AGRICULTURAL COOPERATIVES EXEMPTION

HEARING

BEFORE THE

SUBCOMMITTEE ON TRANSPORTATION AND AERONAUTICS

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

NINETIETH CONGRESS

SECOND SESSION

ON

H.R. 6530

A BILL TO AMEND SECTION 203(b)(5) OF THE INTERSTATE COMMERCE ACT TO CLARIFY THIS EXEMPTION WITH RESPECT TO TRANSPORTATION PERFORMED BY AGRICULTURAL COOPERATIVE ASSOCIATIONS FOR NONMEMBERS

S. 752

AN ACT TO AMEND SECTIONS 203(b)(5) AND 220 OF THE INTERSTATE COMMERCE ACT, AS AMENDED, AND FOR OTHER PURPOSES

JULY 1, 1968

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AGRICULTURAL COOPERATIVES EXEMPTION

MONDAY, JULY 1, 1968

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TRANSPORTATION AND AERONAUTICS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Samuel N. Friedel (chairman of the subcommittee) presiding.

Mr. FRIEDEL. The subcommittee will come to order.

This morning the Subcommittee on Transportation and Aeronautics is holding hearings on H.R. 6530, introduced by the chairman of the full committee at the request of the Interstate Commerce Commission, and a companion bill, S. 752, which originally was the same bill in the Senate but has come to us in substantially amended form.

These two bills have for their purpose the amendment of section 203(b)(5) of the Interstate Commerce Act to clarify the exemption respecting the transportation performed by agricultural cooperative associations for nonmembers.

Under section 203(b)(5) of the Interstate Commerce Act motor vehicles controlled and operated by agricultural cooperatives, or by a federation of such cooperatives, are exempt from the Commission's economic regulation provided the cooperatives meet certain qualifying criteria as defined in the Agricultural Marketing Act of 1929 (12 U.S.C. 1141).

The original exemption for agricultural cooperatives was included in the Motor Carrier Act of 1935. In 1940 this exemption was expanded to include a federation of such cooperative associations if such federation possesses no greater powers or purposes than cooperative associations so defined.

The number of groups and organizations claiming exemptions as agricultural cooperatives has grown considerably in the last 10 to 15 years. Also the transportation activities of agricultural cooperatives have changed greatly since the original exemption was adopted in 1935.

While this committee treated of a number of transportation services performed by motor vehicles which were of illegal nature or so-called grey area in our widespread amendments of 1958 and in those of 1965, this problem is one which at that time was not fully recognized. Rather, the problem has grown more acute in the last several years owing to the doubt cast on Interstate Commerce Commission interpretations as a result of certain court decisions, and owing to the increasing use by the Department of Defense of cooperative association transportation facilities in the handling of Government freight.

It is my understanding that since the legislation initially was intro-

duced last year, much progress has been made by the various segments of the carrier industry and governmental agencies as well as shipping groups, and that there is a general feeling that the bill as amended by the Senate affords a fitting resolution.

At this point in the record we will insert the legislation under consideration and agency reports thereon.

(H.R. 6530, S. 752, and departmental reports thereon follow:)

[H.R. 6530, 90th Cong., first sess.]

A BILL To amend section 203(b)(5) of the Interstate Commerce Act to clarify this exemption with respect to transportation performed by agricultural cooperative associations for nonmembers

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 203(b)(5) of the Interstate Commerce Act is amended by inserting immediately before "; or" the following: ", but, in transportation for nonmembers for compensation, only when those vehicles are being used in the transportation of farm products, farm supplies, or other farm related traffic".

[S. 752, 90th Cong., second sess.]

AN ACT To amend sections 203(b)(5) and 220 of the Interstate Commerce Act, as amended, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That at the end of section 203(b)(5) of the Interstate Commerce Act delete the semicolon and add the following language: ", but any interstate transportation performed by such a cooperative association or federation of cooperative associations for nonmembers who are neither farmers, cooperative associations, nor federations thereof for compensation, except transportation otherwise exempt under this part, shall be limited to that which is incidental to its primary transportation operation and necessary for its effective performance and shall in no event exceed 15 per centum of its total interstate transportation services in any fiscal year, measured in terms of tonnage: *Provided*, That, for the purposes hereof, notwithstanding any other provision of law, transportation performed for or on behalf of the United States or any agency or instrumentality thereof shall be deemed to be transportation performed for a nonmember: *Provided further*, That any such cooperative association or federation which performs interstate transportation for nonmembers who are neither farmers, cooperative associations, nor federations thereof, except transportation otherwise exempt under this part, shall notify the Commission of its intent to perform such transportation prior to the commencement thereof: *And provided further*, That in no event shall any such cooperative association or federation which is required hereunder to give notice to the Commission transport interstate for compensation in any fiscal year of such association or federation a quantity of property for nonmembers which, measured in terms of tonnage, exceeds the total quantity of property transported interstate for itself and its members in such fiscal year.

SEC. 2. Section 220 of the Interstate Commerce Act, as amended, is further amended by adding the following immediately after subsection (f):

"(g) The Commission or its duly authorized special agents, accountants, or examiners shall, during normal business hours, have access to and authority, under its order, to inspect, examine, and copy any and all accounts, books, records, memorandums, correspondence, and other documents pertaining to motor vehicle transportation of a cooperative association or federation of cooperative associations which is required to give notice to the Commission pursuant to the provisions of section 203(b)(5) of this part: *Provided, however*, That the Commission shall have no authority to prescribe the form of any accounts, records, or memorandums to be maintained by a cooperative association or federation of cooperative associations."

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., September 8, 1967.

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request for the views of the Bureau of the Budget on H.R. 6530, a bill "To amend section 203(b)(5) of the Interstate Commerce Act to clarify this exemption with respect to transportation performed by agricultural cooperative associations for nonmembers."

This bill would restrict the current exemption of agricultural cooperatives from economic regulation by the Interestate Commerce Commission to those situations where the traffic is farm-related. The effect of this amendment would be to deprive agricultural cooperatives of revenues which enable them to provide more efficient and economic transportation services.

Since we believe that the present exemption, as interpreted by the courts, properly balances the interest of the public, the cooperatives, and for-hire carriers, we would be opposed to enactment of H.R. 6530.

Sincerely yours,

WILFRED H. ROMMEL,
Assistant Director for Legislative Reference.

DEPARTMENT OF AGRICULTURE,
Washington, D.C., July 24, 1967.

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request of March 13, 1967, for comments with respect to H.R. 6530, a bill "To amend section 203(b)(5) of the Interestate Commerce Act to clarify this exemption with respect to transportation performed by agricultural cooperative associations for non-members."

This proposed legislation would, if enacted, limit the exemption of 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 cooperatives. The exemption from economic regulation would no longer apply to such motor vehicles when used in the transportation, for non-members for compensation, of property of any kind except farm products, farm supplies, or other farm related traffic. This provision for total elimination of certain kinds of cargo from the benefits of exemption would impair the efficiency and economy under which transportation is conducted by cooperatives in accordance with the existing provisions of law.

The Department does not favor enactment of this legislation.

The interpretation of the cooperative exemption in section 203(b)(5) of the Interstate Commerce Act has been the subject of much litigation. In a number of cases before the Interstate Commerce Commission and the courts, the Department of Agriculture has consistently taken the position that the language of the Interestate Commerce Act, when read in conjunction with the language of the Agricultural Marketing Act of 1929, should be given a liberal construction; that cooperatives should not be so limited in their motor carrier operations that efficient operation on behalf of farmer members would be stifled; that it was clearly the intent of the statute that a cooperative, in the conduct of its motor carrier operations, be permitted to transport in addition to its own and is members' property, incidental quantities of property belonging to others; and that backhauls of non-member property of a character which would otherwise be subject to regulation, should be permitted, provided the transportation of such property remained incidental to the transportation of property of the cooperative and its members.

Generally, the courts have ruled in favor of the Department's interpretation of the statutes and against the more restrictive interpretations which others have advocated. The decision of the Ninth Circuit Court of Appeals (350 Fed. 252 (1965), *cert. denied*, 382 U.S. 1011 (1966)), involving the Northwest Agricultural Cooperative Association supports the Department's view. In this case the Court held that a cooperative "does not lose its status by engaging in activity other than its primary statutory activity, so long as the other activity is inci-

dental to the primary one and necessary to its effective performance." Pursuant to the Court's decision a cooperative would be permitted to engage in the transportation of so-called "non-farm related" property to the extent that such transportation activity is incidental to its primary activity of transporting its own or member property and necessary to the effective performance of that activity.

We should like to emphasize that our position in cases involving the cooperative exemption has not been dictated solely by the belief that this is the proper legal interpretation of the statutes, but also by the conviction that the public interest would be appropriately served. Clearly, the interests of the cooperatives and their farmer members are served through the greater operating efficiencies made possible under the "incidental and necessary" test of the *Northwest* decision. Further, to the extent that the motor carrier operations of the cooperatives are efficient, the interests of the marketing system and of consumers are served. At the same time, Department statistics clearly indicate that the impact upon the regulated common carrier industry of transportation by the cooperatives of properaty which might otherwise be transported by the common carriers is quite negligible. Accordingly, we believe it would not be in the public interest to adopt the restrictive approach provided for in H.R. 6530.

Although the Department is opposed to H.R. 6530, there would appear to be merit in legislation which would clarify the scope of the exemption and assist the ICC in its enforcement of the motor carrier provisions of the Act. Our views may be summarized as follows:

First, we believe it would be appropriate for a cooperative to be required to notify the Interstate Commerce Commission if it intends to transport for hire in motor vehicles which it controls or operates, any property other than its own or that of its members, farm products and farm supplies for non-member farmers, and commodities exempt under section 203(b)(6) of the Interstate Commerce Act. The ICC would thus have a record of those cooperatives which intend to transport the type of property which has been the subject of controversy.

Second, to further assist the ICC and to meet one of the problems with respect to which Commission representatives have expressed concern, we believe the Commission or its agents should be given express authority to have access to the books, records, and accounts pertaining to the motor vehicle transportation of those cooperatives which transport property in accordance with their notice to the Commission.

Third, we believe the quantity of this non-cooperative traffic described above which a cooperative could transport in any year should be limited to a quantity which is incidental to the primary transportation operation of the cooperative and necessary to its effective performance. Such a limitation, we believe, flows from application of the decision in the *Northwest* case referred to previously. The amount of such property which cooperatives should be authorized to transport in order to achieve efficiency of operation will vary depending upon the nature of the business of the cooperative, the geographic area where it operates, and the availability of other backhaul traffic.

Fourth, to clarify a question which has arisen in the past and which appears to be one of concern to the regulated motor carrier industry, we believe that *transportation* operations which a cooperative carries out for non-members should not exceed the *transportation* operations which it carries out for members. Under the Agricultural Marketing Act of 1929, a cooperative may not deal in "farm products, farm supplies, and farm business services with or for non-members in an amount greater in value than the total amount of such business transacted by it with or for members." This provision applies to the total business activities of a cooperative. Apparently, there is concern that in a case where the only non-member business of a cooperative is transportation, the cooperative would be free to engage in transportation for non-members in an amount equal in value to the total business of all kinds conducted by the cooperative for members. A provision which would equate non-member *transportation* business with member *transportation* business would alleviate this concern.

There has also been concern expressed that under the language of the Agricultural Marketing Act cooperatives could transport property for the U.S. Government or any of its agencies without limit. We question, however, whether any such result was intended. Any doubt could be removed by a specific provision that transportation of property for the U.S. Government or any of its agencies is to be considered non-member business.

We believe that legislation which embodies the views set out above would constitute an appropriate prescription of the intended scope of the cooperative exemption, and would provide a mechanism which would materially assist ICC

in its enforcement of motor carrier operations. It would give appropriate recognition to the interests of the agricultural community, the common carrier industry, and the public.

The Bureau of the Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

ORVILLE L. FREEMAN, *Secretary.*

OFFICE OF THE SECRETARY,
DEPARTMENT OF TRANSPORTATION,
Washington, D.C., August 2, 1967.

Hon. HARLEY O. STAGGERS.
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Your Committee has requested the views of this Department on H.R. 6530, a bill

"To amend section 203(b)(5) of the Interstate Commerce Act to clarify this exemption with respect to transportation performed by agricultural cooperative associations for non-members."

Section 203(b)(5) of the Interstate Commerce Act provides that, except for safety considerations and qualifications and maximum hours of service of employees, there shall be no Interstate Commerce Act regulation of motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act of 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. "Cooperative association" as defined in the Marketing Act 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, distribution, and/or furnishing farm supplies and/or farm business services, provided, however, that such associations are operated for the mutual benefit of the members thereof as such producers or purchasers and conform to one or both of the following requirements:

First: That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; and

Second: That the association does not pay dividends on stock or membership capital in excess of 8 percent per annum.

And in any case to the following:

Third: That 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. All business transacted by any cooperative association for or on behalf of the United States or any agency or instrumentality thereof shall be disregarded in determining the volume of member and nonmember business transacted by such association.

The present proposal would amend section 203(b)(5) by adding language which would indicate that, in transportation for nonmembers for compensation, the exemption from regulation would apply only when those vehicles are being used in the transportation of farm products, farm supplies, or other farm-related traffic.

Basically, H.R. 6530 is designed to eliminate certain kinds of traffic from the benefits of the exemption. More specifically, the bill is designed to overcome the decision of the Ninth Circuit Court of Appeals in *Northwest Agricultural Cooperative Association* v. *ICC*, 350 F. 2d 252, which held that an agricultural cooperative (as defined in the Marketing Act) whose primary activity was transporting farm products and farm supplies did not lose its status as a cooperative association so as to subject its transportation activities to economic regulation by the ICC where its transportation of non-farm products and supplies was incidental and necessary to the cooperative's farm-related transportation, both in character and amount.

The court defined *incidental* as "limited to otherwise empty trucks returning from hauling member farm products to market, and producing a small return in proportion to the . . . [the cooperative's] income from trucking farm products and farm supplies."

Necessary was defined as when "it is not economically feasible to operate the trucks empty on return trips, and . . . [where] the additional income obtained is no more than that required to render performance of the cooperative's primary farm transportation service financially practicable."

The court further stated that "a cooperative would not be of this character [an association as defined] if its non-farm related business exceeded that which was necessary and incidental to its farm-related business, and it is difficult to imagine circumstances under which non-farm related business could approach fifty percent of the total and still remain incidental and necessary to farm-related business."

In reaching its conclusions, the court relied on the legislative history, the precedents in *ICC* v. *Jamestown Farmers Union*, 47 F. Supp. 749 (D. Minn. 1944), aff'd. 151 F. 2d 403, 8th Cir. 1945, and repeated rejections by Congress of past efforts to narrow the reach of the Agricultural Marketing Act to serve the policies underlying the Interstate Commerce Act at the expense of those upon which the Agricultural Marketing Act is based. The court also rejected the ICC's effort to impose a definition which would have required that transportation of traffic other than for cooperative members must be "functionally related" to the business of the cooperative. The Supreme Court denied a petition for certiorari at 382 U.S. 1011.

The Department is opposed to the proposed legislation. The present exemption has permitted the agricultural cooperatives to conduct efficient and economic operations by allowing a limited amount of for-hire truck transportation. As the Circuit Court pointed out, the legislative history and prior court decisions supported the position of the cooperatives. Moreover, in the 1966 hearings on S. 1729, a similar bill, it was demonstrated that the cooperatives themselves had exercised initiative in 1959 in attempting to resolve the matter by getting the Interstate Commerce Commission to adopt formally its own Administrative Ruling as to their activities; the ICC had rejected their overtures. It was further demonstrated that the amount of non-agricutlural supplies hauled for nonmembers was less than 0.9 of 1 percent of all of the backhaul trips (which included member traffic and agricultural products exempt elsewhere under section 203(b)(6)). Based upon Department of Agriculture studies, it was estimated that the volume of trucking at issue was .00027 of 1 percent of total trucking operations in the Nation. In addition, the cooperatives were able to demonstrate that the seven motor carriers who appeared at the hearings on S. 1729 asserting injury had substantial overall growth rates and an increase in earnings. Moreover, when investigatory proceedings have been undertaken by the ICC, the cooperative involved has made its books available to the Commission.

In sum, the Department is of the opinion that the present exemption is consistent with Congressional intent and that it has not been abused in any sense to the significant detriment of regulated carriers. Our position in this regard reflects both civilian and military considerations. Transportation by agricultural cooperatives for the Department of Defense, while it has permitted efficient service and needed economics in the face of rising freight rates, has been extremely modest when compared to the total amount of traffic moved for that Department by all land carriers.

Section 203(b)(5) is a carefully drawn statute which properly recognizes that the needs of agriculture and those of the regulated for-hire industry must be carefully balanced if the public interest is to prevail. The Commission itself has been able to carry out this intent since the Northwest decision by developing a body of case law within the framework of the court's decision in such recent cases as *Edgerton Cooperative Oil Association—Investigation of Operations*, 105 M.C.C. 100, *Cache Valley Dairy Association Investigation of Operation*, 103 M.C.C. 798, and *Agricultural Transportation Association of Texas Investigation*, 102 M.C.C. 527. It is therefore apparent that the Commission is in a position to cope with any issues presented by the activities of cooperatives, and is not, in our opinion in need of further authority restrictive of a small but legitimate activity. It could also, for example, propose by rulemaking appropriate guidelines to clarify any uncertainties as might appear.

One possible amendment, as we view matters, is that necessitated by the failure of the Agriculture Marketing Act to classify the transportation of property for the U.S. Government or any of its agencies as non-member business. We would have no objection to such a clarifying amendment. As to H.R. 6530, however, we would oppose its enactment.

The Bureau of the Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report for the consideration of the Committee.

Sincerely yours,

JOHN L. SWEENEY,
Assistant Secretary for Public Affairs.

DEPARTMENT OF THE ARMY,
Washington, D.C., July 2, 1968.

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of Defense with respect to H.R. 6530, 90th Congress, a bill "To amend section 203(b)(5) of the Interstate Commerce Act to clarify this exemption with respect to transportation performed by agricultural cooperative associations for non-members." The Secretary of Defense has assigned to the Department of the Army the responsibility for expressing the views of the Department of Defense on this bill.

Section 203(b)(5) of the Interstate Commerce Act, 49 U.S.C. 303(b)(5), exempts agricultural cooperative associations, as defined in the Agricultural Marketing Act of 1929, from economic regulation by the Interstate Commerce Commission. On August 10, 1965, the United States Court of Appeals for the Ninth Circuit in the case of *Northwest Agricultural Cooperative Association, Inc.* v. *Interstate Commerce Commission*, 350 F. 2nd 252, cert, den. 382 U.S. 1011 (1966), judicially established the right of agricultural cooperative association truck lines to backhaul non-farm commodities for non-members. The court limited the legitimate extent of such traffic to that which is incidental and necessary to the farm-related transportation of the cooperative. Since that decision, the Department of Defense has utilized the transportation services of agricultural cooperative associations where their use was in the best interest of the Government.

H.R. 6530 would amend section 203(b)(5) of the Interstate Commerce Act to eliminate the present exemption from economic regulation except in those situations where the back-haul traffic is farm-related.

The Department of Defense is required under Chapter 137 of Title 10, United States Code, the former Armed Services Procurement Act, to procure the supplies and services it needs by competition to the maximum practicable extent. To deprive the Department of the use of the transportation facilities of bona fide farm cooperatives would deprive it of one of the alternatives management presently possesses to foster competition for military traffic.

Our experience to date demonstrates that farm cooperatives are capable of providing efficient service to the Department of Defense at reasonable cost without adverse impact on regulated carriers. The transportation capability of the farm cooperatives constitutes an important segment of the total United States transportation system. If farm cooperatives are to make their maximum contribution to the economy of the nation, their transportation facilities must be available to shippers in those situations where prudent management dictates their use. Otherwise it will not be possible to achieve the objectives outlined in the 1962 Presidential Transportation Message to the Congress wherein it was stated:

"The basic objective of our nation's transportation system must be to assure the availability of the fast, safe and economical transportation services needed in a growing and changing economy to move people and goods, without waste or discrimination, in response to private and public demands at the lowest cost consistent with health, convenience, national security and other broad public objectives. . . . This basic objective can and must be achieved primarily by continued reliance on unsubsidized privately-owned facilities, operating under the incentives of private profit and checks of competition to the maximum extent practicable."

For the foregoing reasons, the Department of Defense recommends against the enactment of H.R. 6530.

The enactment of the bill would remove an effective element of price and service competition and thus deprive the Department of Defense of a source of efficient and low cost transportation for freight shipments. As a result, budgetary requirements of the Department of Defense would be increased.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the considertaion of the Committee.

Sincerely yours,

STANLEY R. RESOR,
Secretary of the Army.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., July 1, 1968.

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request for the views of the Bureau of the Budget on S. 752, an act "To amend sections 203(b)(5) and 220 of the Interstate Commerce Act, as amended, and for other purposes".

This Act is similar to H.R. 6530 in that it would restrict the statutory exemption from economic regulation given to transportation by agricultural cooperatives.

Unregulated transportation by cooperatives is extremely minor and limited in comparison to total for-hire truck and rail transportation and does not appear to have been abused or to have had any adverse effect on the regulated carriers. Such transportation provides revenues that are essential to the efficient operation of the cooperatives while also providing significant benefits and economies for the users.

Although we would have no objection to an amendment clarifying that transportation for the U.S. Government is "non-member business", we continue to believe, as expressed in our comments on H.R. 6530, that the present exemption properly recognizes and carefully balances the needs of agriculture, the regulated for-hire carriers and the public interest. We would therefore be opposed to enactment of S. 752.

Sincerely yours,

WILFRED H. ROMMEL,
Assistant Director for Legislative Reference.

DEPARTMENT OF AGRICULTURE,
Washington, D.C., June 28, 1968.

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This will reply to your request of June 7, 1968, for a report on S. 752, a bill "To amend sections 203(b)(5) and 220 of the Interstate Commerce Act, as amended, and for other purposes."

This bill would amend section 203(b)(5), known as the agricultural cooperative transportation exemption, in order to limit and clarify the scope of the exemption and to assist the Interstate Commerce Commission in its enforcement operations. Specifically, there would be added to section 203(b)(5):

> Provisions under which the interstate transportation that could be performed by a cooperative association or federation of cooperative associations, for nonmembers who are neither farmers, cooperative associations nor federations thereof for compensation (except motor transportation otherwise exempt) would be limited to that which is incidental to its primary transportation operation and necessary for its effective performance, but in no event more than 15 percent of its total interstate transportation services in any fiscal year, measured in terms of tonnage.
>
> A provision that transportation performed by a cooperative association or federation for or on behalf of the United States or any agency or instrumentality thereof shall be deemed to be transportation performed for a nonmember.
>
> A provision that a cooperaative association or federation which performs interstate transportation for nonmembers who are neither farmers, cooperative associations nor federations thereof (except motor transportation other-

wise exempt) shall notify the Interstate Commerce Commission of its intent to do so prior to the commencement thereof.

A provision that in no event shall a cooperative association or federation which is required to give notice to the Commission transport interstate for compensation in any fiscal year of such association or federation a quantity of property for nonmembers which, measured in terms of tonnage, exceeds the quantity transported interstate for itself and its members in such fiscal year.

The bill would also amend section 220 of the Interstate Commerce Act by adding a new subsection which would authorize the Commission or its agents to have access to and authority, under its order, to inspect, examine and copy (but not prescribe the form of) accounts, books, records, memorandums, correspondence, and other documents pertaining to motor vehicle transportation of a cooperative association or federation of cooperative associations required to give notice to the Commission pursuant to the third provision described above.

The Department supports enactment of S. 752 in its present form.

In its original form, S. 752 was identical to H.R. 6530, introduced in the House of Representatives on March 2, 1967. These bills, if enacted, would have severely limited the scope of the exemption and would have impaired the efficiency and economy under which transportation is conducted by cooperatives in accordance with existing provisions of law.

In its report to your Committee under date of July 24, 1967, the Department expressed opposition to H.R. 6530. At the same time, however, the Department pointed out that there would appear to be merit in legislation which would clarify the scope of the exemption and assist the Interstate Commerce Commission in its enforcement of the motor carrier provisions of the Act.

To accomplish these objectives, the Department report suggested a number of clarifying provisions for inclusion in amendatory legislation. All of these suggestions are now embodied in S. 752, as passed by the United States Senate, and as presently before your Committee for consideration.

One additional provision is incorporated in the bill before you. That provision is a specific limitation on the amount of interstate transportation (except motor transportation otherwise exempt) which a cooperative association or federation of such associations may perform for nonmembers who are neither farmers, cooperative associations, nor federations thereof. Such interstate transportation, which the Department recommended be limited to an amount which is incidental to the primary transportation operation of the cooperative or federation and necessary to its effective performance, is also made subject to a specific limitation of 15 percent of the total interstate transportation services of the cooperative or federation.

The inclusion of a specific percentage limitation on the indicated traffic apparently stemmed from a concern on the part of regulated motor carriers that the limitation imposed by the terms "incidental" and "necessary" might permit a cooperative association or federation to transport a significant volume of such traffic, perhaps up to 50 percent of its total interstate volume. The 15 percent limitation should allay any such concern. The Department does not object to this limitation.

The Bureau of the Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

ORVILLE L. FREEMAN, *Secretary.*

DEPARTMENT OF THE ARMY,
Washington, D.C., July 2, 1968.

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of Defense with respect to S. 752, 90th Congress, an Act "To amend sections 203(b)(5) and 220 of the Interstate Commerce Act, as amended, and for other purposes". The Secretary of Defense has assigned to the Department of the Army the responsibility for expressing the views of the Department of Defense on this Act.

Section 203(b)(5) of the Interstate Commerce Act, 49 U.S.C. 303(b)(5), exempts agricultural cooperative associations, as defined in the Agricultural Marketing Act of 1929, from economic regulation by the Interstate Commerce Commission. On August 10, 1965, the United States Court of Appeals for the Ninth Circuit in the case of *Northwest Agricultural Cooperative Association, Inc.* v. *Interstate Commerce Commission*, 350 F. 2d 252, cert. den. 382 U.S. 1011 (1966) judicially established the right of agricultural cooperative association truck lines to back-haul non-farm commodities for non-members. The court limited the legitimate extent of such traffic to that which is incidental and necessary to the farm-related transportation of the cooperative. Since that decision the Department of Defense has utilized the transportation services of agricultural cooperative associations where their use is deemed to be in the best interest of the Government.

S. 752, as introduced on 31 January 1967, would amend section 203(b)(5) of the Interstate Commerce Act to expressly state that in providing for-hire transportation to non-members, the agricultural cooperatives exemption applies only when the commodities transported consist of farm products, farm supplies, or other farm related traffic. The effect of such an amendment would be to eliminate the present exemption except in those situations where the back-haul traffic is farm-related. The amendment of section 203(b)(5) of the Act proposed in S. 752, as passed by the Senate on 4 June 1968, on the other hand, would place no such restriction as to the type of commodities that may be handled for non-members, but would limit presently authorized non-member traffic including transportation performed for the United States Government to an amount not to exceed 15% of the total interstate tonnage handled by such cooperatives during any fiscal year. Additionally, in order to assist the Interstate Commerce Commission in the enforcement of the cooperatives exemption, S. 752 as passed by the Senate requires that cooperatives shall give the Commission prior notice of its intent to perform transportation for non-members and for such purpose, make available all accounts, books, and records for Commission examination.

In letter to the Senate Committee on Commerce dated 24 July 1967 this Department opposed enactment of S. 752, as introduced, on the basis that the proposed amendment would totally deprive the Department of Defense of the use of transportation facilities of bona fide farm cooperatives and thus remove an effective element of price and service competition. For this reason the Department of Defense continues to oppose S. 752, as passed by the Senate.

While the amendments proposed in S. 752, as passed by the Senate, appear to have merit in that they should clarify the scope of the exemption and materially assist the Interstate Commerce Commission in its enforcement, this Department is particularly concerned with the provisions which would place a 15% limitation on non-member traffic. It is not known at this time whether this specific limitation considered together with the provision subjecting United States Government traffic thereto would materially reduce the ability of farm cooperatives to furnish transportation services to the Department of Defense. However, to the extent that this or any other percentage limitation would produce such a result, this Department strongly objects.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely yours,

STANLEY R. RESOR, *Secretary of the Army.*

Mr. FRIEDEL. I am certain that all of the witnesses here today are aware of the time limitations under which the Congress is now operating in an effort to clear up its schedule of desirable legislation before the advent of the conventions in August, and the fact that we therefore have only a short time this morning in which we can compile a record on this problem.

