

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 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.⁷⁶ 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.⁷⁷

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* . . .⁷⁸

Further, by section 70.8

[t]he 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 . . .⁷⁹

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

⁷⁴ 12 U.S.C. § 1141(a) (2) (1964).

⁷⁵ 12 U.S.C. § 1141j(a) (1964).

⁷⁶ Farm Credit Administration supervisory control is provided by 12 U.S.C. 1141(c) (1964).

⁷⁷ *ICC v. Iowa Cooperative Ass'n*, 236 F. Supp. 873, 877 (S.D. Iowa 1964).

⁷⁸ 6 C.F.R. § 70.3 (1966) (emphasis added).

⁷⁹ 6 C.F.R. § 70.8 (1966).