Transportation Cases of Interest to Farmer Cooperatives

August 1963

Service Report 62

Farmer Cooperative Service

U. S. Department of Agriculture

FARMER COOPERATIVE SERVICE
U. S. DEPARTMENT OF AGRICULTURE
WASHINGTON 25, D. C.

Joseph G. Knapp, Administrator

The Farmer Cooperative Service conducts research studies and service activities of assistance to farmers in connection with cooperatives engaged in marketing farm products, purchasing farm supplies, and supplying business services. The work of the Service relates to problems of management, organization, policies, financing, merchandising, product quality, costs, efficiency, and membership.

The Service publishes the results of such studies; confers and advises with officials of farmer cooperatives; and works with educational agencies, cooperatives, and others in the dissemination of information relating to cooperative principles and practices.

CONTENTS

CONTENTS (Cont'd.)

TRANSPORTATION CASES OF INTEREST TO FARMER COOPERATIVES

by
Thomas H. Camp
Transportation Branch
Management Services Division

The Transportation Branch of Farmer Cooperative Service has received requests from cooperative traffic managers, attorneys, and others for information on legal cases pertaining to transportation problems of farmer cooperatives.

This report summarizes transportation cases of interest to farmer cooperatives that should be of value to management and legal personnel of cooperatives responsible for providing adequate transportation service to meet the needs of farmer members.

Transportation cases shown in this report were extracted verbatim from the Summary of Cooperative Cases,[1/] published quarterly by Farmer Cooperative Service and prepared by the Office of the General Counsel, U. S. Department of Agriculture. The various cases were reviewed, identified, classified, and presented -- by problem areas -- for ready reference.

This report does not necessarily contain a complete listing of all legal cases pertaining to transportation problems of farmer cooperatives. It is a compendium only of those cases reviewed in the Summary of Cooperative Cases from 1939 to date.

COOPERATIVE ASSOCIATION EXEMPTION

Cases relating to the cooperative association exemption follow:

Interstate Commerce Commission v. Nelson Cooperative Marketing Association (209 F. Supp. 697 (1962))

This action was brought by the Interstate Commerce Commission to prohibit the defendants from transporting property by motor vehicle in interstate commerce for compensation until the defendants obtained the

---

1/ The comments on cases reviewed in the Summary of Cooperative Cases and shown in this report represent the personal opinion of the authors of the Summaries and not necessarily the official views of the Department of Agriculture. From 1951 to date, case summaries were prepared by Raymond J. Mischler, Office of the General Counsel, U.S. Dept. of Agr. Before 1951, they were prepared by Lyman S. Hulbert, Solicitor's Office, and predecessor agencies of the U.S. Dept. of Agr.

necessary authority to engage in such transportation as required by the Interstate Commerce Act. The District Court granted the injunction holding that the defendants were not a "cooperative association" within the provisions of the Agricultural Marketing Act,[2/] and therefore were not exempt from economic regulations of the Interstate Commerce Commission and were subject to economic regulations imposed by the Interstate Commerce Commission on common carriers by motor vehicle.

Nelson Cooperative, incorporated under the "Cooperative Marketing Association Act" of Oklahoma, is a non-stock corporation with a five-member Board of Directors which is its entire voting media. Nelson Cooperative operates on so-called "agency agreements" with truckers. These agents receive a commission based on the percentage of traffic obtained by them for Nelson Cooperative. Any farming activities which these agents engage in are unrelated to the operations of the Nelson Cooperative.

The transportation performed by Nelson Cooperative is for canneries, meat packing houses, produce dealers, and other persons who are not eligible for membership in the cooperative because they are not engaged in farming operations. The traffic consists of manufactured or processed items, such as canned goods and processed meats, as well as "exempt" commodities such as livestock, produce, grain and other agricultural commodities. Most of the transportation of nonexempt manufactured or processed items involve the movement of canned goods from canneries to wholesale and retail grocers and processed meats between packing houses, meat brokers, and other dealers in meats.

Over 90 percent of the total value of the transportation is performed with or for nonmembers or registered members not eligible due to the nature of their operations. Nelson Cooperative does not attempt to determine whether the shippers submitting traffic to them are engaged in farming operations. Nelson Cooperative solicits shippers as non-voting members by use of an application form which is incorporated in the shipping documents. Members are accepted upon payment of a nominal membership fee. As a result, the membership of the association consists largely of persons who are not farmers and, therefore, are ineligible for membership in the association.

In reaching its conclusion the Court said, in part:

> "Whether the operations of Nelson Cooperative are entitled to the so-called 'agricultural cooperative exemption,' Section 203(b)(5) of the Interstate Commerce Act, depends

---

2/ See Appendix, page 78, for applicable provision.

on whether it qualifies under the Agricultural Marketing Act (Title 12, §§ 1141-1141j, U.S. Code). Section 1141j defines the term 'cooperative association' as it is used in the Agricultural Marketing Act. Section 1141 declares the purpose of the Marketing Act to be the promotion of the effective merchandising of agricultural commodities through producer-owned and producer-controlled cooperative associations.

"For Nelson Cooperative to come within the meaning of the Agricultural Marketing Act, it must be owned and controlled by farmers acting together for their mutual benefit to promote the merchandising of their farm products by means of 'processing, preparing for marketing, 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.' Such an association either must grant members equal voting privileges or restrict its dividends to 8 percent per annum. In any case, such an 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.

"A 'farmer' is a person, natural or corporate, actively engaged in farming operations to some extent. Persons or corporations engaged in businesses such as canneries, meat packing houses, dealers in produce, and other like businesses, do not qualify as farmers solely because farm products are used by them as raw material in their manufacturing processes. Similarly, manufacturers and dealers in farm implements and farm supplies do not qualify as farmers merely because their products may be used on a farm or by a farmer. Business transacted with such nonfarming entities is not member business for the purposes of the third proviso of Section 1141j. See, Machinery Haulers Association, et al. v. Agricultural Commodity Service, 86 M.C.C. 5. The views of the Commission are persuasive and entitled to special consideration, particularly in light of the absence of legal precedents. Levinson v. Spector Motor Company, 330 U. S. 649, 672, 67 S. Ct. 931, 91 L.Ed. 1158; McLean Trucking Company v. United States, 321 U.S. 67, 87-89, 64 S.Ct. 370, 88 L.Ed. 544;

United States v. American Trucking Association, 310 U.S. 534, 549, 60 S.Ct. 1059, 84 L.Ed. 1345.

"Nelson Cooperative does not qualify as a cooperative association in each of the following respects. First, it is not a producer-controlled association. Second, its primary purpose is not the marketing of farm products of, or the furnishing of farm business services to its members. Third, it is dealing in services with or for nonmembers in an amount greater in value than that transacted with or for eligible members, contrary to the third proviso of Section 1141j, Title 12 U.S. Code.

"Notwithstanding the above findings and conclusions, the transportation of canned goods from canneries to grocers and chain stores, of processed meats from packing houses to meat dealers, of cheese from brokers to distributors, and other transportation which is not necessary to farming activities of member farmers are activities in which even a bona fide cooperative association may not rightfully engage.

"Under the precepts of the Agricultural Marketing Act, a cooperative association must act for the mutual benefit of its members in their capacities as farmers and in furtherance of their marketing of farm products or purchase of farm supplies and farm business services. Transportation performed by such an association must directly benefit the farming operations of its members regardless of whether the services are performed for members or nonmembers. This is not the case here.

"This decision is not adverse to Interstate Commerce Commission v. Jamestown Farmers Union Federated Cooperative Transportation Association, 151 F. 2d 403, wherein the Eighth Circuit ruled that transportation performed by a cooperative association may connect at origin or destination with a member cooperative association as well as a farm. In that case, there was no question of the status of the association or the eligibility of its members and all of the transportation was performed for eligible members.

"The operations of Nelson Cooperative * * * constitute those of a common carrier by motor vehicle as defined in Section 203 (a)(14) of the Act (Title 49, § 303 (a)(14), U. S. Code), and its transportation of property other than so-called 'exempt commodities' is in violation of Section 206(a) of the Act (Title 49, § 306(a), U. S. Code), and as such subject to be enjoined by the court under the express provisions of said Act; and, that the relief prayed for by the plaintiff against Nelson Cooperative should be granted."

Accordingly, the Court held that the Interstate Commerce Commission was entitled to be granted the injuction against Nelson Cooperative.

The rather sweeping dictum of the Court as to certain activities "in which even a bona fide cooperative association may not rightfully engage" would appear to overlook the possibility that a "bona fide cooperative" of agricultural producers might operate a cannery or a packing house. It would seem that under such facts the farmer cooperatives "in furtherance of their marketing of farm products" could rightfully transport their own canned goods or processed meat.

Machinery Haulers Association et al., v. Agricultural Commodity Service (No. MC-C-2488)[3/]

This order of the Interstate Commerce Commission resulted from complaints that the defendant, the Agricultural Commodity Service (hereinafter referred to as ACS) Robert Crawford, and certain other named defendants and respondents were engaged in the transportation of property in interstate or foreign commerce as for-hire carriers by motor vehicle in violation of Section 206(a) or 209(a) of the Interstate Commerce Act."

The primary question presented was whether the operations of ACS and its agents were within the scope of the partial exemption of section 203(b)(5) of the Interstate Commerce Act relating to "motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act."

Actually three cases involving related issues were heard on a consolidated record, were the subject of a single report, and recommended order by an examiner, and were disposed of in this single report. The examiner found that the considered transportation by ACS and its named agents constituted for-hire transportation by motor vehicle which was not subject to the exemption provisions of section 203(b)(5) and he recommended that a cease and desist order be entered against ACS and its agents. The Commission also held that ACS did not come within the exemption of section 203(b)(5) and that other named defendants and respondents were engaged in transportation in violation of the Interstate Commerce Act, but the Commission's conclusions differed somewhat from those recommended by the examiner.

While an officer of the Black Angus Breeders Association and a number of other farmers apparently conceived the idea of creating ACS as an agricultural cooperative, certain truckers, each of whom had performed transportation as agents of similar associations in the past, participated in the organization of ACS from its very inception, became either

---

3/ No. MC-C-2488, (Sub-No.(1)) Midwest Coast Transport, Inc. et al., v. Agricultural Commodity Service. No. MC-C-2576, Agricultural Commodity Service - Investigation of. Decided May 3, 1961, petition for reconsideration denied Jan. 1, 1962; Motion to stay cease and desist order denied Jan. 31, 1962, 14 Fed. Carriers Cases, Par. 35, 155 (p.40, 489).

officers or directors of the association, and actively promoted the operations here under consideration. ACS maintained an office at Bloomington, Illinois, from which it carried on its activities. It did not operate in the manner usually associated with the business of farm cooperatives in serving a group of farmers; rather, its primary function admittedly was the performance of for-hire transportation by motor vehicle. It did not own any motor vehicles and the transportation was rendered with equipment ostensibly leased by ACS from certain truckers, also defendant-respondents herein, who purportedly acted as its agent at various points in Illinois, Iowa, Texas and California.

The activities and operations of the defendant-respondent, Robert Crawford of Council Bluffs, Iowa, according to the Commission's findings, were typical. He held intrastate authority in Iowa, maintained offices at Council Bluffs, Fort Worth, Texas and Los Angeles, Calif., and operated approximately 65 refrigerated tractor-trailer units, most of which were leased from owner-operators thereof. All drivers were supervised by Crawford or by his dispatchers. Crawford maintained separate accounts at a local bank in Council Bluffs, one in his own name and the other in the name of ACS. All transportation revenues were deposited in the ACS account. Owner-operators were paid 85 per cent of the revenue, and from 1 to 2 per cent of the remaining income was remitted to ACS at Bloomington. When the transportation was performed by vehicles owned by Crawford, however, 85 per cent of the revenue derived therefrom was transferred from the ACS account to Crawford's account from which his drivers were then paid. Generally, the owner-operator paid all vehicle maintenance costs, fuel taxes, and State license fees, as well as certain claims for shortages in or damages to lading.

The Commission's Bureau of Inquiry and Compliance (hereinafter referred to as the Bureau) contended that ACS was not entitled to the partial exemption provided by section 203(b) (5), and that the evidence abundantly established that the alleged agents of ACS were, in fact, conducting their own independent trucking operations without appropriate authority therefor.

The Secretary of Agriculture took no position with respect to the examiner's ultimate conclusion that the defendants were engaged in, and must cease and desist from unlawful transportation activities. Rather, he largely took issue with the reasons underlying that decision, contending that the applicability of the partial exemption claimed by defendants could not be decided properly by a mere consideration of the types of commodities being transported or their origins and destinations. The Secretary maintained that a cooperative association as defined in the Agricultural Marketing Act must be an association in which member-farmers act together for their mututal benefit as producers of agricultural products or purchasers of farm supplies; that such an association must be substantially owned and controlled by producers of agricultural products; that a corporate producer may qualify as a member with respect to those farm products which it actually produces, or in respect to those farm supplies which are used in the conduct of its farm operations; that when these standards are met, a cooperative may haul for nonmembers within

the volume limits established in the Agricultural Marketing Act provided that such transportation is reasonably incidental to the cooperative's proper purpose; and that the transportation of farm products, farm supplies, or other commodities encompassed by the furnishing of a farm business service may be engaged in by a cooperative even though the points of origin or destination may not be a farm or cooperative, and even if some of the purchasers of these commodities are not farmers.

The so-called "agricultural cooperatives" exemption provided by section 203(b)(5) of the Act reads as follows:

> "Nothing in this part, except the provisions of section 204 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 purpose than cooperative associations so defined."

The Commission asserted that the answer to the primary question presented depended upon the following issues:

1. What are the criteria which must be met by an association in order to qualify as a "cooperative association" entitled to the partial exemption here under consideration?

2. Are the transportation services of an agricultural cooperative association exempt from economic regulation regardless of the commodities handled or the origins and destinations of the traffic?

3. What standards are to be utilized in determining whether the motor vehicles in question are, in fact, "controlled and operated" by the cooperative association claiming the statutory exemption?

Regarding the first issue the partial exemption is available only to cooperative associations defined in section 15(a) of the Agricultural Marketing Act of 1929, as amended, (12 U.S.C.A. 1141j). A cooperative association as defined by the Act must be an organization of member-farmers who act together for their mutual benefit as producers of farm products or as purchasers of farm supplies and farm business service. The term "farmers" includes individuals, corporations, partnerships, and other business entities. Such persons must be engaged, at least to some extent, in a common pursuit - farming - in order to qualify for membership in a lawfully constituted cooperative. Those not engaged in agrarian activities and having no agricultural production whatever,

clearly are not eligible for membership even though farm products may be utilized by such persons as raw materials in their manufacturing process.

The Commission asserted that neither the Marketing Act nor the legislative history thereof justified the conclusion that persons who market or distribute products manufactured from farm products, such as meat packing-houses, canneries, and the like, may qualify for membership in a cooperative association on that basis alone, but that in order to be eligible for membership in a cooperative association as defined in the Agricultural Marketing Act, such persons must be engaged in some respect in farming operations. Otherwise, according to the Commission, all persons engaged in handling or processing food products at any intermediate step between farmer and ultimate consumer might qualify for such membership, and there would then be virtually no limitation upon those who may become members.

With respect to those who can qualify as farmers in some degree, but who have other activities which, in many instances, constitute the principal business in which they are engaged, the defendants and the Secretary of Agriculture generally took the position that such persons are "farmers" within the meaning of the Agricultural Marketing Act, and that they, therefore, may become lawful members of a cooperative association. The complainants and the Bureau, on the other hand, contended that a person must be primarily engaged in farming operations in order to be eligible for membership. The Commission agreed with the contention of the Secretary of Agriculture that persons engaged in farming operations, either as actual producers of agricultural products or as farm owners, may qualify for membership in a cooperative association even though such farming operations may not constitute the primary business in which they are engaged.

The Commission concluded, however, that in situations where one or more of a number of affiliated persons, corporate or otherwise, qualify as "farmer" within the meaning of the Agricultural Marketing Act, only those persons so qualifying are eligible for membership in a cooperative association; and that affiliated or controlling corporate or natural persons not so qualifying may not become lawful members in the association on the basis of such affiliation or control alone. The Commission decided that the apparent membership in a cooperative association of persons who may not qualify as "farmers" does not automatically change the status of such association, provided that the association continues to be substantially owned and controlled by qualifying members.

The Agricultural Marketing Act further provides that the value of business handled by a cooperative association for or with nonmembers shall not exceed that transacted by such association for or with its eligible members. According to the Commission this requirement pertains not only to all transportation services rendered by a cooperative but, in addition, to all farm products, farm supplies, and farm business services

dealt in by the association. Hence, a preponderance of a cooperative's transportation activities might be performed for nonmembers without altering the association's status, provided, that the value thereof is offset by the value of other types of business which it handles for or with members. Moreover, the Commission contended that the evidence must be established that such association, as a general and continuing practice, does not conduct nonmember business greater in value than that performed as agent for its own members.

Having determined the essential attributes which must be possessed by a cooperative association as defined by the Agricultural Marketing Act, the Commission next considered the problems regarding the nature and extent of the transportation services which lawfully may be provided by such an association pursuant to both the Marketing Act and the Interstate Commerce Act.

With respect to this problem, the complainants, the interveners in support of complainants, and the Bureau generally contended that in order to be a legitimate activity of a cooperative, the transportation must constitute a "farm business service," and, as such, must connect either at origin or destination with a farm or a farmers' cooperative. ACS and its agents argued, on the other hand, that if the evidence established that a cooperative met the definition of the Marketing Act, all transportation service rendered by such association was exempt from economic regulation so long as its nonmember business was not greater in value than the total business transacted by it with its members. The position of the Secretary of Agriculture was somewhere between these two extremes. He asserted that a lawfully constituted cooperative may engage in for-hire transportation for non-members where such transportation is reasonably incidental to a cooperative's proper corporate purposes; and that a cooperative may transport farm products, farm supplies, or other commodities encompassed by the furnishing of a farm business service even though they do not originate at and are not destined to a farm or a cooperative, and even if some of the purchasers of these commodities may not be farmers.

The Commission decided that, in order to be exempt from economic regulation, transportation by a cooperative for or on behalf of a person who may qualify as a member, but who has other business activities not connected with farming, must be functionally related to that person's operations as a "farmer" as defined above, regardless of the type of commodities transported and the origins and destinations thereof, and that, therefore, back-hauls are not exempt from economic regulation unless directly essential to the activities of the members of the cooperative in their capacities as producer of farm products, or as purchasers of farm supplies and farm business service.

With respect to the third issue as to whether motor vehicles are in fact controlled and operated by a cooperative association claiming the exemption, the Commission concluded that in order for the motor vehicles

to be controlled and operated by a cooperative association, within the meaning of the partial exemption of section 203(b)(5):

1. the motor vehicle either must be owned by the cooperative association, or it must be in the lawful possession thereof and be used and operated by such association as if it were, in fact, owned by the cooperative; and

2. the driver of the vehicle must be a bona fide employee of the cooperative association, and must possess no duties, obligations, responsibilities, or interests inconsistent with its obligations to the association.

Applying the above-stated general principles to the facts presented in the instant proceedings, the Commission ruled that the motor-carrier operations of ACS and its agents were not within the scope of the partial exemption here in question and recommended that a cease and desist order be issued in connection with the improper transportation with respect to these cases. The cease and desist order of May 3, 1961, which was later postponed was reinstated and the statutory effective and compliance date was fixed as February 19, 1962.

Umatilla Canning Company Common Carrier "Grandfather" Application - Docket No. MC 118424

By application filed December 10, 1958, under the "Grandfather" provisions of Section 7(c) of the Transportation Act of 1958, Umatilla Canning Company of Milton-Freewater, Oregon, sought a certificate of public convenience and necessity authorizing the continuance of operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables, in straight and mixed loads with certain exempt commodities, between points in Washington, Oregon, Minnesota, Idaho, Wisconsin, California, Colorado, Iowa, Missouri, Montana, Nebraska, Nevada, Oklahoma, Utah and South Dakota.

The report recommended by the I.C.C. examiner held that the applicant was a "cooperative association as defined in the Agricultural Marketing Act" within the meaning of section 203(b)(5) of the Interstate Commerce Act and that a certificate authorizing the operations described in the application was not required by, and could not properly be issued under, the Act. The order recommended was that the application be dismissed.

Notice to the parties served November 4, 1960, advised that exceptions had to be filed within 35 days and that at the expiration of the period the order would become effective unless exceptions were filed seasonably or the order was stayed or postponed by the Commission.