I trust accordingly that the presentation of statements will be kept within reasonable bounds, although the entire statements, of course, will be included in the record.

Our first witness this morning is the Honorable Virginia Mae Brown, Vice Chairman of the Interstate Commerce Commission.

STATEMENT OF HON. VIRGINIA MAE BROWN, VICE CHAIRMAN, INTERSTATE COMMERCE COMMISSION; ACCOMPANIED BY GEORGE M. STAFFORD, COMMISSIONER; DALE W. HARDIN, COMMISSIONER; BERTRAM E. STILLWELL, DIRECTOR, OFFICE OF PROCEEDINGS; BERNARD E. GOULD, DIRECTOR, BUREAU OF ENFORCEMENT; ROBERT W. GINNANE, GENERAL COUNSEL; ROBERT L. CALHOUN, LEGISLATIVE COUNSEL; AND JAMES GLENN, CONGRESSIONAL LIAISON OFFICER

Mrs. BROWN. Good morning, Mr. Chairman and members of the subcommittee.

I want to first introduce the people I have with me from the Interstate Commerce Commission this morning.

Commissioner Stafford, Commissioner Hardin, Director Stillwell of the Office of Proceedings, Director Gould of the Bureau of Enforcement, and General Counsel Robert Ginnane. We have also Mr. Calhoun, our legislative counsel, and Mr. Glenn, our congressional liaison officer.

My name is Virginia Mae Brown. I am Vice Chairman of the Interstate Commerce Commission.

On behalf of the Commission, I wish to thank the subcommittee for this opportunity to testify on H.R. 6530, introduced by Chairman Staggers.

This bill is designed to clarify the scope of section 203(b)(5) of the Interstate Commerce Act which presently exempts from the Commission's economic regulation the transportation performed by Agricultural Cooperative Associations for nonmembers.

In addition to this bill, I will also be commenting on S. 752, as amended, and passed by the Senate on June 4, 1968, which deals with the same general subject although in a much different fashion.

H.R. 6530 implements one of the Commission's legislative recommendations transmitted to Congress last year by amending section 203(b)(5) so as to limit the transportation by agricultural cooperatives for nonmembers to farm products, farm supplies, or other farm related traffic.

This bill is identical to S. 752, as originally introduced and upon which the Commission testified before the Senate Subcommittee on Surface Transportation on July 24, 1967. (Hearings on agricultural cooperative transportation exemption before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 90th Cong., first sess., 1967.)

In the interest of saving the committee's time, I will not restate in detail our reasons for recommending this legislation. For the information of the subcommittee, a copy of former Chairman Tucker's testimony before the Senate subcommittee is attached at the conclusion of my prepared remarks.

Mr. FRIEDEL. That will be included in the record. Thank you.

Mrs. BROWN. As the attached statement points out in detail, the Commission for the last several years has been concerned over the effect which the transportation activities of exempt agricultural cooperatives for persons other than members of the cooperation on the Nation's regulated common carriers, in particular the extent to which

these exempt carriers were beginning to transport, on a substantial basis, commodities which bore no real relationship to the primary farm or farm related activities of these associations.

This situation was aggravated by the existence of certain agricultural cooperative associations that are only superficially qualified under the definition of such cooperatives set forth in the Agricultural Marketing Act of 1929, which is incorporated by reference in section 203(b)(5) of the Interstate Commerce Act, and by the decision in *Northwest Agricultural Cooperative Association* v. *Interstate Commerce Commission* (350 F. 2d 252 (9th Circuit 1965) cert. denied 382 U.S. 1011 (1966)) which relaxed to a considerable extent the limitations on the transportation activities of bona fide cooperative associations in a carrying non-farm-related products for nonmembers. It was against this background that we recommended enactment of S. 752 and H.R. 6530.

In the course of the Senate committee's deliberations on S. 752 in its original form, several alternatives to our initial proposal were offered by representatives of motor carrier and railroad industries and a representative of the National Council of Farmer Cooperatives.

As amended by the Senate committee and passed by the Senate, S. 752 represents a composite of the many views expressed in the course of the Senate hearings. Although the Department of Agriculture, along with the Departments of Defense and Transportation initially opposed any legislation in this area, the Secretary of Agriculture subsequently indicated a willingness to accept an amended version of S. 752 provided certain additional changes were made. These changes are included in the Senate-passed bill.

The additions made to section 203(b)(5) by S. 752 are set forth and discussed on pages 10 to 16 of the Senate committee's report (Agricultural Cooperative Transportation Exemption, Report No. 1152, 90th Cong., 2d sess.).

In essence, these amendments limit the interstate transportation for compensation by a cooperative for nonmembers who are neither farmers nor other cooperatives to that which is "incidental to its primary transportation operations and necessary to its effective performance" unless such transportation is otherwise exempt under part II of the act and places an upper ceiling on nonmember transportation by providing that in no event shall it exceed 15 percent of its total interstate transportation services, measured in terms of tonnage in any fiscal year.

S. 752 also requires a cooperative to give notice to the Commission of its intent to engage in transportation for nonmembers who are neither farmers nor another cooperative.

It also limits the total interstate transportation for compensation for all nonmembers (including that performed for farmers and others not subject to the 15-percent limitation) to a qauntity of property which is equal in tonnage to that which it performs for itself and its members in any fiscal year. Finally, S. 752 amends section 220 of the act so as to clarify our authority to inspect the books and records of a cooperative association.

As originally introduced, both S. 752 and H.R. 6530 would have limited transportation by exempt agricultural cooperative associations for nonmembers to "farm products, farm supplies, or other farm-related traffic."

We believed that these bills would have provided a fair and workable solution to the problems confronting both the Commission and common carriers subject to our jurisdiction which have resulted from the expansion of the transportation operations for nonmembers under present section 203(b)(5).

We continue to prefer the approach taken in these bills as originally introduced. However, subject to evaluation of such experience as may be gained thereunder, S. 752 as passed by the Senate would appear to be a step in the right direction.

We should note that some of the provisions of the subcommittee print, as revised, in particular the 15 percent limitation on nonmember traffic, will raise a number of novel questions with respect to administering and enforcing this exemption. It may be possible to minimize these potential difficulties through the establishment of appropriate rules and regulations defining the scope and application of this exemption as suggested by the Senate committee in its report. We have followed this procedure in the case of the exemption for the motor carrier transportation of agricultural commodities under section 203(b)(6), using the general rulemaking authority conferred by section 204(a)(6) of the act.

If S. 752 is enacted, it is our intent to initiate an appropriate rulemaking proceeding to implement the substantive portions of this act along the interpretative guidelines set forth in the Senate committee's report and to take such steps as may be required to give effect to the notice provision.

We believe that enactment of this bill will serve to prevent undesirable diversion of traffic from the Nation's essential common carriers while, at the same time, it will not unduly restrict the legitimate activities of exempt agricultural cooperatives. Accordingly, with the qualifications I have noted, we support enactment of S. 752.

This concludes my prepared remarks, Mr. Chairman.

(The statement of Chairman Tucker referred to follows:)

STATEMENT OF HON. WILLIAM H. TUCKER, CHAIRMAN, INTERSTATE COMMERCE COMMISSION, BEFORE THE SUBCOMMITTEE ON SURFACE TRANSPORTATION, SENATE COMMITTEE ON COMMERCE, JULY 24, 1967

Mr. Chairman, members of the subcommittee, my name is William H. Tucker. I am Chairman of the Interstate Commerce Commission and have served in that capacity since January 1, 1967.

On behalf of the Commission, I wish to thank the subcommittee for this opportunity to testify on S. 752, introduced by Senator Magnuson and Senator Lausche, which is designed to clarify the scope of the present exemption in section 203(b)(5) of the Interstate Commerce Act from the Commission's economic regulation of transportation performed by Agricultural Cooperative Associations for non-members. This bill implements one of the Commission's legislative recommendations transmitted to Congress on January 23, 1967, by amending section 203(b)(5) so as to limit the transportation by agricultural cooperatives for non-members to farm products, farm supplies, or other farm related traffic.

This bill is substantially identical to a specific proposal suggested by the Commission before this subcommittee in the 89th Congress as an amendment to S. 1729[1] and is designed to clarify the scope of the exemption contained in section 203(b)(5) in light of the so-called *Northwest Agricultural Cooperative* litigation which I will discuss subsequently.

Section 203(b)(5) of the Act, which this bill would amend, is one of a number of specific statutory exemptions from the comprehensive scheme of regulation of

[1] *Agricultural Cooperative Transportation*, Hearings before the Surface Transportation Subcommittee of the Committee on Commerce, United States Senate, 89th Congress, 2nd Sess., on S. 1729 (1966).

motor carriers set forth in part II of the Act. Under this section, motor vehicles controlled and operated by agricultural cooperatives, or by a federation of such cooperatives are exempt from the Commission's economic regulation provided the cooperatives meet certain qualifying criteria as defined in the Agricultural Marketing Act of 1929 (12 U.S.C. § 1141).

The Agricultural Marketing Act, as pertinent here, provides that an agricultural cooperative association ". . . [S]hall not deal in farm products, farm supplies, and farm business services with or for non-members in an amount greater in value than the total amount of such business transacted by it with or for members. All business transacted by any cooperative association for or on behalf of the United States or any agency or instrumentality thereof shall be disregarded in determining the volume of member and non-member business transacted by such association."

The original exemption from regulation for agricultural cooperatives was included in the Motor Carrier Act of 1935. In 1940, this exemption was expanded to include a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined.

Although, in general, the only difficulty arising from this exemption for many years was whether, in a given fact situation, a particular operation qualified as an agricultural cooperative association within the definition of such an association under the Agricultural Marketing Act, in the early 1960's the Commission began receiving complaints from carriers and shippers in many sections of the country concerning the expanding operations of allegedly *bona fide* agricultural co-ops.

It was a very tedious process to investigate and bring to a conclusion all of these complaints. Necessarily, we attempted to deal with the problem by laying down broad guidelines. In 1961, the Commission held in the *Machinery Haulers Assn.* v. *Agricultural Commodity Serv.*, 86 M.C.C. 5, that for a co-op to enjoy the benefits of section 203(b)(5) of the Interstate Commerce Act it must meet the following tests:

(1) It must be operated and controlled by and for the benefit of its farmer members through its duly elected officers and directors.

(2) It must either own or control, under long-term lease, the vehicles which it uses to perform transportation.

(3) Its membership must be limited to those who were in fact producers of agricultural commodities.

(4) It may not perform transportation services functionally unrelated to its members' farming activities.

The guidelines established in this proceeding were largely left undisturbed by the courts until a decision was handed down by the United States Court of Appeals for the Ninth Circuit, in *Northwest Agricultural Cooperative Association* v. *Interstate Commerce Commission* 350 F. 2d. 252 (1965), *cert. denied* 382 U.S. 1011 (1966). Since this case is indicative of the problems which the provisions of S. 752 are designed to alleviate, it may be useful at this point to briefly outline the undisputed facts, stipulated by all of the parties involved, which prompted this litigation.

Northwest was and is a non-profit corporation organized under the Idaho Marketing Act for the purpose of enabling its members to collectively and economically transport their agricultural products to markets. It is solely engaged in transportation activities and operates a fleet of long-haul trucks for this purpose. On return trips from market places, Northwest transported farm supplies back to its members. However, the volume of these supplies did not equal the amount of farm products shipped outbound and, consequently, Northwest had empty space in its trucks. To make use of this space Northwest made a practice of backhauling non-farm-related commodities for non-members of the association. For example, it transported for non-members such things as furnaces, air conditioners, and water heaters from California to Idaho; machinery from Minnesota to Idaho; hardware from New Jersey to Oregon; wire springs from Illinois to Oregon; yarn from Oregon to Idaho; door hanger parts from New York to Oregon; and roofing materials from California to Idaho. From November 13, 1963, to March 19, 1964, Northwest received approximately $230,375 for transportation services. Approximately $41,000, or about 16 percent of that sum, was derived from the transportation of non-farm commodities for non-members. It was this latter type of transportation which the Commission sought to have stopped.

In support of its complaint, the Commission contended that transportation activities of agricultural cooperatives are not completely exempt under section 203(b)(5) from its economic regulation. We pointed out in this respect that an

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 busines 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

finding that it was not a *bona fide* cooperative as defined by the Agricultural Margeting Act. In *Cache Valley*, however, we discontinued the proceeding upon finding that the Cache Valley Dairy Cooperative was a *bona fide* cooperative and engaged in non-member transportation only to the extent being "incidental and necessary" to its primary function. In this case, it appeared that the blackhaul reveues derived from non-member traffic in such commodities as beer, steel, lumber and rubber products averaged about one-half of the cost of the association's outbound hauling.

Although the *Northwest* decision failed to indicate at what point, short of the 50 percent limitation, a cooperative's transportation operation would cease to be "incidental and necessary" to its primary business function as a farm cooperative, it is expected that the transportation activities of these cooperatives will include an increasing amount of non-farm traffic for non-members and still be exempt from Commission regulation so long as such transportation does not approach 50 percent of the association's total transportation activities. Moreover, since under the Agricultural Marketing Act, all business transacted between a cooperative and a Federal Agency is disregarded in computing the volume of member and non-member business handled by a cooperative association, any percentage of business limitation is, however, essentially meaningless under the present law.

Since the Commission has no regulatory authority over the transportation activities of these associations, we lack the power to require reports from them which would indicate the amount and type of non-farm related traffic now being handled by exempt cooperatives for non-members. Although some limited data compiled by the Department of Agriculture in 1963 and 1964 before the *Northwest* decision indicated that only a small amount of traffic fell into this category, it is reasonable to assume that the Court of Appeals decision has stimulated expansion in this area, since whatever doubt may have existed over the legality of these activities has been removed. A clear indication of this is the decision of the Department of Defense to make use of exempt cooperative trucking for the handling of military shipments whenever it appears to be in the best interest of the government to do so.

Even though the exact amount of traffic handled by these associations cannot be precisely documented, it is clear that trucking operations performed by them for nonmembers possess certain economic characteristics which, when compared with the economic characteristics of the Nation's common carriers, rail and motor, make the traffic of the latter carrier's extremely susceptible to diversion. Since by law and in fact, cooperative associations are not primarily in the transportation business, it is not vital that these activities generate sufficient revenues from non-members to cover the full cost of operations plus a sufficient return on investment to hold and attract new capital. Indeed, it is conceded that the only need for engaging in these activities for non-members is to provide "backhaul" revenue in order to make the cooperatives' principal transportation activities—that of carrying their own members' traffic—economically viable at all. In addition, since these exempt activities do not constitute common carriage, these associations are free to pick and choose what traffic they wish to handle and on what terms they wish to handle it without regard to published tariff rates, adequacy of service, or any of the others economic regulatory duties imposed by law on common carriers. So constituted, it is readily apparent that the exemption afforded these associations by section 203(b)(5), as judicially interpreted, provides a potent economic weapon against the Nation's common carriers which form the backbone of our transportation system.

It is argued that, since the amount of non-farm traffic carried for non-members by these associations is so small, this or similar amendments to section 203(b)(5) designed to confine this exemption to reasonable limits are unnecessary. We do not agree with this argument. In our judgement, the *Northwest* decision has served to stimulate the transportation of non-farm traffic for non-members by these associations. In this regard, it has recently been brought to our attention that in at least one instance, an allegedly exempt cooperative is actively soliciting non-farm related traffic from commercial shippers who would ordinarily be making use of regulated common carriers. For some time, we have been concerned about the adequacy of common carrier service, particularly on small shipments. At the same time, we recognize that the carriers cannot be expected to fully carry out their common carrier responsibilities if much of their profitable revenue freight is being subjected to diversion by exempt motor carrier operations. It should not be necessary for common carriers to suffer traffic di-

version to these associations in large amounts before remedial action is required.

It is also stated that the effect of any legislation such as S. 752 is to place a higher value on the preservation of the business of regulated common carriers than on the prosperity of the Nation's agricultural producers, since any limitation on the exemption will allegedly render the transportation activities of these associations unprofitable and thus force their discontinuance with resulting higher transportation costs on the producers of agricultural products.

In our opinion, favorable consideration of this legislation does not require choosing between the unquestioned national policy of preserving and enhancing the agricultural sector of our economy on the one hand, and preserving and enhancing our system of common carriage, as contemplated by the National Transportation Policy, on the other.

It should be pointed out that the language used in this bill corresponds to that defining the primary functions of an exempt agricultural cooperative in the Agricultural Marketing Act and would re-establish what we believe to be the intent of Congress in enacting section 203(b)(5) as indicated by the portions of the Congressional debate on the exemption in 1935 which are attached as an appendix to my prepared statement. In administering this exemption prior to the *Northwest* decision, the Commission is not aware of any instance in which its decisions created serious economic harm to the transportation activities of these associations.

In addition, the effect of the *Northwest* decision must be viewed in light of the basic statutory scheme of regulation in part II of the Act as it pertains to the motor carrier activities of those engaged in agricultural activities. For example, section 203(b)(4a) exempts from regulation the transportation by a farmer of his own products or supplies. The problem raised by the *Northwest* decision, however, is that it permits farmers to band together to perform transportation that *each* farmer could not *lawfully* perform, i.e., a group of farmers (cooperative) may legally backhaul any traffic that will reduce their over-all cost of transportation, but under the statute a single farmer may not avail himself of such nonfarm related back hauls solely to make his outbound transportation more economical and efficient.

Similarly, section 203(b)(6) exempts all agricultural commodities by any motor carrier from regulation but does not permit the backhauling of nonagricultural commodities in the interest of efficient or economical transportation except by regulated carriers holding duly issued certificates and permits.

Lastly, in order to make the activities of an agricultural cooperative more economical and efficient, the vehicles used in such operations have been given specific exemption in section 204(f) of the Act from this Commission's rules against trip leasing. The total statutory scheme of regulation, then, plainly reveals that there is no need for the broad and generous construction made by the Court of Appeals in the *Northwest* case. Considered in this light, we believe that the rather moderate amendment to section 203(b)(5) proposed by S. 752 will not result in the serious economic consequences alleged by past opponents of this measure. Nothing in this bill restricts the freedom of these associations to transport any commodities for their members while the limitation we are proposing for non-member traffic will, in our opinion, confine the exemption to reasonable bounds without at the same time inhibiting the economical use of a cooperative's transportation facility.

For these reasons, we urge favorable consideration of this bill. This concludes my testimony, Mr. Chairman.

Appendix

Excerpts From Legislative History of Section 203(b)(5)

When Congressman Jones offered the amendment to exempt agricultural co-ops from economic regulation, he stated:

"I want to assure the members of the committee as well as the Members of the House that there is no desire on the part of those who are interested in this amendment to open the floodgates. . . ." (79 Cong. Rec. 12220 (1935))

Congressman Terry, member of the House Interstate and Foreign Commerce Committee, made these statements during the consideration of the amendment:

"The Committee feels that to the extent the cooperatives are carrying and trucking their own property that they should be exempt, and they are exempt under the terms of the exception on page 9; that is, the casual, occasional, or

reciprocal transportation of property in interstate commerce by any person not engaged in transportation by motor vehicle as a regular occupation or business. All farmers are exempt under this provision and also under subsection 8.

* * * * * * *

"The farmer's operations are included in the exemptions that are in the bill. Every bit of trucking they do in transporting their own property is exempt; and the committee, after full consideration, felt that where the cooperatives go into the regular trucking business as such, that they should come within the provisions of the bill as to reasonable regulations." (79 Cong. Rec. 12221)

Congressman Whittington then stated:

"If the bill covers the matters that are intended to be covered by the proposed amendment, then the acceptance of the amendment would be merely a clarification of the bill, because many Commissions are rather hesitant as to the meaning of the word 'casual.' " (79 Cong. Rec. 12221)

Mrs. BROWN. In the report accompanying S. 752, as amended, it stated on page 15, and I quote:

The need for Commission rule-making power to administer the provisions of the Committee amendment is obvious.

The report goes on to give examples of the provisions of the bill which should be interpreted in rulemaking proceedings. Among those specified would be the establishment of guidelines covering the definition of the term "necessary for" and "incidental to" in accordance with the intent of this legislation.

Of course, there are areas of investigation in such a proceeding other than those mention in this report and no doubt found upon careful analysis of the bill and would be included therein.

In a similar situation, the Commission institute rulemaking proceedings into and concerning the matter of the terms "agricultural commodities not including manufactured products thereof." This was used in section 203(b)(6) of the Interstate Commerce Act. This case was the determination of exempted agricultural commodities and is reported in 52 MCC 511.

There we construed what at that time we considered the meaning of this exemption and with respect to what commodities were included therein.

So, I have no doubt that the rulemaking proceeding as suggested in the Senate report will be very helpful as an effective way to administer the proposed legislation.

Mr. FRIEDEL. I want to compliment you for your very fine opening statement.

Mr. Pickle.

Mr. PICKLE. Thank you, Mr. Chairman.

Mrs. Brown, is there agreement between the Interstate Commerce Commission and the Department of Agriculture with respect to S. 752?

Mrs. BROWN. It is my understanding that the Department of Agriculture and the Commission agree in regard to the position taken in S. 752.

Mr. PICKLE. Do we have a representative of the Department of Agriculture who will testify later this morning?

Mr. FRIEDEL. Yes.

rM. PICKLE. Now, is the Department of Defense satisfied about S. 752 at this date?

Mrs. BROWN. To my knowledge, the Department of Defense and the Department of Transportation have not changed their position. However, I don't understand that they are going to testify.

Mr. PICKLE. Do we have a representative of the Defense Department here this morning?

Do we know, Mr. Chairman, what their position is on this particular measure?

Mr. FRIEDEL. Mrs. Brown says they have not changed. They were opposed to S. 752.

You state they have not changed their views, Mrs. Brown.

Mrs. BROWN. That is my understanding.

Mr. PICKLE. As you understand it, what is the view of the Defense Department?

Mr. Chairman, inasmuch as I am asking for a statement of position with respect to another Department, I would ask that the record reflect what is the Defense Department's position on this measure if it is agreeable.

Mr. FRIEDEL. As I understand it, they are opposed to the bill.

Mr. PICKLE. I would like for it to be a part of the record if that is agreeable.

Mr. FRIEDEL. Without objection.

(See Department of Defense report, p. 9.)

Mrs. BROWN. That would be fine because I am not positive, Mr. Chairman, but I think possibly their statement of position was put in prior to amendment, as far as the record goes.

Mr. PICKLE. One other question.

Does this measure have anything to do with the rate to be charged for the hauling of any of these commodities? The rate structure is not involved in any way with respect to this measure; is that correct?

Mrs. BROWN. That is correct.

Mr. PICKLE. Mr. Chairman, I would like to reserve time for other questions I may have later.

Mr. FRIEDEL. All right.

Mr. Devine.

Mr. DEVINE. I have no questions, Mr. Chairman.

I want to welcome Mrs. Brown and commend you for a thorough and brief statement on behalf of the Commission.

Mrs. BROWN. Thank you very much, Mr. Devine.

Mr. FRIEDEL. Mr. Adams.

Mr. ADAMS. Mrs. Brown, it is nice to have you here this morning.

On page 3 and page 4 of your statement, the various limitations are confusing. I would like to go through them and perhaps you can tell me whether I have this right; starting with the paragraph at the bottom of page 3 and over to page 4, I would like to go through it.

As I understand the exemption, this is on back hauls for others; first their hauling must be incidental to farming; that is, the first one, except they may give 15 percent for nonmembers. Is that right?

Mrs. BROWN. That is right.

Mr. ADAMS. Then you allow, even though it may be a farm commodity and it may be for a farmer, you have a limitation on it that if they are nonmembers the total amount that is hauled in 1 year, even if it is a farm commodity, if it is for nonmembers must be less than 50 percent of the total amount that is hauled by the farmer.

You have about three balls in the air at the same time. I am trying to take them apart. Mrs. Brown, this is basically for the nonmember farmer.

Mrs. BROWN. You are correct.

Mr. ADAMS. So that the bill as it is now written says if you are a farm cooperative you must haul more than 50 percent for your members, for yourself. That is the first thing.

Mrs. BROWN. The only qualification to that is what they haul intrastate.

Mr. ADAMS. I won't get into intrastate.

Then the second thing is that this cooperative can go outside of its membership and outside of farm commodities for 15 percent but that 15 percent stays within the 50 percent.

Mrs. BROWN. Right.

Mr. ADAMS. In other words, you can haul yarn or hangers and so on up to 15 percent for nonmembers and then you can haul agricultural commodities up to less than 50 percent. Is that correct?

Mrs. BROWN. That is correct.

Mr. ADAMS. Those are the only exemptions unless there is some other category under part 2 that I don't happen to know about or have in front of me that would be exempted in any event. Is that your bill now?

Mrs. BROWN. That is right.

Mr. ADAMS. Thank you, Mr. Chairman.

Mr. FRIEDEL. Mr. Watson.

Mr. WATSON. Thank you very much, Mr. Chairman.

I apologize, Mrs. Brown, for not being here during your testimony in its entirety.

Pursuing Mr. Pickle's line of questioning a little bit, as I understand it, the Defense Department was against this. We do not know their position now since these amendments have been included in the bill. Is that your understanding?

Mrs. BROWN. Yes. I always hesitate to state another person's position but originally they were opposed.

Mr. WATSON. I think you are right in not trying to speak for someone else. It is confusing for us to get our own positions together here. Later on we can get some definitive position from the Department.

I appreciate your testimony.

Mrs. BROWN. Thank you.

Mr. FRIEDEL. As I understand it, the Defense Department enters into a contract with these agricultural cooperatives.

Mrs. BROWN. Yes.

Mr. FRIEDEL. Under the present law, they can bring back any commodity.

Mrs. BROWN. Yes. The court decision in the *Northwest* case, a lot of it stems from that, which is a relatively new interpretation.

Mr. FRIEDEL. The House bill and senate bill would correct that, in your opinion?

Mrs. BROWN. From here on after passage of this type bill, it would be subject to the 15-percent limitation.

Mr. FRIEDEL. Thank you, Mrs. Brown.

Mrs. BROWN. Thank you, Mr. Chairman.

Mr. FRIEDEL. Our next witness is Mr. George Dice, Director of Transportation and Warehouse Division, Consumer and Marketing Service, U.S. Department of Agriculture.

Mr. Dice.

STATEMENT OF GEORGE DICE, DIRECTOR, TRANSPORTATION AND WAREHOUSE DIVISION, CONSUMER AND MARKETING SERVICE, DEPARTMENT OF AGRICULTURE; ACCOMPANIED BY DONALD GRAHAM, ASSISTANT TO THE DIRECTOR, TRANSPORTATION AND WAREHOUSE DIVISION; AND MORRISON NEELY, OFFICE OF THE GENERAL COUNSEL

Mr. DICE. Good morning, Mr. Chairman and members of the committee.

May I introduce my associates?

On my right, Mr. Donald Graham, Assistant to the Director of Transportation and Warehouse Division.

On my left is Mr. Morrison Neely, attorney in the Office of the General Counsel of the Department.

I appreciate the opportunity to present this committee with the views of the U.S. Department of Agriculture on S. 752.

This bill would amend sections 203(b)(5) and 220 of the Interstate Commerce Act, as amended, for the purpose of clarifying the scope of the so-called agricultural cooperative exemption and of assisting the Interstate Commerce Commission in its enforcement operations. The Department supports enactment of this legislation.

The Department has filed a written report on S. 752 with this committee.

I will make one comment with respect to that report, sir. It points out that the Department did report adversely to the committee on H.R. 6530 on the basis that we felt that that bill would unduly restrict the operations of farmer cooperatives in transportation.

We did, however, point out also in that report that certain suggestions which the Department had made to this committee were also incorporated in S. 752 as passed by the Senate. I would like to comment briefly on this bill as passed by the Senate and now before you and on the issue which it concerns.

Over the years there has been considerable litigation before the Interstate Commerce Commission and in the courts with respect to the nature and amount of transportation which could be performed by cooperative associations, or federations of such associations, pursuant to the exemption contained in section 203(b)(5) of the Interstate Commerce Act. It is not necessary to describe this litigation in detail.

