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NONFARM BACKHAULS FOR NONMEMBERS OF AGRICULTURAL COOPERATIVES: IMPACT OF THE NORTHWEST DECISION

In 1965, the Court of Appeals for the Ninth Circuit, in *Northwest Agricultural Cooperative Association v. ICC*, held that agricultural cooperatives which haul nonagricultural products to and for non-members maintain their transportation exemption from the Interstate Commerce Act, provided such activity is "necessary and incidental" to the statutory purpose of the association. The decision broadened the scope of activities which had been permitted by the Interstate Commerce Commission under this exemption, and climaxed a continuing dispute between the Commission and the courts as to the nature and limitations of the cooperative exemption, most significantly from the regulation of rates. It is the purpose of this discussion to examine the present status of the cooperative exemption, based on the *Northwest* decision, by analyzing the various positions expounded as to the proper statutory construction, and the ramifications of proposals for change in the regulatory system.

The Northwest Decision

The Interstate Commerce Commission sought to enjoin *Northwest Agricultural Cooperative Association* from engaging in certain transportation activities in alleged violation of the Interstate Commerce Act. It claimed that the nonmember backhauling of non-agricultural products by Northwest could not be performed without requisite Commission authorization. Northwest contended that it was an agricultural cooperative, exempt from the regulations of the Commission by virtue of section 303, which provided:

(b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include ... (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined ... .

Northwest was organized under the Idaho Cooperative Marketing Act "for the purpose of transporting the agricultural products of its members to market at a lower cost than that which the members..."
would incur if transportation were arranged by each member individually.\textsuperscript{11} Outbound, Northwest owned-and-operated vehicles carried the products of its members to market. Returning, so far as was possible, these trucks hauled farm supplies required by its members. However, the demand for such supplies did not meet the volume of member products hauled to market. Therefore, in lieu of returning empty, these vehicles hauled, on a for-hire basis, nonfarm products and supplies from and for nonmembers of the association. These nonfarm backhauls accounted for less than 18 percent of Northwest's total revenue for a 4-month test period.\textsuperscript{12} It was these nonfarm backhauls the Commission sought to enjoin.

A "cooperative association" is defined by the Agricultural Marketing Act\textsuperscript{13} in these terms:

"[C]ooperative association" means any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services: \textit{Provided, however, That such associations are operated for the mutual benefit of the members thereof as such producers or purchasers . . . .}

And in any case [conform] to the following:

. . . [T]he association shall not deal in farm products, farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members.\textsuperscript{14}

Northwest contended that, as a cooperative association within the statutory definition, it remained exempt so long as its total dollar volume of member business exceeded its nonmember business.\textsuperscript{15} Its status should not change because its backhauls were of nonagricultural products for nonmembers. Rather, since these backhauls were incidental to its main purpose as a hauler of member products, and comprised less than half of its total business revenue, the association should still remain within the statutory exemption.

The Commission countered this statutory construction.\textsuperscript{16} It contended that the terms of the exemption extend only to activities "directly beneficial or functionally related"\textsuperscript{17} to the marketing of member products or to the provision of member supplies and/or member business services. Northwest's provision of for-hire transportation was not so related to permissible activities. Therefore, it was not entitled to exemption, but was subject to the Commission's regulations.

\textbf{Held: Judgment for Northwest.} Northwest complied with the statutory requirements, and was a "cooperative association" within the

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\textsuperscript{11} Brief for Appellant at 3, Northwest Agric. Cooperative Ass'n v. ICC, 350 F.2d 252 (9th Cir. 1965).
\textsuperscript{12} Id.; 350 F.2d at 253.
\textsuperscript{14} 12 U.S.C. § 1141j(a) (1964).
\textsuperscript{15} 350 F.2d at 253-54.
\textsuperscript{16} Id.
\textsuperscript{17} Brief for Appellee at 17, Northwest Agric. Cooperative Ass'n v. ICC, 350 F.2d 252 (9th Cir. 1965).
\end{flushleft}
definition expounded by the Agricultural Marketing Act. The statutory provision limits farm activities performed for nonmembers, but this cannot be construed as an express prohibition of all nonfarm activities. Such nonfarm activities must only be "incidental and necessary" to the cooperative's main purpose of marketing farm products and furnishing farm supplies and farm business services for members. Northwest's nonmember backhauls were necessary, since without them, it could not have transported member products as cheaply as the cost of common carriage. They were incidental, comprising less than 18 percent of total business revenues. Northwest, therefore, retained its exemption by the application of this test.