Applicant's position was that it was a cooperative association and hence within the provisions of section 203(b)(5) but that it was nevertheless entitled to a certificate or permit in accordance with section 7(c) of the Transportation Act of 1958. The examiner disagreed with the latter contention. He pointed out that section 203(b)(5) contains no provision, express or implied, for waiver by one coming within its terms.

The examiner determined first that the applicant was a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, and thus within the partial exemption of section 203(b)(5) of the Interstate Commerce Act, which provides in part that:

> "Nothing in this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * 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; * * *."

The definition of "cooperative association" appears in the Agricultural Marketing Act (12 U.S.C. 1141-1141j). Section 1141j(a) states:

> "As used in this subchapter 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. * * * ."

The recommended report stated that whether a party is a cooperative association as defined in the Agricultural Marketing Act required a construction of the latter Act which is a remedial statute and entitled to liberal construction to effectuate the purpose for which it was adopted, citing Interstate Commerce Com. v. Jamestown Farm U. F. Co-op, T. A. 151 f. 2d 403.

Applicant's members were all farmers. It was organized under the laws of Oregon relating to farmers' cooperative associations. Pertinent provisions of the articles of association provided, among other things, that the association "may process, market, and distribute the agricultural produce and purchase supplies and equipment for non-members in an amount the value of which does not exceed the value of agricultural produce processed and marketed, distributed for or supplies purchased for members of the association." Additionally, it was provided that "dividends may be paid on common stock, but shall not exceed eight per cent (8%) per annum, and one vote per member, only."

The applicant operated a freezing plant which produced about 12 million pounds of frozen fruits and vegetables a year, and a canning plant which produced about 500,000 pounds of canned peas a year. Although it produced several other fruits and vegetables in smaller quantities, applicant's principal commodity was peas which were processed both for the frozen and canning markets. In 1959 applicant and five other farmer cooperatives organized American National Processors, Inc., hereinafter called the Association, for the purpose of marketing the frozen fruits and vegetables produced by its members. The Association marketed the entire frozen food production of all its members except one, and handled all billing and collecting and payment of transportation charges. Title to the merchandise remained in the individual processor or shipper until delivery to consignee. Although for-hire motor and rail carriers were utilized to an undisclosed extent by the Association, applicant performed a substantial portion of the transportation. Applicant and the Association operated a joint traffic department, with all truck drivers being employed by the former. Applicant's transportation charges initially were set on a cost basis, the intention being that the operation should merely be self-supporting. It appeared, however, that since the initial hearing in the Commission proceeding in July 1959 certain adjustments had been made to provide for a profit-making operation, although the applicant stated that its transportation service was primarily for the development of the sales program of the members of the Association, there being no active solicitation of shipments from outside organizations. In addition to frozen foods, applicant also transported its own canned goods. Although during June 1959 approximately 32 percent of the total volume of frozen foods transported by applicant involved its own products, this fluctuated greatly, ranging to as much as 70 percent in other months.

In concluding that the application should be dismissed, the examiner stated as follows:

> "Congress' declaration of policy in the Agricultural Marketing Act shows a clear intent to confer broad powers upon cooperatives in the interest of promoting '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.' Its definition of 'cooperative association,' as hereinbefore stated, requires that the members thereof 'act together in processing, preparing for market, handling and/or marketing the farm products of persons so engaged' and 'purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services.' Applicant clearly comes within the foregoing definition insofar as the various activities related therein are concerned. The only question remaining is whether it meets the additional requirement 'that the association shall 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.' Although it is not possible to determine conclusively from this record whether applicant technically or literally meets the latter requirement, as previously noted, its articles of association limit its activities to the same extent and there is evidence indicating probable compliance. Applicant's concern that sometime in the future it may lose its exemption under section 203(b)(5) by reason of its failure to maintain a 'cooperative' status within the meaning of the Agricultural Marketing Act might be well founded; however, such possibility is no justification for granting authority herein. It is noted, in passing, that the facts herein indicate fairly conclusively that the Association could qualify under the foregoing exemption should it decide to undertake the transportation operations now conducted by applicant." (Emphasis added.)

Interstate Commerce Commission v. Jamestown Farmers Union Federated Cooperative Transportation Association

The Interstate Commerce Commission brought a suit to enjoin the Jamestown Farmers Union Federated Cooperative Transportation Association, a corporation, from engaging in the business of transportation because it had not obtained a certificate of public convenience and necessity from that Commission. The Federal District Court held against the Commission and its opinion appears in 57 F. Supp. 749 (see page 20). The Interstate

Commerce Commission then appealed to the Circuit Court of Appeals for the Eighth Circuit and the opinion of that court given on October 23, 1945, No. 13,051, affirming the judgment of the Federal District Court, follows:

"Before WOODROUGH, JOHNSEN, AND RIDDICK, Circuit Judges.

"RIDDICK, Circuit Judge, delivered the opinion of the court.

"The Interstate Commerce Commission brought this action to enjoin the Jamestown Farmers Union Federated Cooperative Transportation Association from alleged violations of sections 206(a) and 209(a) of Part II of the Interstate Commerce Act, 49 U.S.C.A., Secs. 306(a) and 309(a). These sections of the Act provide that no common or contract carrier by motor vehicle, subject to the provisions of the Act, shall engage in interstate operation unless there is in force, in respect to such carrier, a certificate of public convenience and necessity issued by the Commission. The District Court sustained the appellee's claim of exemption under section 203 of the Act, 49 U.S.C.A., Sec. 303(b), which, so far as material here, provides that:

> 'Nothing in this chapter * * * shall be construed to include * * * (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act of 1929, as amended (12 U.S.C.A., Secs. 1141-1141j), or by a federation of such cooperative associations if such federation possesses no greater powers or purposes than cooperative associations so defined * * *.'

"The facts are stipulated. The Jamestown Farmers Union Federated Cooperative Transportation Association, hereinafter called the appellee, is a federation of cooperative associations, incorporated under North Dakota law. It possesses no greater powers or purposes than those possessed by each of its member cooperative associations, which themselves, farmer controlled and farmer operated, perform the functions and observe the restrictions set forth in section 15 of the Agricultural Marketing Act of 1929, as amended, 12 U.S.C.A., Sec. 1141j. Appellee is engaged exclusively in the business of transportation for compensation by motor vehicle on public highways between points in North Dakota and Minneapolis, St. Paul, and South St. Paul in Minnesota.

"The appellee's eastbound traffic consists exclusively of livestock, all of which is delivered to appellee by one of its member cooperative associations, and all of which is destined to St. Paul Stockyards at South St. Paul, Minnesota. The appellee issues to the

member cooperative association from which it receives livestock a receipt showing the name of the person to whom it is to be delivered and the charge for transportation. The name of the person who delivered the livestock to the member association does not appear on this receipt, and appellee has no dealings with such person.

"Appellee's westbound traffic consists exclusively of merchandise delivered to it by the Farmers Union Central Exchange of South St. Paul, Minnesota, a federated cooperative association and a member and stockholder of appellee. This merchandise is destined to various member associations of appellee in cities and towns in North Dakota for resale by them without restriction of sales to farmers. Non-farmers purchase from three to fourteen per cent of this merchandise. The appelle issues to the Farmers Union Central Exchange a receipt for the merchandise received from it for transportation to the consignee named therein, which is always one of appellee's member associations.

"Except in occasional instances, the appellee renders no transportation service which includes receipt of property at a farm or from a farmer, nor does it make delivery of any property transported by it at a farm or to a farmer. None of appellee's member cooperatives owns or operates a farm.

"The issue on this appeal is the scope of the exemption created by section 203(b) of the Interstate Commerce Act, quoted above. The Commission contends that appellee is not entitled to the claimed exemption because, in its opinion, the transportation, which is the exclusive business of appellee, is not included in the authorized activities of cooperative associations as such associations are defined by the Agricultural Marketing Act unless performed as a direct farm business service; that the transportation in which appellee is engaged is not a farm business, since it does not connect either at origin or destination with a farm; that the transportation of merchandise to be offered for sale without restriction of sales to farmers is not a farm business service nor an authorized activity of a cooperative association; and that these conclusions are required by a strict construction of the exemption relied upon by appellee.

"We can not agree with these contentions of the Commission. As was pointed out by the District Court, we are confronted at the very threshold of this case with an evident recognition on the part of Congress that both cooperative associations of farmers and federations of such cooperative associations, operating within the limits imposed by the Agricultural Marketing Act, may rightfully engage in transportation interstate by motor vehicles. Otherwise, as the District Court pointed out, the exemption contained in the Interstate Commerce Act with reference to trucks used in such transportation by cooperatives and federations of cooperatives is meaningless. This being true, it follows, under the stipulation, that appellee

possesses no greater powers or purposes than its member cooperative associations, that it is exempt from the proposed regulation by the Commission, unless the transportation in which it is engaged is not an operation in which a farm cooperative may engage.

"It is, of course, true that the exemption relied on by the appellee must be strictly construed when the necessity for construction arises. So construed, it may well be true, as the Commission contends, that a truck operated in interstate commerce by a farmers' cooperative for a purpose not within the contemplation of Congress in the Agricultural Marketing Act is not exempt from the requirement of a certificate of public necessity and convenience. But whether the interstate operation of such a truck is in an activity in which the farmers' cooperative is or is not permitted to engage presents a question arising under the Agricultural Marketing Act, a remedial statute, entitled to a liberal construction to effectuate the purpose for which it was adopted. It is this Act which requires construction here.

"The expressed purpose of the Agricultural Marketing Act (12 U.S.C.A., Sec. 1141) is:

> '* * * 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 associations 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.
>
> '(4) by aiding in preventing and controlling surpluses in any agricultural commodity, through orderly production and distribution, so as to maintain advantageous domestic markets and prevent such surpluses from causing undue and excessive fluctuations or depressions in prices for the commodity.'

"A cooperative association is defined (12 U.S.C.A., Sec. 1141j) as any association in which farmers act together in processing, preparing for market, handling, and marketing the farm products of persons so engaged; and any association in which farmers act together in purchasing, testing, grading, processing, distributing, and furnishing farm supplies or farm business services. A cooperative association as defined must be operated for the mutual benefit of its members as producers or purchasers, and '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.'

"That the economical and efficient transportation of farm products to market and of farm supplies to farmers is a necessary farm business service can not be doubted. To require that such transportation must originate or end in every case at a farm is to deny to the farmer one of the farm services which the Agricultural Marketing Act was intended to make available to him through the operation of farmer cooperatives. Nothing in the Act either expressly or by implication justifies a holding that the farmer cooperatives may not transport to market farm products which its member farmers have transported and delivered to the cooperative; nor that the trucks of the cooperatives used in such transportation may not on return trips transport farm supplies for delivery to the cooperative for resale. And since a cooperative association is expressly permitted by the Agricultural Marketing Act to transport farm supplies and to render farm service to or for others than its members, the fact that some of the farm supplies carried in its westbound traffic may be sold to others than farmers is of no significance, so long as the proportion of such sales and services is not greater than that permitted by the Act. If, as we hold, a single farm cooperative association may engage in the transportation of farm products from itself to market and of farm supplies and merchandise from the market to itself for resale, it can not be doubted that a federation of such associations may engage in the same transportation. In so doing, it is exercising no greater power than any of its member cooperatives may exercise. It is reasonable to suppose that the reason for the organization of a federation of cooperatives to perform the character of transportation under consideration is that the federation of many cooperatives is able to perform this authorized farm business service more efficiently and economically than could its individual member associations. To the extent that the federation is able to realize the purpose for which it is organized, it is an effective instrumentality in the promotion of the purposes which the Agricultural Marketing Act was designed to realize. To say that such a federation of farmer-owned and farmer-controlled cooperative associations is not itself a farmer-owned and farmer-controlled instrumentality is to give to the Agricultural Marketing Act a narrow and strict construction which its character and purpose forbids.

"The judgment of the District Court is affirmed."

As will be observed from a reading of the foregoing opinion, the Circuit Court of Appeals as well as the Federal District Court, held that a federated cooperative association, in order to be eligible for the limited exemption provided for in the Federal Motor Carrier Act, was not required to haul commodities from farms to market and from a market to farms but could haul from the local stores of its cooperative members to market and from market to such local stores.

Interstate Commerce Commission v. Jamestown Farmers Union Federated Cooperative Transportation Association

In the case of Interstate Commerce Commission v. Jamestown Farmers Union Federated Cooperative Transportation Association, 57 F. Supp. 749, the Commission instituted proceedings for the purpose of enjoining the Association from engaging in the transportation business without obtaining a certificate of public convenience and necessity to do so under the Federal Motor Carrier Act. The Commission alleged that the Association, by operating without a certificate of public convenience and necessity, violated -

> ". . . Sections 206(a) and 209(a) of Part II of the Interstate Commerce Act, 49 U.S.C.A. § 306(a) and § 309(a). These sections require that all common and contract carriers, which carry goods by motor vehicle and which are subject to the provisions of the Act, must procure a certificate of public convenience and necessity from the Interstate Commerce Commission as a condition for operating their vehicles in such transportation. Section 303(b) of the same Act provides, however, that 'Nothing in this chapter, except the provisions of section 304 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 sections 1141-1141j of Title 12, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined; * * *.'
>
> "Defendant is a federation of cooperative associations. Its members are themselves cooperative associations. Defendant's business consists exclusively of transporting livestock from its members in the State of North Dakota eastward to the stockyards at South St. Paul, Minnesota, by motor truck for compensation, and the transportation, for compensation on the westward return trip from one of the defendant cooperative members in South St. Paul, Minnesota, of various merchandise for its North Dakota cooperative associations. All the association members which own and control the defendant are farmer-owned and controlled, and they are the means by which their

member farmers act together in marketing their farm products and in purchasing their farm supplies. Approximately 3 to 14 per cent of the merchandise defendant delivers to its North Dakota members from South St. Paul, Minnesota, is sold to persons who are not farmers.

"The Agricultural Marketing Act of 1937 (Agricultural Marketing Act of 1929, as amended), as now amended, is found in Sections 1141 to 1141j, Title 12 U.S.C.A. In passing this Act, it was the policy of Congress, as declared in Section 1141: '*** 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 - *** (3) by encouraging the organization of producers into effective associations 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.'

"Sections 1141a to 1141i provide for the creation of a Farm Credit Administration and its powers and purposes, and detail the aid which can be accorded to cooperative associations by the Administration. It is in Section 1141j that we find the definition of a cooperative association. It reads:

> 'As used in this subchapter, 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.'"

The Interstate Commerce Commission conceded that a cooperative association meeting the conditions of Section 1141j of 12 U.S.C. and composed of farmers would be entitled to engage in the transportation business; but the Commission argued that Section 1141j quoted above did not provide for a federated type of organization. It further argued that even in the event it was conceded that a federated type of organization was contemplated by Section 1141j, that such an association could only transport agricultural commodities from the farms of its members to market and then haul commodities back from market to the farms of its members.

Owing to the fact that Section 1141j of 12 U.S.C. defines the agricultural cooperative associations that are eligible to borrow of the 13 banks for cooperatives, the St. Paul Bank for Cooperatives appeared as amicus curiae in this case in order that the court might have the benefit of the interpretations which had been placed upon Section 1141j in the administration of the banks for cooperatives. The case was tried under a stipulation of facts and the court found that the federated association was a cooperative association within the meaning of Section 1141j and was therefore exempt from obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission. The following quotations from the opinion in the case indicate the basis for the conclusions reached:

> "The Agricultural Marketing Act does not require that all members of a cooperative must be farmers. It merely says that a cooperative association means any association in which farmers act together in the handling and/or marketing of farm products of the persons so engaged and also an association in which farmers act together in purchasing, distributing and/or furnishing farm supplies and/or farm business services. The fact that defendant's members are not farmers, but are other cooperatives, is not fatal to defendant's status under the Act if farmers act together in the furtherance of its activities within the purview of the Act. That the defendant is an organization in which farmers act together cannot be seriously controverted. Undoubtedly, the farmers in practice have found it to be more efficient in the marketing of their livestock to have the cattle, etc., assembled at the place of business of the local associations, and then transported from such local places to the market in South St. Paul. And presumably they have also determined that the purchase and distribution of farm supplies is more economical and more efficiently handled under an arrangement whereby such supplies are transported to the local cooperatives for distribution among their farmer members. In other words, the local member

cooperatives have but one object, and that is to further the business and farming activities of its farmer members within the purview of the Agricultural Marketing Act. In order to attain such objectives and such purposes more effectively, the local associations have united into a federated cooperative organization which carries on their transportation business.

"Section 1141j does not expressly require that the marketing of farm commodities and the purchasing and distribution of farm supplies by a federation or any other cooperative shall be carried on directly with the farm to which they are ultimately to go, and in view of the purposes of the Agricultural Marketing Act, there is no implication therein which would justify such a construction. The purpose of the Act is to aid the farmer. Methods of marketing and distribution beneficial to him were obviously intended. That it may be more advantageous to the farmer under certain circumstances to have a large cooperative doing the buying of farm supplies, etc., for the smaller local cooperatives seems evident. Moreover, it would not only be most difficult but highly uneconomical and a frustration of the very beneficial purposes of the Act to require a federation of cooperatives to send its trucks to deliver or pick up from the individual farmer a very small fraction of a load. In the final analysis, under the system adopted by the defendant and its members, the marketing of farm commodities and produce and the distribution of farm supplies are evidently carried on with greater efficiency, and greater financial benefits inure to the individual farmers who belong to the local cooperatives. Such a practice is entirely consonant with the purposes of the Agricultural Marketing Act. <u>It definitely consists of a rendering of farm business services to the farmers</u>.

"Some contention is made that the defendant is without the Agricultural Marketing Act because some of the farm supplies which it transports to its members may not be sold by the local cooperatives to farmers. But Section 1141j permits an association to do business with non-members. The provision in this regard has already been noted. The record herein indicates that the mandates of this provision are fully recognized and followed by the member cooperatives of this defendant. Moreover, cooperatives which are in the retail business of furnishing farm supplies to its members are confronted with certain practical problems in meeting competition with other retail institutions in their community. Necessarily, goods must be handled by them which may not be strictly farm supplies. 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 non-members 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. Such views have been reflected in the time-tested administrative practice of the Farm Credit Administration in connection with the availability of loans to cooperatives from the banks for cooperatives, and such practice seems in harmony with the purposes of the statute." (Underscoring added.)

Farmers Cooperative Equity Union Shipping Association et al v. Public Service Commission

In the case of Farmers Co-op. Eq. Union Shipping Ass'n et al v. Public Service Commission (Wis.) 13 N.W. 2d 507, it appeared that Gordon P. Bush was engaged in the business of transporting farm products by motor vehicle as a contract carrier. He filed an application to amend his license as a contract carrier for the purpose of procuring authority to haul livestock for the Farmers Cooperative Equity Union Shipping Association to Madison and Milwaukee, Wisconsin. The Public Service Commission of the State denied the application filed by Bush. An appeal was then taken to the Circuit Court for Dane County, Wisconsin, which reversed the holding of the Public Service Commission and the Commission then appealed the case to the Supreme Court of Wisconsin. In affirming the judgment of the trial court that court said:

"The appellant makes the following statement in its brief: 'If, as appears to be the law under the decision in the United Parcel Case, supra (United Parcel Service v. Public Service Comm., 240 Wis. 603 [4 N.W. 2d 138, 143, 5 N.W. 2d 635] the only evidence which the commission should consider in arriving at its decision was the effect of said plaintiff's proposed operations upon congestion of the highways and the service of "common motor carriers" and of steam and electric railways, it is frankly conceded that the evidence before the trial court showed no such effects, and the finding of that court, as to the unreasonableness of the order, is supported by the clear preponderance of the evidence. In fact, there is no evidence to show that such proposed operations would unduly congest the highways. Neither does the evidence indicate that there is any "common motor carrier" or steam or electric railway which would be affected by such operations.'

"The appellant contends that the doctrine as announced in United Parcel Service v. Public Service Comm., supra, is erroneous.

"Appellant urges that the decision in that case be reconsidered and overruled. We have given the case further consideration and adhere to the decision therein. It rules the instant case in favor of respondents, particularly in view of the frank concession made in appellant's brief, above quoted.

"Upon the findings, all of which are amply sustained by the evidence, under the rule in United Parcel Service v. Public Service Comm., supra, that 'if there is a reasonable need apparent for the use of the service and if the common carrier is not unduly interfered with nor the public highways unduly burdened, a case of convenience and necessity exists,' the application of the plaintiff Bush to amend his contract motor carrier license should have been granted."