Generally, cooperatives and the Department of Agriculture supported an interpretation of section 203(b)(5) which would permit cooperatives to transport, in addition to their own and members' property, incidental quantities of property belonging to others, and to transport on backhauls nonmember property of a character which would otherwise be subject to regulation, provided the transportation of such property remained incidential to the transportation of property of the cooperative and its members. The Interstate Commerce Commission, the regulated motor carriers, and the railroads supported a more restrictive interpretation.

Ultimately some of those interested in the issue advanced legislative proposals with the intent to more definitively spell out the extent of the transportation operation which could be performed under the exemption, and particularly the nature and extent of the transporta-

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tion which could be performed by a cooperative or federation for nonmembers.

In the interest of conservation of the committee's time, we will not go into detail with respect to these legislative proposals. A number of them are described in the report (No. 1152) issued by the Senate Committee on Commerce, in reporting on S. 752.

This bill resulted from consideration by the Senate committee of a subcommittee print also described in the report. In its report to the committee on that subcommittee print, the Department of Agriculture suggested a number of revisions. As pointed out in the committee's report, all of these revisions were adopted in S. 752 as reported by the committee. The committee also pointed out (on p. 18 of the report) that it had been advised that this version of S. 752 "would be acceptable to the Interstate Commerce Commission, three major farm groups which presented testimony or statements at the hearings—the National Council of Farmer Cooperatives, American Farm Bureau Federation, National Grange—as well as by the carriers—the American Trucking Associations and Association of American Railroads."

We are quite sure that those named above, as well as others who have testified or commented on legislative proposals in the past, were in general agreement with the objective of assisting the Interstate Commerce Commission in proceeding more effectively against illegal operators masquerading as bona fide agricultural cooperatives.

Similarly, most parties were agreed on the objective of clarifying the scope of the exemption. It is probably fair also to state that in accomplishing these objectives, all of those named above, as well as the Department, would have preferred some modification or variation from the specific proposal now before this committee.

The willingness of these interests to accept this approach to the accomplishments of the objectives would appear to us to be a rather strong endorsement of the bill. The Department recommends its enactment.

Mr. Chairman, I would like to comment briefly on this question of the limitation contained in S. 752. In doing so, I would like to clarify, first, transportation operations performed by cooperatives which generally are not subject to any controversy. They do transport property belonging to the cooperatives or the federation or property of the members of the cooperative federation. They also transport, and this has not been subject to controversy, incidental amounts for other nonmember farmers.

They also on occasion enter into reciprocal transportation; in other words, haul on a backhaul from an outbound movement, a load of traffic for another cooperative back in the same direction.

Now, other than this traffic there is the traffic which I would refer to as controversial traffic. This is traffic which would normally be handled by regulated motor carriers or by other common carriers. It is this traffic which has been subject to controversy.

Under this bill, if a cooperative or federation does not transport any of this so-called controversial traffic it is not subject to a limitation under this bill. In other words, it may haul exempt traffic under section 203(b)(6) of the act just as any private carrier may transport this traffic without limit, but if the cooperative elects to engage in transportation of this so-called controversial traffic then it is subject to certain limitations.

One of these limitations is that this traffic shall not be in excess of an amount which is incidental to the primary purpose of the cooperative or federation and necessary to its efficient or effective performance.

A second limitation is that it may not in any event exceed 15 percent of the total interstate transportation of the cooperative or federation.

Then, finally, if a cooperative or federation elects to engage in this controversial traffic, then the total amount of all nonmember traffic which it transports may not exceed the amount of member traffic which it transports in its fiscal year.

I shall be glad to answer any other questions that the committee has.

Mr. FRIEDEL. Thank you, Mr. Dice, for a statement which was very brief and to the point.

One thing that disturbs me about this legislation is that it is another effort to work out transportation policy on a piecemeal basis. We have a lot of problems in transportation.

To my way of thinking, the only way to work these problems out is in a comprehensive piece of legislation so that the interests of all modes of transportation, users, and the public can be weighed and properly balanced.

Mr. Dice, I want to thank you for your statement.

Mr. Pickle.

Mr. PICKLE. Mr. Dice, it would seem to me that if all of these groups, the Interstate Commerce Commission, USDA, the carriers, other agencies, are for this bill, who is against it? I am interested, though, in your comments with respect to the items that you call controversial items that would be shipped. I assume this would be items not directly or incidentally related to their own cooperatives.

Give me an example of what you mean by controversial items, items that get us into the category which requires these limitations of quantity.

Mr. DICE. On a backhaul, after transporting a load of its own commodities, a cooperative, if it does not have available farm supplies it is taking back or if there is not available an exempt commodity under section 203(b)(6), may transport a load of general groceries or roofing materials.

Mr. PICKLE. Give me an example of a cooperative starting off from its base and it ships a load of something to another part of the country and turns around. I would like to have a better idea of a specific commodity or commodities and what they would bring back.

Mr. DICE. Examples of what have been brought back would include general groceries, canned goods, that type of thing, roofing material, structural material, structural steel; I believe in some instances they have transported beer. Generally, commodities that are subject to regulations.

Mr. PICKLE. Would you classify as being related to their incidental operations lumber, steel, beer?

Mr. DICE. To an agricultural cooperative, I would not call that farm related or related to its operation.

Mr. PICKLE. In other words, on their backhaul, then they could bring back to this cooperative almost anything that would normally be sent by common carrier.

Mr. DICE. That is correct; within the limitations if this bill should be enacted. This would have to remain incidental to the primary transportation objectives of the cooperative and necessary to its effective performance.

You see, in transporting its own goods, if the cooperative returns empty in all instances obviously its transportation operation will not be efficient. The right to haul incidental and necessary traffic, the right to haul this otherwise regulated traffic to an incidental and necessary degree we have felt was the intent of the Congress in its original enactment.

Without regard to the question of congressional intent, now that we are talking about possible new legislation, we believe that it is desirable that this be permitted to the incidental and necessary degree and we have agreed, we have not raised objections to the 15 percent limitation.

Mr. PICKLE. Certainly as you have said if the cooperative shipped to and from a different point commodities which were directly related to their own operation then they could ship 100 percent of the goods and no limitation would be necessary.

Now, I think there would be some question of what would be the congressional intent, if they went outside of that, how much would they be allowed. I assume in your case, the U.S. Department of Agriculture, you would like to have for them a very large percent for the limitation and I assume that the Interstate Commerce Commission and the carriers would want it to be more limited in what that amount would be.

Mr. DICE. In its decision in the so-called Northwest Agricultural Cooperative case, the Ninth Circuit Court of Appeals made reference to the necessity that a cooperative maintain its status as an agricultural cooperative. While I can't quote it exactly from memory they said in effect that it is difficult to believe that this nonfarm-related traffic could approach 50 percent and still remain incidental and necessary to the cooperatives' primary purpose.

Mr. PICKLE. That is all, Mr. Chairman.

Mr. FRIEDEL. Mr. Devine.

Mr. DEVINE. No questions, Mr. Chairman.

Mr. WATSON. Thank you, Mr. Chairman.

Mr. Dice, I am in the same position as our chairman. We have had a number of bills before this subcommittee that have been unusual this year involving a lot of controversy. So, I haven't had an opportunity to read the Senate reports. So, if we could get a little background on this, I understand that the cooperatives were, of course, granted this exemption for a worthwhile purpose but then in order to make it more productive or lucrative they started the backhauls of virtually everything—steel, wire, refrigerators; everything else. So, then the Commission had to come in and try to take some corrective steps to control this.

Is that not the way the problem arose?

Mr. DICE. This is right.

Now, you referred to returning with almost anything. There is quite a considerable variety of this so-called nonfarm-related traffic or traffic that would be subject to regulations. But this doesn't mean that the cooperatives which transport this on backhaul do so in large

volume. Of course, if this bill is enacted, it would place a very definite limitation. But under the interpretation of provision 203(b)(5) by the Ninth Circuit Court of Appeals, the transportation of this nonfarm-related goods would have to remain incidental to the primary purpose of the cooperative and necessary to its efficient performance or efficient operation.

In several instances that has become well known, the *Northwest Agricultural Cooperative* case and the *Cache Valley* case which was the subject of litigation also, the amount of this backhaul traffic of nonfarm-related goods generally was in the range of 15 to 18 percent of the total interstate transportation.

Mr. WATSON. So even if we pass this bill here the cooperatives will be able to continue to perform virtually as they have been?

Do I construe that from your statement?

Mr. DICE. The Senate committee makes it clear, at least it makes clear its intent that the incidental and necessary language still prevails.

Now, the amount of transportation that a cooperative could undertake which would be incidental and necessary to its primary operation would depend in some measure on the area of the country in which it operates, the availability of other backhaul traffic, and the general nature of its operations. It could very well be that if a federation of cooperatives, for example, has members in several sections of the country, that the outbound movement from one of its members will make possible a backhaul movement from another. In such an instance, it might be that it could be determined that the amount of traffic which would be necessary to the effective operation of that cooperative might be less than 15 percent.

Now, if the 15-percent limitation were not there, there might very well be an instance where a cooperative with virtually no opportunity for backhaul traffic might haul something more than 15 percent of the nonfarm related goods and this might be quite appropriate in terms of making its operations efficient.

Mr. WATSON. Of course, in some instances, that is the very problem; they have been hauling substantially more than that, primarily on the backhaul.

Mr. DICE. I don't personally have any knowledge of instances of bona fide cooperatives that are hauling substantially more than that. Now, there may be such instances. If they are, I am not aware of them.

Mr. WATSON. Under the terms of the Senate bill, the cooperatives would be restricted to no more than 50 percent for nonmember traffic first.

Mr. DICE. If they engage in the transportation of any of this otherwise regulated traffic.

Mr. WATSON. That is right. But they would be limited to 50 percent nonmembers. What is the limitation presently if they do not choose or even if this bill passes, if they do not choose to come under the provisions of it, what is the limitation for cooperatives so far as nonmember traffic?

Mr. DICE. Under the Agricultural Marketing Act of 1929 and this proposed legislation would not change that, under the Agricultural Act, the cooperative could not remain a cooperative and do a total amount of nonmember business in excess of its member business. This is one of the criteria.

Mr. WATSON. In other words, they are limited to 50 percent nonmember business.

Mr. DICE. And this relates to all kinds of business.

Mr. WATSON. So we still retain the 50-percent limitation so far as nonmember business?

Mr. DICE. That is right.

Mr. WATSON. Second, if they choose to take advantage of this and they are limited to 15 percent of their total volume so far as incidental shipments.

Mr. DICE. Total interstate transportation; yes, sir. 50 percent of the total, both member and nonmember. That is right.

Mr. WATSON. I looked at the Senate bill, S. 752. On the first page, line 10, it says, "shall be limited to that which is incidental to its primary transportation operation."

Aren't we inviting just a constant lawsuit here as to construing incidental? What is incidental to its primary transportation operation?

Mr. DICE. Generally, that would be backhaul transportation after movement of a load for the cooperative or its members.

Mr. WATSON. What would the backhaul consist of? That is the problem. I know they have to have a backhaul business in order to make it somewhat economical.

Mr. DICE. The backhaul could consist of farm supplies. It could consist of reciprocal traffic, from another cooperative. It could consist of unmanufactured products of agriculture that are exempt under 203(b)(6) of the act. To the extent that it stays, assuming enactment of this legislation, within 15 percent of the total, then it could also transport the other commodities.

Mr. FRIEDEL. Will the gentleman yield for a brief question?

Mr. WATSON. Yes.

Mr. FRIEDEL. Would it include lumber if the farmer said he wanted to build a new barn, or roofing for a roof?

Mr. DICE. If it is for farm supply purposes, we think this would be included.

Mr. FRIEDEL. Would it include lumber, roofing, things of that sort, or would it be just agricultural products?

Mr. DICE. I would say this would come within the scope of farm supplies. I am not saying that lumber for any purpose. I am saying lumber for the purpose of construction and use on the farms of members.

Mr. WATSON. I was just going to pursue this a little bit and find out some specific things in your judgment which may be included or excluded.

Mr. PICKLE. I hope the gentleman will ask who makes this determination.

Mr. WATSON. I was going to ask that. I will ask it now.

Who will make the determination as to what is incidental and what is necessary?

Mr. DICE. The Interstate Commerce Commission.

Mr. WATSON. If their decision is not in line with the general common carriers, then we have an invitation for a lawsuit, do we not?

Mr. DICE. I suppose that whenever there is disagreement with the decision of the Commission there is potential for a lawsuit.

Mr. WATSON. When I was practicing law, we always said bless those who sue our clients, so I am not trying to knock the law business at all.

Would air conditioners be incidental to it?

Mr. DICE. Yes.

Mr. WATSON. You think that would be incidental?

Mr. DICE. The nature of the commodity does not, as I understand the legislation, have anything to do with the determination as to whether incidental and necessary. It is the amount of all of this traffic which would otherwise be subject to regulation.

Mr. WATSON. Mr. Dice, do you mean to tell me under the terms of this bill these cooperatives would be able to haul anything, just you looking at the volume rather than the actual item?

Mr. DICE. They could haul any commodity which would be subject to regulations within the limitation that it be incidental and necessary, within the limitation of 15 percent, and within the limitation that if they transport this type of goods, this traffic plus the other nonmember goods would have to not exceed 50 percent.

Mr. WATSON. In other words, they could haul anything just so long as it does not exceed 15 percent?

Mr. DICE. That is right.

Mr. WATSON. So it does not make any difference whether it is incidental to a farm operation, necessary to the farm operation at all? Is that your interpretation?

Mr. DICE. Subject to the limitation I indicated that if the Commission should find in a given instance that an amount less than 15 percent is all that is necessary to the efficient operation of the cooperative it could determine that not more than that could be transported.

Mr. WATSON. I can see we are in a very complex area here so far as interpretation. It says incidental to its primary transportation operation.

Of course, you are knowledgeable in this field, far more than I, but I can see where any two people differ on the interpretation as to what is incidental to its primary transportation operation. I thought its primary transportation operation was the transport of agricultural commodities. Isn't that the basis for the establishment of these cooperatives, to get the products to the market quickly?

Because they could not allegedly provide the transportation on schedule as necessary by the farmers in order to meet the farmers' needs, they set up the cooperatives and they could do it in a hurry. Isn't that the basic need for them?

Mr. DICE. That is right. On the basis that a cooperative or a group of farmers acting together can do so more efficiently than each individual.

Mr. WATSON. I agree in this field but oftentimes things start with the finest of purposes and then they branch out. Apparently that is what has happened now.

Mr. FRIEDEL. The time of the gentleman has expired.

Thank you very much.

Mr. DICE. Thank you, Mr. Chairman.

Mr. FRIEDEL. We have quite a few witnesses. I hope their statements will be brief.

The next witness is James F. Pinkney, chief counsel, Public Affairs, American Trucking Associations, Inc.

STATEMENT OF JAMES F. PINKNEY, CHIEF COUNSEL, PUBLIC AFFAIRS, AMERICAN TRUCKING ASSOCIATIONS

Mr. PINKNEY. Mr. Chairman and members of the subcommittee. My name is James F. Pinkney, and I represent the American Trucking Associations, Inc., 1616 P Street NW., Washington, D.C. 20036, an organization of the trucking industry representing all forms of motor carriers of property, and having affiliated State associations in 50 States and the District of Columbia.

We appear here today in behalf of the regulated common carrier system of motor transportation, which is being seriously jeopardized by the expanding for-hire transportation of general commodities by farmer cooperatives. We support S. 752 at this time, in preference to H.R. 6530.

S. 752, passed by the Senate June 6, 1968, would go a long way toward correcting a very troublesome and unhealthy situation in the transportation industry.

I refer to the situation caused by the decision in the so-called *Northwest* case (*Northwest Agricultural Cooperative Association, Inc.* v *ICC*, 350 F. 2d 252, certiorari denied by U.S. Supreme Court), in which the court held that an agricultural cooperative may transport nonfarm related commodities for nonmembers of the cooperative and still be exempt from economic regulation by the Interstate Commerce Commission, provided such transportation does not approach too closely to 50 percent of the cooperative's total transportation business. Stated bluntly, it held that agricultural cooperatives are free, subject to the percentage of business limitation, to engage in general trucking.

Seeking to capitalize on this decision, a number of transportation cooperatives, professing to be farmer cooperatives under the Agricultural Marketing Act of 1929, have entered into the business of transporting general commodities including, in the case of one large one, the transportation of very large quantities of munitions for the U.S. Government.

They transported those munitions both ways; it was not a backhaul situation. Its movements and those of many other such cooperatives have not been confined to incidental movements and have cut deeply into the business of many regulated for-hire motor carriers who are subject to all of the obligations and duties imposed by law on certificated carriers.

These farmer transportation cooperatives have not and do not assume any of the obligations and duties of common carriers and, in all instances known to us, have negotiated to transport freight at below normal tariff rates.

Of course, they don't have to take the bad with the good. They take only truckload quantities as the general practice and have no obligation to serve the public generally.

The bill before you, S. 752, would, as indicated above, bring the operations of these cooperatives more nearly into line with what we believe was definitely the intention of Congress when it enacted section 203(b)(5) of the Interstate Commerce Act—the section which, read in conjunction with the Agricultural Marketing Act, was designed to permit a farmer cooperative to transport farm-related property for nonmember farmers.

The bill does not roll back the exemption to the interpretation given it by the Interstate Commerce Commission, and which was in effect for many years prior to the *Northwest* decision, but would permit such transportation cooperatives to haul some general freight for the public generally but not to exceed an amount in tonnage that would exceed 15 percent of its total interstate tonnage.

The bill also provides machinery whereby the Interstate Commerce Commission would be able to police the activities of the cooperatives—which it now finds extremely difficult to do.

The instant bill has a long history culminating in a general expression of acceptability by all of the principal interests involved. I refer to the Department of Agriculture, the Interstate Commerce Commission, the Association of American Railroads, the American Trucking Associations, Inc., the National Council of Farmer Cooperatives, the American Farm Bureau Federation, the National Grange, and the Transportation Association of America.

We anticipate that several of the alleged agricultural transportation cooperatives will oppose. We also anticipate that these will be those cooperatives, including a great deal of munitions, that are engaged in the large-scale transportation for the general public between large areas in all parts of the United States and that these are the cooperatives presently under attack by the Interstate Commerce Commission or others for performing operations far beyond the scope of the Northwest decision under which they claim exemption.

I have attached typical newspaper advertisements or announcements by so-called farmer transportation cooperatives which indicate the aggressive nature of these people in seeking to transport traffic normally handled by certificated carriers.

We respectfully request this subcommittee promptly to report this salutary bill and to urge its early passage by the House of Representatives in its present form.

That concludes my statement, Mr. Chairman.

Mr. FRIEDEL. Thank you, Mr. Pinkney.

Do you want the attachments you have to your statement included in the record?

Mr. PINKNEY. I would, indeed, sir.

Mr. FRIEDEL. Without objection, it is so ordered.

(The documents referred to follow:)

UNITED AGRICULTURAL TRANSPORTATION ASSOCIATION OF
AMERICA MARKETING CO-OP,
Lynwood, Calif.

Attention: Traffic Manager.

AT LAST A BREAKTHROUGH ON HIGH FREIGHT RATES

DEAR SIR: "Supreme Court sanctions co-op backhauls". The Ninth Court of Appeals in the Northwest Co-op v. ICC case. The decision of that court was that co-ops could back-haul regulated goods if it was necessary to their operation. This means that if a co-op has a rig in Chicago and it can't get an exempt load right away, it can pick up anything and return home rather than return empty. And, the co-op can do it without ICC authority of any kind. The only limitation is that more than half of the co-op's business must be in farm-related goods.

The above is now the law of the United States! Co-ops can do exactly as we have stated. The Supreme Court turned thumbs down on the ICC and the Justice Department who had wanted the Court to rule in their favor. And, the Supreme Court made its one sentence decision in a record three days!

We are allowed to haul 49% of our total freight for non-members which we need to get our trucks back from the east, as we haul from the West Coast to the East Coast for our members. Our members are all farmers and ranchers.

We have ample insurance for your protection. All of our equipment are late model trucks and our Vans are 40' in volume. As per the "Bill" quoted above, we can haul any type of freight coming back from the East Coast, and set our tariffs.

We are most anxious to be of service to you. I have personally been in and also associated with, the freight business for the past 20 years, both in produce and dry freight. Please feel free to call our office or drop us a line for any kind of additional information on rates etc.

Cordially yours,

HOWARD MECOM,
General Manager.

FARM CO-OPS OF AMERICA,
RETURN LOADS SERVICE,
Elizabeth, N.J.

Gentlemen: The U. S. Supreme Court ruled on January 25, 1966 (Case No. 809) that Farm Co-operatives now have the right to *backhaul* any commodity for any company whether or not the product is related to farming and whether or not the shipper is a member of a Farmers Co-operative.

See reverse side of this letter for reprint of news article from Transport Topics.

What this means if you are a shipper is that these farm co-op trucks can give you direct service from any city to any city at lower freight rates.

These exempt hauling tractor-trailers of all descriptions are now available to your company (with a couple of days notice) through this office which acts as a coordinator for the Farm Co-operatives delivering their goods in the greater New York area.

We guarantee the following:

a. Shipments direct—from your plant to your customer. No delay enroute—no transferring of freight—the driver who makes your pickup is the same driver who will make delivery. We are interested in 5000 lbs.—up to truckloads—same truck will make several pickups and several delieveries to various states—offering a unique service at truckload rates.

b. Because we are not regulated by I.C.C., our vehicles can travel as they wish over irregular routes to any city in the U.S.—Our rates are not regulated and we guarantee to reduce your present freight costs considerably.

c. Ship with full insurance protection—new equipment—clean, courteous drivers.

If you are interested in learning more about Farm Co-op Backhauling, please write or call.

Sincerely yours,

ED RHODES,
Eastern Co-ordinator, Farm Co-ops of America.

[Advertisement from May 1967 issue of the Wall Street Journal]

TRANSPORTATION DIRECTORS

We are an Agricultural Co-op fully qualified under the recent Northwest decision to haul your product as back-hauls incident to our business of hauling perishable commodities into the north. If you have loads from the north into the southeast, we may be able to work together advantageously. For further information call, or write:

National Growers' Marketing Association, Route No. 5, Farmers Market, Greenville, South Carolina; telephone 239–7609; George Dumit, General Manager; Kenneth Moody, Dispatcher.

Mr. FRIEDEL. I want to thank you for your very brief statement. Mr. Pickle.

Mr. PICKLE. Mr. Chairman, I don't believe I have any questions. I understand the position of the association.

Mr. FRIEDEL. Mr. Devine.

Mr. DEVINE. Thank you, Mr. Chairman.

I don't think any questions are necessary.

Mr. FRIEDEL. Mr. Watson.

Mr. WATSON. Thank you, Mr. Chairman.

I think it is quite remarkable all these people have finally gotten together on this one particular bill. I have hastily glanced at some of these articles that you have put into the appendix of your statement. I agree with you that they are making a big pitch trying to get general business and do not restrict it to its primary purpose.

Referring to Mr. Staggers' bill, H.R. 6530, did I not understand someone earlier said Mr. Staggers' bill was too restrictive? It seems to me that it would give you, the common carrier, more protection than the Senate bill, S. 752.

Mr. PINKNEY. It would have, and we supported that approach to this problem initially, as did the railroads and other carrier interests. It became perfectly obvious that we had run into solid opposition from the farm community and the Department of Agriculture. So we tried to work out something that could at least give us some relief in the current situation. We believe this will be, as Mrs. Brown said, a step in the right direction—a long step in the right direction.

Mr. WATSON. Compromise, and let everybody live.

Mr. PINKNEY. Yes, sir. It also has the effect of permitting the Interstate Commerce Commission for the first time to obtain knowledge as to who is performing this nonmember transportation, because this bill does not apply until such time as one of these farm co-ops has notified the Commission that it intends to haul general freight. And then routinely the Commission may examine its books. That is also provided in the bill.

Mr. WATSON. Thank you.

Mr. FRIEDEL. Thank you very much, Mr. Pinkney.

Mr. PINKNEY. Thank you, gentlemen.

Mr. FRIEDEL. Our next witness is Mr. Harry Breithaupt, general solicitor for the Association of American Railroads.

STATEMENT OF HARRY BREITHAUPT, GENERAL SOLICITOR, ASSOCIATION OF AMERICAN RAILROADS

Mr. BREITHAUPT. Mr. Chairman and members of the subcommittee, mindful of the chairman's admonition as to brevity, I will present my statement for the record.

I will say for the purpose of the oral record that the railroads join with the Interstate Commerce Commission and the Department of Agriculture and the regulated motor carriers in endorsing and supporting S. 752 in the form in which it was passed by the Senate, and urge your favorable consideration of that measure.

(Mr. Breithaupt's prepared statement follows:)

STATEMENT OF HARRY J. BREITHAUPT, JR., GENERAL SOLICITOR, ASSOCIATION OF AMERICAN RAILROADS

My name is Harry J. Breithaupt, Jr. I am General Solicitor of the Association of American Railroads, with headquarters at the offices of the Association in Washington. I appear in behalf of the member lines of the Association of American Railroads, by authority of its Board of Directors, in support of S. 752 as passed by the Senate on June 4, 1968.

Section 203(b)(5) of the Act (which this bill would amend) exempts from economic regulation by the Interstate Commerce Commission—motor vehicles controlled and operated by a cooperative association as defined in the Agri-

cultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater power or purposes than cooperative associations so defined.

Such motor vehicles are thus exempt by that section from all of the provisions of part II of the Interstate Commerce Act (the so-called Motor Carrier Act) except those provisions relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment.

For a number of years the Interstate Commerce Commission has expressed concern about abuses and other evils growing out of this escape provision of the Act. Others, too, have been concerned. The Commission's principal concern in this regard in past years and the principal concern of others as well up until late 1965 and early 1966 was abuse—sometimes flagrant—of the statutory exemption occurring through subterfuge and deceit practiced by persons who in order to escape economic regulation of general for-hire transportation services performed by them operated unlawfully under the guise of agricultural cooperative associations.

During the course of hearings conducted by a Subcommittee of the Senate Commerce Committee in July of 1966, several witnesses showed by actual examples and case histories just how bogus or phony or fake agricultural cooperative associations have been used as cover for illict transportation activities. The record of those hearings, which were directed to S. 1729 (89th Congress), contains a great deal of well-documented material on that subject. There is no need to repeat it here.

In any event, the principal problem in connection with the agricultural cooperatives exemption is no longer that the eremption is being abused by means of spurious cooperatives. I do not mean to say that the exemption is no longer used as a guise for the performance of unlawful transportation. That troublesome problem has not gone away. Comparatively recent developments, however, have produced a problem that is more serious than that to which the earlier bill was directed.

I refer to the decision of the United States Court of Appeals for the Ninth Circuit in *Northwest Argicultural Cooperative Association, Inc.* v. *Interstate Commerce Commission*, 350 F. 2d 252 (1965), and to the Supreme Court's denial of *certiorari* in that case on January 24, 1966.

The *Northwest* case involved a non-profit corporation formed under the Idaho Cooperative Marketing Association Act for the purpose of enabling its members collectively and economically to transport their agricultural products to markets. Northwest was, and presumably still is, engaged solely in transportation activities with a fleet of long haul trucks. On return trips from market areas, Northwest transported farm supplies back to members of the cooperative. The volume of these farm supplies did not equal the volume of farm products shipped on the outbound trips, however, and consequently Northwest had available empty backhaul space in its trucks. In order to utilize this space Northwest backhauled non-farm-related commodities for non-members of the association for compensation.

For example, Northwest transported for non-members furnaces, air conditioners, and water heaters from California to Idaho; machinery from Minnesota to Idaho; hardware from New Jersey to Oregon; wire springs from Illinois to Oregon; yarn from Oregon to Idaho; door hanger parts from New York to Oregon, and roofing materials from California to Idaho. During a four-month period in 1963–1964 Northwest received approximately $230,375 for transportation services, of which some $41,000, or about 16 percent, was derived from the transportation for non-members of non-farm commodities.

The Interstate Commerce Commission brought suit in 1964 in the United States District Court for the District of Oregon to enjoin Northwest from this hauling of general commodities for-hire throughout the country, for non-member merchants and manufacturers, without a certificate of public convenience and necessity.