Determination of Legislative Intent

The Interstate Commerce Act

Northwest was decided on the ultimate question of statutory construction. The court was faced with interpreting the Interstate Commerce Act and the Agricultural Marketing Act, both enacted at different times to settle different legislative problems. Of these, the legislative history of the Interstate Commerce Act is the most elucidating, and has posed the most problems.

The agricultural cooperative exemption to the Interstate Commerce Act became law as part of the Motor Carrier Act of 1935. The purpose of that legislation was expressly stated to be the regulation of motor carrier transportation so that economical and efficient service could be promoted "without . . . undue preferences or advantages, and unfair or destructive competitive practices . . . ." The regulatory power of such a policy was vested in the Interstate Commerce Commission. In enacting the bill, Congress provided its own interpretation of the policy statement:

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[Y]our committee has no intent to undertake to suppress or restrict in any way the development of motor-carrier transportation by responsible carriers for the good of the public interest. Nor do we want motor-carrier transportation subservient to or restrained or curtailed by any other transportation medium. The purpose of this bill is to provide for regulation that will foster and develop sound economic conditions in the industry, together with other forms of public transportation, so that highway transportation will always progress.
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Congress thus indicated its intent that the Motor Carrier Act was to be a remedial statute, designed to redress inadequacies of motor carrier regulation and to protect the public welfare against future undesirable practices. The Interstate Commerce Commission was empowered to regularize, supervise, and ultimately to regulate motor carrier activities in the public interest.

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18 350 F.2d at 256.
19 Id. at 257. This test is hereinafter referred to as the "necessary and incidental" test.
22 49 Stat. 543.
23 Id.
24 Id.
25 79 CONG. REC. 12,205 (1935).
The cooperative exemption was not part of the Motor Carrier Act as originally proposed, but was added by floor amendment.\textsuperscript{26} Discussion of the proposal was not extensive.\textsuperscript{27} However, some indication of legislative purpose can be ascertained from the Congressional debate.

It is clear from the discussion in the House of Representatives that the basic issue was one of nonmember business conducted by cooperative associations. As described by its proponent, Representative Marvin Jones,

\begin{quote}
[t]his exemption is consistent with the purpose of the act to regulate the use of highways by persons and corporations who use them regularly as places of business and as the primary means of gaining a livelihood. Cooperative associations do not act as moneymakers in transportation. The hauling is done as a means of reducing the marketing expenses of their members.
\end{quote}

Especially in highly organized communities it is almost essential they do some hauling for nonmembers. Otherwise certain farmers who are only temporarily in the community and in some instances tenants might be left without transportation facilities. In some instances it reduces the expense of handling to combine some hauling for nonmembers. This does not mean going into the general business of transportation. It is merely incidental to the hauling for their own members. It is a practical proposition.\textsuperscript{28}

And again:

\begin{quote}
This will not open the gate for a lot of men to go into the trucking business and thus escape, because the moment they haul more for outside people than they haul for their own members they will be out of the window so far as the exemption is concerned.\textsuperscript{29}
\end{quote}

While it is clear that Congress anticipated some nonmember hauling would take place under the exemption—in fact indicated that this would be necessary to effect the general purpose of the Motor Carrier Act—the permissible limits of this activity were not defined in the debates. A pertinent comment was made during Congressional consideration of the Act, however, which offers evidence of the Congressional limits anticipated.

