

exempt commodities for non-members of an association is not exempt, and thus that Northwest's transportation of such commodities without a certificate of public convenience and necessity violated the Act.

Northwest defended on the ground that all of its transportation activity was exempt from regulation under section 203(b) (5). It pointed out that its for-hire transportation of non-exempt commodities for nonmembers produced much less revenue than it received from transporting products for its members, and that the income from these outside activities inured to the benefit of Northwest's members by economizing their marketing expenses.

The district court permanently enjoined Northwest from "transporting, by motor vehicle in interstate commerce on public highways for compensation, property other than that which is exempt from economic regulation under the Interstate Commerce Act, unless either (1) such transportation is directly beneficial or functionally related to the farming activities of defendant's members, or (2) there is in force and in effect, with respect to * * * [Northwest] a certificate or permit or other authorization issued by the Interstate Commerce Commission authorizing it to engage in such operations." The court found (234 F. Supp. 496, 498) :

* * * The difficulty with defendant's position is that it sanctions for-hire transportation in open competition with regulated common carriers without subjecting the Association's [Northwest's] fleet to regulation. Though Congress intended to exempt agricultural cooperatives from regulation under the Act in the transportation of their goods to market and their necessary supplies and services on return, I do not read the statute as granting these associations an exemption to enter the general transportation business. Undoubtedly, the Association's practice affords economies to its members, but these are economies not intended to be conferred by the Act.

This seems to us to have been a sound decision, but on appeal by Northwest to the United States Court of Appeals for the Ninth Circuit the district court's decision was reversed. The court of appeals first held that, since the agricultural cooperative exemption in the Interstate Commerce Act applies broadly to "motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act," the limitation upon Northwest's transportation activities urged by the Commission "must be found in the definition of a cooperative association in the Agricultural Marketing Act."

The court then held that "a cooperative does not lose its status by engaging in activities other than its primary statutory activity so long as they are incidental and necessary to its effective performance," and that "Northwest's transportation of non-farm products and supplies was incidental and necessary" to the effective performance of Northwest's farm service within that test.

The Solicitor General, on behalf of the Interstate Commerce Commission, filed a petition for a writ of certiorari; but the Supreme Court denied review.

Thus, it is clear that the problem is no longer merely one of transportation performed by fictitious or spurious agricultural cooperative associations, but is now one of much broader scope and impact. Under the court of appeals' decision a *bona fide* agricultural cooperative association may perform transportation services of non-farm-related commodities for non-members of the association, and do so for-hire and yet wholly exempt from economic regulation by the Interstate Commerce Commission. The only limitation appears to be that a cooperative's non-farm related business must not too closely approach fifty percent of the cooperative's total business. The court said (350 F. 2d 252, 256) :

A cooperative will retain its exemption only so long as it remains in essential character a "cooperative association" described in the statutory definition. Thus the activities in which it engages must be such that the cooperative can be fairly described as a farmer organization primarily engaged in marketing farm products for farmers, or purchasing, testing, or furnishing farm supplies or farm services for farmers; and operating for the benefit of the members of the cooperative in their capacity as producers of farm products or purchasers of farm supplies or farm business services. A cooperative would not be of the character contemplated by the statute if its non-farm related business exceeded that which was necessary and incidental to its farm-related business, and in no conceivable circumstances could non-farm related business approach fifty per cent of the total and remain incidental and necessary to that which was farm-related. [Italics supplied.]