The Commission contended that transportation activities of agricultural cooperative associations are not completely exempt from economic regulation under section 203(b)(5) of the Interstate Commerce Act. It pointed out that an agricultural cooperative is defined in the Agricultural Marketing Act as one dealing in "farm products . . . farm supplies and/or farm business services." It conceded that transportation services performed for members of a cooperative that are "directly or functionally related" to their agricultural activities are exempt from economic regulation. It argued, however, that for-hire transportation of non-

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.]

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 cooperaives 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 gricultural 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.

The regulated motor carriers are, speaking generally, subject to these same or similar regulatory restraints.

Agricultural cooperatives are subject to none of these restraints and are privileged to make whatever rates they choose to make, at any time, without notice to anyone and without publication, on whatever basis they regard as necessary to obtain the traffic.

Furthermore, agricultural cooperatives are wholly free of the legal obligation that common carriers have to serve the general public over authorized routes, between named origin and destination points, without selectivity. The railroads, for example, must (within recognized limitations) transport anything for anybody, anywhere.

The farm cooperatives are under no obligation at all to serve the general public. They are free to "pick and choose" traffic as they please, soliciting the most desirable and most lucrative traffic and rejecting that which they do not care to transport.

You can see the intolerable competitve situation in which the railroads and the regulated motor carriers find themselves. You can see that exemption results in no measurable benefit to the general public; that it does nothing to improve or strengthen our national transportation system.

For all thes reasons, we are willing at this time to endorse and support S. 752 in the form in which it was passed by the Senate. It is not as strong a bill as we had hoped the Congress would enact but it is, on the whole, constructive legislalation; and, on balance and everything considered, appears to reflect a reasonable compromise of conflicting interests.

Mr. FRIEDEL. Thank you.

Mr. Pickle.

Mr. PICKLE. No questions.

Mr. FRIEDEL. Mr. Devine.

Mr. DEVINE. No questions.

Mr. FRIEDEL. Mr. Watson.

Mr. WATSON. Mr. Chairman, I might comment we have had such a happy marriage going along I move that we report this bill out before somebody starts rocking the boat here.

I appreciate the gentleman's statement.

Mr. FRIEDEL. Mr. Springer.

Mr. SPRINGER. No questions.

Mr. FRIEDEL. Thank you, Mr. Breithaupt.

Mr. BREITHAUPT. Thank you, sir.

Mr. WATSON. Our next witness is Mr. Harold Hammond.

STATEMENT OF HAROLD HAMMOND, PRESIDENT, TRANSPORTATION ASSOCIATION OF AMERICA; ACCOMPANIED BY FRANK A. SMITH, VICE PRESIDENT OF RESEARCH

Mr. HAMMOND. Mr. Chairman, my name is Harold Hammond, I am president of the Transportation Association of America. I have with me Frank A. Smith, our vice president of research.

In summary, the Transportation Association of America strongly supports passage of S. 752 as passed by the Senate.

I think the primary group in TAA that you would be interested in that was back of this legislation was one composed of the users of transportation. We have a special group of over 100 representatives of all types of users that buy transportation from the regulated carriers. This group was much in favor of S. 752 as passed by the Senate. They supported it.

You will find in my statement before you, on pages 4 to 6, some examples of what we do not like to see happen and as Mr. Pinkney

pointed out, some of the things that the undesirable co-ops are doing today in looking for business and taking it away from the regulated carriers. We have been working on this for over 20 months.

We are happy to see a compromise worked out here which is now agreed to by all the regulated carriers and by the regulatory agency and by some of the departments and the Government.

In summary, I think that the proposed legislation would be most helpful to the regulated carriers. Certainly, it would be helpful to the Interstate Commerce Commission and it will be good for the bona fide co-ops.

For these reasons, the Transportation Association of America urges consideration of S. 752 at the earliest possible date.

(Mr. Hammond's prepared statement follows:)

STATEMENT OF HAROLD F. HAMMOND, PRESIDENT, TRANSPORTATION ASSOCIATION OF AMERICA

My name is Harold F. Hammond. I am President of the Transportation Association of America, with headquarters in Washington, D.C. I am appearing before your Subcommittee today on behalf of the Board of Directors of TAA, of which I am a member, in support of S. 752, as passed by the Senate. This bill in brief, would clarify the nature and scope of traffic that can be hauled by agricultural cooperatives exempt from economic regulation by the Interstate Commerce Commission.

For the record, TAA is a national transportation policy organization composed of transport users of all kinds, investors and carriers of all modes who work together to help develop sound national policies that will assure the strongest possible transport system under private enterprise principles. Policy positions are adopted by a 115-member TAA Board, but only after receiving recommendations from its eight permanent advisory Panels, on which serve about 350 top executives from the following respective transport interests: Users, Investors, and Air, Freight Forwarder, Highway, Pipe Line, Railroad, and Water Carriers.

TAA INTEREST IN CO-OP EXEMPTION

TAA's interest in this legislation is directly related to its long-known interest in the so-called illegal for-hire trucking problem. The Association has long been on record as opposing the entry of unlawful carriers into the general for-hire transport field. As your Subcommittee will recall, TAA was a strong supporter of legislation considered over a period of years designed to strengthen both federal and state enforcement powers in this problem area. Congress passed such legislation in 1965, now known as Public Law 89–170.

Along these same lines, TAA's objective in this current legislative effort is to prevent illegal for-hire motor carriers from engaging in general for-hire transportation under the guise of being an exempt farmer cooperative. Since at present there is no requirement that an organization claiming to be an agricultural cooperative must prove that it is bona fide prior to operating under Section 203(b)(5) of the Interstate Commerce Act, the door is wide open for illegal motor carriers to use this as a guise to engage in for-hire transportation beyond the regulatory control of the ICC.

The ICC claims that the illegal use of this exemption has resulted in the diversion of substantial amounts of important traffic from regulated motor and rail carriers by various groups and organizations posing as farmer cooperatives. It says that it is "unable to cope with this situation effectively because of the necessity of overcoming in each case a presumption of eligibility."

ENFORCEMENT IS DIFFICULT

To prove ineligibility under present statutes is not an easy task, since it takes considerable time to gather evidence against such operators. Even then, the issuance of a cease and desist order by the Commission carries with it no financial penalties, which would be applied only if such an order is not complied with and the Commission takes formal court action to enforce it. This is obviously a time-consuming procedure, which is complicated further by the practice of some pseudo farmer cooperatives of changing their names, location, or form of organiza-

tion sufficiently to force an entirely new investigation and issuance of a cease and desist order.

The question can be raised whether passage of P.L. 89–170 has made it easier to take enforcement action against illegal farmer cooperatives. While it is true that such cooperatives are subject to the provisions of this recently passed public law, the fact remains that the burden of proving their ineligibility to use the co-op exemption still rests with the ICC or any plaintiff in a court suit. Since farmer cooperatives can now lawfully engage, within certain broad limits, in the for-hire transport of general commodities for nonmembers, the problem of identifying the illegal ones is very difficult. As a result, the effectiveness of P.L. 89–170 in this area of enforcement is definitely restricted at this time.

EFFECT OF NORTHWEST CO-OP CASE

A much more serious complication has arisen as a result of the Supreme Court's action last year which, in effect, upheld an appellate court's ruling in the Northwest Agricultural Cooperative Association Case [350 F. 2d 252 (9th Circuit, 1965) certiorari denied (1966)] that the farmer cooperative exemption should be interpreted broadly to permit the backhaul of general commodities for nonmembers so long as revenues therefrom do not exceed its cooperative function revenues and are incidental and necessary to the cooperative's primary legal activity.

The effect of this court decision is to permit farmer cooperatives lawfully to engage in extensive for-hire transportation for nonmembers. Since there are approximately 8,600 farmer cooperatives in the United States, the potential competition to regulated carriers is sizeable. Furthermore, since many of these cooperatives are multi-million-dollar organizations, their potential for engaging in general for-hire transportation beyond ICC economic regulation is equivalent to the scope of operations of many of the larger regulated motor carriers.

The combined adverse effect of these two factors—the difficulty of determining a co-op's eligibility and the liberal interpretation of the exemption by the courts—clearly shows the need for remedial legislative action as soon as possible.

SPECIFIC EXAMPLES OF CO-OP TRAFFIC SOLICITATION

We believe immediate legislative action is needed to prevent a rapid rise in traffic solicitation activity on the part of farmer cooperatives, or organizations posing as such, in the general freight field. As an illustration of this, we can cite a number of specific examples furnished us by various shipper members of TAA. Excerpts from letters sent to us by traffic executives of some of the nation's leading corporations include the following:

1—"A few months ago, a representative of an Illinois farm co-op phoned me. The purpose of the telephone call was to offer the transportation of his co-op in hauling our shipments (*hardware manufacturer*) from Louisville to to any point in the state of Illinois. He indicated that the rates could be negotiated." (Underline words added.)

2—"There is enclosed a copy of letter received from one of the farmer cooperatives." (Copied in part from letter from the Milk Producers Marketing Co., Kansas City, Kansas, to a major *glass manufacturer*.)

> 'I want to thank you for the time you gave me during our phone conversation of two weeks ago, regarding transportation. This is a confirmation of the following rates I quoted you, based on a 40,000 minimum, to California points. Pittsburgh Area, 3.50 cwt.; Akron, Ohio, 3.00 cwt.; St. Louis, 2.50 cwt.; and Chicago, 2.75 cwt. It is our sincere desire to further acquaint you with our ability to be of service to you, and if given the chance I am sure we can cement a very pleasant relationship. Won't you at your earliest convenience let us hear from you?'

3—"Recently, we received an order which called for the material to be shipped via the XYZ Dairy Co., which included notation 'Customer Pickup.' The order indicated that the material was sold to one of our major customers in XYZ. In checking into this transaction, it developed that XYZ Dairy was to pick up the shipment in their truck and make delivery to two customers in XYZ. Once we developed this fact, we immediately ran a check on the XYZ Dairy Co. to determine if it was a bona fide co-op. We found that this company was not a farmer co-op and, therefore, we made other arrangements to make shipment." (Names indicated by XYZ at request of shipper, whose company is in the *chemical business*.)

4—"Our field people report that occasionally our distributors or jobbers (an oil company) in the farm belt area of Iowa, Kansas, Nebraska, etc. insist on our using a co-op trucker, even though we pay the freight, and charges are assessed at the common carrier level—with no expense saving whatsoever to us. At first we attempted to resist using these truckers, but for reasons with which we do not entirely agree, our Marketing people prevailed upon us to comply when such requests are made." (Underlined wording added.)

From these examples you can see that farm cooperatives are not hesitant about soliciting traffic that obviously is in no way related to farm business. The above examples, to illustrate this point, cover hardware, glass, chemicals, and petroleum products. Some farmer cooperatives use the Northwest Case as the basis for open solicitation of traffic managers to haul freight of any kind on a negotiated rate basis beyond any regulatory jurisdiction of the ICC. Two specific examples of this type of solicitation are cited below and on the following page.

The first example of an open solicitation for general freight by a farmer cooperative is the following ad that appeared in the "Wall Street Journel" a short time ago. The other example is the solicitation form letter shown on the next page.

TRANSPORTATION DIRECTORS

We are an Agricultural Co-op fully qualified under the recent Northwest decision to haul your product as back-hauls incident to our business of hauling perishable commodities into the north. If you have loads from the north into the southwest, we may be able to work together advantageously. For further information call, or write: National Growers' Marketing Association, Route #5, Farmers Market, Greenville, South Carolina, Telephone 239–7609, George Dumit, General Manager, Kenneth Moody, Dispatcher.

One disturbing feature about both the form letter and ad cited above is the reference therein to the Northwest Case decision. In both instances, this decision is used as the legal basis for the solicitation of freight of any kind. While brief reference is made to the incidental and necessary test and back-haul limitation set forth by the court, it is inconceivable to us that the shipper will be able to know whether or not his traffic complies with these standards. While the shipper may be able to determine whether his traffic is part of a farmer cooperative's back-haul, he would know little else without checking the cooperative's records. The shipper likewise will find it very difficult, if not impossible, to check whether the farmer cooperative itself is bona fide and to determine if his traffic falls within the broad 50/50, member/nonmember test governing such a cooperative's overall business.

The danger is that as more shippers decide to use farmer cooperatives to benefit from low, negotiated rates, their competitors will soon be forced to do likewise.

UNITED AGRICULTURAL TRANSPORTATION ASSOCIATION OF AMERICA,
MARKETING CO-OP,
Lynwood, Calif.

Attention: Traffic Manager.

AT LAST A BREAKTHROUGH ON HIGH FREIGHT RATES! ! !

DEAR SIR: "Supreme Court sanctions co-op backhauls". The Ninth Circuit Court of Appeals in the Northwest Co-op v. ICC case. The decision of that court was that co-ops could back-haul regulated goods if it was necessary to their operation. This means that if a co-op has a rig in Chicago and it can't get an exempt load right away, it can pick up anything and return home rather than return empty. . . . And, the co-op can do it without ICC authority of any kind. The only limitation is that more than half of the co-ops' business must be in farm-related goods.

The above is now the law of the United States! Co-ops can do exactly as we have stated. The Supreme Court turned thumbs down on the ICC and the Justice Department who had wanted the Court to rule in their favor. AND, the SUPREME COURT made its one sentence decision in a record three days!

We are allowed to haul 49% of our total freight for non-members which we need to get our trucks back from the east, as we haul from the West Coast to the East Coast for our members. Our members are all farmers and ranchers.

We have ample insurance for your protection. All of our equipment are late model trucks and our Vans are 40' in volume. As per the "Bill" quoted above

we can haul any type of freight coming back from the East Coast, and set our tariffs.

We are most anxious to be of service to you. I have personally been in and also associated with, the freight business for the past 20 years, both in produce and dry freight. Please feel free to call our office or drop us a line for any kind of additional information on rates, etc.

Cordially yours,

HOWARD MECOM,
General Manager.

The door will thus get wider and wider for entry into the general for-hire transport field.

Another good example of general freight solicitation on the part of farmer cooperatives is the successful effort by several of them to obtain military traffic on the basis of undercutting the rates of regulated carriers. Despite strong objections by TAA and railroad, trucking, and freight forwarder groups, the Department of Defense issued a directive, effective December 1, 1966, authorizing the use of exempt farmer cooperatives when they could perform services at rates lower than those of regulated carriers. Thus, another step was taken to encourage farmer cooperatives to actively seek nonfarm-related traffic from nonmembers.

TAA EFFORTS TO RESOLVE ISSUE

During hearings before Congress in July, 1966, on related legislation, it was quite apparent that the directly affected interests were in very sharp disagreement over what statutory changes are necessary to resolve the agricultural co-op problem. Since that time, considerable effort has been exerted within the TAA policy formulating structure to develop policy positions on this issue that all groups could either support or not oppose. These discussions included representatives of farmer cooperative interests.

These efforts helped narrow the differences considerably and resulted in agreement on a number of proposed statutory changes that, in substance, are incorporated in S. 752, as passed by the Senate. As pointed out in the Report of the Senate Commerce Committee, all major groups directly affected by this legislation—including regulatory agencies, carrier trade associations, and farm organizations—have expressed their acceptance of this compromise bill.

We cite this brief background information to stress the point that the provisions in this bill before your Subcommittee have been given very careful study and consideration by all direct interest.

TAA VIEWS ON S. 752

Following is a brief summary of our interpretation of the key changes that S. 752 would make and why we believe they are desirable:

Impose, as the primary limitation on a co-op's hauling of nonfarm traffic, a test that it be incidental and necessary to the co-op's motor transport of farm traffic for its members.

This is the basic test that has been generally applied by the courts to motor transportation performed by agricultural cooperatives. The incorporation of this test into Section 203 (b) (5) of the Interstate Commerce Act through specific legislative language should, we believe, help stress to the courts that Congress intends that any nonfarm traffic hauled by a co-op should have a direct relationship to the co-op's motor transport of farm traffic for its members. If such a relationship does not exist, the transportation would be unlawful regardless of its scope.

This limitation is important because it should prevent outright the for-hire transport by questionable co-ops of commodities normally moved via regulated carriage. It should prevent such practices as back-to-back hauls of nonfarm traffic and of for-hire hauls of commodities to points well beyond the normal operations of a co-op.

Apply a maximum limitation on a co-op's hauling of nonfarm traffic of 15 percent of its total interstate motor transportation service in any fiscal year on a tonnage basis.

This limitation would supplement the basic "incidental and necessary" test. In other words, it represents the maximum amount of nonfarm traffic that a co-op may handle, regardless of its relationship to the co-op's motor transport of farm traffic for its members.

We believe this limitation is a reasonable one and in line with current practices of the Internal Revenue Service in determining the scope of nonmember business a co-op can conduct without losing its tax-exempt status. It should give bona fide co-ops ample flexibility to augment their primary motor transport service for members, yet should prevent them from engaging in any excessive amount of for-hire transport of nonfarm traffic to the detriment of regulated carriers.

Require co-ops hauling nonfarm traffic to notify the ICC of their intent to do so, and to open their books to ICC inspections.

This is a very important provision, since it would permit, for the first time, the ICC to get the true facts about the scope and nature of nonfarm traffic hauled by farmer co-ops. It should also discourage questionable operators from using the co-op exemption as to subterfuge to enter the general for-hire transport field, since they should find it difficult to prove their eligibility..

Classify U.S. traffic hauled by a co-op as nonmember traffic

This change would replace the present blanket exclusion of U.S. traffic from any member vs. nonmember limitations on a co-op's business. In other words, a co-op at present can haul traffic for the Government without any statutory limitation—and do it free of regulation even though in direct competition with regulated carriers. While court action is pending to prevent abuse of this type of exempt co-op transport, passage of this provision of S. 752 should help resolve this particular issue.

We believe the U.S. Government should be treated like any other shipper when it comes to purchasing transportation services. It should not be able to use the co-op exemption as a means of cutting rates of publicly regulated carriers. While passage of this provision may not stop the use of co-ops by Government agencies for hauling military traffic, it should prevent abuse of this privilege and possibly stop the present practice of the DOD in openly soliciting their services.

CONCLUSION

We have attempted to show the general concern throughout the transportation community about the loopholes in the present agricultural cooperative exemption that are encouraging ineligible cooperatives to use the exemption as a guise through which they can engage in general for-hire transportation. We have also pointed out that the ruling by an appellate court in the Northwest Case, allowed to remain in effect by the U.S. Supreme Court, has opened the door even wider by encouraging bona fide cooperatives to engage in general for-hire transport.

While the actual scope of such for-hire transport operations is unknown at this time, the trend is clearly upward. The longer the trend continues in this direction, the greater the harm to regulated public carriers. Therefore, remedial legislative action is needed as soon as possible.

Passage of S. 752 should help resolve this national transportation policy problem area before it becomes too serious. It should clarify Congressional intent concerning the use of the agricultural cooperative exemption and thus make it possible for the ICC to take more effective enforcement action against persons who misuse it. Carriers should benefit, since specific limitations would be placed on the scope and nature of traffic hauled by co-ops, thus preventing entry into the general for-hire transport field. Bona fide co-ops should benefit, since this legislation should help eliminate operators that use the co-op exemption as a subterfuge to avoid regulation, as well as eliminate the need for continued legal action because of differences over the use of the exemption as now worded.

For these reasons, TAA strongly favors passage of S. 752 in its present form and urges favorable action on it by your Subcommittee at the earliest possible date.

Mr. FRIEDEL. I want to thank you for your cooperation, Mr. Hammond.

Are there any questions, Mr. Pickle?

Mr. PICKLE. Mr. Hammond, when the Northwest case was decided, did you find that some of your members were doing business with these cooperatives?

Mr. HAMMOND. Yes, some of them were. Of course, after the decision, there were many more that were approached to do business with the co-ops. Several of those examples are set forth in my statement here

where you will find there was open advertising and solicitation for business from users.

Mr. PICKLE. If these cooperatives are not subject to the Interstate Commerce Commission regulations, they would not be subject to the establishment of a public rate, then the ability of the shipper to transport his goods at a cheaper cost would be greatly enhanced. How much would they save on their rate?

Mr. HAMMOND. Well, it can be negotiated. This would be no set amount because they don't have to adhere to the regulation by the Interstate Commerce Commission. In that case, it would be entirely up to the shipper and to the co-op to set a rate that would be suitable.

What that does in time, of course, it breaks down your whole regulated transportation system.

Mr. PICKLE. Then your position is that it would be a temptation for some of your members to deal with these kinds of agricultural cooperatives?

Mr. HAMMOND. Surely.

Mr. PICKLE. In the best interest of the overall well-regulated transportation industry, it is best to place limitation on the hauling of these commodities?

Mr. HAMMOND. That is correct.

Mr. PICKLE. Thank you.

Mr. FRIEDEL. Mr. Devine.

Mr. DEVINE. No questions.

Mr. FRIEDEL. Mr. Watson.

Mr. WATSON. No questions.

Mr. FRIEDEL. Thank you very much.

Mr. HAMMOND. Thank you.

Mr. FRIEDEL. Our next witness is Mr. James Harmanson, general counsel of the National Council of Farm Cooperatives.

STATEMENT OF L. JAMES HARMANSON, GENERAL COUNSEL, NATIONAL COUNCIL OF FARM COOPERATIVES

Mr. HARMANSON. Mr. Chairman and members of the subcommittee: My name is L. James Harmanson, Jr., general counsel of the National Council of Farmer Cooperatives, on whose behalf this statement is presented.

I want to say that I think I can contribute to the "happy marriage" that Congressman Watson just referred to but not quite as briefly as the two or three preceding witnesses. I will try to be very brief.

I do feel that your subcommittee is as interested in what this bill contains and will do as you are in who is for it and do not want to base your decision entirely on who is for it and who is against it, and that is the reason that I shall try to come directly to the point in which I feel your subcommittee is interested.

The council is a nationwide organization of farmers' cooperative business associations engaged in the primary business operations of marketing farm products, furnishing farm supplies and providing farm business services for their farmer members and other farmer patrons.

The basis for qualification for membership in the council is the same as the basis for qualification under the exemption in section

203(b)(5)—see appendix I—of the Interstate Commerce Act; namely, "cooperative associations" as defined in the Agricultural Marketing Act of 1929, as amended—see appendix II—or "Federations of such cooperative associations."

Hence, the past and present interest of the council in preserving the long-recognized scope of this exemption and definition against the efforts to so restrict it by interpretation or legislation as to render it of no practical value to cooperating farmers is direct and clear.

Four hundred and eighty pages of printed record cover the public hearings for 5 days in 1966 and 1967 on S. 752, the companion measure to H.R. 6530, and its predecessor in the last session of Congress, S. 1729, before the Senate Surface Transportation Subcommittee of the Senate Commerce Committee.

I shall try to be helpful to your subcommittee this morning by dealing directly with basic points on which we believe information will be helpful to you in reaching prompt decision.

We shall state briefly the council's position, summarize the pertinent background to this legislation and outline why we believe prompt action now by your subcommittee is justified and will truly serve the public and no special interests.

Council position

The council opposed in the Senate and is still opposed to S. 752, the companion bill to H.R. 6530, as originally introduced on the recommendation of the Interstate Commerce Commission. The council had a major part in cooperation with other farm organizations and the Department of Agriculture in suggesting most of the changes in S. 752 which were approved by the Senate Commerce Committee and adopted by the Senate.

The council, therefore, supports S. 752 as passed by the Senate on June 4, 1968, and recommends favorable action on that version by your subcommittee and the House Interstate and Foreign Commerce Committee on the end that such bill might be enacted into law before adjournment of this session of the Congress.

Mr. WATSON. May I interrupt the gentleman at this point?

You are in favor of S. 752?

Mr. HARMANSON. As passed by the Senate on June 4, 1968.

Mr. WATSON. Your first statement there says "The Council opposed in the Senate and is still opposed to S. 752."

Mr. HARMANSON. You read on "as"—maybe the comma is in the wrong place, but "as originally introduced on the recommendation of the Interstate Commerce Commission."

Mr. WATSON. But you are in favor of it as passed by the Senate?

Mr. HARMANSON. Yes. The council opposed in the Senate and is still opposed to S. 752 as originally introduced. But we are in favor of it as it passed the Senate.

Mr. WATSON. I understand now.

Mr. HARMANSON. To continue with my statement.

Background

When the Motor Carrier Act was passed in 1935 and became Part II of the Interstate Commerce Act, there were two exemptions of particular importance to farmer cooperatives and agriculture generally which were written into that act.

One, referred to as the "agricultural commodities exemption," now section 203(b)(6) of the act, exempts from economic regulation by the Commission "motor vehicles used in carrying property consisting of ordinary livestock, fish—including shellfish—or agricultural—including horticultural—commodities—not including manufactured products thereof."

The other exemption, referred to as the "cooperative association motor vehicle" exemption, now section 203(b)(5) of the act and the subject of the bills before your subcommittee today, exempts from economic regulation "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."

Just two requirements, the motor vehicles have to be owned and controlled by the cooperative association and the cooperative association must meet the requirements of the Agricultural Marketing Act, which is the same definition to qualify for loans from the banks for cooperatives under the farm credit system.

The Interstate Commerce Commission in 1935 unsuccessfully opposed the inclusion of these exemptions in the Motor Carrier act and through the years has sought to give a very narrow and strict interpretation to their scope.

It should be made clear that the railroad industry and the regulated motor carriers all through the years have been very vigorous supporters of that position, restrictive interpretations of these exemptions by the Intestate Commerce Commission.

In the 1940's and 1950's, there was much costly litigation in the courts and in administrative proceedings before the Commission as to when an agricultural commodity loses its character as such and becomes a manufactured product.

Three glaring examples. The Commission took the position that nuts in the shell were an agricultural commodity but after you shell them, they become a manufactured product and no longer are an agricultural commodity. We had the same situation with respect to redried tobacco. It was held by the Commission that the redrying of tobacco changed it from being an agricultural commodity.

There was a big controversy over poultry. If you cut the head and legs off poultry and defeather it, it is no longer a product of agriculture; it becomes a manufactured product. So held the Commission. There was a lot of costly litigation and proceedings before the Commission all through the 1940's and 1950's to try to get that straightened out.

Finally, Congress took action in the Transportation Act of 1958 and clarified this exemption to prescribe with particularity named commodities which would be considered exempt and those which would be regarded as nonexempt under section 203(b)(6). Since that time, there has been little difficulty in administering and complying with this exemption.

In the late 1950's and early 1960's, the Commission turned its attention to the cooperative association motor vehicle exemption and sought to limit the transportation by qualified cooperatives to "farm products, farm supplies, or other farm related traffic." The Commission, however, has been deterred in that effort by the decision of the Ninth Circuit Court of Appeals in 1965 in the Northwest case (*Northwest Agricul-*

tural Cooperative Association, Inc. v. *Interstate Commerce Commission*, 350 F. 2d (Ninth Circuit 1965), certiorari denied, 382 U.S. 1011, Jan. 25, 1966), in which the Council participated as amicus curiae.

In that case, the court held in effect that a cooperative qualified under the Agricultural Marketing Act could lawfully engage without operating authority in the transportation of nonfarm related property for nonmembers to the extent that such transportation is incidental to its primary transportation operations and necessary for its effective performance.

One question of other witnesses that seems to concern some members of the subcommittee is how are you going to determine what is incidental and what is necessary. Would that not open up a field for a lot lawsuits? I think it is true that there is hardly any law passed by Congress that is not subject to lawsuits. But the Ninth Circuit Court of Appeals in this Northwest decision did lay down a guideline as to what is meant by incidental and necessary. I am reading from the decision of the court, the Ninth Circuit Court of Appeals.

The court said that:

> Such transportation is incidental to the cooperative's agricultural activity when limited to use of otherwise empty trucks returning from hauling member farm products to market and producing a small return in proportion to the cooperatives' income in trucking farm products and farm supplies.

We recognize, Mr. Watson, that does not have the particularity that we would like for administration by an administrative agency. I would hope that the Interstate Commerce Commission would not be too restrictive in these interim guidelines that Mrs. Brown referred to this morning, but I would say that there is some guideline contrary to what some of these so-called trucking cooperatives have advertised in the papers—that they can haul anything anywhere. That has hurt the bona fide cooperatives of the country.

If you will look at the law as laid down by the interpretation of the Ninth Circuit Court of Appeals you will see that the court has given some guidelines as to what is incidental and necessary.