AGRICULTURAL COMMODITIES EXEMPTION

Cases relating to agricultural commodities exemption follow:

Lester C. Newton Trucking Co. v. United States,
(209 F. Supp. 600 (1962));
Ballentine Produce, Inc. v. United States,
(209 F. Supp. 679 (1962))

In the two cases cited, essentially the same basic issues were involved: Did frozen cooked vegetables constitute exempt agricultural commodities prior to the amendment of section 203(b)(6) of the Interstate Commerce Act by the 1958 Transportation Act.

In the Newton case a three-judge statutory court upheld the Interstate Commerce Commission ruling in MC-C-2522, Frozen Cooked Vegetables - Status. In that case the Commission ruled:

"* * * The term * * * prior to the amendment * * * did not include frozen French fried potatoes, frozen rissole potatoes, frozen potato puffs, frozen candied sweet potatoes, frozen whipped potatoes, frozen French fried onion rings, frozen pre-cooked pouch-packed vegetables in general and frozen pre-cooked pouch-packed vegetables with sauce in particular.

> "We further conclude and find that such term did not include any frozen vegetable which has been cooked in water or steam for a period longer than necessary for the inactivation of the enzymes (blanching); any frozen vegetable which has been cooked by immersion in oil or fat; or any vegetable product the ingredients of which include vegetable matter combined with other commodities."

Accordingly, the Court denied plaintiffs any "grandfather rights" with respect to such products.

In the Ballentine case, plaintiff had been hauling prior to May 1, 1958, under his certificate "frozen sweet potatoes," "frozen creme peas," "frozen candied yams," "frozen French fried potatoes," and "frozen sweet potato patties." He brought this action to enjoin enforcement of a certain order of the Interstate Commerce Commission served August 29, 1961, and allegedly implemented by Field Staff Information Bulletin No. 16, dated September 7, 1961, on the grounds that they "have operated to exclude the above listed products from the scope of the certificate."

The Court said, in summary:

> "From our consideration we have come to the conclusion that while in a broad sense we have jurisdiction of the subject matter of the action since it is a suit to enjoin enforcement of an order of the Commission, nevertheless, the particular order here involved is not a reviewable order, and that even if it were this Court could not at this juncture afford plaintiff any relief. It follows that the complaint should be dismissed but without prejudice to the right of plaintiff to seek relief in a direct proceeding before the Commission with the right to return to this Court should direct proceedings before the Commission turn out to be unsuccessful."

Accordingly, the complaint was dismissed.

Winter Garden Co., Inc. v. United States,
(211 F. Supp. 280 (1962))

In this case a three-judge statutory court held that frozen fruit and vegetable carriers whose common and for-hire operations were not separately conducted before Transportation Act of 1958 subjected them to Interstate Commerce Commission's regulation cannot be required by Commission to segregate common and for-hire haulage since such restriction

would deprive carriers of right under Act's "grandfather" clause to continue performing substantially same operations.

The court's ruling turned entirely on its interpretation of the "grandfather" clause in the Motor Carrier Act of 1935.

W. W. Hughes "Grandfather" Application, MC-105782,
(Sub. 4, embracing MC-105782, Sub. 3, W. W. Hughes, Extension - Frozen Foods (on further hearing, decided by Division 1))

The Interstate Commerce Commission has refused to go along with an examiner's interpretation that the exemption from economic regulation specified in Section 203(b)(6) of the Interstate Commerce Act does not include "deviled crabs, deviled clams, deviled lobsters, croquettes, codfish cakes and any other fish or shellfish products which contain non-exempt ingredients (other than those which properly may be considered as incidental to the cooking process such as seasoning and breading)."

It was the examiner's conclusion that those commodities were no longer fish or shellfish in that they had lost their identities as such and had become new and different products. He said it was clear that deviled products, croquettes and codfish cakes contained ingredients which were non-exempt and that in numerous decisions the Commission had stated that the exempt mixing of non-exempt commodities with exempt commodities destroyed the otherwise exempt status of the latter. It was the examiner's opinion that to the extent administrative ruling No. 110 [4] specified these commodities as exempt, it ought to be over-ruled. Administrative ruling No. 110 was issued in clarification of the changes Congress made in administrative ruling No. 107 [5] in partially adopting that ruling for inclusion in the Transportation Act of 1958.

Considering contentions regarding the examiner's interpretation, the division said it was of the opinion that the legislative intent was in harmony with the opinions shown in ruling No. 110.

Seafood or fish dinners involve the packaging of ordinary non-exempt commodities such as frozen French fried potatoes, French fried onions, cooked broccoli and others, in the same container with the chief course

---

4/ See appendix, page 72.
5/ See appendix, page 75.

consisting of fish or shell fish, the division said. As long as the fish dinners shared a common initial wrapper or container, and retain the characteristics of a fish or seafood dinner in the ordinary and usual sense, the exemption applied, and the transportation of such dinners was exempt from economic regulation, the division said.

The same items moving in separate packages in the same vehicle would come within the principal of Panther Oil and Grease Manufacturing Co., Contract Car. Application 84 MCC 393, and the exemption would no longer apply, the division said.

"We conclude that the fish and shell fish commodities listed as exempt from economic regulation in ruling No. 110 are correctly so designated," it said.

State of Missouri, ex rel. Smithco Transport Co. v.
Public Service Commission of the State of Missouri, et al.
(316 SW. 2d 6, Mo. 1958)

The essential point considered by the court in this case was whether the transportation of milk and dairy products for a cooperative from its Lebanon plant to the St. Louis market was within the exemptions from a certificate of convenience and necessity contained in the State statutes regulating public carriers. A general provision in the State's cooperative marketing act (section 274.300, RS Mo. 1949, V.A.M.S.) extends "any exemption whatever under any and all existing laws applying to agricultural products in the possession or under the control of the individual producer . . . similarly and completely" to such products delivered by farmers to a cooperative and under its possession and control. The court held that this provision had the effect of exempting trucks used in transporting milk for a farmers' cooperative from regulation by the Public Services Commission in view of the exemption accorded "farm or dairy products" in section 390.030, RS Mo. 149, V.A.M.S. (numbered 390.031 in V.A.M.S.).

Sanitary Milk Producers is a farmer cooperative having a membership of more than 5,000 in the States of Illinois and Missouri. It has a plant at Lebanon where it received milk in large quantities. Smithco Transportation Company, by contract with Sanitary Milk Producers, transported the milk in large tanks to St. Louis markets. The records showed that Smithco hauled exclusively for Sanitary; all tanks and equipment being kept at Sanitary's plant and ever ready for use at a moment's notice.

Smithco began hauling for Sanitary in 1955 and thereafter Smithco's trucks were frequently stopped on their way to market because they did

not have a State certificate of convenience and necessity. Smithco was threatened with prosecution. Finally, Smithco applied to the court for a writ of prohibition to enjoin the prosecution. This request was denied. Smithco then filed an application with the Public Service Commission for a permit to haul milk and other dairy products. The Commission denied this request, and the denial was sustained by the Circuit Court of Cole County. Smithco then appealed, contending that the Commission had no jurisdiction for the reason that its hauling of milk and dairy products was exempt by virtue of the statutes.

One of the protestants argued that Smithco was estopped from questioning the Commission's jurisdiction because of the fact that it had filed an application with the Commission. The Court of Appeals ruled, however, that the question of jurisdiction was a live issue in the case on appeal. It then proceeded to rule as is indicated above.

A motion for rehearing was also denied. In discussing this motion, the court rejected a contention that the association was not entitled to the exemption because it did not obtain all its milk from farmer members. The court pointed out that the Public Service Commission's ruling would have denied exemption even when all milk was so obtained. Furthermore, it said the record showed that the association did obtain all its milk from farmer members.

Finally the court pointed out that Smithco was not a common carrier; that if a cooperative contracts with a common carrier that would not relieve the common carrier from regulation, including rate fixing; but that if Smithco is considered a contract carrier, Section 390.061 Cum. Supp. RS Mo. 1957 is not deemed applicable because of the agricultural exemption previously noted.

ICC v. Wagner, (112 F. Supp. 109); ICC v. Allen E. Kroblin, Inc., (113 F. Supp. 599, 26 L.W. 2016)

In two recent decisions, it has been held that (1) "scoured wool" is an agricultural commodity, but garnetted wool and wool shoddy are not such commodities, and (2) New York dressed and eviscerated poultry is not a "manufactured product" but is an agricultural commodity, within the meaning of Section 203(b)(6) of the Interstate Commerce Commission Act. Under this section "agricultural commodities" may be transported by motor carriers without complying with Interstate Commerce Commission's certificate requirements. It is understood that Interstate Commerce Commission plans to appeal the latter decision.

Home Transfer and Storage Co. v. Interstate Commerce Commission (325 U. S. 884, 77 S. Ct. 129, 1 L. Ed. 2d 82)

The Supreme Court of the United States has affirmed the judgment of the statutory three-judge Court for the Western District of Washington (141 F. Supp. 599; see the following case) in the case cited above, holding in effect that frozen fruits and frozen vegetables are "agricultural commodities," and not "manufactured products" under Section 203(b) (6) of the ICC Act, Part II.

This decision by the Supreme Court would appear to settle the matter that under existing law motor trucks transporting frozen fruits and frozen vegetables in interstate commerce are not subject to economic regulation by the Federal Government. This is an important decision for many cooperatives, particularly frozen fruit and vegetable processors. The net effect will be an increase in the number of motor carriers available to haul these commodities with increased competition for the business no doubt reflected in lower hauling charges.

East Texas Motor Freight Lines, Inc. v. Frozen Food Express (76 S. Ct. 574); Frozen Food Express v. United States (76 S. Ct.569); Home Transfer & Storage Co. v. United States (141 F. Supp. 599)

The Supreme Court of the United States, on April 23, 1956, in East Texas Motor Freight Lines, Inc. v. Frozen Food Express, decided that fresh and frozen dressed poultry are agricultural commodities and not manufactured products thereof within the meaning of Section 203(b)(6) of the Interstate Commerce Act. Under this holding, motor vehicles are free to carry such commodities without procuring a certificate of public convenience and necessity from the Interstate Commerce Commission. The Court relied primarily on the legislative history which reveals the Congressional intention to include ginned cotton and pasteurized milk within the terms of the agricultural exemption. A dissenting opinion was filed by Mr. Justice Burton, with whom Mr. Justice Frankfurter, Mr. Justice Minton, and Mr. Justice Harlan joined.

On the same day, the Supreme Court held in Frozen Food Express v. United States that the determination by the Interstate Commerce Commission as to the scope of the agricultural exemption in the Interstate Commerce Act (49 U.S.C. 303(b)(6)) is an order subject to judicial review. The Court stated that the determination by the Commission that a commodity is or is not an exempt agricultural commodity has an immediate and practical impact on carriers who are transporting the commodities and on shippers as well. The Court held that the order is in substance a declaratory one which touches

vital interests of carriers and shippers alike and which sets the standard for shaping the manner in which an important segment of the trucking business will be done. Mr. Justice Harlan dissented on the ground that the order does not represent the final views of the Commission nor does it compel any carrier to do or refrain from doing any act.

On May 7, 1956, a statutory three-judge court, sitting at Bellingham, Washington, ruled that frozen fruits and frozen vegetables were exempt agricultural commodities and not manufactured products thereof. In reaching its decision the court relied heavily on the Supreme Court decision in the East Texas case referred to above, quoting, among other passages, the following:

> "At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been 'manufactured' within the meaning of section 203(b)(6)."

ICC v. Allen E. Kroblin, Inc. (75 S. Ct. 49)

On October 14, 1954, the Supreme Court declined to review the decision of the Eighth Circuit Court of Appeals (212 F. 2d 555), reported in the following summary, which held that New York dressed and eviscerated poultry is not a "manufactured product" but is an agricultural commodity within the meaning of 49 U.S.C. 303(b)(6) of the Interstate Commerce Commission Act. Accordingly, that decision now stands as final.

ICC v. Allen E. Kroblin, Inc. (113 F. Supp. 599, Aff. 212 F. 2d 555 Cert. Den. 348 U.S. 836)

The U. S. Court of Appeals, Eighth Circuit, affirmed a lower court decision on May 11, 1954, holding that New York dressed and eviscerated poultry is not a "manufactured product" but is an agricultural commodity within the meaning of 49 U.S.C. 303(b)(6) of the Interstate Commerce Commission Act.

The court referred to the exhaustive analysis of the question by the lower court (113 F. Supp. 599) and stated that it agreed fully with the views expressed. It supplemented this statement as follows:

> "If we were to undertake to add a word, it would be simply to emphasize the inescapable fact that, when Congress, in its

enactment of § 303(b), chose to change the language of the exemption here involved, as it had been originally drafted and recommended by Charles F. Eastman, then Federal Coordinator of Transportation and long a member of the Interstate Commerce Commission, from one for motor vehicles used 'exclusively in carrying * * * unprocessed agricultural products,' to one for motor vehicles used 'in carrying * * * agricultural commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation,' the result necessarily was to put processed agricultural commodities, not rising to the state of a manufactured product, in the same class with unprocessed agricultural commodities, for purposes of the exemption.

"Also, the statements made from the legislative floor, on which the amending action was predicated, that it was desired to make certain that pasteurized milk and ginned cotton would be left outside the certificating requirements of the Act, necessarily implied a recognition that, in the realities of agricultural marketing and distribution, certain processing incidents were inherent in or commercially attendant upon the existence of an outlet for the farmer, at a local or relatively local level, for various of his commodities, as a step in the channelizing of them into their natural-commodity market, and that the degree of freedom and flexibility allowed in the further transportation of such processed commodities, not reaching a manufactured state, was as much and as directly linked with the ability of the farmer to sell these commodities conveniently or to receive an advantageous price for them as in the case of unprocessed agricultural commodities. In other words, Congress obviously intended that, as a matter of relationship to the agricultural economy, the accomplishing of a distribution of processed agricultural commodities, not constituting manufactured products, should, within the necessities or practicalities of a marketing of them as such, be made to have no more transportational impact upon the farmer than the marketing of his unprocessed commodities.

"And within the realities of marketing and distributing poultry, the dressing thereof at the local market level would seem to be no more of a step in the disposing of it as poultry than would the pasteurizing of milk or the ginning of cotton in disposing of them as milk and cotton. Certainly, no less could hardly be done to make practicable the hauling of poultry as such, for natural food purposes, than a removing of the head and feathers thereof. Nor is it claimed here that there is any difference between New York dressed poultry and eviscerated poultry in relation to the question of manufactured products. The position of the Commission in its naked effect - though not thus baldly phrased - is simply that, as a matter of giving motor-carrier regulation as full a scope as

possible, a chicken should be regarded as being converted into a manufactured product whenever its head has been cut off. . . . Neither the language nor the spirit of the agricultural exemption warrants us in adopting any such artificial concept and curb in the realities of marketing agricultural commodities."

Interstate Commerce Commission v. Yeary Transfer Co., Inc.

In April 1952, the District Court for the Eastern District of Kentucky rendered an opinion in Interstate Commerce Commission v. Yeary Transfer Company, Inc., (presently unreported) upholding the position of the Department of Agriculture that redried tobacco is an agricultural commodity within the meaning of section 203(b)(6) which exempts interstate haulers of "agricultural commodities (not including manufactured products thereof)" from the certificate and permit requirements of the Interstate Commerce Act. The Interstate Commerce Commission had sought to enjoin the Yeary company from transporting mechanically redried tobacco in interstate commerce without appropriate operating authority issued by the Commission.

DEFINITION OF PRIVATE AND CONTRACT CARRIAGE

Cases relating to the definition of private and contract carriage follow:

Interstate Commerce Commission v. Shippers Cooperative, Inc.
(196 F. Supp. 8 (1961))

In this action by the Interstate Commerce Commission for injunctive relief against a motor carrier and another corporation under the Interstate Commerce Act, the U.S. District Court, held that (1) a nonprofit cooperative association of individual shippers who banded together to ship products collectively, leasing units of motor carrier equipment which the association operated under its complete control, expense and responsibility was a "contract carrier" requiring certification as such under the Interstate Commerce Act and was neither a "common carrier" nor a "private carrier" under the act; and (2) that the other corporation was participating in the illegal transportation. Accordingly, judgment was entered against both defendants.

The action was brought under 49 U.S.C.A. § 322(b)(Interstate Commerce Act) for injunctive relief against Shippers Cooperative, Inc., a corporation (hereinafter referred to as Shippers) and Pierson-Corn, Inc., a corporation (hereinafter referred to as Pierson-Corn) as defendants, for violations of §§ 303(c), 306(a) and 309(a) of the Interstate Commerce

Act. It was alleged that (1) Shippers was engaged in the transportation of property by motor vehicle, in interstate commerce, for compensation, over the public highways, was a motor carrier in interstate commerce, and as such was subject to the Interstate Commerce Act, and (2) Pierson-Corn was engaged in the business of a traffic consulting and advisory service, entered into contracts and agreements with Shippers to manage, supervise, and handle all matters in connection with its motor carrier activities, and was arranging for and participating in said transportation. No permit to engage in such business had been obtained from ICC.

The questions at issue were whether or not the acts performed by defendant, Shippers, were violative of the aforementioned sections of the statute, and as a corollary, whether or not the acts performed by Pierson-Corn constituted participation in any violation of the act. Inasmuch as the facts surrounding the shipment of goods in interstate commerce and the failure to obtain certification were uncontroverted, the dispute resolved itself into a controversy as to whether or not Shippers was a "common," "contract," or "private" carrier, and whether or not Shippers was subject to the certification provisions of the Interstate Commerce Act.

The Court found that Shippers was a non-profit corporation association of individual shippers who had banded together to ship their products collectively in order to save money on shipping costs. The shipper-members gave the property to be shipped to Shippers, but title to the property at all times remained in the individual shippers. Shippers had under lease 18 full units of motor equipment which it operated under its complete control, management, expense and responsibility, including the procuring of cargo and liability insurance. Property was transported in interstate commerce between the Georgia-South Carolina-Tennessee territory and points in California.

Individual shipper-members were assessed, pro rata, on a prepaid trip basis and each shipper contributed money to pay the transportation cost of his own merchandise on the basis of estimate, any necessary adjustments being made at the end of the trip.

Pierson-Corn, under a written contract with Shippers, performed a traffic and consultation service for Shippers, preparing records of the movement of members' merchandise, rendering a bookkeeping service and all other necessary office work on behalf of Shippers and its members. Pierson-Corn was paid 30 cents per one hundred pounds of members' merchandise, so obviously derived a profit from this activity.

The court first rejected an argument by Shippers that ICC had failed to exhaust its administrative remedy. It pointed out that questions of statutory interpretation are matters of law, and therefore the so-called "primary jurisdiction doctrine" is not applicable. Civil Aeronautics Board v. Modern Air Transport, 2 Cir., 1950, 179 F. 2d 622, 624 et seq, was cited.

The court proceeded to consider the basic legal question involved.

Under the Interstate Commerce Act a "common carrier" is a person who (1) transports persons or property in interstate commerce, (2) for compensation, and (3) holds itself out to the general public as a performer of such services. A "contract carrier" is a person, other than a common carrier, who (1) transports persons or property in interstate commerce, (2) for compensation, (3) under continuing contracts with a limited number of persons to provide transportation services to such persons. A "private carrier" is a person, not a contract or common carrier, who (1) transports property in interstate commerce, (2) in furtherance of a commercial enterprise, and (3) who is the owner, lessee or bailee of the property transported. The statutory definitions make each category mutually exclusive.

A comparison of the requirements of common carriage with the services performed by defendants in this case resulted in a finding that Shippers was not a "common carrier" within the meaning of the Interstate Commerce Act. However, the court decided that Shippers was a "contract carrier," and not a "private carrier," on analogy to the decision in Schenley Distillers Corp., et al. v. United States, D. C. Del. 1945, 61 F. Supp. 981, affirmed 1946, 326 U.S. 432, 66 S. Ct. 247, 90 L.Ed. 181.

Since Shippers was a corporation organized to fill the transportation needs of certain other business entities, these entities owned the property transported by Shippers; these entities reimbursed Shippers for the expense of transportation; and Shippers had long-term leases on motor vehicles which it operated under its sole control and management at its own expense, procuring insurance and maintaining the vehicles and obtaining drivers, the court could find no material distinction between the instant facts and those involved in the Schenley case.

Accordingly, the court held that ICC was entitled to an injunction against Shippers and also Pierson-Corn, since it obviously was participating in the illegal transportation.