While the definition referred to permits the cooperatives to deal in and transport the products of nonmembers, restrictions in the definition and practical considerations make it impossible for cooperatives to engage in outside trucking to a degree that would injure regular, for-hire motor carriers.\textsuperscript{30}

The Agricultural Marketing Act

The cooperative exemption to the Interstate Commerce Act refers for definition to the Agricultural Marketing Act.\textsuperscript{31} The latter Act establishes the Farm Credit Administration, a function of which is to make loans to eligible cooperative associations meeting the statutory qualifications.\textsuperscript{32} In section 1141j of the Act, the cooperative definition

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\textsuperscript{26} Id. at 12,220.
\textsuperscript{27} Id. at 12,218-22.
\textsuperscript{28} Id. at 12,218.
\textsuperscript{29} Id. at 12,219.
\end{flushright}
is propounded. The difficulty in interpretation has come with respect to the third requisite for qualification, that a cooperative, "shall not deal in farm products, farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members." 33

It is significant to note that the Interstate Commerce Act provision exempts cooperatives "as defined in the Agricultural Marketing Act" 34 rather than merely referring to the specific cooperative definition expressed in section 1141j of that Act. This indicates that the scope and purpose of the entire Act should be taken into account when applying the bare words of the definition to the facts of a particular case, and provides yet another source of determining the intent of Congress as to those organizations falling within the definition.

The policy of the Agricultural Marketing Act is expressed in section 1141. This section provides:

(a) It is declared to be the policy of Congress to promote the effective merchandising of agricultural commodities in interstate and foreign commerce so that the industry of agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products—

(2) by preventing inefficient and wasteful methods of distribution. 35

(3) by encouraging the organization of producers into effective organizations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies. 35

In view of the general reference to this policy in the exemption clause of the Interstate Commerce Act, the purpose of the definition should be considered in light of the avowed congressional policy establishing that definition.

**Scope of the Problem**

The contemporaneous constructions placed upon the provisions of the Interstate Commerce Act by the Commission which possesses special competence in this field, are entitled to great weight and respect and will not be overturned unless they are arbitrary or plainly erroneous. 36

The traditional concern of the Interstate Commerce Commission in dealing with cases arising from the cooperative exemption has been to prevent an association, under the guise of the exemption, from engaging in transportation as a public carrier for-hire. 37 This concern

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manifests the problem the Commission has had in attempting to impose any form of regulation on cooperatives.

The Commission must enforce the regulatory provisions within its authority with a view toward promoting the "National Transportation Policy,"\(^3\) designed to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices... and enforced with a view to carrying out the above declaration of policy.\(^3\) But exempt cooperatives which engage too extensively in the area of for-hire carriage of nonmember and nonagricultural goods, will be in derogation of this "Policy" restriction on "unjust discriminations, undue preferences or advantages."

Logically, the Commission's position seems sound. An agricultural cooperative is exempt from all regulatory control, except for safety and hours of service provisions, merely by being such a bona fide cooperative.\(^4\) Since it is exempt, a cooperative need have no contact with the Commission whatsoever. It is not required to file a petition for exemption, or to describe its exempt activities in any way. The practical effect of this is that by declaring itself exempt, a cooperative, whether actually exempt or merely claiming to be exempt, can operate in interstate commerce in any way the cooperative itself may determine to be permissible under the statute.

The Commission has the power to investigate violations of the statutes within its jurisdiction, either upon the receipt of a complaint concerning such practices,\(^4\) or upon its own motion.\(^4\) It may also apply to the appropriate district court to enjoin operations by motor carriers in violation of the statutory regulations.\(^4\) However, the problem of administration of such provisions is clear: before bringing any action against a cooperative, the Commission must first have knowledge, either independently or furnished by complaint, of both the existence of the cooperative and the nature and extent of its unpermitted activities. But where there is no requirement for cooperatives to notify the Commission of their activities, or even of their existence, organized and rational supervision becomes all but impossible.