Mr. PICKLE. You have read, apparently, the language from the Ninth Circuit Court of Appeals relating to guidelines. Is what you read contained in your testimony?

Mr. HARMANSON. I departed from the testimony because I felt this would be a pertinent place to bring that out for the subcommittee.

In like manner, the court stated that transportation of non-farm-related products is "necessary":

> When it is not economically feasible to operate the trucks empty on return trips, and where the additional income obtained is no more than that required to render performance of the cooperatives' primary farm transportation service financially practicable.

Now, returning to the statement. This interpretation of "incidental and necessary," as has been indicated, is not a new interpretation, but we feel, and the crux of our testimony before the Senate subcommittee was, that this was the interpretation intended by the Congress from the time that this amendment was introduced by Congressman Jones, then chairman of the House Agriculture Committee, when the Motor Carrier Act was passed in 1935 and it is consistent with the interpretation that has been given by the Farm Credit Administration in their regulations in administering this definition for qualification for loans to cooperatives through the banks for cooperatives.

It is also significant that this interpretation also is consistent with the Administrative Ruling No. 91 issued by the Commission's own Bureau of Motor Carriers in 1940 which stated in part that the business of a cooperative for purposes of this exemption under the Marketing Act must be primarily, and I emphasize "primarily", that of farmers acting together and marketing farm products and/or furnishing farm supplies and farm business services.

The Commission's own Bureau recognized as early as 1940 that the operation of the cooperative did not have to be exclusively that of marketing farm products and furnishing farm supplies and farm business services.

During the past 5 years while the controversy over the interpretation of this exemption has been going on in proceedings before the Commission and in the courts, recommendations for legislative action to narrow this exemption have been submitted by the Commission to the Congress. Exhaustive hearings were held in the Senate in 1966 and 1967 and many avenues for action have been explored and considered. The final product to date is S. 752 as passed by the Senate on June 4. Its major provisions, substantially incorporating non-self-serving recommendations originally made by the council in cooperation with other national farm organizations and the U.S. Department of Agriculture, may be summarized thus:

1. A qualified cooperative or federation would be limited in its interstate transportation for compensation for nonmembers, who are neither farmers, cooperative associations nor federations, except transportation otherwise exempt—and that means that which is exempt under 203(b)(6); railroad trucks, common carrier trucks, private trucks—anybody can haul those named commodities—so that which is incidental to its primary transportation operations and necessary to its effective performance and before engaging in such transportation for nonmembers the cooperative would be required to give notice to the Commission of its intent to engage in such transportation.

2. Transportation for or on behalf of the United States or any agency or instrumentality thereof would be considered as nonmember business.

None of the testimony this morning that I have heard has explained to you the reason for that. It is simply this: The Agricultural Marketing Act of 1929, as amended, which is the basis for this exemption in section 203(b)(5), contains a provision that business done with the United States or any instrumentality thereof shall not be considered in determining whether the total business done by the cooperative with its nonmembers exceeds that done with its members.

The reason that was written into the act was that in the 1930's, I think, perhaps 1935, when most of the marketing cooperatives of the country were handling products under the support programs, with which you are familiar, and many marketing cooperatives handling products such as cotton and grain, most of their business was not marketing the products for members but it was storing them for the U.S. Government under the loan program.

Therefore, it meant that if you had this storage business done for the United States, counted as nonmember business, many of the marketing cooperatives would not have been able to qualify for loans from the banks for cooperatives. This was put in by the Congress for a specific

reason and not related to this transportation problem which has developed.

We think it is only fair and we have attempted to support a clear statutory declaration that this business done for the U.S. Government in the hauling field should be counted as nonmember business.

3. The nonmember interstate transportation in any fiscal year measured in terms of tonnage of a cooperative or federation of cooperatives required to give notice to the Commission could not exceed the total quantity of property transported interstate for itself and its members.

4. The Commission would be given specific authority to examine the pertinent motor transportation records of any cooperative or federation required to give notice to the Commission under the bill for purposes of determining whether the cooperative or federation is in compliance with the requirements of this exemption.

A further provision of the Senate passed version of S. 752 would impose a 15-percent maximum limit on the necessary and incidental interstate hauling of other than "exempt commodities" for nonmembers who are neither farmers, cooperative associations, nor federations of cooperative associations.

The council did not originally propose nor support this or any other maximum limitation. The council felt that an arbitrary maximum limitation was not necessary with the other new requirements and that it would unduly hamper the economical and efficient marketing of their members' products by many cooperatives which did not have common carrier service available at reasonable rates if available at all.

But after the Senate Surface Transportation Subcommittee proposed a 10-percent maximum limitation on all interstate hauling for compensation for nonmembers, excepting exempt commodities, the council joined with the U.S. Department of Agriculture and the general farm organizations in proposing as a substitute a maximum 15-percent limitation on interstate hauling for nonmembers who are neither farmers, cooperative associations, nor federations of cooperatives. This counterproposal was adopted by the Senate Commerce Committee and is in the bill as now referred to you from the Senate.

We know there is some opposition to this proposed limitation on the part of some cooperatives and perhaps by some operators who are seeking to utilize this exemption to make money for themselves rather than for farmers.

But with very few exceptions, the council's members have advised us that they can live under this maximum limitation and will do so in order to get this controversy settled by Congress so that they can proceed with more certainty in providing for the transportation needs of their farmer members.

WHY ACT NOW

If this session adjourns without final action by the Congress, the result will be more costly and unproductive litigation, further frustration and uncertainty in the administration of this exemption by the Commission, and encouragement to those unqualified operators who might seek to operate under this exemption to the detriment of the genuine farmer-owned and farmer-controlled cooperatives in the country.

We are convinced that no legislation can be devised which will satisfy all in the regulated transportation industry or in agriculture.

But we are firmly convinced through years of close association with this controversy that the almost unprecedented support or acceptance of the Senate-passed version by the three general farm organizations, the U.S. Department of Agriculture and leading organizations in the railroad and regulated motor carrier industries commends it to you for prompt and favorable action.

We thank you for the opportunity to present the position and recommendations of the Council for action on this important matter.

(The appendices referred to follow:)

APPENDIX I

INTERSTATE COMERCE ACT, PART II SECTION 203(b)(5)

Section 203(b): "Nothing in this part, except the provisions of section 203 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;"

APPENDIX II

SECTION 15(a) OF THE AGRICULTURAL MARKETING ACT—APPROVED JUNE 15, 1929, AS AMENDED (49 STAT. 317, 12 U.S.C.A. 1141j(a))

As used in this act, the term "cooperative 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: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof as such producers or purchasers and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; and

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That 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. All business transacted by any cooperative association for or on behalf of the United States or any agency or instrumentality thereof shall be disregarded in determining the volume of member and nonmember business transacted by such association.

Mr. HARMANSON. Mr. Chairman, if I might add just a word, Mr. Newsom, Master of the National Grange, was unable to be here in person today. He has asked me to present at this time a letter for the record in which the Grange gives unconditional support for S. 752 as passed by the Senate.

Mr. FRIEDEL. It may be placed in the record.

(The document referred to follows:)

NATIONAL GRANGE,
Washington, D.C., June 28, 1968.

Re S. 752 and H.R. 6530.

Hon. SAMUEL N. FRIEDEL,
Chairman, Subcommittee on Transportation and Aeronautics, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN FRIEDEL: The National Grange supports S. 752 as passed by the Senate on June 4, 1968 and respectfully recommends its early approval by

your Subcommittee so that action can be completed in this Session of the Congress.

The Grange has participated with the other general farm organizations and the National Council of Farmer Cooperatives during the past several years in trying to develop reasonable and fair clarification and amendment of the cooperative association exemption in the Motor Carrier Act to preserve for bona fide cooperatives the economic and efficient marketing of their members products intended by this exemption.

The Bill, as finally passed by the Senate on June 4, 1968, represents a constructive action to preserve the basic scope of this exemption and at the same time establish specific guidelines which should be very helpful in preventing abuses by those not qualified under the exemption.

The Grange was active in 1935 in supporting the inclusion of this exemption in the Motor Carrier Act to preserve for farmers, working together in their cooperatives, this needed economy and efficiency in marketing their products. With the mounting increases in rail and common motor carrier freight rates, this exemption is increasingly important to agriculture.

Since I cannot be present to personally testify at the Hearings on this legislation, I shall appreciate your including in the record this statement of the Grange's unqualified support of S. 752 as passed by the Senate.

Respectfully yours,

HERSCHEL D. NEWSOM, *Master.*

Mr. FRIEDEL. Are there any questions, Mr. Watson?

Mr. WATSON. Thank you very much.

I think you have made a good contribution. Thank you very much.

Mr. FRIEDEL. Our next witness is Mr. Matt Triggs, American Farm Bureau Federation.

STATEMENT OF MATT TRIGGS, ASSISTANT LEGISLATIVE DIRECTOR, AMERICAN FARM BUREAU FEDERATION

Mr. TRIGGS. Good morning, Mr. Chairman, and Mr. Watson.

The American Farm Bureau Federation respectfully recommends the enactment of S. 752, as approved by the Senate.

S. 752 amends section 203(b) (5) of the Motor Carrier Act by establishing limitations on the transportation services that may be provided by agricultural cooperatives.

A major purpose of the bill is to prevent the development of nonregulated for-hire transportation by non-bona fide cooperative using the cooperative form of organization to legitimize such operations.

S. 752, as approved by the Senate, contains more restrictive limitations on cooperatives than we had favored in our testimony to the Senate Committee on Commerce.

Nevertheless, it is our opinion that the bill, as amended, represents a carefully considered and a reasonable compromise of the views presented to the Senate committee by the contending parties.

Its enactment will be a benefit to all by a statutory settlement of a controversy that has occupied the attention of the parties and the courts for many years, without having necessarily been finally resolved.

We respectfully urge the committee to approve, without amendment, S. 752 in the revised form approved by the Senate.

We appreciate the opportunity to present the views of the American Farm Bureau Federation on this matter.

Mr. FRIEDEL. Thank you very much, Mr. Triggs.

Are there any questions, Mr. Watson?

Mr. WATSON. No, Mr. Chairman; other than to thank him.

As usual, the Farm Bureau comes up with a reasonably well thought out and, I think, very sound position.

Mr. TRIGGS. Thank you.

Mr. FRIEDEL. Our next witness is Mr. Angus McDonald, National Farmers Union.

STATEMENT OF ANGUS McDONALD, DIRECTOR OF RESEARCH, NATIONAL FARMERS UNION

Mr. MCDONALD. Mr. Chairman and members of the committee: I am research director of the National Farmers Union.

I would like to have this brief statement incorporated in the record. Although it is very brief, I will be even more brief in my summary.

I would like to indicate first our complete support of S. 752 as passed by the Senate.

I also would like to comment on the fact that Mr. Harmanson referred to a number of groups who, ordinarily are not on the same side of the table, are in support of the bill.

It is not unusual, however, for the Farmers Union and the National Grange and Farm Bureau to support legislation together particularly in regard to transportation. We have over the years supported the agricultural exemption. We feel it is necessary for efficient transportation of farm commodities necessary to the livelihood of members of farm cooperatives.

We feel that this bill, while it was not sponsored particularly by our group but our agreement was reached after lengthy consultation with other individuals representing farm organizations, particularly Mr. James Harmanson, whom you have just heard, we agreed that it would be a step in the right direction, that it would possibly avoid lengthy and costly litigation.

Mr. Chairman, that concludes my statement.

(Mr. McDonald's prepared statement follows:)

STATEMENT OF ANGUS MCDONALD, DIRECTOR OF RESEARCH, NATIONAL FARMERS UNION

Mr. Chairman and members of the committee, I appear here in support of S. 752 which would, we hope, resolve some of the controversies which have arisen regarding the administration of the agricultural exemption as set forth in the Interstate Commerce Act.

The National Farmers Union, over a long period of years, has supported this exemption which is vitally necessary to the efficient marketing of farm products. We have also opposed various attempts which have been made both by Government officials and certain organizations to weaken the exemption.

We feel that the problem of the transportation of farm commodities is unique. Congress was wise when it passed the Interstate Commerce Act in exempting farm commodities from regulation. Certain commodities are of a highly perishable nature and rigid rules in regard to both transportation rates and routes would greatly hamper efficient transportation.

The agricultural exemption also provides protection for consumers and enables them to purchase high quality food which has been transported to the market in the shortest possible time. Certain agricultural products are not only very perishable but are of such a seasonable nature that transportation facilities may be strained to the utmost at a particular time. This involves relying on all kinds of transportation—both regulated and non-regulated—to bring food products to the point of distribution without spoilage and waste.

We have been very much aware of certain problems which have arisen in regard to the non-member portion of products which are transported by cooperatives in interstate commerce. It is perhaps unnecessary to tell this committee that there is a wide divergence of opinion pertaining to the administration of the agricultural exemption provisions of the ICC Act, both among Government

officials and farm organizations whose members are primarily interested in the production and transportation of agricultural products. We are particularly gratified that over a long period of years there has been, so far as we know, no substantial difference of opinion among farm groups regarding the agricultural exemption. This unanimity of opinion is also evidenced in the support of the bill now before this Committee.

We urge that S. 752 be approved as expeditiously as possible. It is particularly important that action be taken since the other body has already approved a companion bill. We feel that the compromise which has been developed to a large extent by Mr. Harmonson of the National Council of Farmer Cooperatives, represents a step forward in the administration of the agricultural exemption. Passage of the bill will possibly make unnecessary costly and time consuming litigation.

Mr. FRIEDEL. Thank you.

Are there questions?

Now we will hear from the opposition, and I would like to make an oral statement.

We would like to hear one statement and ask the rest to file their statements in the record. But we are going to finish this meeting today.

The first witness is Mr. Olson.

Mr. OLSON. Sir, I think we have all come a long way. It is very important to our portion of the industry that we each be heard.

Mr. FRIEDEL. Mr. O. A. Olson, manager of the All Star Dairy, Lawrence, Kans.

STATEMENT OF O. A. OLSON, GENERAL MANAGER, MILK PRODUCERS MARKETING CO., LAWRENCE, KANS.

Mr. OLSON. Mr. Chairman and gentlemen of the committee, my name is O. A. Olson. I am general manager of Milk Producers Marketing Co., a cooperative corporation with home offices and plant located at Lawrence, Kans., and I am appearing on behalf of that company in opposition to S. 752.

I have with me today on my right Mr. Jenkins, our division manager. On my left, our attorneys, Mr. Bingham and Mr. Sapp, both of Kansas City.

Milk Producers was organized in 1932 under the Agricultural Marketing Act and has been in continuous operation ever since; in each year of operation it has been certified by the U.S. Department of Agriculture as a qualified cooperative association under section 1141j of title 12 of the United States Code, including 1968.

Our company's opposition to the bill is based upon our entry into the transportation field in 1965, as an economic necessity for our survival. We institute these operations only after careful scrutiny and upon the studied advice of counsel.

A brief background on our company may be somewhat helpful to the committee in understanding why we are forced into the activities, and why we feel it is necessary to oppose this legislation.

Milk Producers was organized to provide the dairy farmer in Kansas and Missouri with a production and marketing outlet for their products. Its only stockholders are member-patrons who are actively engaged in the production of milk, or who have in the past been so engaged.

Retired or other farm members not actively engaged in milk production are permitted to retain their stock and receive dividends, but

are not allowed to vote at stockholders' meetings. Active producers are permitted one vote at such meetings regardless of the number of shares they hold. Thus, we comply with all essential requirements of the Agricultural Marketing Act, and have been in such compliance since the company's inception.

Our membership has, during the past 10 years, dropped from a high of 3,000 producers in 1958, to 174 as of June 24, 1968.

Our company processes these products, packages them, and sells them principally in the Kansas City area in competition with such large national dairy corporations as the National Dairy Corp., Hawthorn Mellody Dairy Farms Dairy Co., Foremost Dairies, Inc., the Borden Co., and Fairmont Foods.

National Dairy, Borden, and Fairmont are ranked 31, 42, and 353, respectively, in Fortune's list of the 500 largest industrial corporations, with combined gross sales of over $4 billion for the year 1967. (Fortune, June 15, 1968 issue, p. 186, et seq.)

These companies are primarily responsive to the stockholders, not the farmer, and their principal goals are profits.

Milk Producers have the same goals, but our stockholders are all farmers; unlike these companies, we cannot undercut the dairy farmer by producing milk substitutes or "filled milk" products (in which butterfat is replaced with vegetable fat).

We have strong fears that, if present research by such companies as those I have mentioned is successful, milk and milk products will be crowded out of the market by synthetic production and vigorous selling of margarine. (See Forbes magazine, May 15, 1968, issue at p. 34.)

In view of the regulation of the dairy industry, we are unable to pay more to our producers than any other competitor, since prices are controlled and dictated by the Federal Milk Market Administrator of the U.S. Department of Agriculture.

The only ways in which the dairy farmer can increase the price he receives for his product is by increasing his own efficiency, which he can only do by mechanization and at great capital expense, and by selling to a dairy co-op, such as Milk Producers, with the hope that the co-op's operation will be sufficiently profiitable to permit dividend payments to him.

Our dairy operations have lost money in each of the last 6 years; this is the pattern across the country and, yes, even around the world, producers in increasing numbers are leaving dairy farming for other, more profitable areas of endeavor.

As a result of this, we have experienced a decline in public dairies in the State of Kansas from 99 in 1958 to the present 44, and from 72 in the Kansas City area in 1950 to 10 at the present time.

Mr. WATSON. Your statement about being marketed out of business by the large companies with the synthetic products and all of that, have you ever tried, and I appreciate your problem, have you ever tried to recapture some of the market by saying the only true milk is the original cow milk, not machine produced, something like that?

Mr. OLSON. We certainly do, Mr. Watson. We have an intensive program for consumer education in the field of dairy products acceptance to the human body, as a matter of fact, in competition with substitutes.

Mr. WATSON. The cows are the only ones that give milk. The machine can at best produce something that is artificial.

Mr. OLSON. That is right.

Talking about the economic thing again, the substitutes are making the inroads generally because of the cost of production of milk as opposed to the cost of production of the substitute products.

Mr. WATSON. Thank you.

Mr. OLSON. Business in the United States has found it increasingly necessary to free itself from reliance on one product or service: diversification has become the only safe way to profits. The reasons for this are evident—if a company's principal product or service is faltering, another more profitable operation can take up the slack, and permit the continuation of the principal enterprise.

Milk Producers has quite simply found it essential to do precisely this in order to avoid economic extenction. At the present time, we are negotiating for the purchase of a frozen food operation in addition to our transportation division. We have been unable to pay any patronage dividends for the past 6 years, because we have had no earnings from milk production; nor, were we able to pay any stock dividends during the past year because of current losses.

Our principal business of milk production generated gross sales of approximately $5.9 million of gross sales in 1967; by contrast, our transportation division had gross sales of only $1,675,000, or about 28.3 percent of total gross revenues.

Thus, we remain substantially below the 49-percent ceiling established by the Agricultural Marketing Act for nonmember business.

Our principal transportation customers are also major buyers of our milk products. This, in effect, is the reason for our being in the transportation business. In this way, we are able to provide to our customers a double-barreled sales program—milk products and transportation services. Such customers are national wholesale grocery chains, and can readily make use of both our products and services. If the transportation services were not available, we would face the possible loss of milk customers.

I wish to emphasis two important facts relative to our transportation activities: (1) we serve anyone desiring our facilities without rebates or discrimination; and (2) our truck rates are about evenly balanced between being higher and lower than those of regulated carriers.

Our transportation business has been built upon our willingness and ability to provide the service our customers require rather than any attempt to undercut the rate structure of regulated carriers.

We feel the committee should also be aware of the fact that, insofar as we are able to determine, not one of the other co-ops the Interstate Commerce Commission has challenged in the courts is a bona fide "cooperative association" as that term is defined by the Agricultural Marketing Act. We are aware of only two other bona fide co-ops in the United States presently engaging in the for-hire transportation business: these are the Cache Valley Dairy Association located in Utah, and the Northwest Agricultural Cooperative Association, operating out of the State of Oregon.

I would also point out to the committee that there has been no authoritative findings reported by any group or agency of which we are

aware to determine the qualifications of the so-called co-ops purporting to operate under the exemption of section 203(b)(5) of the Interstate Commerce Act (49 U.S.C. 303(b)(5)).

In fact, of the cases presently pending against co-ops for illegal transportation activities, the companies involved are apparently uniformally not qualified. They are, in fact, wildcat truckers seeking to avoid the requirements of the Interstate Commerce Act by posing as farmers' groups.

Milk Producers is vigorously opposed to the operations of these pseudo-co-ops. They have given our industry a black eye, and specifically have caused milk producers to be unjustly included in a group which is now being condemned for violations of the Interstate Commerce Act.

If we are correct in our belief that our operations are well within the scope of the qualifications contained in section 203(b)(5) of the Agricultural Marketing Act, and that the renegade groups calling themselves cooperatives are not, this legislation is not necessary: The administrative findings of the Department of Agriculture and the Interstate Commerce Commission would form a sufficient basis upon which to terminate the activities of the illegal operators.

Under such circumstances, the legitimate cooperatives engaged in transportation will be forced to limit themselves to a maximum of 49 percent of their gross revenues for nonmembers. In other words, there is an absolute ceiling upon the size of any true cooperative's nonmember transportation—indeed, any other business—activity.

Should this bill be passed, milk producers will be forced either to close its transportation division, curtail its activities substantially, or seek regulated authority from the Interstate Commerce Commission.

Even if we were to become a regulated carrier tomorrow, we will still be subject to the same ceiling of 49 percent nonmember business, including transportation, as imposed by the Agricultural Marketing Act. And, it is well to note that should our revenues from member business decline, the maximum revenues which we may receive from nonmember sources will also decline.

I believe the committees will readily see that the true cooperative poses no substantial threat to the regulated transportation industry. The means of eliminating the illegal operators carrying on their activities under the guise of a cooperative is for greater coordination between the Department of Agriculture and the Commission's Bureau of Enforcement, and vigorous prosecution of the violators. This would free the legitimate co-op to pursue its transportation activities within the limits already imposed upon it, and remove the stigma created by the actions of the sham co-ops.

Milk Producers, I might point out, has no opposition to regulation by the Commission. However, I would also point out that we have committed our company to transportation as a matter of financial survival, and that passage of this bill would effectively destroy what may well be our company's salvation.

Substantial capital has been committed to our operations in an honest faith in their legality; these expenditures could not be fully recovered, and we would be forced to seek out and develop another source of revenue in order to survive. This would require great amounts of time and money not available to us, not to mention the money lost

in the interim. This is tantamount to taking our property without due process of law.

In view of these facts, we must oppose this legislation in its present form. S. 752 is extremely ambiguous: it is unclear whether the limits on nonmember traffic are to be 15 percent or 50 percent of total tonnages transported; at best, it is confusing.

Moreover, it does violence to the terms and philosophy of the Agricultural Marketing Act by carving out an area of possible co-op endeavor and limiting the co-op's activity in that area to 50-percent nonmember business, as opposed to the act's limitation of 50-percent ceiling on all nonmember business, in the aggregate. And these inroads are to be made at the behest of a strong, well-organized special interest group, the regulated carriers.

I would also point out that it seems inappropriate for the committee to take any decisive action on the matter until it has had a better opportunity to consider the full implications of the measure, the effect passage would have upon the bona fide cooperatives like milk producers, and whether or not passage would really serve to curtail illegal operations and promote the best interests of the regulated transportation industry.

I strongly question the wisdom of recommending passage unless there is greater opportunity for a more extensive study than exists in the present session of Congress.

I would like to conclude with some comments on possible amendments which the committee might wish to consider.

As I stated a moment ago, Milk Producers has no objection to regulation by the Commission; we have always attempted to cooperate with that agency to the greatest extent possible, have made all our books and records available to the Commission's representatives, and I seriously doubt that regulation would pose any great difficulties for us.

But in order to acquire authority to continue our present operations, we would be forced to stop them, at least temporarily, file our applications, and then wait until all the administrative hearings, appeals, and judicial action were completed. In the process, we would lose most of our customers and good will, and be unable to meet our commitments for equipment—in other words, lose all of the business we have managed to build over several years.

In imposing formal regulation or licensing upon any business of this type, Congress has almost uniformly permitted legitimate operators to continue their activities by merely proving their qualifications and operations, rather than the burden of establishing in extensive and often bitterly contested administrative cases the need for a new service.

I would therefore suggest that, if the committee deems passage advisable, it amend the bill to provide that existing cooperatives engaging in transportation activities be granted authority by the Commission encompassing those activities upon proof of the following:

(A) That they are, in fact, a bona fide "cooperative association" under the Agricultural Marketing Act, and recognized as such by the U.S. Department of Agriculture; and

(B) That they have been performing a transportation service at the effective date of the bill.

This is no more than was done for the motor carrier industry upon passage of the Motor Carrier Act in 1935; the requirement of proving the qualifications under paragraph (A) would serve to prevent the pseudo co-ops from obtaining any authority from their illegal operations.

Finally, I would also suggest, in view of the overall decline in revenues for cooperatives as closely connected with farming activities as milk producers (that is, not those which are principally involved in activities which are not farm related), that an amendment to section 1141j of title 12, U.S.C. (the Agricultural Marketing Act) be considered to the effect that all business conducted by a cooperative association under the regulation of the Interstate Commerce Commission (or similar agency) would be disregarded in determining the volume of member and nonmember business transacted by such association.

I wish to thank the committee for this opportunity to appear today and make our position known, and for your courteous attention.

Mr. FRIEDEL. Thank you, Mr. Olson, for a very informative statement.

I have no questions.

Mr. Watson?

Mr. WATSON. Mr. Chairman, I have two or three questions.

May I parenthetically state at this time I have an appointment I should have met at 12. The House is in session.

If these gentlemen want to be heard, certainly I want to give them an opportunity to be heard.

Could we possibly get permission to sit this afternoon and take a little while? I would like to ask him two or three questions. I want to give everybody an opportunity to be heard.

Mr. FRIEDEL. We will try to get permission to sit while the House is in session. If we get permission, we will come back at 2 o'clock.

Mr. WATSON. Would you like to dispose of this witness?

I will ask him two or three questions.

Mr. FRIEDEL. Yes.

Mr. WATSON. Mr. Olson, you at first made a rather strong indictment of all the cooperatives except three, yours and two others. You are not a member of this council that the gentleman represented a moment ago?

Mr. OLSON. No; we are not.

Mr. WATSON. Upon what basis do you make this blanket indictment? Briefly now.

Mr. OLSON. Under the qualifications branch as we are regulated by the U.S. Department of Agriculture, each year they determine by our activity our right to do for our members as the act provides. In other words, in our case of milk, we as a true cooperative under their surveillance are allowed to weigh, test, sample, and determine the rate of pay of the member producers that we represent. This is the qualification by which each year the qualification branch gives us this true status. This is what I base that on.

Mr. WATSON. In other words, you conclude simply because you are further regulated and inspected by the Department of Agriculture that that puts you in a unique position in contrast to those agricultural commodities and cooperatives that are not regulated, inspected, or have

these added burdens; they are not true cooperatives? Is that the basis of your position.

Mr. OLSON. We believe that the problem probably stems from the fact that many groups have banded together and call themselves a cooperative, operating under the cooperative principle very much the same as perhaps grocery stores or any other like businesses.

This is where we feel the distinction is between the two. The word "cooperative," in other words, must mean something. This is where I base this contention.

Of course, the cooperative could extend well beyond milk. It could include other agricultural commodities.

Mr. WATSON. You don't mean to imply that all of these other cooperatives are truckers? Certainly you have genuine bona fide farmer cooperatives.

Mr. OLSON. They are not agricultural. That is the difference.

Mr. FRIEDEL. Will the gentleman yield?

Mr. WATSON. Yes.

Mr. FRIEDEL. What do you haul on your backhaul?

Mr. OLSON. We are hauling general commodities of all types. This is for economic necessity actually. That is the purpose of this.

Mr. FRIEDEL. Isn't that what the other cooperatives do?

Mr. OLSON. Yes. We are trying to draw the distinction here without malice to anyone between the types of cooperatives, cooperatives in principle, cooperatives as regulated and planned by the Department. This is the difference between them.

Mr. WATSON. Since you are restricted to milk, help me to understand what commodities you would be in a position to haul on your backhaul.