Scott v. ICC (213 F. 2d 300)

This case may be of interest to cooperatives as bearing upon their transportation, marketing, and distribution activities. It points out that mere legal ownership of products at the time of transportation is not necessarily controlling in determining whether the hauler is acting as a contract carrier or private carrier under the Motor Carrier Act, 49 U.S.C. 303(a) (14, 15, 17), 306(a)(1), 309(a)(1), 322(b).

Scott, the defendant, was engaged in transporting petroleum products. He owned 18 trucks having capacity in excess of 135,000 gallons, employed 40 to 50 persons, but maintained no bulk storage tanks to store or

own any petroleum products except as delivered into his trucks at the refinery. He purchased petroleum products only for immediate and direct delivery to customers. His delivery charge was cost of the products plus an additional charge, which was less than the cost of transportation by common carriers, but he bore losses due to lack of quality, shortage, spoilage, and customer's failure to accept delivery. The court held he was a contract carrier, even though title to the products was vested in him at time of transportation.

After setting forth the pertinent sections of the law and outlining the essential elements of the complaint and answer, the court said:

> "The question presented for determination is one of classification under the Act, supra. It is whether Scott falls within the class of a contract carrier, within the meaning of section 203(a)(15), or that of a private carrier, within the meaning of section 203(a)(17). Where there are controverted issues of material fact in a case of this kind, the burden rests upon the Commission to show by a preponderance of the evidence that the character of the business of the carrier is such as to bring him within the class of a common carrier or a contract carrier. Taylor v. Interstate Commerce Commission, 9 Cir., 209 F. 2d 353, certiorari denied, 74 S. Ct. 677; Interstate Commerce Commission v. Tank Car Oil Corp., D.C., 60 F. Supp. 133, affirmed, 5 Cir., 151 F. 2d 834. But in this case the material facts are without dispute or controversy. And therefore the question of classification becomes one of law. Brooks Transport Co. v. United States, D.C., 93 F. Supp. 517, affirmed 340 U.S. 925, 71 S. Ct. 501, 95 L. Ed. 668.
>
> "The uncontroverted evidence adduced upon the trial tended to show these facts. Scott resides in Albuquerque, New Mexico. At one time he owned and operated an oil business in Albuquerque, and in connection therewith his facilities included a bulk plant and tanks for the storage of petroleum products. Several years before the institution of this action, he sold that business, and since that time it has been operated under different management and ownership. Sometime after the sale of such business, Scott obtained in due course a certificate of convenience and necessity authorizing him to engage in the transportation in intrastate commerce of bulk petroleum products in certain counties in New Mexico. Later, he sought and obtained authority in due form of law to operate as a common carrier of petroleum and petroleum products in trucks from points and places in New Mexico to other points and places in that state. And during the times involved here, he did transport such products in tank trucks between points of origin and points of destination within New Mexico. Scott was the successful bidder to sell and deliver to the Holloman Airbase in New Mexico, between December 1, 1951, and May, 1952, 625,000 gallons of fuel oil; and he performed the contract on his part by purchasing the product from a refinery in New Mexico, transporting it by tank trucks to

the airbase, and there delivering it. Scott entered into a written contract with Shell Oil Company, a distributor of gasoline and other petroleum products, in which he agreed to sell to such company at delivered prices large quantities of first structure gasoline, second structure gasoline, diesel fuel, and stove oil. The contract specified base delivered prices at twelve points in Arizona and two in New Mexico. The delivered prices included federal and state taxes, and the prices were to vary from time to time with the prices fixed by the Platt Oilgram Chart. By its terms, the contract provided that payment for all products delivered during each calendar month should be made on or before the fifteenth of the succeeding month. And it further provided that it should be in effect from February 1, 1952, to January 31, 1954, unless terminated in the meantime, and should continue after January 31, 1954, unless terminated by one of the parties giving to the other at least thirty days' notice. A few days after the contract between Scott and Shell Oil Company became effective, Scott entered into a contract with New Mexico Asphalt and Refinery Company in which he agreed to purchase from the refinery company, f. o. b. the loading racks of its refinery in Artesia, New Mexico, large quantities of first structure gasoline, second structure gasoline, diesel oil, and stove oil. The contract provided that the prices to be paid for such products should be the usual and customary prices as established and quoted by Platt's Oilgram Service. It further provided that all products purchased during any calendar month should be paid for on or before the fifteenth of the following month, and that if payment was made within ten days after purchase a discount of one per cent should be allowed. And it further provided that it should be in force and effect until March 31, 1954, unless terminated sooner in the manner therein specified. Acting pursuant to these contractual arrangements, Scott obtains gasoline and other petroleum products from the refinery company at its refinery in New Mexico, transports such products by tank trucks operated on the highways to points in Arizona and there delivers them to Shell Oil Company. In each instance, there is a specific order from the Shell Oil Company for the products before they are loaded. The order is sent to Scott prior to the obtaining of the load. After receipt of an order from Shell Oil Company, an order to the refinery is prepared in the offices of Scott at Artesia. This order is sent with the truck to the refinery and the truck is loaded accordingly. After being loaded, the tank is sealed with a refinery seal. The refinery prepares an invoice of the load and charges it to Scott. The destination in Arizona of each load is known to the refinery company. Scott then prepares his invoice to Shell Oil Company. Taxes are paid on the refinery invoice. Delivery of the products is made from the trucks directly to the storage tanks or station tanks of Shell Oil Company. The products are purchased at the refinery at the public posted prices, f.o.b. the refinery; and they are delivered at the fixed delivered prices.

Scott has eight or nine other customers, some in Arizona and some in Colorado, for whom he purchases and to whom he sells petroleum products; and the accounts of such customers are handled substantially in the same general manner as that of the Shell Oil Company. Scott maintains at Artesia an office where his records are kept and a garage for the storage, repair, and maintenance of his trucks. The office and garage are in the same building. He owns and operates approximately 18 trucks and trailer tanks for the transportation of gasoline and other petroleum products, and such trucks have a combined carrying capacity in excess of 135,000 gallons. He employs approximately 40 to 50 persons. About 35 of such persons are truck drivers, 6 are machinists or repair men in the garage, 1 is a loader who drives the trucks from the garage to the refinery and checks the load, 2 are dispatchers, and 2 are office helpers. He does not maintain any fixed storage tanks and does not own or use in any manner bulk storage tanks. He does not store or own any petroleum products except as they are delivered into his trucks at the refinery. He does not purchase gasoline or other petroleum products except for immediate transportation and delivery to customers; and he sells nothing that he does not deliver directly. His delivered charge is the cost of the products at the refinery plus an additional charge which is comparable to but less than the cost of transportation by a common carrier. He bears the loss from the failure of the products to meet quality requirements, loss from shortages, loss from spoilage, and loss from the failure of the customer to accept delivery. But he does not perform any service from which he could gain a profit except the service of transportation. When these uncontroverted facts and circumstances are considered in their entirety, we share with the trial court the view that the primary business of Scott is the transportation in interstate commerce of gasoline and other petroleum products under individual contracts or agreements for compensation and that other phases or features of his business are incidental and secondary to that of such transportation.

"In challenging the judgment, Scott places emphasis upon the point that he purchases the gasoline and other products from the refinery company in Artesia; that title to such products thereupon vests in him; that it remains in him until the products are delivered to Shell Oil Company or other purchasers from him; and that therefore he transports his own property. It is argued in support of the point that Scott bears all loss of gasoline or other products by way of leakage or otherwise occurring before delivery is made to his customer. But Scott's legal ownership of the products at the time of their transportation is not necessarily controlling in determining whether he acts as a contract carrier or a private carrier. His acquisition of the legal title to the products at the time they are received from the refinery and his parting with such title at the time of the delivery of the products does not necessarily as a rule of thumb entitle him to be classified as a private carrier. Interstate Commerce Commission v. Tank Car Oil Corp., 5 Cir., 151 F. 2d 834.

"Scott's primary business being that of transporting by motor vehicle in interstate commerce gasoline and other petroleum products under individual contracts or agreements for compensation, he falls within the class of a contract carrier, even though title to such products is vested in him at the time of their transportation. A. W. Stickle & Co. v. Interstate Commerce Commission, 10 Cir., 128 F. 2d 155, certiorari denied 317 U.S. 650, 63 S. Ct. 46, 87 L. Ed. 523."

MOTORTRUCK LEASING

Cases relating to motortruck leasing follow:

ICC Docket No. MC-C-3361, United Retail Merchants Stores, Inc., et al. (decided April 27, 1962, by Division 1)

Lack of control is again emphasized as the prime factor in finding a leasing arrangement between United Retail Merchants Stores, Inc., of Washington State (hereafter called "URM") and six exempt commodity haulers as being in violation of the Interstate Commerce Act since the arrangement did not constitute valid private carriage.

URM, a federation of independent grocers, utilized the services of the six "exempt" carriers under a so-called "master lease," allowing them to lease the vehicles, when they were needed, on a trip basis. This eliminated the necessity of executing a separate lease for each trip.

When URM required a vehicle for the transportation of a shipment from California to Washington, the "lessor" arranged to haul a load of exempt commodities from Washington to California , where he then reloaded and returned to Spokane on behalf of URM. The "lease" was in effect only from the time the carrier picked up URM's shipment in California and delivered it to Washington.

The Commission viewed the operation as outside the law because the lessor did not fully control, direct and dominate the performance of the service.

It ruled that "there was obviously no selection of the driver by the shipper as an employee . . . no negotiation for the amount of the driver's wages . . . (URM) does not maintain a file of health certificates required for drivers . . . has no control over the southbound movement (hence) no way for it to determine in advance the driver's availability under the hours of service regulations for the northbound trip . . ."

Noting that the owner-operators acted "in the capacity of independent contractors, who from time to time agree to do a given piece of work" and that "the individual owners clearly have carrier control of the responsibility for their vehicles at all times," the Commission concluded "that the equipment owners serving URM pursuant to the leasing or rental agreements mentioned are engaged in operations in interstate or foreign commerce as for-hire motor carriers without appropriate authority; and that the shipper respondent is aiding and abetting in the continuance of unlawful operations, in interstate or foreign commerce."

A cease and desist order was entered.

United States of America, et al., v. Henry E. Drum, et al.
(368 U.S. 370 Decided January 15, 1962)

In an investigation initiated by it, the Interstate Commerce Commission held that the driver-owners, appellees, who leased their motor vehicles and hired their services as drivers to the Oklahoma Furniture Manufacturing Company (hereinafter referred to as Oklahoma) were contract carriers within 49 U.S.C. § 303(a)(15) and subject to the Motor Carriers Act's permit requirements. (49 U.S.C. § 309(a)(1)). (79 M.C.C. 403). The Commission entered an order requiring the driver-owners to cease and desist from their operations unless and until they should receive appropriate authority from the Commission.

The driver-owners then brought action in the U. S. District Court for the Western District of Oklahoma to set aside the cease and desist order. The District Court set aside the ICC's order on the ground that Oklahoma was engaged in private carriage under 49 U.S.C. 303(a)(17), rather than contract carriage (193 F. Supp. 275).

The Supreme Court of the United States reversed the decision of the District Court and held that the Commission was not limited, in its determination of whether the use involved private or contract carriage, to the test of whether any person other than Oklahoma had any right to control, direct, and dominate the transportation, but could find the driver-owners to be contract carriers if they were "in substance" engaged in the transportation of property for hire.

Having discovered that some of its drivers were misusing its credit cards, and being of the opinion that its equipment was too often involved in accidents, and too often in need of repairs and maintenance,

Oklahoma entered into an arrangement with its long-haul drivers. The Commission's ruling resulted from this arrangement under which the drivers became the owners of the trailer-truck tractors and leased the tractors to Oklahoma. Oklahoma hired the tractors and the driver-owners on a mileage basis, without any guaranty of minimum mileage. Oklahoma had the sole right to control the use of the tractors through the drivers. It paid for public liability and property damage insurance, conducted safety inspections, closely directed all details of loading and delivery routes, instructed drivers regarding steps to be taken in emergencies, administered physical examinations, supervised the preparation of reports required by the Commission, paid social security taxes, withheld income taxes, and provided workmen's compensation. The drivers, as owners of the tractors, bore operating maintenance costs and the risk of depreciation and damage, but were covered by a collective bargaining agreement, which gave them seniority rights, death benefits, immunity for discharge except for cause, military service protection and vacation pay. The owner-drivers were required to maintain their trucks in good running condition at all times and they were required to pay for all repairs.

The decision of the Supreme Court observed that the Motor Carrier Act of 1935 subjected many aspects of interstate carriage--including entry of persons into the business of for-hire motor transportation and the oversight of motor carrier rates--to administrative controls. Congress took cognizance of a shipper's interest in furnishing his own transportation, and limited the application of the licensing requirements to those persons who provide "transportation . . . for compensation" or, under a 1957 amendment, "for hire transportation." Therefore, the ICC has to determine whether a particular arrangement gives use to that "for-hire" carriage, or whether it is, in fact private carriage. This case involved such determination.

The Supreme Court noted that the primary objective of the scheme of economic regulation is to assure that shippers generally will be provided a healthy system of motor carriage to which they may resort to get their goods to market. This is the goal, stated the court, not only of Commission surveillance of licensed motor carriers as to the rates and services, but also of the requirement that the persons from whom shippers would purchase a transportation service designed to meet the shippers' distinctive needs first must secure Commission approval. The statutory requirements that a certificate or permit be issued before any new for-hire carriage may be undertaken bespeaks congressional concern over diversions of traffic which may harm existing carriers upon whom the majority of shippers must depend for access to market. Thus, according to the Court, referring to "for compensation" or "for hire" transportation, the definitions of the Act, must, if they are to serve their purpose, impose practical limitations upon unregulated competition in a regulated industry. They are to be interpreted in a manner which transcends the merely formal. From the outset, the opinion states, the Commission has correctly interpreted the definitions as importing

that a purported private carrier who hires the instrumentalities of transportation from another must--if he is not to utilize a licensed carrier--assume in significant measure the characteristic burdens of the transportation business.

The court considered that because of its desire to rid itself of its existing transportation operation Oklahoma had entered into the arrangement detailed above. The court observed that Oklahoma's operation under the arrangement possessed a number of hallmarks of a genuine lease of equipment and a genuine employment arrangement. However, Oklahoma was able to spare itself--and pass over to the owner-operators--certain characteristic burdens of the transportation business, such as the large capital investment in the tractors, the risk of their premature depreciation or catastrophic loss, the risk of a rise in variable costs such as fuel, and repairs and maintenance of the tractors in good operating condition.

The court concluded and agreed with the ruling of the Commission that under the particular facts of Oklahoma's arrangement with the owner-drivers. Oklahoma had sufficiently emancipated itself from the burdens of transportation so that it would be inconsistent with the statutory scheme to permit it to secure transportation service from these unlicensed owner-operators.

The district court had reversed the Commission's conclusion relative to shipper control and this point was not challenged by the Commission on this appeal. The Supreme Court said that although "control" had been the focus of the Commission's efforts to delineate verbally the permissible area of nonlicensed leases of transportation equipment, a finding of shipper control does not require a resolution of the ultimate issue in the shipper's favor. The Commission's initial technique was to assess the lessee-shippers assumption of the burdens of transportation in terms of the degree to which he undertook to "control" or "dominate" it, but the Commission reports have taken note of various factors which clearly transcend any narrow concept of physical direction of the details of the operation. It has always been apparent that the vesting of such physical "control" in the shipper would not in itself suffice to render the transportation private carriage.

The Supreme Court further stated that the Commission has begun to move away from "control" as the verbal embodiment of its manifold inquiry and thus accord explicit recognition to a premise which has long been implicit in its decisions: "That some indicia of private carriage may be assumed and detailed surveillance of operations undertaken without the shipper's having significantly shouldered the burdens of transportation."

The Court concluded that the test of substance with which the Commission has supplemented its "control" inquiry was a proper exercise of administrative discretion and that it was evident that the Commission refused to allow Oklahoma the status of a private carrier because of its belief

that financial risks are a significant burden of transportation and its belief that such risks had been shifted by Oklahoma to the owner-operators to an extent which rendered the sanctioning of the operation as a private carriage a departure from the statutory design.

The opinion states that such conclusions were well within the range of the responsibility Congress assigned to the Commission. Further, that if the basis for the reversal of the district court was to confine the Commission to the "control" test, it was in error, and, if, on the other hand the district court meant to substitute its judgment for the Commission's on the question of substance, it indulged in an unwarranted incursion into the administrative domain.

Interstate Commerce Commission Docket No. MC-C-3155

When vehicles are not assigned to lessee's exclusive use and possession, but are permitted to be used by the lessor for other activities, for-hire carriage may result. This was the primary point used by the Interstate Commerce Commission in finding a lease arrangement between G & W Transfer, Hickory, North Carolina, and Calvine Mills, Inc. of North Bergen, New Jersey, to be for-hire carriage. In its opinion, the Commission says:

"By the terms of the agreement between respondents in effect at the time of hearing, Calvine is given exclusive use and possession of the leased equipment and utilizes drivers employed by it. This arrangement undertakes to present the form of an equipment rental operation which does not supply drivers. In fact, however, the vehicles involved were stationed at G & W's garage and were subject to utilization, often with drivers actually on Calvine's payroll, for movements on behalf of other shippers. The conclusion is inescapable that regardless of the terms of the lease, the vehicles involved were not assigned to Calvine's exclusive use and possession, but reverted to G & W's control for use in other activities, and that in many instances the drivers maintained an economic relationship to this purported lessor by which they are dependent upon it for employment. We are convinced here that, even if all the usual responsibilities of an employer with respect to drivers were conceded to be borne by Calvine, the real service offered by G & W, Calvine and other shippers is, in substance, for-hire motor carriage subject to regulation under Part II of the Act."

Oklahoma Furniture Mfg. Co., MC-C-2143

The Interstate Commerce Commission has decided that transportation services performed for a lessee of equipment by owner-operators of such

equipment constitutes contract carriage for which a certificate is needed. Commissioner Webb, dissenting, called this decision "sweeping" enough to require certification of all truck-owner operators. It is understood that the case is being appealed.

The lessee and its drivers insisted, of course, that their relationship was one of employment. The Commission, however, found only three significant factors distinguishing the arrangement from the ordinary contract carriage situation: (1) separate tractor-leasing and driver-employment contracts were used; (2) the lessee absorbed the cost of liability and cargo insurance; and (3) the lessee exercised some employee controls over the owner-operators.

The Commission did not consider this sufficient. It reasoned that the two most significant instrumentalities of motor carriage - the equipment and the driver - were both furnished by the owner-operator. Even if the driver could be considered a bona fide employee with respect to his driver duties, he does not lose his independent-contractor's status with respect to his equipment. The Commission noted that "there is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists." Moreover, it said that, as found in R.N.G. Commercial Auto Renters, Inc., 73 M.C.C. 665, many of the employee controls existing here were merely "natural concomitants of any contract-carrier operation devoted exclusively to the needs of a particular shipper." As for the shipper-lessee's assumption of insurance costs, this was "little more or less than a rate adjustment."

Commissioner Webb, in his dissent, noted that interspersed throughout the majority report are references to 15 indicia of private carriage, not one of which is present in the typical contract carriage operation. The manufacturer (1) pays the owner-operators for driving; (2) withholds social security and federal income taxes; (3) provides workmen's compensation benefits; (4) retains the right to hire and fire; (5) bargains with the owner-operators' labor union; (6) provides the trailer; (7) has exclusive control over all transportation equipment; (8) maintains such equipment; (9) assumes cargo-damage responsibility; (10) loads and dispatches the shipment; (11) issues detailed routing instructions; (12) issues no bills of lading; (13) keeps drivers' logs and medical certificates; (14) pays for liability and cargo insurance; and (15) expressly reserves the exclusive right to control and direct transportation service.

He said that the sweeping pronouncements of the majority report mean plainly and simply that, unless he holds a certificate, no owner-operator can be employed by a common carrier, a contract carrier, or by a private carrier if he rents and drives his own equipment.

Interstate Commerce Commission -- Ex Parte No. MC-43

On November 30, 1953, the Interstate Commerce Commission entered three separate orders in Ex Parte No. MC-43, Lease and Interchange of Vehicles by Motor Carriers, which (1) modified the rule pertaining to the utilization by authorized carriers under leases or other arrangements, of equipment which had previously transported that group of commodities referred to generally as agricultural commodities whose transportation is partially exempt under the Interstate Commerce Act, and of equipment which is controlled and operated by farm cooperative associations, (2) further deferred the effective date of the two provisions of the rules prescribing the duration of leases of equipment and the manner in which compensation for leased equipment should be computed, and (3) reopened the proceeding for further hearing solely with respect to these two deferred provisions.