The Interstate Commerce Commission must attempt to regulate the transportation activities of agricultural cooperatives, consistent with its purpose to prevent "undue preferences or advantages, and unfair or destructive competitive practices."\(^4\) However, it is unable to maintain even supervisory authority over the operations of these cooperatives, since there is no requirement of qualification for exemption by application to the Commission. Faced with this dilemma, the Commission may take two courses of action: it may seek a change

\(^{3}\) Transportation Act of 1940, ch. 722, § 1, 54 Stat. 898, 899.  
\(^{3}\) Id.  
\(^{4}\) 49 U.S.C. § 322(b)(1) (1964). (This is the provision utilized by the Commission in *Northwest.*).  
in the law to enable it to obtain knowledge at least of the existence of those cooperatives entitled to exemption, or it may work with the present legislation, and attempt to confine the exemption by construing the statutes in accordance with its viewpoint. In fact, both these courses of action have been attempted.

**Commission Position**

**Recommendations for Statutory Change**

The Commission has recommended consistently that changes be made in the existing laws to allow it more control over the carriers exempt from its regulation. It is responsible for enforcing the safety and hours of service regulations of the Interstate Commerce Act even as to exempt haulers such as cooperatives, and has urged legislative action that would provide some means for determining the operation of exempt carriers in order to enforce compliance with these applicable regulations. In response to such requests, bills were introduced into Congress in 1957 which would have required the yearly filing of a short statement identifying the carrier and its activities by all carriers exempt from regulation but subject to the safety provisions of the Act.

The recommended amendment would not require the filing of complicated or elaborate reports. It is only necessary that we be kept informed respecting the identity of such carriers, their location, and the number of vehicles owned or operated. This could be accomplished through the simple expedient of mailing a postcard once a year.

Each bill died in committee.

In 1961, the Commission changed its position. Rather than requiring the mere registration of carriers as it had done previously, it sought to gain substantive regulatory control over the exempt haulers. The Commission found that organizations were often claiming exempt status for themselves as cooperatives, even though they were clearly not qualified for exemption. This practice siphoned off a substantial amount of revenue from goods that would otherwise be transported by carriers subject to Commission regulation. Further, even when these unqualified exempt carriers were identified, the Commission was unable to overcome the "presumption of eligibility" which each carrier claiming exemption possessed.

Bills were introduced in two separate Congressional sessions. These bills, if enacted, would have required that in order to obtain

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49 CCH 1957-1958 Cong. Index 3555, 5570.
an exemption, cooperatives claiming exempt status would be required to apply for and receive a certificate of exemption issued from the Commission, attesting to their inclusion within the Agricultural Marketing Act definition. Again the bills died in committee. In the presentation of one of the bills it was stated that

[w]hile the number of groups and organizations claiming exemptions as agricultural cooperatives has grown considerably in the last 10-15 years, the Commission is not presently equipped with authority effective enough to weed out those which are not entitled to the exemption or to prevent other such persons from commencing operations. . . .

It is not the purpose of the proposed measure to interfere in any way with the legitimate operations of bona fide agricultural cooperatives under the exemption provided in the Interstate Commerce Act. It is, however, designed to enable the Commission to cope more effectively with groups and organizations using this exemption as a device to engage in unlawful transportation activities.

It is justifiable to infer that, due to its history of inaction concerning the statutes proposed in this field, Congress does not wish to answer the pleas of the Commission with remedial legislation aimed at ameliorating the existing situation. For whatever reasons, Congress is unwilling to change the inherently ambiguous nature of the agricultural cooperative exemption. This refusal forces the Commission to act within its limited scope in attempting to regularize the carriers claiming its benefit.

Construction of the Existing Statutes

Nonfarm Business Prohibited

Unable to effectuate its recommendations in congressional action, the Commission has worked within its investigatory framework in attempting to define the limits of exempt operations, either by its own proceedings or by judicial interpretation. It has urged persistently that the exemption provisions of the Motor Carrier Act should be strictly construed so that cooperatives shall not be allowed to engage indiscriminately in for-hire carriage for nonmembers. Its contention is that the Motor Carrier Act is a remedial statute. Exemptions to such statutes must be applied as narrowly as possible to permit application of the regulatory provisions to all carriers within its scope.