Mr. OLSON. Our understanding, again, the qualification of the cooperative does not necessarily mean that it is relegated to strictly the product it is principally engaged in. This could be grain or a number of other—cotton, I suspect, is a large one in this field.

But the Department has the qualification branch for each area in which they incorporate the necessary requirements for being a true cooperative, to render the services back to their members as is defined in the act. Ours, peculiarly, is milk.

Mr. WATSON. Help me to understand how your equipment would be adaptable to any other commodities other than liquids. Certainly, milk would be highly restrictive insofar as placing any other liquid from a special container truck.

Mr. OLSON. We are not professing to be delivering liquid as liquid in tankers. What we are delivering is finished products as you would purchase in the home and store. Our transportation differential is involved in general commodities. This is our mode of operation.

Mr. WATSON. Mr. Olson, when you get into this processing business, then, you are in the same business as these larger dairies?

Mr. OLSON. That is right. We are farmer-owned, farmer-controlled, doing business in the finished product as a continuation of the farmer-produced milk.

Mr. WATSON. You get the milk from around the farms?

Mr. OLSON. Right.

Mr. WATSON. You bring it into your plants. Then you process it into all types of things: cheeses and everything else.

Mr. OLSON. No, sir; strictly fluid products.

Mr. WATSON. Then you have your trucks go out and distribute it in the various marketplaces?

Mr. OLSON. That is right.

Mr. WATSON. Would you not come into the general processing industry such as Borden's, some of the others you speak of?

Mr. OLSON. That is right. There is a tremendous difference in the size of the people involved here. That is why we mentioned that.

Mr. WATSON. Yes; I am sure of that. The difference in size would not, I think, warrant any distinction between your position and that of the other.

Actually, Mr. Olson, your worry is prospective rather than present, isn't it? You say you are well below the 49 percent ceiling established by the Agricultural Marketing Act. So, if you have any problems they would be prospective rather than present?

Mr. OLSON. If this bill is passed, very definitely they would restrict us to the 15 percent.

Mr. WATSON. You could continue operating as you are now, I assume. You would not declare under this act.

Mr. OLSON. In that it would destroy, of course, our division for transportation because of the small amount of volume of product we would have moving interstate. It would not be economically feasible to continue to operate the division.

Mr. WATSON. In other words, your contention is that this act is directed against the wildcat truckers seeking to avoid the requirements of the Interstate Commerce Commission by posing as farmer groups. Actually, it would be a detriment to yours and two other bona fide farm cooperatives.

Mr. OLSON. We are not trying to put a blanket treatment on it. Our feeling here, once again, is that true cooperatives—the section which we have been legally advised is permissible for us to operate under on a for-hire basis, is one that was designed primarily for true cooperatives, being cooperatives that qualify under the Department. This is why we are not knowledgeable as to other true cooperatives that might be so engaged as we are. So, of course, we are having to set ourselves apart.

We feel that the groups of truckers who have amalgamated and called themselves a cooperative could very well be creating the prospect of disaster to what might have been very honestly established in this section to provide diversification for true cooperatives.

Mr. WATSON. Mr. Olson, you actually believe that you are entitled to continue under the "bona fide cooperative exemption" simply because your stockholders are farmers? Isn't that it? You can have the processing activity and so forth which would remove you from the exemption but simply because your stockholders are farmers then you think that exemption should follow on through the manufacturing process and everything else?

Mr. OLSON. We are required, Mr. Watson, as a cooperative to qualify. Again this is rendering services back to the patrons. These are the people who own the organization, the farmers who own and operate it. We must, as I have said before, we must continue to qualify each year on the basis of services to these members.

Certainly, here is where we feel justified in establishing diversified departments that will help to enhance the way of life for the members.

We comply with the Marketing Act at all times. This cannot be true of a group of truckers.

Mr. WATSON. I agree with you that the farmers certainly have a tight squeeze and ultimately the consumer is paying for it. I appreciate that fact. But if we were to follow your premise, then we would say that a textile mill, the farmers could get together and buy a textile mill and they could bring their wool or their cotton into the textile mill and they manufacture it; just so long as the stockholders are farmers, the exemption would follow them on through in transporting their goods.

Mr. OLSON. Yes, sir. That is the whole idea of the act originally.

Mr. WATSON. I think if we would follow that, we would completely destroy the whole transportation process which is in delicate balance now.

You state on page 7 that even if you were to apply to become a regulated carrier, you would still be subject to the same ceiling of 49 percent.

Mr. OLSON. Yes, sir.

Mr. WATSON. You could apply to be a common carrier if you wish and haul anything. I am not saying it would be granted. It would be based on the public convenience and necessity but you would apply to be a common carrier and then you would not have to worry about any of this. You could haul anything you wished.

Mr. OLSON. No; not and be, again, a qualifying cooperative.

Mr. WATSON. You can't have your cake and eat it, too.

If you want to be a common carrier and carry anything and not be subject to all these limitations, you could apply to be a common carrier, could you not?

Mr. OLSON. I don't know how we could do this as a cooperative.

Mr. WATSON. I mean set up an independent carrier system.

Mr. OLSON. I suspect this would probably not set very well with the qualifications people.

Our cooperatives generally do not engage themselves in outside business as more or less stockholders of it. I don't know legally whether this would be against them or not. It would not be the wish of our company, I am sure.

Mr. WATSON. You could not qualify as a common carrier and still retain your exemption as an agricultural cooperative because the two are imcompatible.

Mr. OLSON. In the qualifications, again, I believe, that it would be specifically held that this business done with nonmembers would still apply to the 49 percent regardless of how you would divide it, set it apart or anything else. Their reaction to that would be nonmember business.

Mr. WATSON. Still, we come back to the basic position right now, it would not hurt you but you are more concerned about the prospective difficulties?

Mr. OLSON. That is true.

Mr. WATSON. More than you are about the present difficulties.

Mr. OLSON. That is true.

Mr. WATSON. Thank you.

Mr. FRIEDEL. The committee will stand in recess until 2 o'clock, provided permission is given, as has been requested.

(Whereupon, at 12:30 p.m., the subcommittee recessed, to reconvene at 2 p.m. the same day.)

AFTER RECESS

(The subcommittee reconvened at 2:30 p.m., Hon. Samuel N. Friedel, chairman, presiding.)

Mr. FRIEDEL. The hearing will come to order. For a continuation of hearings on H.R. 6530 and S. 752 amending section 203(b)(5) and 220 of the Interstate Commerce Act to clarify the exemption with respect to the transportation performed by the Agricultural Cooperative Associations for nonmembers.

The first witness this afternoon will be Mr. Winston M. Boggs, the sales manager of the Agricultural Transportation Association of Texas.

Gentlemen, I will say again that it will be a service to the committee if you summarize your statement by letting us know whether you support the legislation or are opposed to it. Your full statement will be in the record.

STATEMENT OF WINSTON BOGGS, SALES MANAGER, AGRICULTURAL TRANSPORTATION ASSOCIATION OF TEXAS; ACCOMPANIED BY JACK R. COBB, GENERAL MANAGER; AND HOWARD McCORMICK, GENERAL MANAGER, AMERICAN FARM LINES, OKLAHOMA CITY, OKLA.

Mr. BOGGS. Mr. Chairman and members of the subcommittee, I am accompanied by Mr. Jack R. Cobb, general manager of the Agricultural Transportation Association of Texas and Mr. Howard McCormick, general manager of the American Farm Lines, Oklahoma City, Okla., one of the largest transcontinental cooperative trucklines.

Mr. Chairman, I have a very short statement; I will read some of it and then I will insert the rest of it to save your time.

My name is Winston Boggs; I am sales manager for Agricultural Transportation Association of Texas whose main offices are located at 107 NW. 29th Street, Fort Worth, Tex. ATA of Texas is a farm cooperative truckline.

Our board of directors are as follows: Taylor Meriman, traffic manager, Tri-Valley Growers, San Francisco, Calif.; George Rees, general manager, Oxnard Frozen Foods, Oxnard, Calif.; Harry Riddling, Jr., sales manager, Cypress Gardens Citrus Products, Inc., Winterhaven, Fla.; Frank Perez, sales manager, Naturipe Berry Growers, San Jose, Calif.; Joe Marshburn, general manager, Florida Citrus Canners Co-op., Lake Wales, Fla.; Robert Stubbs, sales manager, Plymouth Citrus Products, Plymouth, Fla.; Glen Grader, secretary-treasurer, National Processors, Inc., Albany, Oreg.

All of these are cooperatives.

Our transportation cooperative is made up of farm producing cooperatives and federated cooperatives. We operate 100 pieces of equipment and cover 48 States for our members. We appreciate this opportunity to present our views on S. 752 to your committee. We are outlining our specific objections to the provisions of this proposed bill.

We would like to discuss the basic issues which we believe have been presented for decision.

We do not sanction operations which claim, but are not entitled to, the partial exemption provided by section 203(b)(5) of the Interstate Commerce Act. We support the Interstate Commerce Commission in the enforcement of the law which it has the duty to administer, and we appreciate their problem in dealing with illegal operations that claim co-op exemption. We know there are transportation co-ops that are not bona fide under the definition of cooperative associations as set forth in the Agricultural Marketing Act. These illegal operations should be stamped out, and since they also hurt bona fide agricultural cooperatives and federated co-ops, we believe in, and support, the Interstate Commerce Commission in its enforcement. In fact, we have tried to help Interstate Commerce Commission to enforce the law.

Also we know of some that are illegal that the Interstate Commerce Commission has gotten injunctions and they have been put out of business. So they have some authority. They have some so far as stopping the illegal co-op.

Now, the co-ops that are running transcontinental have only about 500 tractor trailers involved in these co-ops. We haul for our members from the west coast to the east coast and we have no members on the east coast or Midwest so we have to haul back for nonmembers back to the west coast because it is not feasible to deadhead that piece of equipment back.

That is the reason why we think this 752 as passed by the Senate would almost put us out of business because we cannot deadhead our equipment from the east coast back to the west coast. If we run a hundred pieces of equipment over there we could load about 15 of them back and deadhead the rest of them back. This would not be feasible under this. So far as the rest of the law is concerned in S. 752 as passed by the Senate, I think it would be good to be in the bill.

All our objection to the bill is the percentage in the bill of 15 percent. I think the percentage should be left as is in the Agricultural Act that is in force now.

(Mr. Boggs' prepared statement follows:)

STATEMENT OF WINSTON BOGGS, SALES MANAGER, AGRICULTURAL TRANSPORTATION ASSOCIATION OF TEXAS

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Harry Riddling, Jr., Sales Manager, Cypress Gardens Citrus Products, Inc., Winterhaven, Florida
Frank Perez, Sales Manager, Naturipe Berry Growers, San Jose, California
Joe Marshburn, General Manager, Florida Citrus Canners Coop., Lake Wales, Florida
Robert Stubbs, Sales Manager, Plymouth Citrus Products, Plymouth, Florida
Glen Grader, Secretary Treasurer, National Processors, Inc., Albany, Oregon

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We know ourselves of several so-called agricultural coops that are now operating and these should be stopped. I think it would be stopped if the Bill S. 752 was passed in regards to the law involved in the bill; but I do not think that the percentage should be changed unless it is just to make the government freight non-member. We have some so-called coops that are operating and were set up just to haul government freight, but I do not think just because there are a few bad apples in a barrel that we should throw out the whole barrelful.

It is necessary for non-member backhaul, when it is not economical or feasible to operate the trucks empty on a return trip. We have members on the West Coast that ship to the East Coast and we have to depend on non-member or government freight movements to get the trucks back to the West Coast to our members. Therefore, if the House of Representatives pass the bill that the Senate has passed, limiting the coops, including government, to 15% non-member movement, then out of 100 trucks sent to the East Coast, we would have to run approximately 85 of them back empty. This would not be feasible for anyone except some of the common carriers that are hauling defense department movements that charge from $1.00 to $1.50 per mile for their backhauls, which I think is a ridiculous rate.

The farmers who are participating in the farm transportation coops are trying 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 economical equality to that of other industries; and to that end, to protect, control and stabilize the current of interstate and foreign commerce in the marketing of their agricultural products. The number of trucks operated by farm cooperatives has increased about 12% during the past six years, while total truck registration increased approximately 30% over the same period. Actually, the cooperative trucks represent 7/10ths of 1% of the total truck registrations in 1966, as compared with 9/10ths of 1% in 1960, so the cooperatives are decreasing instead of increasing as alleged by regulated motor carriers and railroads. So, we do not see why the percentage should be changed in the present Agricultural Marketing Act. There are only approximately 500 tractor-trailers that are operating 1,000 miles or more across country for farm cooperatives. I do not see where this would hurt the motor carriers or the railroads since motor carriers and railroads have thousands and thousands of pieces of equipment operating, so we would oppose the change in the Agricultural Marketing Act as far as the percentage is concerned.

Mr. FRIEDEL. What is the percentage in the old bill?

Mr. BOGGS. Not to do more for nonmembers than you do for members. So it would be 49–51. The Government is exempt now. It does not count for you or against you.

Mr. FRIEDEL. Let me get it clear in my mind. Are you opposed to S. 752?

Mr. BOGGS. Yes, sir; in the form it is now.

Mr. FRIEDEL. In your statement in the fourth paragraph you say: "We know ourselves of several so-called agricultural co-ops that are now operating and these should be stopped. I think it would be stopped if the bill S. 752 were passed."

Mr. BOGGS. Right.

Mr. FRIEDEL. Yet you say you are opposed to it?

Mr. BOGGS. "In regards to the law involved," it says in my statement, "in the bill," but I do not think that the percentage should be changed. I am opposed to it as far as the percentage is concerned but as far as the rest of the bill is concerned, I am not.

Mr. FRIEDEL. Are there any questions, Mr. Adams?

Mr. ADAMS. The only question I had was the same thing that the chairman asked on the 15 percent. If you carry back farm commodities you could go up to—are you still limited to 15 percent?

Mr. BOGGS. Not on farm commodities as far as under section 203(b)(6) which is produce.

Mr. ADAMS. The limitation we worked out this morning was 15 percent for nonmembers, 50 percent farmers and nonmembers, if nonagricultural. But if it is agricultural that comes back, the limitation does not apply.

Mr. BOGGS. If it is agricultural and fresh produce, it goes under section 203(b)(6).

Mr. ADAMS. Is that the only type of agricultural products you can carry that are exempt?

Mr. BOGGS. For nonmembers, yes.

Mr. ADAMS. For nonmembers?

Mr. BOGGS. Yes, sir.

Mr. FRIEDEL. Thank you very much.

Mr. MCCORMICK. Mr. Chairman, I am with the American Farm Lines. We are the largest——

Mr. FRIEDEL. What is your name?

Mr. MCCORMICK. Howard McCormick. We are the largest transcontinental member-owned, farmer-financed, farmer-controlled co-op in existence today that runs transcontinental. We are opposed to any legislation that will be detrimental to the farmers in defense of our country.

That is all we have to say about it.

Mr. FRIEDEL. Thank you very much.

Mr. BOGGS. Thank you, Mr. Chairman.

Mr. FRIEDEL. Our next witness is Mr. W. T. Brady, secretary, Tex-Cal Farmers & Ranchers Cooperative, Inc, Compton, Calif

STATEMENT OF W. T. BRADY, EXECUTIVE SECRETARY, TEX-CAL FARMERS & RANCHERS CO-OP, INC., COMPTON, CALIF.

Mr. BRADY. Mr. Chairman, we also support all of the opposition to this bill. I would like to read my statement. It is very short. I have a couple of small quick observations to make and that will be it, I believe.

My name is W. T. Brady, and I am from Los Angeles, Calif. I am the executive secretary of Tex-Cal Farmers & Ranchers Co-op, Inc., a nonprofit farm cooperative, incorporated under the laws of the State of Texas.

Our association is composed of farm members which have banded together to market the various farm commodities and to transport these commodities under section 203(b)(5) of the Federal Agricultural Marketing Act.

We are most concerned with H.R. 6530—at this point I would like to insert the bill S. 752 which we have been talking about all day—and feel that the passage of this bill will, in its present form, be a detriment to our members as well as thousands of farmers and ranchers throughout the United States. We strongly oppose this bill in its entirety as we feel that the present regulations are more than adequate to regulate the transportation of goods in an economical way from farms to the markets.

The purpose of transportation for our farmers is to transport the goods to the markets economically and, in turn, have some sound, feasible, and economical method to return this equipment back to our members so that the overall cost of transportation will not price our members out of the competitive markets.

If the passage of this bill, in its present form, is completed, it will limit our trucks to haul only 15 percent of nonmember freight as a return haul and we must, therefore, deadhead 85 percent of our trucks to the point of origin. As anyone with simple arithmetic background knows, this is economically impossible and will, therefore, cause the prices of farm goods delivered to the market to be appreciably increased.

I would like to point out at this particular time that it costs within an infinitesimal percentage the same cost to deadhead a truck as it does a full load. Your difference in costs is very, very slight. The only savings basically are the fuel savings.

We have recently read that the common carriers, both truck and rail, have been granted substantial increases for the transportation of commodities; however, we are basically using the same rates in our association that have been used for several years.

Our association is also an approved cooperative by the Department of Defense for the cartage and hauling of their goods from, and to, the various bases throughout the United States. As many of us know, Government freight is exempt from economical regulation under section 22 of the Motor Carrier Act, and under section 203(b)(5), we have been saving the Government untold thousands of dollars on the movement of Government freight.

In these days of higher taxes, through the bill that is pending for the 10 percent surcharge, and the reported $6 billion cut in the national spending, by not passing this bill, we will still be in a position to assist the Government in cutting their cost of transportation.

It has been related to me, by the various transportation people in the Department of Defense, that movement by the agricultural marketing association vehicles has afforded the Government a substantial savings, plus they are receiving through truck service that is faster than the service that they had prior to this time.

I would like to point out at this particular time since we have written the statement we made a little survey. There are 13 approved co-ops of the Department of Defense out of the thousands of co-ops throughout the United States.

These 13 co-ops in the last year and a half have hauled approximately $15 million worth of revenue-producing freight. After studying the tenders that have been filed by the common carriers under section 22 and studying the cheapest tender that the co-ops have filed, under our exemptions that we filed with the Department of Defense we find

a 25 or 30 percent savings for the tax year, meaning that in the last year or year and a half these 13 co-ops have saved the taxpayers $5 million.

This must not be overlooked as we see it.

Mr. FRIEDEL. Let me ask you this question. How many co-ops are there? Do you know?

Mr. BRADY. I have no idea. To my knowledge they are not even cataloged. There are thousands of them.

Mr. FRIEDEL. Do you know what percentage the 13 cooperatives bears to the overall trucking requirements of the Department of Defense?

Mr. BRADY. You mean the total freight that the Government uses the co-ops to ship?

Mr. FRIEDEL. Yes.

Mr. BRADY. I read an article that was published in one of the trade journals a few months ago. It seems to me that it was something less than 1 percent of the total dollars that the Department of Defense spent for freight charges. Yet out of this 1 percent we have estimated a savings to the Government of over $5 million of the taxpayers' money.

This is one of the reasons that we are extremely concerned with this bill. The second reason is that the Department of Defense offers us an opportunity to get our trucks back to the point of origin. We are not like a common carrier that has thousands and thousands of solicitors on the street that can solicit business from every manufacturer in the country.

We have been hauling for the Department of Defense, saving them money. We have no solicitors. Therefore, I feel that by limiting this to 15 percent we will knock the taxpayers out of the savings, plus we will also knock our member farmers from an economical way to move their goods into the market.

This, I think, is the high point that has not been mentioned heretofore.

Now, we feel that if in your judgment this bill must be passed at this session of Congress—we had no knowledge ourselves of the Senate bill at the time of the hearing or we would have been there, but we had knowledge of this hearing last week. So this was quite short notice. I think that if there is such a hurry for the Congress to have to pass a bill, then there is no provision of any kind for a grandfather clause in any of the bills and I appeared before this committee 10 years ago in 1958 and there was a grandfather clause, I personally know, at that time.

I read the original act of 1935 and there was a grandfather clause at that time. So, in effect, if this bill is passed the way it is written, I firmly believe that you will put many, many of these co-ops out of business. The freight then will have to go back through the other channels which I will comment on in a moment that apparently have been unsatisfactory and made the cost of the produce at the markets and the farm products higher than they are today because, as we all know, the cost of everything goes up.

Our transportation basic cost is still about the same as it has been for years.

Mr. FRIEDEL. You may proceed with your statement.

Mr. BRADY. If, in your judgment, this bill must be passed, then we strongly advocate and plead that a section be added to this bill to insert a grandfather clause so that those associations that are presently operating under the existing law will not be put out of business as this bill indicates by sound arithmetical calculations we cannot operate our vehicles under this change. This bill will, therefore, have the effect of eliminating many of the cooperatives that are performing transportation services for nonmembers.

I do not feel that Congress should legislate a lawful business out of existence.

In conclusion and in summary, the passage of this bill will work to the detriment of the farmers and the general public by raising the cost of farm products in the markets and will cost the Government these thousands of dollars. And since this was written, we have run this study, now it is in the millions, for the Department of Defense.

I think that these savings and such economy should not and must not be overlooked. I have a comment or two that I have picked up in the last couple of days. This bill, as I see it, was designed to benefit the common carrier exclusively at the expense of the farmers. Now, the provisions of this bill would destroy the only major source of dependable flexible and economically feasible shipments of farm products to the market, the agricultural cooperatives nonprofit transportation machinery.

Trucks owned and operated by the agricultural cooperatives have been exempt from the ICC regulations for more than 30 years and have been a major factor in protecting the farmer from the high freight rates and poor service that would result from the monopolistic dominance by common carriers.

I have only one other statement. In the Senate Report No. 48 of 1966, common carriers neglected or refused to recognize the needs of the farmers. In this Senate report was noted complaints against common carriers regarding small shipments, shipments to and from areas of lesser volume of traffic shipment, having multiple pickups and deliveries and refusal of shipments that the carriers believed to be marginally profitable.

We feel that by the passage of this bill, if we limit ourselves to 15 percent for backhaul, gentlemen, I don't know how we will get our equipment back to the point of origin. Obviously, we can't deadhead them back.

Mr. FRIEDEL. Are there any questions?

Mr. ADAMS. I have just one question.

I take it then what you wont out of this bill is either a grandfather clause for yourself or you want on page 2 the proviso stricken which says:

Provided, That for the purpose hereof, notwithstanding any other provision of law, transportation performed or on behalf of the United States or any agency or instrumentality thereof shall be deemed transportation performed for a nonmember.

Mr. BRADY. The position of putting the Federal Government into the nonmember category is a rather devastating position to the taxpayers as I see it.

Even though your co-ops only haul less than one percent of the defense dollar, still we are still talking about $5 million worth of taxpayers money. I don't believe this can be overlooked.

So, if the bill is passed as it is written, then there should be a grandfather clause to let the people, who have been doing this and saving the Government this money, be able to continue to save the Government this money.

Then, I think that we are in an awful big hurry here, as I understand you, of deadlines to make, you have a situation that the Congress will have to adjourn very shortly. I don't believe that the time for a comprehensive study has been allowed for this thing.

Mr. ADAMS. You have the ability to carry 50 percent of your total tonnage even if it is nonmember, if it is farmer oriented.

Mr. BRADY. I would appreciate if you would point that out to me.

Mr. ADAMS. That is what I asked this morning. Page 1 of the bill says the transportation performed for nonmembers who are neither farmers, cooperative associations, or federations. That is the 15 percent. The proviso on page 2 says you can carry up to the same quantity if it is for a nonmember but I gather in the agricultural field.

Mr. BRADY. It does not say it though. My reading of it, I interpret it in the manner and I may be entirely wrong. If we haul what we would consider to take as agricultural exempt products under 206(b).

Mr. ADAMS. Up to 50 percent.

Mr. BRADY. It does not say that. There is no proviso for that anywhere that I can find. As I read the bill we can haul 85 percent for members, 15 percent for nonmembers. Let us assume that we have our truck back East and it must come back for a member——

Mr. ADAMS. You have a cooperative association or farmer who is a nonmember, he wants you to backhaul. You can backhaul until you use up to 50 percent of your tonnage.

Mr. BRADY. Where is that?

Mr. ADAMS. Line 5 through line 8 on page 1 and lines 13 to 20 on page 2 there is no other interpretation you can make unless the language means nothing.

Mr. BRADY. What were the lines on the second page.

Mr. ADAMS. The proviso, lines 13 through 20.

Mr. BRADY. I see. I had not read that because I was looking for a percentage figure.

This raises another question, though. Does the 15 percent come off the 50 and go down to 35 for nonmembers?

Mr. ADAMS. This morning I asked that and they said it goes 15 and 35 to make a total of 50. In other words, you go 15 percent for nonmembers. Then you can go an additional 35 percent for people who are farmers or cooperatives who are nonmembers just so long as your total of what you do for nonmembers plus the farmers isn't more than half of your total.

As I gather from your background you are probably transporting citrus products or frozen juices and so on to the East. You could backhaul farmers material within that definition for 35 percent and you could backhaul for nonmembers, nonfarmers, 15 percent.

If I am wrong in that, I would appreciate your submitting a statement so that we can be sure we have the right interpretation.

Mr. BRADY. I am sure what you have said is correct. However, there is a practical operational point where we have a problem. There is

little of the farm products that move into the west coast from some of these areas that are farmers sell and market their products.

Our problem, if there are products that belong to a different farm group or an exempt product, we will call it that, is that the coordination of this is sometimes impossible. So, we do have a great amount of difficulty coordinating the products that would come under the 206(b) section of the law and it becomes an operational problem.

Mr. ADAMS. What do you haul back?

Mr. BRADY. Prior to the time of the Department of Defense we hauled just general freight, sir, and an occasional member load and it was very occasional because the cooperatives that we deal with on the west coast and that we belong to, their major move is from the west coast to the east coast. The move from the east coast to the west coast, there is a limited quantity of cooperative freight coming West.

Therefore, we are forced to find some method to fill our trailers. Upon reading this, it brings another question to mind. I don't know and I would like to ask the gentleman whether he can clarify it. Let us assume that our trucks are back East, can we then trip lease a certificated carrier? Does this count against this 15 percent?

Mr. ADAMS. We haven't said that it would.

Mr. BRADY. I am just asking you. I don't know.

Mr. FRIEDEL. You are supposed to give us the information.

Mr. BRADY. This is the problem because the reason we are against the bill, we feel that there is legislation sufficient to stamp out the abuses that we have listened to all morning.

Mr. FRIEDEL. I understand. If this bill passes you would like to continue doing what you are doing today under a grandfather clause?

Mr. BRADY. Yes, sir.

Mr. FRIEDEL. With no limitation whatsoever on any commodity.

Mr. BRADY. We still have the primary objective in mind that we must serve our members. There are times of the year that the members' commodities for the market are not available. There are different growing seasons and so forth.

There are times when you are going to park a piece of expensive equipment. This works to the farmers detriment also. He has an investment in this.

Mr. FRIEDEL. Mr. Brady, I want to thank you.

Now, we have three other witnesses. The bells have rung. We will have to go back to the floor again. This will be the end of the meeting.

Mr. James Cardwell, president of the Midwest Growers Cooperative Corp., Oklahoma City, Okla.

STATEMENT OF JAMES CARDWELL, GENERAL MANAGER, TRANSPORTATION OFFICE, MIDWEST GROWERS COOPERATIVE CORP., OKLAHOMA CITY, OKLA.

Mr. CARDWELL. Mr. Chairman and members of the committee, I will try to make this rather brief. My name is James Cardwell, general manager of the Transportation Office of Midwest Growers Cooperative of Los Angeles.

My statement is on file here. It is a matter of the record.

I would like to make a few comments. I would like you to know that we are against the bill in its present form. Also, I would like to bring out that we do save the Department of Defense a substantial

amount of money. I would like you to know that we are not in any way in the manufactured business. Our members grow the products and we haul to the various markets of the Nation.

Consequently, we back haul whatever goods we can get.

(Mr. Cardwell's prepared statement follows:)

STATEMENT OF JAMES CARDWELL, GENERAL MANAGER, MID-WEST GROWERS COOPERATIVE CORP., OKLAHOMA CITY, OKLA.

Mr. Chairman, my name is James Cardwell, and I am the General Manager of the Transportation Office of Mid-West Growers Co-operative Corp., Los Angeles office, which is non-profit farm co-operative incorporated under the laws of the State of Oklahoma.