To further explain the intent and scope of the three orders, the Commission issued a press release on December 7, 1953, reading in part as follows:

> "With respect to equipment now partially exempt from regulation, the Commission, having in mind possible adverse effects the so-called 30-day and division of revenue provisions of the leasing rules would have upon farmers and farm cooperatives and upon the orderly movement of agricultural commodities to market, and consonant with the public interest, has modified the rules to allow maximum freedom of movement of such equipment on return from market destinations by excepting such equipment from both the 30-day and the division of revenue provisions of the rules, subject only to certain safeguards designed to protect the public and regulated carriers against abuse of the exception. This modification also simplifies the previous exceptions to the 30-day provision by providing one rule having uniform application to all equipment now partially exempted from regulation under the agricultural exemptions prescribed in the act. This modification in favor of agricultural transporters is intended as a permanent exception to the 30-day provision.
>
> "In addition, in view of the fact that the record in this proceeding is almost 5 years old, and in consideration of the extreme controversy engendered by the 30-day and compensation provisions, as indicated by the pendency of restrictive legislation before the Congress, the Commission deemed it appropriate to reexamine these two provisions and their effect on the operations of motor carriers, other than those transporting agricultural commodities. In order to have the record reflect more recent experience of the industry, the

effective date of these two provisions and, therefore, their applicability to regulated motor carriers, has been further postponed for another 12 months beyond March 1, 1954, to March 1, 1955, and the proceeding has been reopened for further hearing solely with respect to these two provisions. Such further hearing will not affect the permanent exception to the 30-day provision discussed in the preceding paragraph."

COOPERATIVE SHIPPING ASSOCIATIONS

Cases relating to cooperative shipping associations follow:

FF-C-7 Atlanta Shippers Association, Inc., Atlanta, Ga.
ICC, Div. 1, May 16, 1962

The Interstate Commerce Commission has found that shipper associations which take the form of corporations do not qualify for exemption from economic regulation as bona fide shippers' associations under section 402(c)(1) of Part IV of the ICC Act, which concerns regulation of freight forwarders.

The Division said that "The essential predicate of any bona fide shippers' association is that the association, at all times and with respect to each less-than-truckload or less-than-carload shipment moving in its service, must act as agent for its lawful shipper-members in reducing the 'transportation costs to the members through savings effected in cooperation with other members who likewise employ the association as transportation agent.' In other words, the avowed purpose, and the practical result, of an association's combining freight of its members must not be to obtain any benefits for the shipper other than the lowering of the transportation costs of the members through savings effected in cooperation with other members 'who likewise employ the association agent.'

"As a consequence, in order to avoid being characterized as a 'for compensation' or for-hire freight forwarder, a group or association of shippers must affirmatively stand aloof to the lure of a public calling and may not lawfully handle nonmembers' shipments which have no connection with, nor fundamental relation to, the business of its shipper-members. Whenever the freight consolidating and distributing service performed in connection with non-member shipments by the group or association of shippers is supplied with a purpose to profit from the effort itself as distinguished from a purpose merely to obtain for its members the benefits of carload, truckload, or other volume rates, then the operation is, in substance, a common-carrier freight forwarding service for compensation."

The division said that in addition to the agency relationship, more was required of a shippers' association if it were to fall within the considered exclusion.

After discussing the additional requirements, the division said that, in short, the operations conducted in the name of a purported shipper association, in order to come within the statutory exclusion, must be conducted by the association which at all times acted as agent for its shipper members who, as its principals, "(1) possess the exclusive right and ability to control the operation and (2) assume, both jointly and severally, the essential risks entailed in conducting such operations."

Dwelling on the corporate issue, the division said that the basic distinction between an association and a corporation was that the latter was a distinct legal entity or person deriving its existence from a franchise granted by the governing body, while an association, a creature of contract, was its members and had no existence apart from the individuals comprising it.

Answering the question of whether or not a corporation lawfully might act as a bona fide shippers' association within the statutory framework provided by Congress in section 402(c), the division said "we think it may not."

". . . We think it is apparent" it said, "that the corporate form of organization is basically inconsistent with, and inimical to, the kind of agency relationship, with its attendant mutuality of obligation, which must be preserved between the group or association and the member shippers."

The division said Congress intentionally avoided use of the word "corporations" in denominating those to whom the exclusionary provisions of section 402(c) would apply.

"In our treatment of this corporate issue," the division said, "the decisions in the Pacific Coast Wholesalers' case have not been overlooked.

"Although that shippers' organization was incorporated, we do not believe that those decisions have any pertinency to the issue now under consideration, for the question of whether a corporation could qualify under the exclusionary provisions of section 402(c)(1) was neither raised, nor considered in those proceedings. Accordingly, the mere circumstance that the Pacific Cost Wholesalers' Association was a corporation aids neither side in the disposition of this controversy. We realize, of course, that there are numerous so-called shippers' associations other than Pacific Coast Wholesalers now operating under the corporate form and because of our present conclusions we expect them, within a reasonable time, to take any action necessary to assume the characteristics of a bona fide shippers' association as described herein. Failure to do so will expose them to the institution of any action necessary to assure such compliance."

United States v. Pacific Coast Wholesalers Association

The Pacific Coast Wholesalers' Association is a cooperative corporation which was organized by a small group of dealers in automotive parts at Los Angeles, California. It was organized "to provide a means of assembling, consolidating, forwarding and distributing freight for its members, on a nonprofit basis, and for the purpose of securing the benefits of carload, truckload, or other volume rates . . . . No freight is handled for nonmembers . . . ."

Part IV of the Interstate Commerce Act deals with freight forwarders and gives the Interstate Commerce Commission jurisdiction over freight forwarders that are not exempt from the provisions of the Act. Section 402(c) of Part IV of the Act (49 U.S.C. 1002(c)) reads as follows:

> "The provisions of this chapter shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, or (2) to the operations of a warehouseman or other shippers' agent, in consolidating or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed." (Underscoring added.)

The Pacific Coast Wholesalers' Association, believing that it was exempt under the provisions of the statutory provision just quoted, did not file an application with the Interstate Commerce Commission for a permit to operate as a forwarder of freight, and the Interstate Commerce Commission in a report dated November 26, 1945, held that the association was exempt. Later, upon the petition of the Freight Forwarders Institute, as intervener, the proceedings were reopened, and the Commission in brief held that the Pacific Wholesalers' Association was not exempt with respect to less-than-carload lots on which the consignors paid the freight to their destination in California. This conclusion seems to have been based upon the assumption that the association was holding itself out to the general public as a forwarder of freight, and also on the theory that it was not operating on a nonprofit basis with respect to less-than-carload lot shipments that were consigned F.O.B. destination.

The association then instituted proceedings against the United States (81 F. Supp. 991), and the Interstate Commerce Commission and the Freight Forwarders Institute then intervened.

The shipments in question all involved transactions in which shipments originated in the East and were consigned to the association in Chicago upon the instructions of its members. In Chicago, the shipments of the

members were "consolidated in carloads and forwarded to destinations or break-bulk points and distributed to members of the association or to their customers in the destination areas. . . ."

Without going into details with respect to how the various shipments in question were handled, it appears that they were handled in substantially the following manner: Consignors of freight of less-than-carload or truckload shipments paid the freight on the shipments to their destinations in Los Angeles. These less-than-carload shipments, when they were received in Chicago, were consolidated by the association into carload lots. By consolidating the less-than-carload lots or less-than-truckload lots into carloads or truckloads, savings in freight were effected, and these savings were collected by the association and paid by the association to its members. In the report of the Interstate Commerce Commission dated December 18, 1947, it is said:

> "Simple logic would dictate the conclusion that in handling shipments on which freight is borne by nonmember-consignors, the association is operating for hire and therefore for profit."

In the same report, the Interstate Commerce Commission also said:

> "These differences or 'savings' are paid to the member consignees, regardless of the fact that the charges were collected from the consignors."

The Court, in holding that the association was operating on a nonprofit basis and that it did not hold itself out to the general public as a forwarder of freight said:

> "That the association at all times acts solely at the request, and under the direction, and for the account and benefit, of the member-purchaser. As between member and association, then, the former always acts as principal, the latter as agent.
>
> "The existence of this agency is implicit in the findings of the Commission. The report states that 'All of the shipments involved are consigned * * * upon instructions of the members' of the association. Admittedly, the facilities of the association are not available to a non-member shipper otherwise than through arrangements made by a member. And the necessary arrangements are that the member as principal instruct the association as agent to handle the shipment. Moreover, both the purpose and the result of the transaction is not to benefit the shipper, but to reduce transportation costs to the member through savings effected in cooperation with other members who likewise employ the association as transportation agent.
>
> "When this principal-agent relationship between member-purchaser

> and the association is borne in mind it is clear that there is no profit to the association from the activities described in the Commission's report, 49 U.S.C.A. § 1002(c); and it is equally clear that the association, as agent for the members, does not 'hold itself out to the general public to * * * provide transportation of property * * * for compensation.' 49 U.S.C.A. § 1002(a) (5)." (Underscoring added.)

As pointed out above, it is clear that the association acted only at the request of its own members, and hence the association was not holding itself out to the public as a general forwarder of freight. Likewise, because the savings in transportation costs that the association was able to obtain by consolidating the less-than-carload or truckload lots of its members into carloads or truckloads were reflected back to its members, the association functioned on a nonprofit basis. It was the fact that it was in the contemplation of the members of the association and of the association itself that the savings which the association was thus able to effect would be reflected back to its members which resulted in the association's operating on a nonprofit basis. Indeed, this is the reason the association was formed.

The particular mechanics by which the savings were effected through cooperative action are not material in determining the nonprofit character of an organization. The members of the association wanted to reduce the transportation costs on automotive parts which they purchased in the East. The association was a means of accomplishing this result. It appears clear that the savings effected were distributed on a patronage basis.

In United States v. Pacific Coast Wholesalers' Association, 18 LW 4152, decided by the United States Supreme Court on February 6, 1950, the decision of the trial court was affirmed.

This case seems to establish that any business may be operated cooperatively on a nonprofit basis by making prior appropriate contracts to bring about this result; and, of course, any business that functions on a nonprofit basis has no income taxes to pay.

CIVIL AERONAUTICS ACT REQUIREMENTS

A case relating to civil aeronautics act requirements follows:

Consolidated Flower Shipments, Inc. - Bay Area v. Civil Aeronautics Board, (C.A. 9th, 213 F. 2d 814)

In this case, decided June 9, 1954 (see 22 L.W. 2617), the Ninth Court of Appeals held this flower growers' shipping cooperative subject to

the Civil Aeronautics Act's certification requirement for air freight forwarders and to the Civil Aeronautics Board's freight forwarder regulations.

The court pointed out that the Civil Aeronautics Act contained no exception similar to that found in the Interstate Commerce Act. Nor would the court go along with the cooperative's argument that it was not a "public" carrier, since the evidence showed that its services seemed to be open to all who would join. Finally, the court would not ignore the separate legal entity of the cooperative and regard it merely as the alter ego of the flower producers members; a viewpoint advanced on behalf of the cooperative.

LABOR RELATIONS

Cases relating to labor relations follow:

Town & Country Manufacturing Company, Inc., et al. and General Drivers, Chauffeurs and Helpers Local Union No. 886, (136 NLRB No. 111)

In this case the National Labor Relations Board found:

> 1. ". . . That the Respondent violated Section 8(a)(1) of the Act by threatening employees with discontinuance of operations or with discharge or other reprisals because of their activities on behalf of the Union; by promising employees wage increases and other benefits if they voted against the Union; by interrogating employees concerning the identity of supporters of the Union; and, by requiring employees to sign individual work agreements with Respondent under threats of withholding work."
>
> 2. ". . . That the Respondent seized upon a pretext when it assigned its ICC difficulties as the reason for subcontracting and discharging its drivers, and that its true motive for doing so was because the men had joined and selected the Union as their bargaining representative. Accordingly, we find that the Respondent discriminatorily discharged its drivers in violation of Section 8(a)(3) when it terminated their employment on November 2, 1959."
>
> 3. ". . . That the termination of Respondent's hauling operations was motivated by its opposition to the Union, we find that the Respondent thereby sought to disparage and undermine the Union as majority bargaining agent for its drivers and that the termination constituted a violation of Section 8(a)(5) for this reason."

It ordered the employer to reinstate its private truck operation and reinstate the drivers it fired.

Stephens v. Cotton Producers Association (117 F. Supp. 517)

The Federal District Court held, in Stephens, et al., v. Cotton Producers Ass'n., et al., 117 F. Supp. 517, that Congress intended the exemption from the Fair Labor Standards Act for those employed in agriculture to apply not only where the farmer employed his own laborers to do work but also to cases where he utilized an association to do the work.

This was an action to recover unpaid minimum wages and overtime payment pursuant to the Fair Labor Standards Act. Although the Cotton Producers Association was joined as party defendant, the court decided at the conclusion of the testimony that only the Farmers Mutual Exchange of Calhoun, Inc., was involved and Cotton Producers Association was stricken.

Plaintiff was an employee of Farmers Mutual engaged in catching chickens on the farms of growers, loading them on defendant's trucks and trucking them to local processing plants at Holly Springs, Canton, and Lawrenceville. The court held, first, that the services of the plaintiff in connection with the catching of chickens, putting them in coops, and loading them upon the trucks of the defendant on the farms of the growers did not bring such employees under the Fair Labor Standards Act. Excerpts from the court's opinion on this point follow:

> "The Act provides in part that its provisions shall not apply 'with respect to * * * any employee employed in agriculture', 29 United States Code Annotated, § 213(a) (6). It also provides that the term 'agriculture' includes farming in all its branches and among other things, includes the raising of poultry 'and any practices performed by a farmer or on a farm as an incident to * * * such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.' See 29 United States Code Annotated, § 203(f). By the wording of the statute itself it is not required that certain activities to be agricultural must be performed by a farmer, but it is only necessary that the acts in question be 'performed * * * on a farm as an incident to * * * such farming operations'. It seems clear that when a farmer has raised chickens and wishes to market them, catching of the chickens, putting them in coops and loading them on a truck for transportation to market, is an incident to such farming operations. Although the above exemption is contained in a remedial statute and should be construed strictly, it should nevertheless be given due effect if Congress so intended. Compare Damutz v. Wm. Pinchbeck, Inc., 2 Cir., 158 F. 2d 882(3), 170 A.L.R. 1246. The mere fact that the farmer, instead of employing his own help to catch and load chickens, procured Farmers Mutual

through its employees to do the same, should not defeat the exemption.

* * * * *

". . . . This ruling is in accord with interpretations placed upon the Act by the Administrator in his release No. M-13 on March 28, 1947, which states in part: 'The handling and cooping of live poultry for market are also within the scope of this exemption.' Bearing in mind the consistent and historic policy of Congress to assist the farmers, I cannot conclude that Congress intended to give the farmer this exemption only if he employed his own laborers to catch his chickens, and to deprive him of his exemption merely because he employed an association, such as Farmers Mutual Exchange, to do so. There is no such limitation in the statute."

The court then ruled that one of the plaintiffs, Johnston, was engaged in the production of goods for commerce while driving the truck. The court said that, although under some circumstances Johnston might be said to be "engaged in commerce," it was not necessary to decide whether he was engaged in interstate commerce, because:

"This Court is ruling that the employee of a retail feed store having an agreement with a farmer to haul the farmer's chickens from the farm to a processing plant to which the farmer has sold the chickens, there to be cleaned, dressed and shipped in commerce is, while engaged in driving such truck, engaged in the production of goods for Commerce."

The court also held that plaintiff Johnston, in transporting the chickens from the farms to the processing plants, was an "individual employed within the area of production," and was so engaged in trips to Holly Springs, but not so engaged in two trips to Canton and on one trip to Lawrenceville. An excerpt from the opinion on this issue follows:

"Was plaintiff Johnston, in transporting the chickens from the farms to the processing plants 'any individual employed within the area of production'? Pursuant to this statute, the Administrator by regulation defined 'area of production'. In Part 536 of his Rules and Regulations and in Section 536.2 (see 29 U.S. C.A. App.) the Administrator provided that 'an individual shall be regarded as employed in the "area of production" * * * in handling, packing, storing * * * in their raw or natural state * * * agricultural or horticultural commodities for market * * * if the establishment where he is employed is located in the open country or in a rural community', and 95% of the commodities on which such operations are performed by the establishment come

from normal rural sources of supply located not more than fifty airline miles (in case of poultry processing plants) from the establishment. The terms 'open country' or 'rural community', it was stated, shall not include any city, town, or urban place of 2500 or greater population. It further provided that the commodity should be considered to come from normal rural sources of supply within specified distances above if they were received from farms within such specified distances.

"Under the evidence here, the processing plant at Holly Springs, Georgia, qualifies as one of the exempted establishments under the above regulations, and to that plant Johnston made a number of trips. He also made two trips to a processing plant at Canton, Georgia, and one trip to a processing plant at Lawrenceville, Georgia, neither of these plants qualifying as exempt under the regulation.

"The Administrator also issued interpretive bulletin No. 14 explaining the terms 'handling of agricultural commodities for market,' Section 26 of this bulletin reading as follows:

> " '26. The operations included in this term appear to be those physical operations customarily performed in obtaining agricultural or horticultural commodities from producers' farms, transporting them to and receiving them at the establishment, weighing them or otherwise determining on what basis the producer is to be paid, placing them in the establishment where further operations are to be performed, and delivering the commodities to warehouses. Specifically, these operations include loading the commodities on trucks, wagons, etc., in producers' fields or at concentration points, transporting them to the establishment, receiving and unloading them at the establishment, counting or weighing the commodities, assembling, binning, piling, or stacking them in the establishment, moving them from one place to another in the establishment, moving the bags, boxes, cases, barrels, bales, coops, and other loaded containers to wagons, trucks, railroad cars or other conveyances, and transporting the commodities away from the establishment. Since it makes no difference that the employer does not own the goods being handled, the employees of brokers or commission houses who physically handle the goods may be within the exemption.'

"On March 28, 1947 the Administrator by release No. M-13, provided in effect that the type of exemption under Section 13(a) (10) was concerned with operations on agricultural or horticultural commodities, these being defined as such commodities as they normally

come from the farm and before their natural state has been changed. It also stated 'the handling of, cooping of, live poultry for market are also within the scope of this exemption.' It stated that 'operations are considered performed for market if the employer intends to dispose of his commodities in the form in which the particular operations leave them! It stated that 'handling' includes those physical operations customarily performed in obtaining poultry or eggs, transporting them to and receiving them at the establishment, weighing them, placing them in the establishment, and delivering them to warehouse or to transportation facilities.

"It would seem to follow therefore, that defendant's employee Johnston, in transporting chickens from the farms to the processing plants (said plants being the market as far as the farmer was concerned) was, under the above statute, regulations and interpretations of the Administrator, 'an individual employed within the area of production' (that is to say, within the fifty mile area of the processing plants) and that he was engaged in handling (for this term includes transportation) in their raw or natural state, of agricultural commodities (chickens) for market.

"A casual reading of the above regulations adopted by the Administrator may create the impression that the phrase 'where employed' means that the person working at the processing plant must be employed by the processing plant in order to be exempt. Slight reflection, however, will dispel such an inference. The word 'employed' frequently refers to a person whose services are utilized in furtherance of the business of another, notwithstanding the absence of a technical employer-employee relationship. 14 Words & Phrases, Employed, p.500, et seq. Where the Administrator used the words 'where employed' he evidently meant 'where engaged'. As stated by Judge Borah in Tobin v. Girard Properties, Inc., 5 Cir., 206 F. 2d 524, 527. 'It is not important whether the employer * * * is engaged in interstate commerce. It is the work of the employee which is decisive.'

"It is not necessary to decide whether a different construction of the regulations might render them repugnant to the Act which, in Section 13(a) (10) provides exemption to any individual employed within the area of production engaged in handling agricultural commodities for market.

"If, therefore, Johnston's activities while employed in transporting these chickens to the processing plants, will bring him within the Act, so will his employment working at the processing plants, within the area of production, bring him within the exemption."