With reference to the definition of the cooperative associations found in the Agricultural Marketing Act, the Commission implies an

54 111 Cong. Rec. 7064-65 (1965) (remarks of Senator Magnuson, Chairman of the Commerce Committee, in which this measure died).
58 McDonald v. Thompson, 305 U.S. 263, 266 (1938).
inherent limitation. The third proviso of that definition states that a cooperative "shall not deal in farm products, farm supplies, and farm business services with or for nonmembers" in excess of its member activities. To the Commission, the express mention only of farm-related activities indicates that Congress did not anticipate that cooperatives would engage in nonfarm-related dealings at all, or at least that whatever nonfarm-related dealings a cooperative did have would have to be "functionally related" to its principal farm-related function. Thus, to the Commission, nonmember dealings were obviously anticipated, but the incidental hauling of agricultural products for nonmembers is far different from the hauling of nonagricultural products to and for nonmembers, and such incidental hauling should not be covered by the exemption.

In its brief filed for the Northwest appeal, the Commission made this position clear by applying the maxim of statutory construction "Expressio unius est exclusio alterius" to the facts of that case. The Commission found that

[applying this maxim to 12 USCA Section 1141j(a), a cooperative association means an association in which farmers act together doing the things mentioned therein, all of which have to do with farm products, farm supplies or farm [sic] business services. It excludes all matters not included in these terms... It specifically includes only farm items, and therefore excludes all non-farm activities.]

Since this was the case, then all nonagricultural backhauls for nonmembers must be, by the terms of the statutory definition itself, outside the scope of proper activities performed by a cooperative.

Logically, it appears that the maxim is inapplicable in this situation. The Agricultural Marketing Act prohibits the provision of more nonmember than member business. This is not a test of inclusion, as required for application of the maxim, but of exclusion.

Accordingly, if the maxim is applied here, the result is that the section must be deemed to contain all the factors that would disqualify the association and all other activities must be construed as not so prohibited.

This is neither the position the Commission would advocate nor the position that should be taken with respect to the statute. The maxim should not be applied when it can, by one interpretation, eliminate the substantive restrictions on the nature of a cooperative's business altogether.

If the Commission's interpretation is correct, the following result is inevitable:

60 Id. (emphasis added).
61 See ICC v. Jamestown Farmers Union Federated Cooperative Transp. Ass'n, 151 F.2d 403, 404 (8th Cir. 1945).
63 Id. at 24.
64 Cache Valley Dairy Ass'n Investigation of Operations, 96 M.C.C. 616, 620 (1964).
65 "Expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 692 (4th ed. 1951).
66 Brief for Appellee at 9, Northwest Agric. Cooperative Ass'n v. ICC, 350 F.2d 252 (9th Cir. 1965).
67 Id. at 10.
68 Reply Brief for Appellant at 6, id.
Statutory language:

"the association shall not deal in farm products, farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members." 12 U.S.C. § 1141j (a).

Interpolations required . . . :

[all of the foregoing, plus] "... the association shall not deal in or transport any nonfarm products, nonfarm supplies, or nonfarm business services either for members or nonmembers . . . ."

Nowhere is this restriction provided for; and prior discussion indicates that this interpretation is unacceptable in light of indications of legislative intent, both at the time the Motor Carrier Act was enacted and also when additional regulatory legislation has been introduced in Congress without success. Therefore, this proposal by the Commission should be rejected.

Nonmember Business Restricted: The Courts and the Commission

The Commission, both by its proposals for change and its construction of the existing statutes, has sought to keep the number of exempt cooperatives to the minimum permitted by a literal interpretation of the statutory definition. The rulings of the courts, however, have not lent support to this position. Rather, they have tended to broaden the scope of the exemption in keeping with their liberal view as to the proper statutory construction. This dichotomy can best be shown by comparing the Commission's interpretations with the answers of the courts.

There is a basic interpretational difference of opinion between the Commission and the courts that is vitally important to the area under discussion. The Commission adheres to the view that

transportation rendered by a cooperative association must be assessed in light of the essential relationship between the association and its members in their capacities as producers of farm products and purchasers of farm supplies and/or farm business services; and, in order to come within the so-called agricultural cooperative exemption, such transportation, whether performed for members or nonmembers, must be designed to benefit directly, or be functionally related to its members' activities as such producers and purchasers.