Mid-West Growers Co-operative Corp. is composed of various farm members banded together to market their various farm products and transport the products under Section 203(b)(5) and 203(b)(6) of the Interstate Commerce Act. We operate with the purpose of transporting the goods of our members to the markets economically and, in turn, have some sound, feasible and also economical method of returning this equipment back to our members in order to maintain an over all cost which will keep our members competitive in the markets.

We are greatly concerned with Bill H.R. 6530 as we feel that the passage of this bill, as it is presently drafted, will prove detrimental not only to our members, but to the thousands of ranchers and farmers throughout the nation. We very strongly oppose the entire bill because, in our opinion, the present regulations more than adequately regulate the transportation of goods, while maintaining an economical manner of doing so.

This bill, as drafted, will limit our trucks to haul only 15% of non-member freight on the return haul and would, therefore, force us to dead head 85% of our trucks back to the original shipping point. This, in effect, would be mathematically and economically impossible and would force the price of farm commodities to be drastically increased in the markets.

Should you definitely feel that a bill of this nature must be passed, we feel that a practical solution would be the insertion of a "grandfather" clause which would insure the cooperatives that are presently operating under the existing law that they would not be put out of business, which the bill as written would certainly do. These cooperatives operating at the present are completely lawful, and we do not feel that Congress should legislate the lawful business out of existence.

We have been approved by the Department of Defense to haul their freight to various locations and bases in the United States. This is exempt from economical regulation under section 22 of the Motor Carrier Act, and by operating for the Department of Defense under Section 203(b)(5), we have been able to reduce the transportation costs for the Department of Defense. It is our understanding, through conversations with various employees for the Department of Defense, that the Department of Defense is receiving faster service because the vehicles which operate under the Agricultural Marketing Act provide "through" truck service at the substantial savings to the government.

In closing, we wish to stress the fact that the passage of this bill, as presently written, will only cause an overall increase in farm commodity costs and will be detrimental to the farmers and the general public. We feel that the savings of thousands of dollars to the Department of Defense, which is presently being afforded by using the Agricultural Marketing vehicles, cannot, should not and must not be ignored and should certainly be taken into consideration.

Mr. FRIEDEL. Thank you, Mr. Cardwell. Are there any questions?

Mr. ADAMS. No.

Mr. FRIEDEL. Our next witness will be Mr. Howard Mecom, general manager of the United Agricultural Transportation Association of America Marketing Co-op.

STATEMENT OF JOHN CABANISS, COUNSEL, UNITED AGRICULTURAL TRANSPORTATION ASSOCIATION OF AMERICA MARKETING CO-OP, WACO, TEX.

Mr. CABANISS. Mr. Chairman and members of the committee, my name is John Cabaniss, Waco, Tex., attorney for the United Agricultural Transportation Association of America Marketing Co-op, of which Mr. Howard Mecom is the general manager. And if I may, I am appearing in his behalf. I will take about 2 minutes of the committee's time. We are trying to help on this. We are against the bill.

Mr. Brady, Mr. McCormick and a number have summed up some of the objections which we have and selfishly we would like to state this for the record, that the board of directors of our co-op has directed us to let the Interstate Commerce Commission inspect the records at any and all times, which they have done and which they have been doing since September 21, 1966 when we were incorporated.

Now, in aid of this committee's work we would like to present one thing. I knew of this as an attorney about Sunday, when I caught a plane. So I grabbed something out of my briefcase that has been of invaluable aid to me. I would like to mention the author's name because I think it is deserving.

He is a law student in Hastings Law School out in California. He is a young man. His name is Charles B. Wiggins. He wrote an article called "Non-Farm Backhauls for Non-Members of Agricultural Cooperatives: Impact of the Northwest Decision."

If you have ever done a little graduate work, in the paper that the professor called for he wants a good style paper and wants you to give a little background and go into historical interpretation of the particular topic you are on, you know how important it is to have someone who can sit down and lay out cold turkey for you. This young man does it.

Mr. FRIEDEL. Would you like to have it printed in the record?

Mr. CABANISS. I would like to, sir.

We thank you for your time.

(The documents referred to follow:)

STATEMENT OF HOWARD MECOM, GENERAL MANAGER, TRANSPORTATION OFFICE, UNITED AGRICULTURAL TRANSPORTATION ASSOCIATION OF AMERICA, MARKETING CO-OP, WACO, TEX.

Mr. Chairman, my name is Howard Mecom and I am the General Manager of the Transportation Office of United Agricultural Transportation Association of America, Marketing Co-op, Los Angeles office. We are a corporation formed under the laws of the State of Texas and are a non-profit cooperative.

Our co-operative consists of members who have banded together to market and transport farm commodities under Section 203(b)(5) and 203(b)(6) of the Interstate Commerce Act. We have, under present laws, transported members' products economically to the market places of the United States and are able to use non-member freight for return of the vehicle back to the point of origin. This method has proved economically sound and has helped keep the cost of farm commodities from drastically increasing.

I am here to state our opinions and views on Bill HR-6530 about which we are extremely alarmed and concerned. This bill, in its present form, will limit our trucks to haul only 15% non-member freight on the return haul, meaning that 85% of the return haul would have to be dead head. This, I am sure you can see, would be economically impossible to do without causing a tremendous increase in the cost of farm products and commodities.

If it is felt that legislation should be granted and passed, we feel that the cooperatives that are presently operating should be protected by, perhaps, the inclusion of a "Grandfather Right" clause which would allow these co-operatives to continue in business. This bill, as presently drafted, would surely put many of the cooperatives out of business. We do not feel that legislation should be passed whereby a lawful business will be forced out of existence.

In the minutes of our co-operative, the Board of Directors have directed me to let the Interstate Commerce Commission check our books and records, which they have constantly done. We have, at all times, fully cooperated with the Interstate Commerce Commission; however, under the existing law, we are not required to do this. I, therefore, feel that if this bill is passed, we should have "grandfather rights" as we have always cooperated with the Interstate Commerce Commission and complied with their regulations.

We also operate as a cooperative approved by the Department of Defense to haul their freight. This government freight is exempt from economical regulation under Section 22 of the Motor Carrier Act, and by operating under Section 203 (b) (5) for the Department of Defense, we have helped reduce the cost of transportation for this branch of the government. It appears to me that this phase of our operation is very important, especially in view of the current tax increase and in view of the fact that there is a six billion dollar cut in the budget. The savings our vehicles have been giving to the government should certainly be taken into consideration as I am sure you can realize this type of savings is very important to the national budget.

It is our opinion, as well as many members of the Department of Defense, that the service rendered by the cooperatives is faster than service previously received, since we are able to provide "through" transportation. This phase is also very important to the Department of Defense.

It was recently approved that the common carriers, including rail and truck, have substantial rate increases. We wish to point out, however, that we have maintained basically the same rates for several years. This is an important factor to the farming and ranching markets and has been a prime factor in the cost of farm commodities.

To summarize our opinions and views, we feel that the passage of this bill will be detrimental to the general public and the farmers and will create an increase in the cost of farm commodities. It will also endanger the existence of lawful businesses that are presently assisting the government in substantial savings in the cost of transportation. We feel that these facts must be very fully and carefully considered.

Thank you very much.

Nonfarm Backhauls for Nonmembers of Agricultural Cooperatives: Impact of the Northwest Decision

(By Charles B. Wiggins, Hastings Law School, California)

In 1965, the Court of Appeals for the Ninth Circuit, in *Northwest Agricultural Cooperative Association* v. *ICC*,[1] held that agricultural cooperatives which haul nonagricultural products to and for nonmembers maintain their transportation exemption from the Interstate Commerce Act,[2] 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.

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[1] 350 F.2d 252.
[2] 49 U.S.C. ch. 8 (1964).

The Interstate Commerce Commission [3] sought to enjoin [4] Northwest Agricultural Cooperative Association [5] from engaging in certain transportation activities in alleged violation of the Interstate Commerce Act.[6] It claimed that the nonmember backhauling of nonagricultural products by Northwest could not be performed without requisite Commission authorization.[7] Northwest contended [8] 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 . . .[9]

Northwest was organized under the Idaho Cooperative Marketing Act [10] "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." [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 members 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.[12] It was these nonfarm backhauls the Commission sought to enjoin.

A "cooperative association" is defined by the Agricultural Marketing Act [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: *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.[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.[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.[16] It contended that the terms of the exemption extend only to activities "directly beneficial or function-

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[3] Hereinafter referred to as Commission.
[4] 234 F. Supp. 496 (D. Ore. 1964).
[5] Hereinafter referred to as Northwest.
[6] The alleged violations were of 49 U.S.C. §§ 303(c), 306(a), 309(a) (1964).
[7] 234 F. Supp. at 498.
[8] *Id.*
[9] 49 U.S.C. § 303(b)(5) (1964).
[10] 5 IDAHO CODE ANN. §§ 22–2601 to –2628 (1948).
[11] Brief for Appellant at 3, Northwest Agric. Cooperative Ass'n v. ICC, 350 F.2d 252 (9th Cir. 1965).
[12] *Id.*; 350 F.2d at 253.
[13] 12 U.S.C. §§ 1141–41j (1964).
[14] 12 U.S.C. § 1141j(a) (1964).
[15] 350 F.2d at 253–54.
[16] *Id.*

ally related" [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.

HELD: *Judgment for Northwest.* Northwest complied with the statutory requirements, and was a "cooperative association" within the 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 *non*farm activities.[18] 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.[19] 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.[20]

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 [21] became law as part of the Motor Carrier Act of 1935.[22] 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. . . ." [23] The regulatory power of such a policy was vested in the Interstate Commerce Commission.[24] In enacting the bill, Congress provided its own interpretation of the policy statement:

[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.[25]

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.

The cooperative exemption was not part of the Motor Carrier Act as originally proposed, but was added by floor amendment.[26] Discussion of the proposal was not extensive.[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,

[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.

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[17] Brief for Appellee at 17, Northwest Agric. Cooperative Ass'n v. ICC, 350 F.2d 252 (9th Cir. 1965).
[18] 350 F.2d at 256.
[19] *Id.* at 257. This test is hereinafter referred to as the "necessary and incidental" test.
[20] Northwest Agric. Cooperative Ass'n v. ICC, 350 F.2d 252 (9th Cir. 1965), *rev'g* 234 F. Supp. 496 (D. Ore. 1964), *cert denied,* 382 U.S. 1011 (1966).
[21] 49 U.S.C. § 303(b)(5) (1964).
[22] 49 Stat. 543.
[23] *Id.*
[24] *Id.*
[25] 79 CONG. REC. 12,205 (1935).
[26] *Id.* at 12,220.
[27] *Id.* at 12218–22.

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.[28]

And again:

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.[29]

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 non-members, 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.[30]

The Agricultural Marketing Act

The cooperative exemption to the Interstate Commerce Act refers for definition to the Agricultural Marketing Act.[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.[32] In section 1141j of the Act, the cooperative definition 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.

"(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.

[28] *Id.* at 12,218.
[29] *Id.* at 12,219.
[30] Letter from Joseph D. Eastman, Federal Coordinator of Transportation, to Senator Wheeler, July 27, 1935, *quoted in* Machinery Haulers Ass'n v. Agricultural Commodity Serv., 86 M.C.C. 5, 15 (1961).
[31] 12 U.S.C., §§ 1141–41j (1964).
[32] 12 U.S.C. § 1141e (1946).
[33] 12 U.S.C. § 1141j(a) (1964).
[34] 49 U.S.C. § 303(b)(5) (1964).
[35] 12 U.S.C. § 1141(a)(2)–(3) (1964).

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 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." [38] 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.[39]

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.[40] 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,[41] or upon its own motion.[42] It may also apply to the appropriate district court to enjoin operations by motor carriers in violation of the statutory regulations.[43] 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." [44] 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 cources of action: it may seek a change 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.

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[36] ICC v. Weldon, 90 F. Supp. 873, 877 (W.D. Tenn. 1950); *accord*, East Tex. Motor Freight Lines, Inc. v. Frozen Food Express, 351 U.S. 49, 54 (1957).

[37] Northwest Agric. Cooperative Ass'n v. ICC, 350 F.2d 252, 256 (9th Cir. 1965); ICC v. Jamestown Farmers Union Federated Cooperative Transp. Ass'n, 151 F.2d 403, 404 (8th Cir. 1945); Cache Valley Dairy Ass'n Investigation of Operations, 96 M.C.C. 616, 620 (1964); Agricultural Transp. Ass'n of Tex. Investigation of Operations, 96 M.C.C. 293, 299 (1964); Machinery Haulers Ass'n v. Agricultural Commodity Serv., 86 M.C.C. 5, 24 (1961).

[38] Transportation Act of 1940, ch. 722, § 1. 54 Stat. 898, 899.

[39] *Id.*

[40] 49 U.S.C. § 303(b) (1964).

[41] 49 U.S.C. § 13(1) (1964).

[42] 49 U.S.C. § 13(2) (1964).

[43] 49 U.S.C. § 322(b)(1) (1964) (this is the provision utilized by the Commission in *Northwest*).

[44] 49 Stat. 543 (1935).

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,[45] 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.[46] In response to such requests, bills were introduced into Congress in 1957 [47] 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.[48]

Each bill died in committee.[49]

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.[50]

Bills were introduced in two separate Congressional sessions.[51] These bills, if enacted, would have required that in order to obtain 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.[52] In the presentation of one of the bills [53] 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 bonafide 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.[54]

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.

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[45] 49 U.S.C. § 303(b) (1964).
[46] 69 ICC ANN. REP. 129 (1955). The same recommendation is made in 70 ICC ANN. REP. 165 (1956) and 71 ICC ANN. REP. 139 (1957).
[47] S. 1490, 85th Cong., 1st Sess. (1957); H.R. 5664, 85th Cong., 1st Sess. (1957).
[48] 71 ICC ANN. REP. 139–40 (1957).
[49] CCH 1957–1958 CONG. INDEX 3555, 5570.
[50] 75 ICC ANN. REP. 184 (1961). The same recommendation is made in 76 ICC ANN. REP. 201 (1962), 77 ICC ANN. REP. 19 (1963), and 78 ICC ANN. REP. 76–77 (1964).
[51] S. 677, 88th Cong., 1st Sess. (1963); H.R. 3770, 88th Cong., 1st Sess. (1963); S. 1729, 89th Cong., 1st Sess. (1965); H.R. 5400, 89th Cong., 1st Sess. (1965).
[52] CCH 1963–1964 CONG. INDEX 3547, 5565; CCH 1965–1966 CONG. INDEX 3552, 5566.
[53] S. 1729, 89th Cong., 1st Sess. (1965).
[54] 111 CONG. REC. 7064–65 (1965) (remarks of Senator Magnuson, Chairman of the Commerce Committee, in which this measure died).

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 [55] should be strictly construed so that cooperatives shall not be allowed to engage indiscriminately in for-hire carriage for nonmembers.[56] Its contention is that the Motor Carrier Act is a remedial statute.[57] Exemptions to such statutes must be applied as narrowly as possible to permit application of the regulatory provisions to all carriers within its scope.[58]

With reference to the definition of the cooperative associations found in the Agricultural Marketing Act,[59] the Commission implies an 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" [60] 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 *non*farm-related dealings at all,[61] or at least that whatever nonfarm-related dealings a cooperative did have would have to be "functionally related" to its principal farm-related function.[62] Thus, to the Commission, non*member* dealings were obviously anticipated,[63] 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.[64]

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*" [65] to the facts of that case.[66] The Commission found that

> [a]pplying 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.[67]

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 maximum 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.[68]

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.

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[55] 49 Stat. 543 (1935).

[56] Machinery Haulers Ass'n v. Agricultural Commodity Serv., 86 M.C.C. 5, 24 (1961); ICC v. Jamestown Farmers Union Federated Cooperative Transp. Ass'n, 151 F.2d 403, 404 (W.D. Tenn. 1945); Cache Valley Dairy Ass'n Investigation of Operations, 96 M.C.C. 616, 620 (1964); Agricultural Transp. Ass'n of Tex. Investigation of Operations, 96 M.C.C. 293, 297 (1964).

[57] ICC v. Weldon, 90 F. Supp. 873, 876 (W.D. Tenn. 1950).

[58] McDonald v. Thompson, 305 U.S. 263, 266 (1938).

[59] 12 U.S.C. § 1141j(a) (1964).

[60] *Id.* (emphasis added).

[61] *See* ICC v. Jamestown Farmers Union Federated Cooperative Transp. Ass'n, 151 F.2d 403, 404 (8th Cir. 1945).

[62] Machinery Haulers Ass'n v. Agricultural Commodity Serv., 86 M.C.C. 5, 25 (1961).

[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.*

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

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 . . ." [69]

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.[70] 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.*[71]

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 suppliers. 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.[72]

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 altoghter 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

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[69] Brief for Secretary of Agriculture as Amicus Curiae at 9, *id.*

[70] *See* Chandler, *Convenience and Necessity: Motor Carrier Licensing by the Interstate Commerce Commission,* 28 OHIO ST. L.J. 379, 384–85 (1967).

[71] Machinery Haulers Ass'n v. Agricultural Commodity Serv., 86 M.C.C. 5, 24 (1961) (emphasis added).

[72] ICC v. Jamestown Farmers Union Federated Cooperative Transp. Ass'n, 57 F. Supp. 749, 753 (D. Minn. 1944), *aff'd* 151 F.2d 403 (8th Cir. 1945) (emphasis added).

[73] Machinery Haulers Ass'n v. Agricultural Commodity Serv., 86 M.C.C. 5, 25 (1961).

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 definition [75] 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

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[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).

Agricultural Markting Act relating to member and nonmember business,[80] is without support here.

Section 70.8 also indicates that one may be a "nonmember" within this same provision[81] 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 more liberally that 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.[82] 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

> in considering the overall content of the statute, we believe that the limitation of the third part of section 1141j implies an affirmative corollary; namely, that an association's dealings with nonmembers shall be limited to farm products, farm supplies, and farm business services.[83]

It enjoined Cache Valley's nonmember backhauls, concluding

> 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 it's members' activities as producers of farm products and purchasers of farm supplies and/or farm business services.[84]

In 1965, the Ninth Circuit Court of Appeals reversed the district court judgment in *Northwest* and propounded the "necessary and incidental" test.[85]

In 1967, the Commission reconsidered its decision in *Cache Valley* in light of the *Northwest* ruling.[86] At the rehearing, the Commission stated that by the *Northwest* test,

> 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.[87]

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.[88]

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*.[89] In his belief, Congress would have changed the law had it desired that this result be achieved;

> [h]owever, 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 transporta-

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[80] 12 U.S.C. § 1141j(a) (1964).
[81] *Id.*
[82] Cache Valley Ass'n Investigation of Operations, 96 M.C.C. 616 (1964).
[83] *Id.* at 621.
[84] *Id.* at 622.
[85] 350 F.2d 252 (9th Cir.), *rev'g* 234 F. Supp. 496 (D. Ore. 1964).
[86] Cache Valley Dairy Ass'n Investigation of Operations, 103 M.C.C. 798.
[87] *Id.* at 799.
[88] *Id.* at 804.
[89] *Id.*

tion 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]

At the time the Motor Carrier Act and the Agricultural Marketing Act were enacted,[94] 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.[95] 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.[96] Thus, even though more liberal than the Commission

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[90] *Id.*

[91] Day v. North Am. Rayon Corp., 140 F. Supp. 490, 493–94 (E.D. Tenn. 1956); United States v. American Trucking Ass'ns, 310 U.S. 534, 542–44 (1940); SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344, 350–51 (1943); Cawley v. United States, 272 F.2d 443, 445 (2d Cir. 1959); Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945); Brodie v. Gardner, 258 F. Supp. 753, 758 (N.D. Ind. 1966).

[92] Ozawa v. United States, 260 178, 194 (1922), *cited in* United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940) *and* Crosse & Blackwell Co. v. FTC, 262 F.2d 600, 606 (4th Cir. 1959). *Accord*, Wirtz v. Allen Green & Associates, 379 F.2d 198, 200 (6th Cir. 1967); United States v. Maryland *ex rel.* Meyer, 349 F.2d 693, 695 (D.C. Cir. 1965); Richmond F. & P.R.R. v. Brooks, 197 F.2d 404, 407 (D.C. Cir. 1952); Arkansas Oak Flooring Co. v. Louisiana & A. Ry., 166 F.2d 98, 101 (5th Cir. 1948).

[93] Juneau Spruce Corp. v. ILWU, 83 F. Supp. 224, 227 (D. Alas. 1949); Elizabeth Arden, Inc. v. FTC, 156 F.2d 132, 134 (2d Cir. 1946); Delany v. Moraitis, 136 F.2d 129, 131–32 (4th Cir. 1943); Day v. North Am. Rayon Corp., 140 F. Supp. 490, 494 (E.D. Tenn. 1956); Bloch v. Ewing, 105 F. Supp. 25, 28 (S.D. Cal. 1952).

[94] The Motor Carrier Act was enacted in 1935, and the Agricultural Marketing Act in 1929.

[95] Agricultural Transp. Ass'n of Tex. Investigation of Operations, No. MC C–4028, 1966 FED. CARR. REP. ¶ 36,034.

[96] Edgerton Cooperative Oil Ass'n Investigation of Operations, No. MC C–4570, 1967 FED. CARR. REP. ¶ 36,100.

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.

Mr. FRIEDEL. The next witness is Mr. Harold Goolsbee, Jr., Manager of Big Sky Farmers & Ranchers Marketing Co-op.

STATEMENT OF HAROLD GOOLSBEE, JR., MANAGER, BIG SKY FARMERS & RANCHERS MARKETING CO-OP, GREAT FALLS, MONT.

Mr. GOOLSBEE. Mr. Chairman and other committee members, my name is Harold Goolsbee, Jr., and I am from Havre, Mont. I am the manager of Big Sky Farmers & Ranchers Marketing Co-op which is incorporated under the laws of the State of Montana.

You have my statement that I would like to have entered for the record.

Mr. FRIEDEL. We will place it in the record.

(Mr. Goolsbee's prepared statement follows:)

STATEMENT OF HAROLD GOOLSBEE, JR., MANAGER, BIG SKY FARMERS & RANCHERS MARKETING CO-OP., GREAT FALLS, MONT.

Mr. Chairman, my name is Harold Goolsbee, Jr., and I am from Havre, Montana. I am the manager of Big Sky Farmers and Ranchers Marketing Co-op which is incorporated under the laws of the State of Montana.

Our Co-operative is composed of farm members which have banded together to market the various farm commodities and to transport these commodities under Section 203(b)(5) of the Interstate Commerce Act.

I am here today to present our views of HR–6530 which is a companion to Senate Bill S–752. We feel that the passage of this bill in its present form will be detrimental to our members as well as the general public throughout the United States. We strongly oppose this bill in its present form as we feel that existing regulations are adequate to regulate the transportation of goods in an economical way from our members to the markets. The purpose of our co-operative for our members is to transport the goods of our members economically and, in turn, have some sound, feasible yet economical method to return our equipment back to our members so that the overall cost of transportation will not price our members out of competitive markets.

With the passage of this bill, HR–6530 and Senate Bill S–752 in the present form, it would limit our trucks to haul only 15% for non-member freight as a return haul. We would then have to dead head 85% of our trucks back to the point of origin. This is economically infeasible and would, therefore, cause the price of farm goods of our members to have an appreciable increase.

We have recently read that the regulated carriers, both truck and rail, have been granted an increase from 3% to 10% for the transportation of agricultural commodities; however, we are still using the same rates in our co-operative that have been used for the past several years due to the fact that we are able to haul non-member freight in our co-operative.

Our co-operative is also approved by the Department of Defense for the cartage and hauling of their goods from, and to, the various bases throughout the United States. With the new law in effect for a 10% sur-charge for taxes and the reported six billion dollar cut in the national spending, by not passing this bill we will still be in a position to assist the government in cutting the costs of transportation because the co-operative vehicles afford the government a substantial savings plus they are receiving through truck service that is faster than any service they used previously. If this bill is passed in its present form, we would not be able to offer these savings to the government.

In summary, we feel that the passage of this bill would work to a detriment to our members, farmers, and the general public by raising the cost of agricultural products in the markets and would cost the government untold thousands of dollars over the years to come. Such a savings to the government and public should not and cannot be overlooked.

Thank you very much.

Mr. GOOLSBEE. I would like to make a comment, that we are opposed to this bill, H.R. 6530 and companion bill S. 752. Our biggest objection is the 15 percent for nonmember freight.

Mr. FRIEDEL. Would you be satisfied with 25 percent, 20 percent?

Mr. GOOLSBEE. We would be willing to compromise on that percentage.

Mr. ADAMS. I would like to ask one question of these gentlemen who appeared in opposition. Section 22, I notice in several of your statements exempts government agencies. Then we have (b)(6) which exempts agricultural commodities, then we have (b)(5) which is the cooperative that we are operating under now.

I would like to know the opinion from counsel whether or not the exemption for the Defense Department you believe would continue under 22 or would be overridden by this legislation.

Mr. BRADY. Section 22 is written specifically for common carriers. We are not common carriers. I pointed that out in my paper that under section 22 the common carriers have filed, we file under section 203(b)(5).

Mr. ADAMS. It is the position—and I would like one of the others who are in opposition to this, if they have a different interpretation, to so state it, that this bill as an amendment to (b)(5) would prevent the carriage of government goods back as a backhaul except to the extent that they could be hauled under a 15-percent limitation.

Mr. GOOLSBEE. That is right.

Mr. ADAMS. Thank you.

Mr. FRIEDEL. Thank you, gentlemen. The meeting is adjourned.

(The following material was submitted for the record:)

STATEMENT OF E. M. NORTON, SECRETARY, NATIONAL MILK PRODUCERS FEDERATION

THE FEDERATION

The National Milk Producers Federation is a national trade association. It represents dairy farmers and the dairy cooperative associations which they own and operate and through which they act together to process and market, in their own plants on a cost basis, the milk and butterfat produced on their farms.

The Federation was organized in 1916 and has represented dairy farmers and their cooperatives in the Nation's capital for more than 50 years.

Practically every form of dairy product produced in the United States in any substantial volume is produced and marketed through dairy cooperatives represented through the Federation.

These are farmers' cooperatives, exempt under section 203(b)(5) of part II of the Interstate Commerce Act and qualified under the Agricultural Marketing Act (12 U.S.C. Sec. 1141 j).

These cooperatives are owned and controlled by the farmers they serve and they are operated for the mutual benefit of such farmers. The cooperatives themselves can take no profit; and all earnings or savings made in the marketing of milk and dairy products, including any savings made in transportation, inure to the benefit of the farmers.

Dairy cooperatives are primarily marketing associations. However, many of them operate supply divisions through which supplies are purchased on a cooperative basis for their farmers.

WHY AGRICULTURAL EXEMPTIONS?

The theory of the Interstate Commerce Act is quite opposite to that of free competition. Under the Act, rates and routes are regulated, competition is restricted, and the transportation business is channelled to selected operators with the objective of providing dependable service by a limited number of strong carriers.

In the unregulated area, rates and adequacy of service are determined by factors of vigorous competition.

It should be emphasized that the issue involved in this hearing is strictly one of competition. The exempt operators are subject to the safety regulations of the Commission. The Commission and the regulated carriers are seeking to restrict the competition provided by the exempt operators.

When the motor carrier part of the Interstate Commerce Act was passed in 1935, agricultural leaders asked that rates and routes in the agricultural field be left unregulated and subject to open competition. This Congress granted, with language broad enough to permit some incidental back-hauling of general freight on trucks used for hauling agricultural products to market, in the interest of economical use of equipment.

This program has operated effectively for more than 30 years. The great majority of truck operations are regulated to accomplish the objective of the Interstate Commerce Act. At the same time, a very small percentage of total operations have remained uncontrolled and subject to competition in the agricultural field. This has resulted in lower rates and more flexible service to farmers which is the objective Congress intended to accomplish by the exemption.

A study made by the Department of Agriculture in 1958 (Marketing Research Report No. 224), concerning the trucking of poultry, indicates that rates were approximately one-third less during a period when such trucking was unregulated as compared with a period when rates were regulated.

A similar study in 1959 (Marketing Research Report No. 316), concerning the trucking of frozen fruits and vegetables, indicates rates approximately one-fifth lower under free competition as against a regulated period.

In both cases, processors reported that service had improved during the period when the trucking was unregulated.