Dallum v. Farmers Co-operative Trucking Association

In Dallum v. Farmers Co-operative Trucking Association, 46 F. Supp. 785, two former employees of the trucking association brought suit against it "to recover overtime compensation and liquidated damages" under the Fair Labor Standards Act of 1938, 29 U.S.C.A., Section 201, et seq. The court in giving the facts stated that:

> The plaintiffs, at the times set out in the complaint herein, were employed by the defendant as truck driver and helper. The defendant is a co-operative trucking association, organized under the laws of the State of Minnesota, with its principal place of business at Wadena, Minnesota, and a membership of creameries and produce companies located in that vicinity.
>
> During the period with which we are concerned, butter, eggs and farm products were picked up and gathered by the defendant's trucks at the different member creameries, and these commodities were then transported to Wadena, Minnesota, where the loads were reassembled and moved on to St. Paul, Minneapolis or Duluth, at which destination the shipments were unloaded at either railroad or steamship company docks, or at the dock of another motor carrier. No provision in the contracts of carriage for member creameries of St. Paul, Minneapolis and Duluth was made for a continuation of the haul across state lines. It was known to the plaintiffs and all interested in the movement of said commodities that the same were to go forward in interstate commerce. The contract issued by the defendant covered the local haul only, and carriage charges were made by it for that part of the haul. When the defendant made delivery of the commodities to railroad, steamship company or forwarded, a bill of lading was issued by such carrier to the interstate destination.

The trucking association contended it was exempt from the operation of the Fair Labor Standards Act relating to maximum hours. Section 213 (b) (1) of the Fair Labor Standards Act provides that:

> The provisions of section 207 (of this title) shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49.

Section 207 just referred to relates to compensation for hours worked in excess of the hours specified in the statute.

> The provisions of the Motor Carrier Act, 49 U.S.C.A. § 302, "apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce * * *."

The court said:

> The question presented is, were the plaintiffs engaged in the operation of a motor truck used in the transportation of goods in interstate commerce. If they were so engaged, then the Fair Labor Standards Act would have no application to the maximum hours of service. On the other hand, if the goods which the trucks hauled were not shipments in interstate commerce, the Fair Labor Standards Act would, in all respects, govern the employment of the plaintiffs.

The court discussed the various types of transportation in which the employees of the trucking association had engaged. It appeared that all the shipments, except shipments of butter to the plant of the National Butter Company at St. Paul, Minnesota, involved the transportation of commodities which were destined for transportation out of the State of Minnesota. It is true that in no instance did the trucking association transport commodities outside of the State of Minnesota, but the consignors of shippers of the commodities, except as noted above, intended that the commodities would be moved outside of the State. In this connection the court said:

> The intention of the original shipper to move these goods across state lines to definite interstate destinations is established in the evidence by the shipping directions issued in connection with each shipment. The movements of the goods by the defendant and other carriers was done in the performance of a preconceived intention to transport said goods to interstate destinations. There was a practical continuity in the movements.
>
> * * * * * * * * * * * * * * *
>
> The fact that several carriers participated in the movement, that different modes of transportation were used, and that rebilling from intermediate points was required, does not destroy the continuity of movement, nor does it destroy its interstate character.

The court therefore held that all of the transportation involved, except with respect to the butter that was transported to the National Butter Company at St. Paul, Minnesota, was intended for interstate shipment and that, therefore, "the plaintiff's employment was of a nature which involves safety of operation." In this connection the court cited the case of United States v. Amercian Trucking Association, 310 U.S. 534, 60 S. Ct.1032,

84 L. Ed. 1342, in which the Supreme Court held that the jurisdiction of the Interstate Commerce Commission over employees, as that term is used in Section 204 (a) (1) and (2) of the Federal Motor Carrier Act "is limited to those employees whose activities affect the safety of operation. The Commission has no jurisdiction to regulate the qualifications or hours of service of any other." In other words, the Fair Labor Standards Act in proper cases is applicable to all employees other than "those employees whose activities affect the safety of operation."

The court in the instant case found it unnecessary to determine whether the trucking association was exempt as an agricultural trucking association from the Federal Motor Carrier Act of 1935, because it was clearly subject to that Act with respect to "safety of operation," which is not covered by the exemption. In regard to the butter delivered to the National Butter Company, the court held that the transportation services involved were subject to the Fair Labor Standards Act. In this connection the court said:

> The purchase of butter by the National Butter Company subsequent to February 1, 1940, was not in response to any particular previous requisition therefor. It cannot be successfully maintained that local drayage service constitutes a part of interstate commerce, where there is no intention on the part of the original consignor, the trucker or the consignee, to continue the transportation beyond state lines. It is my opinion that it must be held that this butter came to rest at the plant of the National Butter Company at St. Paul, Minnesota, there to await the demands of customers of said Company. In such a situation, the haul of the butter to the distribution plant in St. Paul would be commerce entirely within the state, and the services rendered by the plaintiffs in connection with such transportation would be covered by the Fair Labor Standards Act of 1938.

The trucking association "was authorized by the Railroad and Warehouse Commission of Minnesota to operate as an intrastate carrier. It had no authority, either from the State or from the Interstate Commerce Commission, to operate as an interstate carrier." Under the law, although trucks are operated only within the boundaries of a State they are subject to regulations by the Interstate Commerce Commission under the Federal Motor Carrier Act, if they transport commodities which are destined for shipment out of the State, and it is immaterial that the transportation across a State line is by another carrier.

Of course, if an association is exempt from the Federal Motor Carrier Act, except with respect to "qualifications and maximum hours of service of employees and safety of operation or standards of equipment," no special consent or authorization from the Interstate Commerce Commission is necessary to enable it to engage in business, but on the other hand, if an association is not exempt and is a common or contract carrier, it is,

if carrying goods in interstate commerce, subject to that Act. This means that an association, although operating solely within a State, if a common carrier may, among other things, be required to obtain a certificate of "public convenience and necessity" from the Interstate Commerce Commission to authorize it to operate, insofar as interstate commerce is concerned, unless that Commission finds that its operations do not "affect or impair uniform regulations by the Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in the Interstate Commerce Act." In 1940 the Interstate Commerce Commission issued safety regulations applicable to private carriers (23 M.C.C. 1).

Every operator of a truck, cooperative or otherwise, should have his status determined under the Federal Motor Carrier Act of 1935 and for this purpose communications should be addressed to the Interstate Commerce Commission, Washington, D. C., or one of the branch offices of the Commissions.

Again, every operator of a truck, cooperative or otherwise, should have his status determined under the Fair Labor Standards Act of 1938 and the fact that an operator may be "unable" to determine whether an employee is covered by that Act will not relieve the operator from liability thereunder to pay unpaid minimum wages or unpaid overtime compensation, as determined thereby and an additional equal amount as liquidated damages.

And in the case of Overnight Motor Co. v. Missel, 316 U.S. 572, a rate clerk of the Company, which operated trucks in interstate commerce, was held entitled to recover such amounts, under the Fair Labor Standards Act. As pointed out above, the employees of the cooperative in the instant case likewise effected such recoveries, insofar as their work involved intrastate commerce. However, there is no discussion in the opinion of the fact that the Fair Labor Standards Act is applicable only to employees engaged in interstate commerce. The basis on which the employees were considered eligible to recover in the intrastate transactions is not disclosed. In contrast with this holding, in the case of Walling v. Jacksonville Paper Company, 63 S. Ct. 332, involving a wholesaler in Florida who received his goods from other States but who sold only in Florida, the court said relative to the Fair Labor Standards Act:

> * * * we cannot conclude that all phases of a wholesale business selling intrastate are covered by the Act solely because it makes its purchases interstate. The use of the words "in commerce" entails an analysis of the various types of transactions and the particular course of business along the lines we have indicated.
>
> * * * The applicability of the Act is dependent on the character of the employees' work. Kirschbaum Co. v. Walling, supra, 316 U.S. page 524, 62 S. Ct. 1120, 86 L. Ed. 1638. If a substantial part of an employee's activities related to goods whose movement

> in the channels of interstate commerce was established by the test we have described, he is covered by the Act. * * *

Thus the Supreme Court pointed out that some employees of an employer might be under the Fair Labor Standards Act, while other employees of the same employer might not be subject to the Act, depending on the characters of the employees' work with respect to interstate commerce. Under the test referred to in the quotation, if goods received from other States came to rest at a wholesale house in Florida for sale to Florida customers and it was not definitely known who those customers would be, at least the employees concerned only with such sales would apparently not be under the Fair Labor Standards Act.

It should be clearly kept in mind that all employees of a concern engaged in the business of trucking in interstate commerce, including all cooperative trucking associations, whether exempt or nonexempt, whose duties effect safety of operation, are under the jurisdiction of the Interstate Commerce Commission, but all other employees of any such concern or cooperative are subject to the provisions of the Fair Labor Standards Act.

In regard to the Fair Labor Standards Act, communications should be addressed to the Department of Labor, or one of its branch offices.

ANTITRUST PROCEEDINGS

Cases relating to antitrust proceedings follow:

Okerberg v. Crable, (185 Kan. 211, 341 P.2d 966 (1959))

A contract entered into between a number of independent milk haulers transporting milk from farms of producers to a single creamery, which assigned the territories among the haulers and imposed other regulations on the haulers was held not in restraint of trade or contrary to public policy under Kansas law. The court applied what it terms "the modern doctriné of reasonableness" and found that any restraint involved here was not unreasonable because (1) the regulations set up under the contract worked no hardship on the producers being served but, on the contrary, promoted their best interests; (2) the producers could, if they wished, haul the milk themselves or sell to another outlet; and (3) there was no fixing of prices of the milk. The case did not involve any charge of violation of Federal law.

For a number of years prior to February, 1957, plaintiff and defendants were signatories, along with about 30 other haulers, to a contract establishing milk route territory regulations applicable to their routes. Bennett Creamery Company, although not a party, acquiesced in the territorial division and the regulations adopted.

The contract provided, in substance, that "milk routes were to be recognized by number and color, and when routes overlapped roads should be colored to denote route territory on a route map to be kept and locked in a glass case in the haulers' office at Bennett's plant; any route change was to be made by not less than 'three committee members' at the request of the haulers desiring the change and with all affected haulers present; a hauler had to serve all producers in his territory who sold to Bennett and he would be penalized if he forfeited a producer's business; far-reaching routes would be protected from encroachment by new and nearer routes; * * * . The remaining portion of the contract required the regulations to be signed by all haulers and posted with the route map, indicating their acceptance of both."

In February, 1957, in order to provide for a more modern and efficient method of hauling milk from refrigerated bulk tanks on producers' farms via a hauler's bulk tank truck to Bennetts, an additional paragraph (Item 10) was added to the regulations whereby it was agreed that tank hauling rights could be sold and transferred by a can hauler to a bulk tank hauler under one of two proposed payment plans. The payment plan involved in the suit was the first, or cash, payment plan, under which cash was to be paid within thirty days after the first bulk tank hauling and was to be computed at the "minimum rate of 50 cents per pound average of previous 12 months daily average weight." The average weight was determined by dividing the total pounds of milk produced during the previous twelve months by 365 or if the period was less than 12 months, by dividing the total number of pounds by the number of days shipped. Such sales to a purchasing hauler were to be final and binding and without recourse except that if a bulk tank farmer-producer reverted to cans within 12 months, then the territory owner (can hauler) had to refund the prorata share of the purchase price to the bulk tank hauler. If the change back to cans occurred after a year then no refund was to be made but the bulk tank hauling rights were not thereby lost to the tank hauler or his successor.

Item 10 further provided that the Haulers' Committee would decide any bulk tank question not covered by Item 10. At least ten haulers were required to call a meeting of route owners and a two-thirds majority of all route owners was required to change the regulations. A total of 34 haulers, including appellant and both appellees, signed the regulations.

As a result of a conversion by three of plaintiff's producers from the can to the bulk tank system, plaintiff transferred these producers to the defendants' bulk tank routes. Defendants, however, failed and refused to make the payments called for by the contract, contending that it was illegal either as being (1) in restraint of trade under Kansas law; or (2) in violation of the State's public policy.

After citing and discussing a number of Kansas cases, the court said:

> "The Heckard case recognized that no 'hard and fast' rule governing all such contract cases can be laid down. 164 Kan. at page 223, 188, P. 2d at page 931. The court there held:

> 'The old rule as to limitations of time and space with respect to contracts involving restraint of trade has given way to the modern doctrine of reasonableness and the real test is never whether there is any restraint but always whether the restraint is reasonable under the facts and circumstances of the particular case.' (Syl.par.7.)

"In the Heckard opinion, similarly to our present case, the solution of the question of reasonableness of a contract of the character there being considered was said to depend 'upon fundamental elements of common fairness in view of the facts and circumstances of the parties.' 164 Kan. at page 224, 188 P. 2d at page 933.

"Some of the circumstances to be considered in determining the fundamental elements of common fairness of the regulations in this case are that under finding eleven all of the producers of milk, none of which is a complaining party here, are generally charged the same hauling rates within a particular route territory of a can hauler whether the milk goes to Bennetts or some other plant and irrespective of the distance from the farm to the receiving plant. Thus the regulations did not work any hardship on the milk producers. On the other hand the producers had access, if they desired it, to the regular service of a hauler who knew and traveled all types of roads under all weather conditions, with proper equipment, so that the milk was picked up at approximately the same time every day if they used cans, or once every two days if they used the bulk tank system. Without such system and orderly regulations there would be overlapping of territories, excessive distances to be covered by haulers, and other circumstances whereby the producers could not be positive that all or any of the milk produced would reach its destination or what its condition would be when it arrived. As we view the regulations, the fundamental elements of common fairness, so far as the milk producers are concerned, are well established.

"The appellees through the regulations here being considered have been and now retain their territory as can haulers along with the three customers of appellant they obtained by reason of Item 10. Under the reasoning of the Heckard case, this is not inimical to our 'restraint of trade' statutes or public policy.

"We cannot agree with the trial court's second conclusion of law that the regulations had the purpose and effect of eliminating competition for the transportation of milk by third parties. So far as Bennetts and the signers of the regulations are concerned, the producers could haul their milk themselves, if they preferred. The entire plan is based on competition, as heretofore stated, and further discussion is unnecessary on this point.

"From previous discussions we think that the trial court's findings do not support the third conclusion of law since there is no price-fixing of the milk or requirement that the producer must sell to Bennetts. At

no time does the milk become the property of the hauler. Appellees have cited United States v. Nationwide Trailer Rental System, D. C., 156 F. Supp. 800, affirmed per curiam, 355 U.S. 10, 78 S. Ct. 11, 2 L. Ed. 2d 20, which is not controlling here because a federal law was there involved. That case shows what appellees contend and the trial court concluded as to the purpose and effect of these regulations but a careful study of that case shows the distinction between a void agreement, as there, and a valid and reasonable set of regulations such as we have here.

"In regard to the fourth conclusion of law [which was that the agreement 'being contrary to the declared public policy of the State is presumed to be injurious to the public welfare'] we believe our previous discussion has determined it was not proper and especially is this true on the point of a presumption. They must be in favor of the validity of the regulations and not the invalidity thereof. The burden at all times was on the appellees to prove the invalidity of the regulations."

Denver Milk Producers v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers' Union, et al.

In the case of Denver Milk Producers v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers' Union et al., decided by the Supreme Court of Colorado, 183 P.2d 529, it was held that an injunction was in order. The basis for the ruling is summarized in two headnotes, to the opinion, reading as follows:

> "Where unions threatened to destroy plaintiffs' businesses unless they should sign union contracts, displayed force against truck drivers of nonunion carriers preventing nonunion carriers from delivering milk to union dairies, caused union brick layers engaged in necessary construction work in dairy to cease work, and threatened to picket retail stores unless they ceased to sell milk of nonunion dairy, there was no 'labor dispute' within Labor Peace Act prohibiting injunctions in labor disputes and hence plaintiffs were entitled to permanent injunction restraining such acts. Laws 1943, c, 131, §§ 2(7), 16."
>
> "The issuance of permanent injunctions restraining unions and their members from engaging in secondary boycott, picketing, etc., could not be refused on theory that they would be deprived of their rights under the First, Thirteenth and Fourteenth Amendments to the Federal Constitution. Laws 1943, c, 131, §§ 2(7), 16; U.S.C.A. Const. Amends. 1, 13, 14."

Steve Rogers v. Poteet, et al.

In the case of Steve Rogers v. Poteet, et al., 355 Mo.986, 199 S.W.2d., 378 recently decided by the Supreme Court of Missouri, that court affirmed with some modifications a decree entered by the lower court perpetually enjoining the defendants below "from hindering, interfering with or preventing in any respect whatsoever, the receipt, unloading and processing of any milk brought to the Borden Dairy Company in Kansas City, Jackson County, Missouri by the plaintiff-respondent, Steve Rogers, his agents, employees or representatives."

> "The defendants-appellants are members of a labor union which has unionized the Borden Dairy Company plant (and others) in Kansas City. Pursuant to a union plan the appellants refused to unload milk delivered to that plant by respondent Rogers for himself and others, because he was not a member of their union. He thereupon brought this suit on the theory that appellants were violating our conspiracy statute, Sec. 8301; and that he was an independent contract hauler of the milk and not subject to being unionized. Appellants challenge the sufficiency of the petition, evidence, and decree. They deny that they are conspirators; and contend respondent Rogers is not an independent contractor, but works under the control of the Pure Milk Producers Association of Greater Kansas City, hereinafter called the Producers Association, a non-profit co-operative corporation organized under Sec. 14435 et seq., and that a bona fide labor dispute exists. Both parties invoke constitutional law." (Underscoring added.)

The statutory provision of the law of Missouri under which the injunction was granted and upheld reads as follows:

> "Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article, or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article."

The plaintiff in the court below was an independent contractor and not an employee. When he attempted to deliver milk which he had collected on his route to the plant at which it was processed, the union employees of the plant refused to handle his milk and a considerable loss to the producers of the milk was thus caused. The union men against whom the injunction was issued of course contended that they were acting within their rights in refusing to handle milk delivered by a nonmember of the union. The court in affirming the action of the trial court said in part:

"Appellants also rely on several decisions of the United States Supreme Court and one other Federal decision upholding the right of union labor to strike and engage in peaceful picketing as a matter of personal liberty, free speech and assemblage under the First and Sec. 1 of the Fourteenth Amendments, which cover the same ground as Sec's. 8, 9, and 10, Art. 1, Constitution of Missouri, 1945. They argue that their refusal to handle for their own employers the milk brought to the processing plants by non-union haulers, and respondent in particular, was a means of persuasion and came within the constitutional right of free speech. Specifically, they invoke the Stapleton case just cited below, and that decision did hold unconstitutional Sec. 12 of the Kansas Session Laws, 1943, C.191, which forbid any person, as the opinion states, 'to refuse to handle, install, use, or work on particular materials or equipment and supplies because not produced, processed, or delivered by members of a labor organization.' It appears from Shepard's U. S. Supreme Court Citations that an appeal in the Stapleton case dismissed on November 13, 1945, by stipulation, costs to be equally divided.

"As we read the Stapleton opinion, the holding therein is not based on the right of free speech, but on the personal right 'to choose the terms and conditions under which one will work, like' the right of free speech, which is the language of the opinion. Undoubtedly unionized employees would have the right to quit work or to refuse to accept employment because of undesirable conditions, or for any other reason, even an unworthy one (absent a contract to the contrary). Hunt v. Crummach, 325 U. S. 821, 89 L.Ed. 1954, 64 S.Ct. 1545. But, if, for instance, in this case they had conspired with their own employer to restrain competition in the interstate marketing of milk they would have been liable under the Sherman Anti-Trust Act, even though they acted in furtherance of their own interests; whereas, if they merely confederated with each other for a like purpose they would not be liable under that Act, Allen Bradley Co. v. Local Union No. 3, etc. 325 U.S. 797, 89 L.Ed. 1939, 65 S. Ct. 1545.

"This shows labor conspiracies in some circumstances are still under the ban of Sherman Anti-Trust Act. In other words, outside of the fundamental guarantees in the Bill of Rights in the Federal and State Consitutions, the question of the legality of such combinations is one of statutory law, not constitutional law. And the right to boycott for coercive purposes is not one of those fundamental rights, so far as we are aware. The history of the Federal legislation on this general subject is reviewed in the Allen Bradley case last cited above, beginning with the Sherman Anti-Trust Act, originally enacted in 1890, and followed by the Clayton Act, originally enacted in October 1914; the Norris-LaGuardia Act; enacted in March 1932; and the Wagner National Labor Relations Act, enacted in July, 1935."