The courts, on the other hand, have tended to see that

[n]ecessarily goods must be handled by them which may not be strictly farm supplies. Some of their customers may not be members or even farmers. But if the cooperative is predominantly engaged in one or more of the activities specified in the Agricultural Marketing Act, and if its business with nonmembers is in an amount not greater in value than the total amount of the business that it transacts with its own members, such association does not lose its fundamental character as a cooperative. In other words, if such activities are merely incidental to, and necessary for the effectuation of the cooperative's principal activities as embraced within the Act, the status of the cooperative remains unimpaired.

69 Brief for Secretary of Agriculture as Amicus Curiae at 9, id.
71 Machinery Haulers Ass'n v. Agricultural Commodity Serv., 86 M.C.C. 5, 24 (1961) (emphasis added).
This conflict between application of the "functionally related" test and the "incidental and necessary" test has caused much difficulty for cooperatives, the Commission, and the courts.

What the parties mean by these phrases is not altogether clear, but certainly the Commission would impose a more stringent construction on the nature of the nonmember business. To be "functionally related" within the Commission's test, backhauls would have to be "directly essential to the activities of the members of the cooperative in their capacities as producer [sic] of farm products, or as purchasers of farm supplies and farm business services."73 This would seem to suggest, for example, that the backhauling of fertilizer for nonmembers would be acceptable only if a partial backhaul load was required by members, with the space remaining used to haul fertilizer to be sold to nonmembers, but that backhauling such a product for sale to nonmembers, when there was no member demand for it, would not be permitted. It is unlikely that Congress, in enacting the exemption provision, meant it to be so strictly applied, especially when the provision relies on a definition not designed to be used for the Commission's regulatory purposes, but in determining eligibility for government loans to cooperatives.

The "necessary and incidental" test proceeds from an interpretation of the purposes of the Agricultural Marketing Act "to promote the effective merchandising of agricultural commodities . . . by preventing inefficient and wasteful methods of distribution."74 It recognizes that cooperatives are beneficial to the public, and that their organization and continued success should be encouraged. Since nonmember backhauling helps to accomplish this task by lowering transportation costs of cooperatives, the practice should be permitted as to cooperatives which otherwise qualify for exemption. Also, this test has built-in controls on the extent and amount of nonmember business.

The backhauls must first be "necessary" to the cooperative's business activities. The test would permit nonmember backhauling only when backhauling for members cannot provide a sufficient supply of revenue to keep the return capacity of vehicles profitably utilized. Nonmember backhauling, to be "necessary," must be such that the cooperative cannot provide adequate substitutes from member backhauling demands, and cannot profitably continue its operations without such backhauling activities.

The nonmember backhauls must also be "incidental" to the cooperative's primary purpose of the marketing or providing of farm products, supplies, or business services for its members. This incidental activity must always be less in amount than the cooperative's primary activity. Therefore, the safeguard required by the Agricultural Marketing Act definition75 is imposed by the very term itself.

The rule of the "necessary and incidental" test may be defined as follows. Agricultural cooperatives may haul nonmember goods of a nonagricultural nature without losing their statutory exemption only if (1) these products are hauled by cooperative vehicles returning

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from the delivery of member products, and it appears that (2) there is not sufficient demand from member backhauls, that (3) the association cannot operate economically if its vehicles must return empty, and that (4) the total revenue from such operations does not exceed the total revenue derived from member operations. Under the existing interpretation, if these criteria are met, the cooperative remains within the scope of the exemption, and is not subject to the regulations of the Commission.

Independent Interpretation: The Farm Credit Administration

The provisions of the Agricultural Marketing Act, including the definition which concerns this topic, are administered by the Farm Credit Administration. In order to grant loans to cooperatives, the Administration must find the applicant to be a bona fide cooperative within the definition. Therefore, its interpretation of the statute is relevant to the present problem.