The National Milk Producers Federation opposed regulation of trucking in the agricultural field in 1935 when the basic law and the agricultural exemptions were first enacted. Lower costs of marketing agricultural products and greater flexibility of service were two of the points stressed in favor of exemptions for agriculture.

Thirty years of experience with part II of the Interstate Commerce Act and with the agricultural exemptions have not changed our position. During this period, we have consistently defended the exemptions against attacks upon them by the Interstate Commerce Commission and the regulated truckers. As recently as last November, our membership reaffirmed support for the agricultural exemptions.

DAIRY COOPERATIVE TRUCKS

In a study made by the Department of Agriculture in 1963 (General Report 109), dairy cooperatives accounted for about one-third of all trucks reported by marketing cooperatives. This is partly due to the local retail delivery operations of many dairy cooperatives.

About half of the dairy cooperatives operate trucks. About six percent of them had fleets of over 25 trucks. About 25 percent of the dairy cooperative trucks are rated at 2½ tons and over. Seventy-four percent of the dairy cooperatives had no over-the-road trucking operations.

A follow-up study made by the Department of Agriculture in 1964 (General Report No. 121), is not broken down into type of cooperative. However, it shows that trucks operated by farmers' cooperatives had back-hauls on about one-fifth of their trips and that about 93 percent of the back-hauls were the cooperatives' own goods. The study indicates that general freight accounted for about .9 of 1 percent of the back-haul trips.

The study also shows that farmers' cooperatives are good customers of the for-hire motor-truck and rail carriers. Nineteen large cooperatives which operate trucks spent $100 million on transportation in 1962; $86 million of this went to the for-hire carriers with about $12 million incurred for transportation in the cooperatives' own trucks.

In the case of dairy cooperatives, much of the equipment is not suitable for back-hauling general freight; and, as indicated above, much of the space available on back-haul is needed for the goods of the cooperative.

But to the extent that dairy cooperatives can back-haul general freight and thus reduce the overall cost of transporting farmers' commodities to market, we want to retain the exemption which Congress provided.

Running trucks empty on return trips would be a needless waste of resources which Congress ought not to condone or require.

.00027 OF 1 PERCENT

The volume of trucking involved in this hearing is estimated at .00027 of 1 percent of total trucking operations.

There are two fairly recent studies made by the United States Department of Agriculture which bear upon the volume of trucking operations performed by farmers' cooperatives. These are General Report 109, issued in February 1963, and General Report 121, issued in June 1964. Both are reports of actual surveys made by the Farmer Cooperative Service.

These reports have been cited by proponents of legislation attacking the agricultural exemptions to emphasize the fact that as of January 1, 1961, cooperatives were operating an estimated 33,000 motor-trucks.

Failure to regulate these trucks, proponents have argued, would impair the transportation industry of the country and cause great hardship to regulated carriers.

The reports show that in the 10-year period 1951 to 1961 the number of trucks operated by cooperatives increased about 18 percent as against an increase in total truck registrations of about 32 percent.

The relative proportion of trucks operated by cooperatives is therefore decreasing, and the relative proportion of trucking business done by cooperatives today is probably less than the proportion indicated by the surveys.

In terms of trucks registered, the surveys show that in 1960, less than .3 of 1 percent of total trucks registered were operated by cooperatives.

Truck mileage of all farmers' cooperatives in 1960 was estimated in the reports at about .5 of 1 percent of all truck mileage over rural and urban roads.

Out of the .5 of 1 percent of cooperative truck mileage, about 72 percent was local pick-up and delivery and movements from farms to local concentration points. In the case of dairy cooperatives, which account for a large proportion of total cooperative trucks, this would be hauling from farm to plant and on local home and store distribution routes. This type of operation is not involved in this proceeding.

Only about 28 percent of the cooperative trucking operations are over-the-road trucking.

Information obtained from 18 of the larger cooperatives doing over-the-road trucking shows that the cooperatives had back-hauls on about 21.8 percent of their trips. Smaller cooperatives would probably have less back-hauls, because their operations would be more irregular and back-hauls would be more difficult to arrange.

In 92.9 percent of the back-hauls, the cooperative was hauling its own goods. Goods of other cooperatives accounted for 5.9 percent of the back-hauls and exempt agricultural commodities for .3 of 1 percent. Back-hauls of the type complained about at this hearing, non-agricultural supplies hauled for non-members, accounted for only .9 of 1 percent of the back-haul trips.

Putting these figures together, we come up with the conclusion that the type of hauling done by farmers' cooperatives, about which the Interstate Commerce Commission and the regulated truckers are concerned, is approximately .00027 of 1 percent of the total trucking operations of the country.

Certainly this does not show any abuse by farmers' cooperatives of the agricultural exemption granted them by Congress.

Neither does it show any need for remedial legislation.

It has been suggested that non-member, non-agricultural back-hauls by farmers' cooperatives may increase following the decision in the Northwest Agricultural Cooperative case.

The over-the-road mileage of farmers' cooperative trucks is only about .14 of 1 percent of total truck mileage. If every outbound load were matched with an inbound load of non-member, non-agricultural freight, the business lost to regulated carriers would still be only about .07 of 1 percent of total truck mileage.

Furthermore, the U.S.D.A. surveys show that a high percentage of the back-haul trips of farmers' cooperatives are used in transporting the cooperatives' own goods and the goods of other cooperatives. These trips, of course, would not be available for other freight. Also, in many cases, the equipment is not suitable for back-hauling general freight, for example, milk tank trucks.

Although the volume of non-member, non-agricultural business handled by farmers' cooperatives is a very infinitesimal part of total trucking operations, it is important to these farmers' organizations to be free of regulation by the Interstate Commerce Commission and to be able to do the most economical job possible in transporting farmers' products to market.

All savings made by utilizing trucks of farmers' cooperatives for back-hauls are passed back to the farmers, since the cooperative operates on a cost basis without profit to itself.

Even though the pending legislation might open a relatively small hole in the dike, we fear its passage would encourage the Interstate Commerce Commission to intensify its attacks on the whole agricultural exemption.

The Commission has a long history of persistent and aggressive attacks upon farmers and their cooperatives and on the agricultural transportation exemptions granted them by Congress.

NONQUALIFIED COOPERATIVES

Practically all of the objections of the Commission and the regulated carriers have been directed against the trucking operations of organizations which they allege are not qualified cooperatives.

There is very little complaint against the back-hauls of qualified farmer cooperatives of the type which we represent. In fact, how could there be where the percentage of general freight hauled by farmers' cooperatives is so very small.

Nevertheless, the legislation sought by the Interstate Commerce Commission and the regulated truckers has attacked directly the farmers' agricultural cooperatives. Similar attacks in the past have been leveled against other parts of the agricultural exemptions.

We are concerned that the proposed legislation is merely another attempt, in a long series of attempts on the part of the Commission and the regulated truckers, to undermine the agricultural exemptions.

We hold no brief for non-qualified organizations which seek to avoid the regulation of their trucking operations by claiming the cooperative exemption.

Such organizations are not protected under either the law or the court decisions. They are subject to action by the Interstate Commerce Commission, and the Commission has successfully maintained actions against them.

The Commission has complained that when one improper operation is stopped the same men set up another organization and resume the same type of operation.

We are not aware that other agencies have encountered similar enforcement difficulties. An injunction against the officers would appear to be adequate to put an end to similar operations under another name.

In effect, the Commission has proposed that it be relieved of the burden of proving that the guilty operator is guilty by requesting, instead, that Congress limit the operations of qualified agricultural cooperatives which are performing efficient and economical transportation services for farmers.

The farmers' cooperative exemption should be left alone, and the Commission should enforce the present law against non-qualified organizations which have no valid exemption.

THE NORTHWEST CASE

At Congressional hearings on this issue, the Commission has relied heavily on the decision of the United States Court of Appeals in the Northwest Agricultural Cooperative Association case (350 F.2d 252).

That decision, the Commission told Congress, would permit a farmers' cooperative to haul non-member, non-agricultural freight in unlimited amounts so long as the total non-member business done by the cooperative did not exceed the total value of member business.

The court's opinion does not support such an interpretation of the case.

The court was quite specific, it seems to us, in limiting the volume of such freight to that which is incidental to the agricultural objectives of the cooperatives. The issue in the Northwest case was whether a farmers' cooperative hauling agricultural products to market for its members could utilize its trucks on the return trips to haul non-farm related freight. The court held that such transportation was incidental to its agricultural objectives and therefore exempt from economic regulation by the Interstate Commerce Commission.

The court said [emphasis added]:

* * * * *

"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 percent of the total and remain incidental and necessary to that which was farm-related."

* * * * *

"The construction which we give the term does not open the door to unrestricted competition by exempt cooperatives with regulated carriers. If a cooperative engages in transportation for hire which is not incidental and necessary to the performance of an activity permitted by the Agricultural Marketing Act, it will lose its status as a 'cooperative association' and its transportation activities will be subject to economic regulation by the Commission under the Interstate Commerce Act."

* * * * *

The Commission has since reviewed its interpretation of the Northwest case in an enforcement action and has there taken quite a different view from that which it presented to Congress.

Its present interpretation of the Northwest case appears in the decision of the full Commission in the case of Cache Valley Dairy Association (No. MC–C–3876, decided May 2, 1967) as follows:

* * * * *

"The guiding principle enunciated by Northwest is plain: 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 non-members to the extent and only to the extent that such non-farm-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."

* * * * *

As we have pointed out elsewhere in this statement, even if every outbound load of agriculture products were matched with an inbound load of general freight, the volume involved would be less than .07 of 1 percent of total truck mileage.

CONCLUSION

The right to back-haul general freight and thus make the most economical use of transportation equipment is important to farmers' cooperatives. All savings made in overall transportation costs through such back-hauls are passed back to the farmers and result in lower transportation costs for moving agricultural commodities to market.

The agricultural exemption is limited to qualified farmers' cooperatives. Non-qualified operators have no exemption and are subject to action by the Interstate Commerce Commission. Most of the complaints have been directed against non-qualified operators. The present law provides a remedy for controlling such operations, and it should be enforced instead of attacking the farmers' cooperatives.

The volume of non-member, non-agricultural freight hauled by farmers' co-operatives is estimated at .00027 of 1 percent of total truck mileage. This is much too small to cause any adverse effect on the nation's regulated transportation system or to justify legislation for the benefit of the regulated carriers at the expense of the American farmer.

The present system of regulating the great majority of truck transportation but leaving transportation in the agricultural field subject to the benefits of vigorous competition has worked well for 30 years, and it should be continued.

We strongly oppose legislation such as H.R. 6530 which is an unjustified attack upon farmers agricultural cooperatives by the Interstate Commerce Commission and the regulated carriers.

S. 752, as it passed the Senate, is a compromise bill and is much less objectionable. If any legislation in this area is to be reported by the Committee, it should be along the line of the Senate bill.

The volume of non-member, non-agricultural freight hauled by farmers' co-operatives, .00027 of 1 percent of total truck mileage, does not indicate any need for legislative relief of the regulated truckers at the expense of the American farmers and their agricultural cooperatives.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Washington, D.C., July 9, 1968.

Hon. SAMUEL N. FRIEDEL,
Chairman, Subcommittee on Transportation and Aeronautics,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Your subcommittee has under consideration S. 752. The RLEA, a voluntary association of the chief executive officers of the twenty-three standard national and international railroad labor organizations wishes to express its support for S. 752 as it was passed by the Senate.

For some years, Section 203(b)(5) of the Interstate Commerce Act has been attracting, by its exemption, carriers who could be considered agricultural cooperative associations only in the most nominal of senses as well as encouraging bona fide agricultural cooperative associations to transport and on a large scale, commodities with little or no relationship to the farm or farm related commodities. The existence of this situation is, of course, in contravention of the spirit of purpose embodied in Section 203(b)(5) and against the grain of the Interstate Commerce Act.

The diversion of transportation in interstate commerce into unregulated forms certainly runs contrary to the principles of effective administration of an equitable and efficient transportation system for the country. Furthermore, the diversion of this traffic results in employment of a high ratio of non-union labor which is paid at a lower wage scale, and this constitutes a threat to the wage scale of union members in the railroad industry. Consequently, the movement to curtail non-farm related hauling of legitimate agricultural co-ops and to curtail the nominal agricultural cooperative is one which this association wholeheartedly supports. The bill that is presently before you is one which represents a good deal of consultation with the government, motor carriers, agricultural cooperatives, and rail carriers. Their consultation has in our minds resulted in legislation which achieves the need of a coherent transportation policy while doing as little damage as possible to the legitimate interests of the agricultural cooperative associations. For these reasons, we would encourage your committee's favorable disposition toward the bill as passed by the Senate.

Yours very truly,

DONALD S. BEATTIE,
Executive Secretary.

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Washington, D.C., December 11, 1967.

Hon. HARLEY O. STAGGERS,
Chairman, House Committee on Interstate and Foreign Commerce,
Rayburn House Office Building, Washington, D.C.

DEAR CHAIRMAN STAGGERS: On November 2, 1967, this Association, in meeting assembled in Hollywood, Florida, adopted a resolution Supporting S. 752—90th Congress, sponsored by the Honorable Walter R. McDonald, Commissioner of the Georgia Public Service Commission, Atlanta, Georgia.

Pursuant to the directive contained in the resolution, a copy of this resolution is attached for your information and consideration.

Very truly yours,

EVERETTE KREEGER, *Secretary.*

RESOLUTION SUPPORTING S. 752—90TH CONGRESS

Whereas, The National Association of Regulatory Utility Commissioners (NARUC) is an organization whose membership consists of the public utility regulatory commissions of each of the states of the United States; and

Whereas, Regulation of both motor carriers and railroads in the public interest is an important function of the member commissions; and

Whereas, The economic well being of the motor carrier and railroad industries is a vital factor to the economy of the member states and the nation and to the nation's defense; and

Whereas, Many of the member commissions of the NARUC have for a number of years been actively engaged in the enforcement of their motor carrier laws, rules and regulations to the end that illegal transportation be curtailed; and

Whereas, The National Association of Regulatory Utility Commissioners has

frequently supported the enactment by the Congress of legislation to remedy the major problem of illegal transportation, the most recent such action being its support of P.L. 89–170; and

Whereas, Since the decision of the United States Court of Appeals for the Ninth Circuit in Northwest Agricultural Cooperative Association vs. Interstate Commerce Commission, 350 F. 2d 252, numerous agricultural cooperatives and psuedo agricultural cooperatives have and are engaging in the transportation for compensation for non-members of any commodity at any rate, to, from or between any point subject only to the restriction that they do not exceed the non-member limitation provided in the Agricultural Act; and

Whereas, It is the opinion of the NARUC that such transportation is not only contrary to the intent of the Congress when it enacted the agricultural cooperative exemption (Sec. 203(b)(5) of the Interstate Commerce Act) but it also provides a further breeding ground for illegal operators making the state enforcement task much more difficult; and

Whereas, Such transportation is clearly detrimental to the economy of the motor carrier and the railroads; and

Whereas, the Interstate Commerce Commission has recognized the problem and repeatedly has recommended remedial legislation to the Congress; therefore be it

Resolved, That the NARUC recommends and strongly urges that the Congress of the United States at the earliest possible date enact S. 752 or appropriate corrective legislation to the end that the transportation activities of the agricultural cooperatives be limited to the movement of farm related items and that such cooperatives not be permitted to engage in the general transportation business;

Resolved Further, Copies of this resolution be transmitted to the Chairman of the appropriate Senate and House Committees of the United States Congress, the Chairman of the Interstate Commerce Commission and the Secretary of the Department of Transportation.

Sponsored by the Honorable Walter R. McDonald of Georgia.

Certified a true copy of a Resolution duly adopted by the National Association of Regulatory Utility Commissioners in Convention at Hollywood, Florida, on November 2, 1967.

EVERETTE KREEGER, *Secretary, NARUC.*

NORTHWEST AGRICULTURAL CO-OPERATIVE ASSOCIATION,
Ontario, Oreg., July 5, 1968.

Subject: House Counterpart of S. 752

Hon. HARLEY O. STAGGERS,
House of Representatives,
Washington, D.C.

DEAR MR. STAGGERS: The following is the text of a letter I have sent to members of the House Committee on Interstate and Foreign Commerce regarding the amendment of Section 203(b)(5) of the Interstate Commerce Act. This proposed amendment greatly affects the ability of farmers located in sparsely settled areas to market their products. Please give the House Bill your careful consideration and vote no.

"S–752 constitutes a legislative preference for the regulated transportation industry over agriculture. This proposed amendment of a statute that has been in effect for more than 30 years is not required by any changed circumstances. In fact, the need for implementation of the provisions of the Agricultural Marketing Act for an efficient and economic distribution of farm products is greater now than it was in 1935 when Congress sought to fulfill those provisions with the passage of the agricultural cooperative exemption in Section 203(b)(5) of the Interstate Commerce Act.

"For more than 30 years agricultural cooperatives have been exempt from economic regulation by the Interstate Commerce Commission. The boundaries of that exemption lie in the requirement that the cooperative must be a legitimate cooperative engaged exclusively in providing its farmer members with an efficient and economic transportation service. In the course of performance of this service, the coperative may handle that nonmember business which is reasonable and necessary to the maintenance of its primary function. Cooperatives have always been subject to the hours, safety and other regulations of the Interstate Com-

merce Commission. We do not object to this and, indeed, consider such regulation desirable. We do, however, object to any change in the present practice which will place in the jurisdiction of the Interstate Commerce Commission the transportation future of farmers. Such action will add to the already difficult problem of transportation and marketing of farm products. Regulated transportation has done little to provide service to farmers in out-of-the-way and sparsely settled rural areas, and it has done nothing to furnish transportation of agricultral products from the farm to warehousing or storing areas. Yet, that industry has mounted a terrifying legislative campaign to restrict the farmer from serving himself through organization.

"This legislation is not necessary. In the report of Senator Lausche from the Senate Committee on Commerce, he recommends that S. 752 pass because:

"1. It is in conformance with, and implements, the National Transportation Policy, and

"2. Farmer cooperative transportation could undermine regulated transportation and has contributed to a decline of the common carrier system.

"Both these statements are false.

"There is no statistical evidence in the Record of Hearings before the Subcommittee on Service Transportation of the Commerce Committee, July 24, 25 and 26, 1967, to justify them. With the exception of opinion testimony by lobbyists for the transportation industry, all evidence is to the contrary.

"The Office of the Secretary of Transportation, charged with the responsibility of implementing the National Transportation Policy, recommended against amendment of 203(b)(5) and, in a letter to the Chairman of the Senate Committee on Commerce dated July 24, 1967, stated in part:

" 'The present exemption has permitted the agricultural cooperatives to conduct efficient and economic operations by allowing a limited amount of for-hire truck transportation.

* * * * * * *

" 'In sum, the Department is of the opinion that the present exemption is consistent with Congressional intent and that it has not been abused in any sense to the significant detriment of regulated carriers.

* * * * * * *

" 'Section 203(b)(5) is a carefully drawn statute which properly recognizes that the needs of agriculture and those of the regulated for-hire industry must be carefully balanced if the public interest is to prevail.'

"The representative of the United States Department of Agricultural who testified before the Senate committee in opposition to S–752 described a survey made by the Department clearly showing that growth in national trucking greatly exceeded cooperative trucking and pointed out that for the year 1966 cooperative trucking miles constituted less than one half of one percent of the estimated United States truck miles.

"The American Trucking Association annual report for 1966 reported that tonnage for that year was up 7 percent over 1965 and up 17.1 percent over 1964. Furthermore, the industry reported tonnage increases in nine of the major commodity classes—including agricultural commodities.

"Clearly, cooperative transportation is not a threat to the regulated industry.

"S–752 is a result of a massive lobbying campaign by regulated carriers—a campaign that cannot be matched by farmers or their organizations; a campaign that has been successful in spite of the opposition of the governmental agencies charged with the balancing of the various interests involved, and with the expertise to do so—agencies such as the Department of Agriculture, the Department of Transportation and the Department of Defense.

"That campaign was successful in the Senate in spite of the overwhelming factual evidence that change in the present law is not necessary. I urge that you give this bill your careful consideration and that the interests of the farmers as articulated in the Agricultural Marketing Act are not sacrificed merely to eliminate this insubstantial competition to the American Trucking Association and to allow it to gain control over the distribution of agricultural products."

Very truly yours,

EVAN P. GHEEN, *President.*

STANLEY, SCHROEDER, WEEKS, THOMAS & LYSAUGHT,
Kansas City, Kans., July 6, 1968.

Re Senate Bill 752.
Hon. HARLEY O. STAGGERS,
Chairman, House Interstate and Foreign Commerce Committee,
Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN STAGGERS: As a result of the hearing before the House subcommittee, you should surely realize that the co-operatives opposed to the above mentioned legislation are few and far between. Without exception none of the co-operatives were aware of the pending legislation when the Senate subcommittee held its hearings nearly a year ago nor were any of their views incorporated in the pending Bill. As a consequence, the attitude of those few co-operatives, which have taken advantage of the exemption of 49 U.S.C. 303 (b) (5), was not heard or determined by the Senate subcommittee. Nor did these cooperatives have adequate time to prepare for the July 1 hearing of Mr. Friedel's subcommittee, since we received notice of it only on June 28, and only then because of your good offices. The record will show that there are approximately 6 or 7 bona fide agricultural co-ops subjected to the provisions of the above legislation and that, in each instance, the legislation is so unduly restrictive as to amount to a termination of the services of the co-op. The Department of Agriculture originally opposed the pending legislation on the basis that restricting the income of farm cooperatives would be in opposition to the national policy in view of falling farm prices and income. As we have been able to determine, the Department of Agriculture has approved the pending legislation only on a "last resort" basis as a possible compromise with the American Trucking Association.

Under the circumstances and by reason of the tremendous time problem involved in connection with the pending legislation, we attach herewith two separate proposals which we submit, respectfully, should be incorporated in amendment of the pending legislation so as to comport with the present congressional intent and to support present farm prices and farm income.

Attached Proposal No. 1 preserves substantially the language of Senate Bill 752 as passed. Subparagraph (i) of the proposal, however, spells out definite standards for qualifications of co-operative associations in accordance with the Agricultural Marketing Act. This, we feel, would provide the Commission with a simple and straightforward means of determining the qualifications of co-ops engaged in a transportation business. It is our feeling that there are two types of co-operatives: those which are qualified as *agricultural* co-ops—i.e., dealing in, processing, etc. of farm products, goods, supplies and so forth—under the Marketing Act; and second, those co-operatives which are engaged in selling goods or services which are essentially not farm-related. Examples of the latter would include those co-ops who sell insurance, gasoline and oil, auto parts, batteries, etc. We feel that the former type of co-operative was the only type included to be benefited by Section 203(b)(5), and that other co-ops could not qualify for the exemption. We certainly have no ax to grind with the other co-operatives, but if the matter is considered closely, they have never been entitled to the exemption.

"The second through the fifth paragraphs embody, with only minor changes, the terms of the Senate Bill. The balance of this proposal is an authorization for "grandfather rights" in essentially the same language as that found in Section 206(a) of the Interstate Commerce Act, subject to proof of the co-op's qualifications in subparagraph (i). Grandfather rights were accorded the transportation industry upon passage of the Motor Carrier Act of 1935 and in the subsequent legislation in 1958. According to the hearings before the committees involved, Grandfather Rights would, in accordance with the attached Proposal No. 1, be accorded very few co-operatives who could qualify under the Agricultural Marketing Act. The final proviso in this proposal would eliminate a co-op's carriage of explosives or combustibles falling within the scope of the Explosives and Combustibles Act, 18 U.S.C. § 831 et seq. This should satisfy the most important interests of the regulated industry by forcing any co-ops intending to transport munitions or explosives to obtain Commission authority to do so and to prove public convenience and necessity in so doing.

Proposal No. 2, attached herewith, would permit the present cooperatives to exist with their relative transportation divisions, but would basically be uneconomical and wasteful from the standpoint of the Nation's transportation problems by requiring the co-operative truck to return empty in a substantial proportion of its trips.

For these reasons, we seriously urge the amendment to Senate Bill 752 incorporated by Proposal No. 1 herein or, as a last resort, the amendment to such Bill as incorporated by Proposal No. 2, herein, in the event you cannot personally oppose the pending legislation.

Very truly yours,

ROBERT H. BINGHAM,
General Counsel for Milk Producers Marketing Company,
A Co-operative Corporation.

PROPOSAL NO. 1

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That at the end of section 203 (b) (5) of the Interstate Commerce Act delete the semicolon and add the following language: ", subject to the following conditions and limitations:

(i) That such cooperative association or federation shall have been determined to be qualified under the said Agricultural Marketing Act by the Farm Credit Administration, or by such other office, bureau, service, division, commission or board in the Executive branch to which authority to make such determination may have been transferred or retransferred by the President;

(ii) That any such cooperative association or federation which performs interstate transportation for nonmembers who are neither farmers, cooperative associations or federations thereof, except transportation otherwise exempt under this part, shall notify the Commission of its intent to perform such transportation prior to the commencement thereof;

(iii) That any interstate transportation performed by such a cooperative association or federation of cooperative associations for nonmembers who are neither farmers, cooperative associations, nor federations thereof for compensation, except transportation otherwise exempt under this part, shall be limited to that which is incidental to its primary transportation operation and necessary for its effective performance and shall in no event exceed 15 per centum of its total interstate transportation services in any fiscal year, measured in terms of tonnage;

(iv) That, for the purposes hereof, notwithstanding any other provision of law, transportation performed for or on behalf of the United States or any agency or instrumentality thereof shall be deemed to be transportation performed for a nonmember;

(v) That in no event shall any such cooperative association or federation which is required hereunder to give notice to the Commission transport interstate for compensation in any fiscal year of such association or federation a quantity of property for nonmembers which, measured in terms of tonnage, exceeds the total quantity of property transported interstate for itself and its members in such fiscal year;

Provided, however, That, subject to Section 210, if any such cooperative association, federation or predecessor in interest was so qualified and in bona fide operation as a common carrier by motor vehicle on _____ over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on _____ during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in section 206(b) of this part and within one hundred twenty days after this Act shall take effect. The application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *Provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such state if there be a board in such state having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board.

Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter; *And provided further*, That in no event shall any provision of this section be construed to permit the transportation of any commodity regulated under the Explosives and Combustibles Act, as codified June 25, 1948, as amended, [18 U.S.C. § 831, *et seq.*] by any such cooperative association or federation, unless there is in force and effect with respect to such cooperative association or federation a certificate of public convenience and necessity issued by the Commission authorizing the carriage of such commodities, and no such certificate shall be issued to such cooperative association or federation except in accordance with the procedure provided for in section 207(a), and then only to the extent that such service is or will be required by the present or future public convenience and necessity, as shall have been proved by reliable, probative, and substantial evidence."

PROPOSAL NO. 2

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That at the end of section 203(b)(5) of the Interstate Commerce Act delete the semicolon and add the following language: ", subject to the following conditions and limitations:

(i) That such cooperative association or federation shall have been determined to be qualified under the said Agricultural Marketing Act by the Farm Credit Administration, or by such other office, bureau, service, division, commission or board in the Executive branch to which authority to make such determination may have been transferred or retransferred by the President;

(ii) That any such cooperative association or federation which performs interstate transportation for nonmembers who are neither farmers, cooperative associations or federations thereof, except transportation otherwise exempt under this part, shall notify the Commission of its intent to perform such transportation prior to the commencement thereof;

(iii) That no transportation service rendered for any nonmembers who are neither farmers, cooperative associations or federations thereof, shall exceed 35 per centum of the total gross dollar revenues of any such cooperative association or federation from all operations during any fiscal year;

(iv) That any transportation service rendered by such cooperative association or federation for nonmembers who are neither farmers, cooperative associations or federations thereof, shall be restricted to agricultural commodities, processed or unprocessed, whether or not otherwise exempt under this section, and to those commodities reasonably related to the production, processing, distribution and marketing of agricultural products, or which would otherwise promote, foster or develop the activities contemplated by the said Agricultural Marketing Act, *Provided, however*, that in no event shall any cooperative association or federation transport any commodity subject to the provisions of the Explosives and Combustibles Act, codified June 25, 1948, as amended [18 U.S.C. § 831, *et seq.*]."

(Whereupon, at 3:10 p.m., the hearing was adjourned.)

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