The court further said:

> "We hold the respondent was an independent contractor under our state law. Neither the producers on the milk route nor the Producers Association had or claimed any right to control over the details of work or his physical conduct. He could and did hire his own assistants. The fact that the Producers Association could determine the destination of the milk, and could change the routes, and that the producers' contracts with the haulers were made subject to the former's contracts with the Association, did not create a relation of master and servant.
>
> "And in our opinion he was not an employee but an agricultural laborer within the meaning of Sec. 152(3) of the National Labor Relations Act. If the Producers Association had hired the haulers as servants directly or indirectly for commercial or manufacturing purposes, or processing connected therewith, it seems they would have been 'employees', though dealing with farm products. But the holdings are the other way where the work is a part of the production of an agricultural commodity, as was conceded in the Edinburg and North Whittier cases just cited, and was held in two others. It has been expressly ruled that workers on a dairy farm processing and delivering milk are agricultural laborers under the Unemployment Compensation Act of the State of Washington. State v. Christensen, 18 Wash.(2d) 7. 137 Pac. (2d) 512. 146 A.L.R. 1302. And this court has held 'agricultural labor' includes the horticultural labor of a florist in growing flowers under our Compensation Act. St. Louis Rose Co. v. Unemployment Comp. Commission, 348 Mo. 1153, 159 S.W. (2d) 249."

The appellate court directed that the decree of the lower court should be redrafted so as to assure the appellants of their "constitutional right by peaceful picketing and persuasion and means not involving violence, intimidation and coercion to advocate the cause of their Union and thereby advance their own interests."

The case of Columbia River Packers Association v. Hinton, 315 U.S. 143, in the leading Supreme Court case on the question of a "union" of independent contractors, and it of course held that the fisherman who were functioning as independent operators could not form a labor union and have the rights and privileges of a labor union.

In the case of National Labor Relations Board v. Hearst Publications, Inc., 322 U.S.111, the Supreme Court held that the newsboys involved in that action came within the scope of the National Labor Relations Act, although apparently it was conceded that the technical relation of master and servant did not exist with respect to them.

The case of Ring v. Spina, 148 F.2d 647, involved the Dramatists' Guild of the Authors' League of America, Inc. It was a suit for treble damages

under the Sherman Anti-Trust Act. The defendants attempted to defend by claiming that the Dramatists' Guild of the Authors' League of America, Inc., was a labor union and as such entitled to the exemptions from the antitrust acts prescribed for labor unions, but the court was clearly of the opinion that the members of the Guild were not employees and that the Guild was not technically a labor union and hence that the organization did not come within the exceptions to the antitrust acts. A similar conclusion was reached relative to physicians and their organization in the antitrust case of American Medical Association v. United States, 317 U. S. 519.

For a discussion of the question of whether independent contractors have a status analogous to that of employees, and for cases bearing upon this question see Labor Law - Contract Requiring Employer Not to Deal with "Independent Businessmen" Unless They Join Union of Employees Doing Similar Work, 40 Col. L.R. 1439; Determination of Employer-Employee Relationship in Social Legislation, 41 Col. L.R. 1015; Labor-Trade Regulation - Application of Sherman Act to Entrepreneurs in a Position Similar to Laborers,42 Col. L.R. 702.

MASTER AND SERVANT

Cases relating to master and servant follow:

State of Wisconsin v. Dried Milk Products Co-op (Dairy Maid Products, Inc.), (114 N.W. 2d 412 (April 3, 1962)

In this case, the Cooperative, as owner of the vehicle and employer of the driver, was convicted in the Circuit Court for Columbia County, Wisconsin, of violating a State statute providing that no person shall operate on a class "A" highway any vehicle or combination of vehicles not complying with certain weight limitations. The defendant appealed. The Supreme Court held that the statute applies to the owner of a vehicle who causes or permits a vehicle to be operated by another, and that construction of the statute as applying to the owner of the vehicle does not render the statute unconstitutional. Judgment was affirmed.

Phillips Cooperative Gin Co. Appellant, v. Lillian Toll, Administratrix, (335 S.W. 2d 303)

Action by administratrix of estate of deceased automobile passenger for wrongful death of passenger killed in collision between automobile in which he was riding and truck. The court held that the evidence was sufficient to sustain a finding that the truck driver, who contended that he was an independent contractor but who failed to deposit evidence of liability insurance as required, was in the employ of Phillips Cooperative Gin Company at the time of the accident. The court also held that testimony respecting the requirement of an independent contractor to deposit evidence of liability insurance did not constitute erroneous injection of the question of insurance.

The administratrix of the estate of Richard F. Toll, Sr., alleged that the collision between a car driven by deceased and a truck driven by

W. T. Jackson was due to Mr. Jackson's negligence and that he was the agent, servant and employee of the Gin Company at the time of the accident. Judgment was rendered for the administratrix and the Gin Company appealed. On appeal the court held that the evidence was sufficient to sustain the verdict but the judgment was reversed because of an erroneous instruction and the case was remanded.

When the case was tried anew, the only issue submitted to the jury was whether Mr. Jackson was agent of the Gin Company at the time of the accident. The Gin Company and Mr. Jackson testified that he had been hauling for the Gin Company as an independent contractor over a period of years. A witness for the plaintiff testified that he was an acting chairman of the Arkansas Commerce Commission and that carriers of cotton seed were required by law to file securities in the form of a policy of public liability insurance and that upon searching the files of the Commission he discovered no record of Mr. Jackson's having filed anything.

The court held that if Jackson was merely acting as agent of the Gin Company, he would not have been required to file anything with the Commerce Commission and that under the circumstances the fact that nothing had been filed with the Commission was a fact from which a jury could draw the inference that the truck was being operated by the Gin Company.

Judgment for plaintiff was affirmed.

Phillips Co-op Gin Co. v. Toll, (311 S. W. 2d 171.)

In an action arising out of a collision between an automobile and a truck-trailer which was returning from delivery of cotton seed for defendant gin, the lower court entered judgment against the defendant and it appealed. The Supreme Court of Arkansas held that the lower court did not err in refusing to grant a directed verdict for the defendant gin. It held that the lower court did err, however, in instructing the jury that, in determining whether the truck driver was defendant's employee, it should consider in whose business he was engaged and who had the right of control and that, if the jury found that he was engaged in defendant's business and defendant had the right to control and direct his conduct, the truck driver was defendant's employee regardless of whether he was selected or paid by defendant.

The Phillips Cooperative Gin Company, defendant in the case, had accumulated a quantity of cotton seed which it sold from time to time to various oil mills. On September 27, 1955, W. T. Jackson carried a load of cotton seed by truck-trailer from the gin to the Southern Cotton Oil Mill in North Little Rock. On his return trip there occurred the traffic mishap which resulted in the death of Mr. Richard F. Toll, Sr. His administratrix brought suit claiming that the relationship between the Gin and Jackson was that of master and servant. The Gin Company claimed

that Jackson was an independent contractor. The only question considered by the appellate court was the relationship between the gin and Jackson at the time of the mishap.

The court pointed out that when it is shown that the person causing the injury was at the time rendering a service for the defendant and being paid for that service, and the facts presented are as consistent with the master-servant relationship as with the independent contractor relationship, then the burden is on the one asserting the independence of the contractor to show the true relationship of the parties. It then proceeded to cite some of the salient facts relied on by the appellees to make a jury question on the issue of master-servant as opposed to independent contractor. These were as follows:

> 1. The gin sold a load of cotton seed to the Southern Cotton Oil Mill and arranged with W. T. Jackson to transport the load of seed. On his way back Jackson had the traffic mishap here involved. The contract between the gin and Jackson was entirely oral.
>
> 2. Jackson loaded the seed onto the truck-trailer at the gin as directed, but the load was not weighed until it reached the Southern Cotton Oil Mill.
>
> 3. There is no evidence in the record that anyone except Jackson ever transported seed of the gin to any destination in the times here involved.
>
> 4. The gin claimed that the purchaser of the seed was to pay Jackson for transporting the seed. Jackson was to receive $4.20 per ton. However, the particular load here involved was on September 27, 1955, and the records show that as late as October 5, 1955, the Southern Cotton Oil Mill addressed an inquiry to C. H. Martin (manager of the gin) listing this load of seed by invoice number, pounds, rate for hauling, and gross amount, and showed the hauling item as $65.66; and the Southern Cotton Oil Mill asked Martin in an inquiry of October 5th: "This freight has not been paid to anyone. Advise how you want it handled." Along with the load of September 27th there was a load of September 26th, on which the hauling amounted to $71.74, so the total of these two loads was $137.40. As above stated, the September 27th load was the one which Jackson had just hauled when he was returning and had the traffic mishap here involved. The check of the Southern Cotton Oil Mill for $137.40 for handling was made out to C. H. Martin, dated October 5, 1955, and bore the notation: "W. T. Jackson Trucking." The check was endorsed by C. H. Martin and Phillips Cooperative Gin Company, so it never went through the possession of W. T. Jackson.

5. In explanation as to the inquiry made by the oil mill and as to why the check was made as it was, the appellant's witnesses explained that the gin had the custom of advancing money to Jackson and being repaid by collecting the amounts due Jackson from the various oil mills to which he had hauled seed from the gin.

6. C. J. Jackson, father of W. T. Jackson (the man here involved) is the president of the Board of Directors of the gin. C. J. Jackson testified that he had no interest whatever in either the truck or trailer used by W. T. Jackson; but it was nevertheless established that the trailer was registered and licensed in the name of C. J. Jackson.

7. W. T. Jackson testified that he did hauling "for the public"; that on September 26, C. H. Martin, general manager of the gin, told him to take a load of seed to the Southern Cotton Oil Mill in North Little Rock; that Jackson loaded the seed on the truck-trailer that night; that he began the trip to North Little Rock "about daylight on September 27th"; that he delivered the load of cotton seed to the Southern Cotton Oil Mill; and "the Southern Cotton Oil Mill paid me for the hauling. The checks were made out to me." The photostatic copy of the checks in the record, however, shows that the checks were made out to C. H. Martin and that he endorsed the checks and passed them through the account of the gin, as stated in paragraph 4, supra.

8. The gin admitted that there was no written contract with Jackson, but examination showed that unless Jackson conformed to the gin's oral instructions he would not be permitted to haul any more seed for the gin.

The court concluded that the foregoing facts made a case from which reasonable men might draw the inference that Jackson was in fact the servant of the gin rather than an independent contractor. Accordingly, no error was found in the refusal of the trial court to grant an instructed verdict for the defendant gin.

The court then proceeded to consider an instruction (No.5) requested by the plaintiff and allowed by the lower court. It concluded that this instruction added "confusion rather than enlightenment" and, being a binding instruction, it should have incorporated "all of the essential conditions in the case." This, the court said, the instruction failed to do because it omitted the element of who had the right to terminate the arrangement. It further found that the instruction was "argumentative" and "a comment on the weight of the evidence", so it was defective on these grounds also. On the basis of this error, the judgment was reversed and the case remanded.

APPENDIX

Section 15(a) of the Agricultural Marketing Act

Approved June 15, 1929, as amended (49 Stat. 317, 12 U.S.C.A.1141(j)(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 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.

Ruling No. 110
Cancels Ruling No. 98

Interprets Ruling No. 107
and Section 203(b)(6)

September 26, 1958

INTERSTATE COMMERCE COMMISSION

BUREAU OF MOTOR CARRIERS

The following is an administrative ruling of the Bureau of Motor Carriers, made in response to questions propounded by the public, indicating what is deemed by the Bureau to be the correct application and interpretation of the Act. Rulings of this kind are tentative and provisional, and are made in the absence of authoritative decisions upon the subject by the Commission.

Question:

The exemption in Section 203(b)(6) of the Interstate Commerce Act was amended by the Transportation Act of 1958 so as to provide that the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural commodities (not including manufactured products thereof)" shall include property shown as "Exempt" in the Commodity List in the Bureau of Motor Carriers' Administrative Ruling No. 107 of March 19, 1958, and shall not include property shown therein as "Not Exempt", but with certain exceptions. What are these exceptions, and what commodities shown in the Commodity List in Ruling No. 107 are affected by these exceptions?

Answer:

The exceptions in mentioned amendment are to the effect that notwithstanding what is shown in Administrative Ruling No. 107, the words of the exemption shall not be deemed to include "frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted)" and shall be deemed to include "cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not including fish and shell fish which

have been treated for preserving, such as canned, smoked, pickled, spiced, corned or kippered products)".

This Bureau considers that the status of the following commodities listed in Administrative Ruling No. 107 has been affected by the amendment, and that their present "Exempt" or "Not exempt" status is as shown below:

Cocoa beans - Not exempt
Coffee beans - Not exempt
Dinners, seafood, frozen - Exempt
Fish (including shell fish)
- Breaded, cooked or uncooked, frozen or fresh - Exempt
- Cakes, codfish, cooked or uncooked, frozen or fresh - Exempt
- Canned, as a treatment for preserving - Not exempt
- Clam juice or broth, cooked or uncooked, frozen or fresh - Exempt
- Cooked or partially cooked fish or shellfish, frozen or fresh - Exempt
- Croquettes, salmon, cooked or uncooked, frozen or fresh - Exempt
- Deviled crabs, clams, or lobsters, cooked or uncooked, frozen or fresh - Exempt
- Dinners, cooked or uncooked, frozen or fresh - Exempt
- Fried fish fillets, oysters, or scallops, frozen or fresh - Exempt
- Salted, as a treatment for preserving - Not exempt
- Sticks, cooked or uncooked, frozen or fresh - Exempt

Fruits and Berries
- Bananas, fresh, dried, dehydrated, or frozen - Not exempt
- Citrus fruit sections, frozen - Not exempt
- Frozen - Not exempt
- Quick frozen - Not exempt
- Sliced, frozen - Not exempt

Hemp fiber - Not exempt

Imported commodities - Fact of importation does not affect status of otherwise exempt commodities, except that wool imported from any foreign country is not exempt.

Tea - Not exempt

Vegetables
Frozen - Not exempt
Quick frozen - Not exempt

Wool, raw, cleaned, or scoured, but not including wool imported from any foreign country - Exempt
" imported from any foreign country - Not exempt
" tops and noils - Not exempt
" waste (carded, spun, woven, or knitted) - Not exempt.

W. Y. Blanning

Director

Ruling No. 107
Section 203(b)(6)

March 19, 1958

INTERSTATE COMMERCE COMMISSION

BUREAU OF MOTOR CARRIERS

The following is an administrative ruling of the Bureau of Motor Carriers, for the purpose of making readily available holdings of the Commission and the courts, and Bureau opinions, relating to the status of various commodities under the partial exemption in Section 203(b)(6) of the Interstate Commerce Act. The "Bureau opinions" in this ruling are tentative and provisional and are made either in the absence of authoritative Commission or court decisions or in applying the holdings and reasoning of court decisions which have reversed or altered past general and specific findings of the Commission.

General

This ruling relates to Section 203(b) (6) as it presently reads:

> Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation; * * *.

Pending before the Congress are bills which if enacted into law would limit or revise the application of the exemption and render obsolete many of the interpretations herein.

For each entry in the Commodity List there is shown either the number assigned to one of the Commission or court decisions in the Case List, or the words "Bureau opinion," the latter denoting an informal expression of the Bureau. In a few instances reference is made to a numbered Note appended to the ruling. Certain of these explain the reason for Bureau opinions which differ from past Commission decisions. Others mention pending Commission proceedings which may affect the status of commodities making reference thereto.

Though commodities are shown as either "Exempt" or "Not exempt," it must be kept in mind that an "Exempt" commodity loses its exemption whenever it is transported in a vehicle which at the same time is transporting for compensation commodities not within the exemption.

The absence of a commodity from the list below should not be taken to mean that it is either within or not within the exemption. Only those commodities are listed as to which inquiries have been received in the past by the Bureau or which have been the subject of Commission or court proceedings.

W. Y. Blanning
Director

COMMODITY LIST

Alfalfa, see Feeds
Animal fats - Not exempt - Bureau opinion
Animals, see Livestock

Bagged commodities - Placing exempt commodities - Case 1 in bags does not affect their exempt status.

Bark, see Forest Products
Barley, see Grains
Bees - Exempt - Case 1
Beeswax, crude, in cakes and slabs - Exempt - Bureau opinion
Beet pulp, see Feeds
Beets, sugar - Exempt - Case 1
Berries, see Fruits
Bran, see Feeds
Broom corn, threshed and baled - Exempt - Bureau opinion
Bulbs, see Horticultural Commodities
Butter - Not exempt - Case 20
Buttermilk - Exempt - Case 20

Canned fruits and vegetables - Not exempt - Case 20
Carnauba wax as imported in slabs or chunks - Not exempt - Bureau opinion
Castor beans - Exempt - Case 1
Cattle, live, see Livestock
Cattle, slaughtered - Not exempt - Case 20
Charcoal - Not exempt - Bureau opinion
Cheese - Not exempt - Case 1
" , cottage - Not exempt - Case 20
" , cream - Not exempt - Case 20
Christmas trees, plain, sprayed, or coated - Exempt - Bureau opinion
Citrus fruits, see Fruits

Coal - Not exempt - Bureau opinion
Coca beans - Exempt - Case 1(b), Note 1
Coffee beans, green - Exempt - Case 1(b), Note 1
" , roasted - Not exempt - Bureau opinion
" , instant - Not exempt - Bureau opinion
Containers, crates, and boxes which have been used in the movement of exempt commodities and are being returned for reuse - Exempt - Case 8
" , new for use in shipping exempt commodities - Not exempt - Case 8
Copra meal - Not exempt - Case 6
Corn, see Grain
" cobs - Exempt - Case 1
" cobs, ground - Exempt - Bureau opinion, Note 4
" fodder - Exempt - Case 1
Cottage cheese, see Cheese
Cotton, carded but not spun, woven, or knitted - Exempt - Bureau opinion, Note 5
" ginned or unginned - Exempt - Case 1
" linters - Exempt - Case 20
" waste, consisting of scraps of cotton fibre not spun, woven, or knitted - Exempt - Bureau opinion, Note 5
" yarn - Not exempt - Bureau opinion
Cottonseed, whole - Exempt - Case 1
" cake - Not exempt - Bureau opinion
" , dehulled - Exempt - Bureau opinion
" hulls - Exempt - Case 20
" meal - Not exempt - Case 20
Crates, see Containers
Cream, see Milk
Cream cheese, see Cheese

Dehydrated, see commodity name: Fruits, Vegetables, Eggs, etc.
Diatomaceous earth - Not exempt - Bureau opinion
Dinners, frozen - Not exempt - Bureau opinion
" , seafood, frozen - Not exempt - Case 7, Note 6
Dried, see commodity name: Fruits, Vegetables, Eggs, etc.