By applicable Code of Federal Regulations provisions, section 70.3 allows the Administration to grant loans to cooperatives for nonmember business to enable them to handle goods, other than farm supplies, used on farms and in farm homes only when the making of such a loan is directly connected with and reasonably necessary for the performance by such an association of its primary functions [as defined by statute]. The authority for the banks for cooperatives to make such loans is contingent upon . . . reasonably convincing evidence, that the handling of such goods by a cooperative is incidental to and necessary for the effectuation of the cooperative's principal activities . . . .

Further, by section 70.8

[the term 'nonmember' as used in § 70.1 [quoting 12 U.S.C. § 1141j(a)], refers to all persons who are not members whether farmers or not . . . .]

If cooperatives do not lose their eligibility for loans by the Administration merely for dealing in other than farm goods within the “necessary and incidental” test of section 70.3, the Interstate Commerce Commission interpretation that nonfarm business is prohibited by the very terms of the provision in the Agricultural Marketing Act relating to member and nonmember business, is without support here.

Section 70.8 also indicates that one may be a “nonmember” within this same provision even when not a farmer. If one is not a farmer, he would have no appreciable need for the types of products here deemed “farm products.” If a cooperative is permitted to haul products for him, presumably, then, at least some of these products would be non-“farm products”. And a cooperative is allowed to haul such nonfarm-related products by the terms of section 70.3, within the same “necessary and incidental” test propounded by Northwest. Clearly, the Farm Credit Administration interprets this statute far

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70 Farm Credit Administration supervisory control is provided by 12 U.S.C. 1141(c) (1964).
72 6 C.F.R. § 70.3 (1966) (emphasis added).
73 6 C.F.R. § 70.8 (1966).
75 Id.
more liberally than the Commission would apply it, and the Administration's interpretations are those of an agency whose very purpose is to identify those cooperatives falling within the statutory definitions.

"Necessary and Incidental" Applied

The effect of the "necessary and incidental" test propounded by Northwest has been graphically demonstrated by the Commission. In December 1964, the Commission investigated Cache Valley Dairy Association.\(^8^2\) The Commission found Cache Valley was a bona fide cooperative association but that it was backhauling nonagricultural products for nonmembers accounting for 2 percent of its total revenues. The Commission found that

\[\text{in considering the overall content of the statute, we believe that the limitation of the third part of section 1141j} \text{ implies an affirmative corollary; namely, that an association's dealings with nonmembers shall be limited to farm products, farm supplies, and farm business services.}\(^8^3\)

It enjoined Cache Valley's nonmember backhauls, concluding

\[\text{that the transportation activities of a cooperative association partially excluded by section 203(b)(5) of the act are limited to that transportation which is designed to benefit directly or be functionally related to its members' activities as producers of farm products and purchasers of farm supplies and/or farm business services.}\(^8^4\)

In 1965, the Ninth Circuit Court of Appeals reversed the district court judgment in Northwest and propounded the "necessary and incidental" test.\(^8^5\)

In 1967, the Commission reconsidered its decision in Cache Valley in light of the Northwest ruling.\(^8^6\) At the rehearing, the Commission stated that by the Northwest test,

\[\text{a cooperative which otherwise meets in all respects the requirements of the Marketing Act definition lawfully may transport non-farm-related traffic on a for-hire basis for nonmembers to the extent and only to the extent that such nonfarm-related transportation is shown to be, as a matter of fact, "incidental and necessary" to the effective performance of its primary farm-related functions specifically authorized by that act.}\(^8^7\)

The Commission found that Cache Valley was engaged in nonfarm backhauls only when it failed to have sufficient member backhaul business to fill its trucks, and nonmember backhauling accounted for only 2 percent of its total revenue. Application of the "necessary and incidental" test to these facts compelled a reversal of its previous ruling, and the exemption of Cache Valley.\(^8^8\)

