

agricultural cooperative is defined in the Agricultural Marketing Act as one dealing in "farm products, . . . farm supplies and/or farm business services." We admitted that transportation services performed for non-members of the association directly or functionally related to their agricultural activities, were exempt from economic regulation. But, we argued that for-hire transportation on non-exempt commodities for non-members of an association is not exempt, and thus Northwest's transportation of such commodities without a certificate of public convenience and necessity violated the Act.

Northwest's defense to the suit was that the transportation was exempt under section 203(b) (5). It pointed out that its for-hire transportation of non-exempt commodities for non-members produced much less revenue than it received from transporting member products, and that the income from such activities inured to the benefit of members of the association by economizing their marketing expenses. Northwest's president stated that if Northwest were denied access to this income from non-members, its cost of transporting the cooperative's farm products to market would exceed the cost of available common carriage and thus would force the cooperative to discontinue its operations.

Although a Federal District Court enjoined Northwest from transporting for compensation non-exempt commodities in interstate commerce by motor vehicle unless the transportation was directly beneficial or functionally related to the farming activities of Northwest's members or was authorized by appropriate authority, the Ninth Circuit Court of Appeals reversed this decision holding: (1) that a cooperative does not lose its status by engaging in activities other than its primary statutory activity, so long as they are incidental to its primary activity and necessary to its effective performance, and (2) that " * * * [O]n the uncontradicted facts Northwest's transportation of non-farm products and supplies was incidental and necessary to its farm-related transportation both in character and in amount—incidental because limited to otherwise empty trucks returning from hauling member farm products and farm supplies; necessary because it is not economically feasible to operate the trucks empty on return trips and because the additional income obtained is no more than that required to render performance of the cooperative's primary farm transportation service financially practicable."

Specifically rejecting the Commission's contention that a cooperative association may not deal at all in non-farm products, supplies, or business service, the Court concluded (1) that a cooperative will retain its exemption so long as it remains in essential character a "cooperative association" as described in the statutory definition, and (2) that the " * * * [R]eturn hauls * * * [A]re 'connected with farm operations,' for they are incidental and necessary to the effective performance of Northwest's * * * " * * * trucking operation [which], viewed as a whole, is a farm service performed jointly by Northwest's members 'for themselves', "and " * * * therefore did not deprive Northwest of its essential character as a 'cooperative association' under the Agricultural Marketing Act." At the same time, the Court stated, by way of caveat, that 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 50 percent of the total and remain incidental and necessary to that which was farm-related."

As I have previously noted, the Supreme Court, by its denial of the petition for a writ of certiorari, declined to review the Court of Appeals' decision. Although the Supreme Court has held that its denial of certiorari does not indicate approval of a lower court decision and that courts in other circuits are free to reach a result opposite from that taken by the Ninth Circuit, we are not optimistic over the prospect that the impact of the *Northwest* decision will be latered by judicial decision and, therefore, we are seeking enactment of this legislation. Pending enactment of this bill, we feel that the *Northwest* decision gives us no alternative but to sanction the transportation activities of these associations in non-farm related commodities for non-members where the record indicates that the association in question is a *bona fide* agricultural cooperative and its business handled for non-members is "incidental and necessary" to its primary function. This standard has most recently been applied in two proceedings, *Agricultural Transportation Assn. of Texas, Investigation of Operations*, 102 M.C.C. 527 (1966) and *Cache Valley Dairy Assn., Investigation of Operations*, 103 M.C.C. 798 (1967). In the first proceeding, which is now in the courts, we issued a cease and desist order against ATA of Texas, upon