope of the applicable regulation in determining the availability of a kindred exclusion, which speaks in terms of excluding a company "subject to regulation under the Interstate Commerce Act." In the instant case this means an exploration of whether there is any relevant regulation involved and whether Congress, in the light of legislative purpose and policy of the Act, could have reasonably meant to exclude from the Act a company subject to such minimal ICC jurisdiction as is involved in the case of dormant, non-operating certificate holders such as American-Hawaiian.

25/ See, Commission Memorandum, pp. 9-20.

CONCLUSION

We agree with the ICC that ". . . mere possession of a dormant water carrier certificate can scarcely be sufficient to permanently exempt the holder from regulation under the Investment Company Act of 1940."[26/] That the holder files annual reports with the ICC, which are meaningful for operating carriers only, and must obtain ICC approval for a transfer of a certificate has no effect on the non-availability of Section 3(c)(9).

Respectfully submitted,

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DATED: February 8, 1965

26/ ICC memorandum (as corrected), p. 3.

ATTACHMENT A

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Interstate Commerce Commission

OFFICE OF THE GENERAL COUNSEL

Washington 25

June 10, 1958.

Joseph C. Woodle, Esq.,
Director, Division of Corporate Regulation,
Securities and Exchange Commission,
Washington 25, D.C.

Re: American-Hawaiian Steamship Co.

Dear Mr. Woodle:

This is in reply to your letter of April 23, 1958, in which you inquire as to the status of American-Hawaiian Steamship Company under the Interstate Commerce Act.

Pursuant to its decision in American-Hawaiian Steamship Company Common Carrier Application, 250 I.C.C. 219, the Commission on April 17, 1944, issued a "grandfather" certificate of public convenience and necessity to American-Hawaiian Steamship Company, authorizing service as a common carrier by self-propelled vessels between specified Atlantic and Pacific Coast ports. American-Hawaiian suspended its carrier services in 1953 and cancelled its tariffs as of February 28, 1955. Its carrier operations have remained dormant since that time.

Unlike the provisions of Part II and Part IV of the Interstate Commerce Act, Part III, which pertains to water carriers, has no provisions for revoking a water carrier certificate for any reason. You will note that in United States v. Seatrain Lines, 329 U.S. 424, 432-433, the Supreme Court stated that "The [water carrier] certificate, * * is not subject to revocation in whole or in part except as specifically authorized by Congress." The Commission several times has recommended to the Congress that the Act be amended to authorize specifically the revocation of water carrier certificates for non-use. As yet, such amendatory legislation has not been enacted. Under these circumstances the Commission has established no procedure for the revocation of water carrier certificates because of non-use.

At the present time, because it is not actually engaged in water carrier operations, the only regulatory requirement of the Interstate Commerce Act applicable to American-Hawaiian is the annual reporting requirement of Section 313 (49 U.S.C. 913). As you know, Part III of the Act does not subject the issuance of securities by water carriers to regulation by the Interstate Commerce Commission.

I regret that the pressure of other matters prevented an earlier reply to your letter. Please call upon me if I can be of further assistance to you.

Sincerely,

Robert W. Ginnane

Robert W. Ginnane,
General Counsel.