This ruling, however, was opposed in a vigorous dissent by Commissioner Bush, who expressed the opinion that the legislative intent of Congress had been greatly exceeded by Northwest.\(^8^9\) In his belief,

\[\begin{align*}
\text{82 Cache Valley Dairy Ass'n Investigation of Operations, 96 M.C.C. 616 (1964).} \\
\text{83 Id. at 621.} \\
\text{84 Id. at 622.} \\
\text{85 350 F.2d 252 (9th Cir.), rev'g 234 F. Supp. 496 (D. Ore. 1964).} \\
\text{86 Cache Valley Dairy Ass'n Investigation of Operations, 103 M.C.C. 798.} \\
\text{87 Id. at 799.} \\
\text{88 Id. at 804.} \\
\text{89 Id.}
\end{align*}\]
Congress would have changed the law had it desired that this result be achieved; however, until Congress passes legislation authorizing the transportation for nonmembers of a bona fide agricultural cooperative association—of commodities *other than* those transported by such cooperative for its members—we should continue to express our true understanding that the transportation for nonmembers, of non-farm related traffic is not exempt from regulation pursuant to the provisions of section 203(b)(5) of the Interstate Commerce Act.90

**Conclusion**

Cooperative associations, the Interstate Commerce Commission, and the courts have been obligated to interpret the agricultural cooperative exemption by attempting to ascertain Congressional intent with respect to the adaptation of an inherently ambiguous statute. The Commission has urged that the exemption be construed strictly in order to effectuate regulation of all but those cooperatives clearly falling within the terms of the statutory definition of a cooperative. It has seen nonmember backhauls as permissible only if "functionally related" to the main purpose of service to member farmers.

The courts infer from its conduct that Congress has tended to give cooperative associations a favored status. Courts consistently have endeavored to keep the operational impediments of cooperatives to the minimum allowable by a fair interpretation of the statutory purpose. They have held that nonmember backhauling of nonagricultural products and supplies is acceptable if such an activity is "necessary and incidental" to the main purpose of the association.

When a statute is ambiguous, it is the job of the court to interpret the statute in a manner consistent with its determination of the legislative purpose for enactment.91 A literal interpretation should not be effectuated if legislative purpose is at variance with such a construction.92 If the words appear unduly narrow to give the statute a realistic and intended meaning, it is the function of the courts to extend its application to broader limits than the words might literally permit.93

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90 Id.
At the time the Motor Carrier Act and the Agricultural Marketing Act were enacted,\(^4\) the present extent of transportation operations by cooperatives, and the necessity, in many instances, for them to backhaul nonagricultural products for nonmembers as a prerequisite to economical operations, was undoubtedly not anticipated. But the stipulated policy and the contemporary dialogue indicate that Congress intended to allow cooperatives a measure of latitude in conducting their affairs, all of which should ultimately benefit the public as agricultural consumers. The "necessary and incidental" test allows cooperatives to retain this favored position while remaining within the bounds of the exemption. And while these statutes could be modified to provide more exact exemption criteria, legislative unwillingness to change the provisions has made such discussion moot.

Recently decided investigations by the Interstate Commerce Commission indicate that the "necessary and incidental" test can be successfully implemented, despite the fears of that agency to the contrary. In August 1966, the Commission held that, when its exemption is challenged, an association must first bring itself within the statutory definition of a "cooperative association" and then must prove to the Commission that, as a matter of fact its nonagricultural activities are actually incidental, and actually necessary.\(^5\) In May 1967, the Commission further narrowed the test to require that, to be "necessary and incidental," nonfarm activities could not be "a separate direct movement;" they must be conducted as a related backhaul movement resulting from the delivery of member products to market.\(^6\) Thus, even though more liberal than the Commission desires, the "necessary and incidental" test seems closest to expressing the intent of Congress toward cooperative activities, while still providing a meaningful limitation to be applied by the Commission in assessing cooperative activities in backhaul operations.

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\(^4\) The Motor Carrier Act was enacted in 1935, and the Agricultural Marketing Act in 1929.
\(^6\) Edgerton Cooperative Oil Ass'n Investigation of Operations, No. MC C-4570, 1967 FED. CARR. REP. ¶ 36,100.

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