

This decision, with the situation it has created, poses a very serious problem for the regulated carriers. It is fraught with much more difficulty and potential harm for them than the older problem of spurious co-ops. Wholesale diversion of traffic from the regulated common carriers (both truck and rail) is likely, indeed certain, to occur. The potential is there, and the raiding has already started. It is not easy to point to specific examples of diversion. The nature of exempt transportation and the circumstances under which exempt transportation is performed are such that there is an air of secrecy about it. Agricultural cooperatives, like other exempt haulers, are free of those provisions of the Interstate Commerce Act requiring the publication of rates, the filing of reports, etc.

About the only information available to us as to the nature of the non-member transportation these cooperatives are performing, or undertaking to perform, comes to us from rate quotations they are making in connection with Department of Defense traffic. There we can see the bids they submit, and we can learn the extent to which they are undercutting rail and regulated motor carrier rates. Even in the case of this military traffic transported by cooperatives, however, the information available to us is fragmentary and incomplete; and the military traffic is a very small part of the overall picture.

The broad-scale exemption from economic regulation now available to agricultural cooperative associations in the transportation of non-farm-related commodities for non-members gives them a tremendous advantage in competition with the closely regulated rail and motor carriers for such traffic. The cooperatives' transportation charges are not subject to control by the Interstate Commerce Commission, and they are free to go as low as they please in their efforts to attract traffic for what would otherwise be empty backhauls. Indeed there is nothing in the Court's decision that limits the exemption to backhauls.

As the Solicitor General of the United States said in his petition to the Supreme Court for a writ of certiorari (*Interstate Commerce Commission v. Northwest Agricultural Cooperative Association, Inc.*, No. 807, October Term 1965):

The decision below now holds out the clear prospect that cooperatives will, in the future, be able to obtain substantial backhaul tonnage by diverting traffic in non-farm related commodities from regulated motor and rail carriers. Such cooperatives may charge unregulated rates for the purpose of deriving some contribution to the cost of round trip movements. Such rates will be as low as necessary to divert traffic from the regulated carriers which rely exclusively upon transportation revenues for their livelihood. The record in this case illustrates the range of commodities which is subject to such diversion.

Finally, while the present case on its facts involves only the backhauling of non-farm-related commodities, the principle announced by the court of appeals might also be applied to other transportation of such commodities deemed "necessary and incidental" to the cooperatives' farm-related activities. As one example, a cooperative association which has trucks wholly idle at certain seasons of the year might, on the basis of this decision, employ them during those periods in for-hire transportation of the products of a nearby manufacturing plant.

Nor should it be overlooked that the sweeping exemption now available to *bona fide* agricultural cooperative associations is almost certain to encourage and spur the formation and use of spurious agricultural cooperatives as a means of evading ICC regulation. Illicit transportation of this kind will surely increase. There is now a much greater incentive, or temptation, than heretofore for artifice, sham and deception.

As the law now stands, then, agricultural cooperatives may transport anything for anybody, anywhere, at any rate—entirely free of any economic regulation whatsoever—subject only to the nebulous condition that its transportation activities with respect to non-farm products and supplies be "incidental and necessary" to its primary statutory activity.

The railroads, on the other hand, are required to establish rates that meet statutory standards of justness and reasonableness; to file and publish them for all the world (including the agricultural cooperatives) to see; to adhere strictly to those rates; to forgo any changes in them (absent special circumstances) except upon thirty days' notice; to observe the prohibition and requirements of the long- and short-haul clause, and the aggregate of intermediates clause, in section 4 of the Interstate Commerce Act; and to avoid unjust or undue discrimination, preference or prejudice.