Eggs
Albumen, fresh, liquid - Exempt - Case 5
Dried - Exempt - Case 20
Frozen - Exempt - Case 20
In shell - Exempt - Case 1
Liquid, whole or separated - Exempt - Case 5
Oiled - Exempt - Case 1
Powder, dried - Exempt - Case 20
Shelled - Exempt - Case 5
Yolks, dried - Exempt - Case 20
Yolks, fresh, liquid - Exempt - Case 5

Fats, animal - Not exempt - Bureau opinion
Feathers - Exempt - Case 20
Feeds
Alfalfa meal - Not exempt - Bureau opinion
Alfalfa pellets - Not exempt - Bureau opinion
Beet pulp - Not exempt - Case 6
Bran shorts - Not exempt - Case 6
Copra meal - Not exempt - Case 6
Corn Gluten - Not exempt - Bureau opinion
Cottonseed products, see Cottonseed
Distilled corn grain residues, with or without solubles added - Not exempt - Case 6
Fish meal - Not exempt - Case 6
Hominy feed - Not exempt - Bureau opinion
Middlings - Not exempt - Case 6
Oat hulls, ground - Exempt - Bureau opinion, Note 4
Pelletized ground refuse screenings - Not exempt - Case 6
Rice bran - Exempt - Bureau opinion - Compare Case 12
Screenings, feed - Exempt - Case 6
Wheat bran - Not exempt - Bureau opinion
Wheat shorts - Not exempt - Bureau opinion

Fertilizer, commercial - Not exempt - Bureau opinion
Fish (including shell fish)
General. Frozen, quick frozen, and unfrozen fish and shell fish in the various forms in which it is shipped, such as live fish, fish in the round, beheaded, and gutted fish, filletted fish, beheaded shrimp, and oysters, clams, crabs, and lobsters, with or without shells, including crab meat and lobster meat - Exempt - Case 11

Breaded, uncooked, frozen or unfrozen - Exempt - Administrative Ruling No. 98, November 28, 1955.
Cakes, codfish - Not exempt - Case 7, Note 6
Clam juice or broth - Not exempt - Bureau opinion
Cooked or partially cooked fish or shrimp, frozen or unfrozen - Not exempt - Administrative Ruling No. 98, November 28, 1955.
Croquettes, salmon, frozen - Not exempt - Case 7, Note 6
Deviled crabs, clams, or lobsters, frozen - Not Exempt - Case 7, Note 6
Dinners, frozen - Not exempt - Case 7, Note 6
Fried fish fillets, oysters, or scallops, frozen - Not exempt - Case 7, Note 6
Frogs, live or dressed - Exempt - Bureau opinion
Frozen, see General above, and individual listings
Hermetically sealed in containers as a treatment for preserving - Not exempt - Case 11
Hermetically sealed in containers for cleanliness only, preservation attained by refrigeration - Exempt - Bureau opinion

Fish (Continued)
Meal - Not exempt - Case 6
Offal (inedible portions of fish not further processed) - Exempt - Bureau opinion
Oil from fishes - Not exempt - Bureau opinion
Preserved, or treated for preserving, such as smoked, salted, pickled, spiced, corned or kippered - Not exempt - Case 11
Shells, oyster, moving to market for use in button making - Not exempt - Case 16
Stew, consisting of raw oysters or clams, milk, and seasoning, frozen but uncooked - Exempt - Bureau opinion
Sticks, frozen - Not exempt - Case 7, Note 6
Turtles, sea or fresh water - Exempt - Bureau opinion
Whale meat, fresh - Exempt - Bureau opinion

Flagstone - Not exempt - Bureau opinion
Flax fiber - Exempt - Case 1
Flaxseed, whole - Exempt - Case 1
" meal - Not exempt - Bureau opinion
Flour - Not exempt - Bureau opinion
Flowers and flower plants, see Horticultural commodities
Fodder, corn and sorghum - Exempt - Case 1
Forage, see Hay
Forest Products
Bark - Exempt - Case 1
" , boiled to clean and soften - Exempt - Bureau opinion
Blankets of pine and spruce boughs - Exempt - Bureau opinion
Greenery - Exempt - Case 1
Holly sprigs, and cuttings - Exempt - Bureau opinion
Leaves - Exempt - Case 1
" , sisal, husks and moisture removed - Exempt - Bureau opinion
Mistletoe - Exempt - Bureau opinion
Myrobalons, as imported in natural state - Exempt - Bureau opinion
Palmyra stalk fibers (fronds from palm leaves) - Exempt - Bureau opinion
Peat moss, dried, shredded, baled - Exempt - Case 22
Resin, crude - Exempt - Case 1
" products, such as turpentine - Not exempt - Administrative Ruling No. 62, August 3, 1937.
Roots, natural or dried - Exempt - Bureau opinion
Sap, maple - Exempt - Case 1
Spanish moss - Exempt - Case 1
Sphagnum moss - Exempt - Bureau opinion
Spices, see separate listing: Spices
Trees, see separate listing: Trees
Valonia, as imported in natural state - Exempt - Bureau opinion
Wreaths of holly or other natural material with small amount of foundation or decorative material - Exempt - Bureau opinion

Frogs, see Fish
Frozen, see commodity name: Fruits, Vegetables, Fish, Poultry, etc.
Fruits and Berries
Bagged - Exempt - Case 1
Canned - Not exempt - Case 20
Citrus fruit sections, fresh, cold-packed, semi-frozen, or frozen - Exempt - Bureau opinion, Note 2
Color added - Exempt - Case 1
Dates, pitted, dried - Exempt - Bureau opinion
Dehydrated - Exempt - Bureau opinion, Note 3
Dried, naturally or artificially - Exempt - Cases 1 and 20
Figs, dried, halved or quartered - Exempt - Bureau opinion
Frozen, fresh - Exempt - Case 20
Fumigated - Exempt - Case 1
Graded - Exempt - Case 1
Hulls of oranges after juice extractions - Not exempt - Bureau opinion
In brine, to retain freshness - Exempt - Bureau opinion
Juice, orange or other citrus - Not exempt - Case 17
" , fruit, plain or concentrated - Not exempt - Bureau opinion
Kernels - Exempt - Bureau opinion
Oiled apples - Exempt - Case 1
Peaches, peeled, pitted, and put in cold storage in unsealed containers - Exempt - Case 20
Quick frozen, fresh - Exempt - Case 21
Pies, frozen - Not exempt - Case 14
Preserved, such as Jam - Not exempt - Bureau opinion
Purees, strawberry and other, frozen - Not exempt - Case 7, Note 6
Raisins, seeded or unseeded - Exempt - Bureau opinion
Sliced, fresh or frozen - Exempt - Bureau opinion, Note 2
Strawberries, in syrup and unsealed containers in cold storage - Exempt - Case 20

Grains
Artificially dried - Exempt - Case 1
Barley, rolled - Exempt - Case 20
" , whole - Exempt - Case 1
Corn, cracked - Exempt - Bureau opinion
" , shelled - Exempt - Case 1
" , whole - Exempt - Case 1
Feeds, see separate heading: Feeds
Hulls, see Feeds
Milo maize - Exempt - Bureau opinion
Oats, whole - Exempt - Case 1
Oil extracted from grain - Not exempt - Bureau opinion
Popcorn, popped - Not exempt - Bureau opinion
" , unpopped, shelled, in sealed or unsealed containers - Exempt - Bureau opinion

Grains (cont'd.)
Rice bran - Exempt - Bureau opinion, Compare Case 12
" , brewers - Exempt - Bureau opinion
" , clean - Exempt - Cases 12 and 20
" polish - Exempt - Case 20
" , precooked - Not exempt - Bureau opinion
" , whole - Exempt - Case 1
Rye, whole - Exempt - Case 1
Sorghum grains, whole - Exempt - Case 1
Wheat germ - Not exempt - Bureau opinion
Wheat, whole - Exempt - Case 1
Grass sod - Exempt - Bureau opinion
Gravel - Not exempt - Bureau opinion
Greenery, see Forest products
Grinding, see Note 4

Hair, alpaca, camel, or goat, clipped from animal - Exempt - Bureau opinion
" , hog or other animal, product of slaughter of animal - Not exempt - Bureau opinion
Hay and forage, dried naturally or artificially - Exempt - Case 1
" , chopped - Exempt - Case 20
" , dehydrated - Exempt - Case 1
" , salt (from salt marshes) - Exempt - Bureau opinion
" , sweetened with 3% molasses by weight - Not exempt - Bureau opinion
Hemp fiber - Exempt - Case 1
Herbs, see Spices
Hides, green and salted - Not exempt - Cases 1 and 23
Honey, in the comb or strained - Exempt - Case 1
" , heat treated to retard granulation - Exempt - Bureau opinion
Hops - Exempt - Case 1
Horticultural commodities
Bulbs - Exempt - Bureau opinion
Flowers, growing or cut - Exempt - Bureau opinion
Leaves, natural or dried - Exempt - Bureau opinion
Nursery stock - Exempt - Bureau opinion
Plants, vegetable and flower - Exempt - Bureau opinion
Roots, rhubarb, asparagus, mint, etc. - Exempt - Bureau opinion
Trees, growing, balled in earth - Exempt - Bureau opinion
Wreaths, holly or other natural material, with small amount of foundation or decorative material - Exempt - Bureau opinion
Humus, of a nature similar to peat moss - Exempt - Bureau opinion

Ice for cooling subsequent shipments of exempt commodities - Exempt - Administrative Ruling No. 63, August 3, 1937.
Imported commodities - Have same status as domestic - Cases 1(b) and 22
Insecticides - Not exempt - Bureau opinion

Juices, See Fruits

Jute fiber, in bales - Exempt - Bureau opinion

Kelp, dried, ground - Exempt - Bureau opinion, Note 4

Latex, see Rubber
Leaves, see Forest products, Horticultural commodities, and Spices
Livestock
- Exhibit animals, such as those of 4-H club members, which though showed for a few days, are chiefly valuable for slaughter - Exempt - Bureau opinion.
- Medical use animals, such as ordinary healthy swine for serum manufacture - Exempt - Bureau opinion
- Monkeys - Not exempt - Bureau opinion
- Ordinary, i. e., all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, and other special uses - Exempt - Case 1
- Race horses - Not exempt - Case 1
- Registered or purebred cattle for ordinary farm or ranch uses, not chiefly valuable for breeding, race, show, or other special purposes - Exempt - Bureau opinion
- Show horses - Not exempt - Case 1
- Zoo animals - Not exempt - Bureau opinion

Limestone, agricultural - Not exempt - Bureau opinion
Linseed meal, see Meal
Lumber, rough sawed or planed - Not exempt - Cases 1 and 9

Manure, in natural state - Exempt - Case 1
" , dried or dehydrated, bagged - Exempt - Bureau opinion
Maple sap - Exempt - Case 1
" syrup - Not exempt - Bureau opinion
Meal, alfalfa - Not exempt - Bureau opinion
" , copra - Not exempt - Case 6
" , cottonseed - Not exempt - Case 20
" , fish - Not exempt - Case 6
" , flaxseed - Not exempt - Bureau opinion
" , linseed - Not exempt - Bureau opinion
" , peanut - Not exempt - Bureau opinion
" , soybean - Not exempt - Bureau opinion
Meat and meat products, fresh, frozen or canned - Not exempt - Cases 1 and 20
Milk and Cream
- Buttermilk - Exempt - Case 20
- Chocolate - Not exempt - Case 1
- Condensed - Not exempt - Case 20
- Frozen - Exempt - Case 20
- Homogenized - Exempt - Case 1
- Pasteurized - Exempt - Cases 1 and 20
- Powdered - Exempt - Case 20

Milk and Cream (cont'd.)
Raw - Exempt - Case 1
Skim - Exempt - Cases 1 and 20
" , with two-thirds of water removed, in bulk or unsealed containers - Exempt - Bureau opinion
Standardized - Exempt - Case 1
Sterilized in hermetically sealed cans - Not exempt - Bureau opinion
Vitamin "A" - Exempt - Cases 1 and 20
Milo, see Grains
Mohair, raw, cleaned, or scoured - Exempt - Case 1(a)
Molasses - Not exempt - Bureau opinion
Moss, see Forest products
Mushrooms, fresh - Exempt - Case 4

Nursery stock, see Horticultural commodities
Nuts, (including peanuts)
Peanut meal - Not exempt - Bureau opinion
" shells, ground - Exempt - Case 20, Note 4
Polished - Exempt - Bureau opinion
Raw, shelled or unshelled - Exempt - Cases 1, 3, and 18
Roasted or boiled - Not exempt - Bureau opinion
Shelled, raw - Exempt - Cases 3 and 18
Shells, - Exempt - Bureau opinion
" , ground peanut - Exempt - Case 20, Note 4
Unshelled, raw - Exempt - Case 1

Oats, see Grains
Oil, mint - Not exempt - Case 1
Oil, extracted from vegetables, grain seed, fish, or other commodity - Not exempt - Bureau opinion

Packaged commodities - Packaging exempt commodities does not affect their exempt status - Case 1
Peanuts, see Nuts
Peat moss, see Forest products
Pelletized feeds, see Feeds
Pelts, - Not exempt - Case 1
Pies, frozen - Not exempt - Case 14
Pigeons, racing - Not exempt - Case 13
Plants, vegetable or flower, see Horticultural commodities
Poles, see Trees
Popcorn, see Grains
Poultry, dressed, fresh or frozen - Exempt - Case 19
" feathers - Exempt - Case 20
" , frozen - Exempt - Case 19
" , live - Exempt - Case 1
" , picked - Exempt - Case 20
" , stuffed and frozen - Exempt - Bureau opinion

Pulp, beet - Not exempt - Case 6
Pulp, sugarcane - Not exempt - Bureau opinion
Purees, see Fruits

Rabbits, dressed - Exempt - Bureau opinion
Raisins, see Fruits
Ramie Fiber - Exempt - Case 1
Resin, see Forest products
Rice, see Grains
Rock - Not exempt - Bureau opinion
Roots, see Forest products, Horticultural commodities
Rubber, crude, in bales - Not exempt - Bureau opinion
" , latex, natural, liquid, from which water has been extracted and to which ammonia has been added - Not exempt - Case 15
Rye, see Grains

Sand - Not exempt - Bureau opinion
Sap, see Forest products
Sawdust, from lumber mills - Not exempt - Bureau opinion
Seeds
Cotton, see Cottonseed
Deawned - Exempt - Case 20
Flax, see Flaxseed
Inoculated - Exempt - Case 1
Meal made from seeds, see Meal
Natural - Exempt - Case 1
Oil extracted from seeds - Not exempt - Case 1
Packets or boxes of seeds in display racks - Exempt - Bureau opinion
Scarified - Exempt - Case 20
Screened or sized - Exempt - Case 2
Spice, see Spices
Sprayed for disease control - Exempt - Case 2
Seaweed, dried, ground - Exempt - Bureau opinion, Note 4
Shells, nut, see Nuts
" , oyster, see Fish
Shingle bolts, see Trees
Skins, animal - Not exempt - Cases 1 and 23
Sliced, see commodity name: Fruits, Vegetables, etc.
Soil, potting - Not exempt - Bureau opinion
" , top - Not exempt - Bureau opinion
Sorghum fodder - Exempt - Case 1
" grains - Exempt - Case 1
Soup, frozen - Not exempt - Bureau opinion
Spices and herbs, unground, whether seeds, berries, leaves, bark, or roots - Exempt - Bureau opinion
Spices and herbs, ground but not further processed - Exempt - Bureau opinion, Note 4

Stover - Exempt - Case 1
Straw - Exempt - Case 1
Sugar - Not exempt - Case 1
  " beets - Exempt - Case 1
  " cane - Exempt - Case 1
  " can pulp - Not exempt - Bureau opinion
  " ,raw - Not exempt - Bureau opinion
Syrup, cane - Not exempt - Case 1
Syrup, maple - Not exempt - Bureau opinion

Tea - Exempt - Case 1(b), Note 1
Telephone poles, see Trees
Textile waste, see Cotton waste
Tobacco
    Chopped leaf - Exempt - Bureau opinion
    Cigars and cigarettes - Not exempt - Bureau opinion
    Homogenized - Not exempt - Bureau opinion
    Leaf - Exempt - Case 1
    Redried leaf - Exempt - Case 1(a)
    Smoking - Not exempt - Bureau opinion
    Stemmed leaf - Exempt - Bureau opinion
    Stems - Exempt - Bureau opinion
Top Soil - Not exempt - Bureau opinion
Trees
    Bolts for making shingles - Exempt - Bureau opinion
    Brush, mesquite, twigs and debris burned off - Exempt - Bureau opinion
    Christmas, plain, sprayed, or coated - Exempt - Bureau opinion
    Cut to length, peeled, or split - Exempt - Case 1
    Growing, see Horticultural commodities
    Sawed into lumber - Not exempt - Case 1
    Shingle bolts - Exempt - Bureau opinion
    Telephone poles, not creosoted - Exempt - Bureau opinion
Turtles, see Fish

Vegetables
    Bagged - Exempt - Case 1
    Beans, dried artificially and packed in small container - Exempt - Case 20
    Candied sweet potatoes, frozen - Not exempt - Case 7, Note 6
    Canned - Not exempt - Case 20
    Cooked - Not exempt - Bureau opinion
    Cucumbers, salt cured - Exempt - Case 1(b), Note 1
    Cured - Exempt - Case 1
    Cut up, fresh, in cellophane bags - Exempt - Case 20
    Dried, naturally or artificially - Exempt - Cases 1 and 20
    Dehydrated - Exempt - Bureau opinion, Note 3
    French fried potatoes - Not exempt - Case 10

Vegetables (Continued)
Frozen, fresh - Exempt - Case 21
Garlic powder - Exempt - Bureau opinion, Notes 3 and 4
Graded - Exempt - Case 1
Oil extracted from vegetables - Not exempt - Bureau opinion
Onion powder - Exempt - Bureau opinion, Notes 3 and 4
" chips and flakes, dried - Exempt - Bureau opinion, Note 3
Peas, split - Exempt - Bureau opinion
Peeled, uncooked - Exempt - Bureau opinion
Powder, onion and garlic - Exempt - Bureau opinion, Notes 3 and 4
Quick frozen, fresh - Exempt - Case 21
Shelled - Exempt - Bureau opinion
Soup, frozen - Not exempt - Bureau opinion
Soybean meal - Not exempt - Bureau opinion
Washed, fresh, in cellophane bags - Exempt - Case 20

Whale meat, see Fish
Wheat, see Grains
" products, see Feeds, Flour
Wood chips for making woodpulp - Not exempt - Bureau opinion
Wool, raw, cleaned, or scoured - Exempt - Case 1(a)
" grease, as obtained from cleaning or scouring process - Exempt - Bureau opinion
" tops and noils - Exempt - Bureau opinion, Note 5
" waste, carded but not spun, woven or knitted - Exempt - Bureau opinion, Note 5
" Yarn - Not exempt - Bureau opinion
Wreaths, see Forest products

CASE LISTS

Commission

1. Determination of Exempted Agricultural Commodities, 52 M.C.C. 511

1(a). Determination of Exempted Agricultural Commodities, 62 M.C.C. 87

1(b). Determination of Exempted Agricultural Commodities, MC-C-968, First Supplemental Report, decided February 11, 1958

2. Blythe Common Carrier Application, 66 M.C.C. 560

3. Bonney Motor Express, Inc., Extension, 69 M.C.C. 480

4. Dougherty Common Carrier Application, 31 M.C.C. 793

5. Erickson Transport Corp., Extension - Madison, South Dakota, decided December 31, 1957, MC-113908 Sub 21

Commission (Cont'd.)

6. Herrett Trucking Co., Inc., Extension - Feeds, 69 M.C.C. 487

7. Hughes Extension - Frozen Foods, 71 M.C.C. 457

8. Karst Extension - Containers, 62 M.C.C. 579

9. Lewis Common Carrier Application, 69 M.C.C. 603

10. Midwest Coast Transport, Inc., Extension - Montana MC-111812 Sub 27, decided December 31, 1957

11. Monark Egg Corp., Contract Carrier Application 52 M.C.C. 576

12. Penn-Dixie Lines, Inc., Extension - Rice 72 M.C.C. 797

13. Prang Extension - Homing Pigeons, 53 M.C.C. 223

14. Refrigerated Transport Co., Inc., Extension, Frozen Foods, 72 M.C.C. 459

15. Shipley Transfer, Inc., Extension - Liquid Latex, 52 M.C.C. 806 (Not printed)

16. Sprofera Common Carrier Application, 66 M.C.C. 123

17. Watkins Motor Lines, Inc., Interpretation, 64 M.C.C. 455

COURT

18. Consolidated Truck Service, Inc. vs. U. S. and I.C.C., 144 F. Supp. 814

19. East Texas Motor Freight Lines, Inc. vs. Frozen Food Express, 351 U. S. 49

20. Frozen Food Express vs. U. S. and I.C.C. 148 F. Supp. 399, affirmed without opinion 355 U. S. 6

21. Home Transfer & Storage Co. vs. U. S. and I.C.C., 141 F. Supp. 599, affirmed without opinion, 352 U. S. 884

22. Premier Peat Moss Corp. vs. U. S., 147 F. Supp. 169

23. Southwestern Trading Co. vs. U. S., 208 F. 2d 708

NOTES

Note 1.

The report in Determination of Exempted Agricultural Commodities, MC-C-968, First Supplemental Report, decided February 11, 1958 was served on February 14, 1958. Whether any petitions for reconsideration will be filed is not known at this time.

Note 2.

In Penn-Dixie, 68 M.C.C. 29, Division 1 of the Commission held fresh citrus fruit sections not to be within the exemption. However, this decision was rendered prior to the affirmance by the U. S. Supreme Court of the court decisions in I. C. C. vs. Home Transfer & Storage Co., 141 F. Supp. 599, 352 U. S. 884 and in Frozen Food Express vs. U.S., 148 F. Supp. 399, 355 U.S. 6. In the former case peeled and sliced frozen peaches were held to be within the exemption, and in the latter case cut up vegetables and peeled and pitted peaches were held to be within the exemption.

Note 3.

In the Determination case, 52 M.C.C. 511, the Commission held that dehydrated vegetables do not come within the exemption. However, that position would seem no longer valid in view of the recent holding in Frozen Food Express vs. U.S., 148 F. Supp. 399 that dried egg powder, dried egg yolks and powdered milk are within the exemption, which holding was affirmed by the U. S. Supreme Court in 355 U.S. 6.

Note 4.

It is rather clear from the Determination case, 52 M.C.C. 511, that the Commission considered grinding to be manufacturing, though it did not specifically so hold. The Bureau until recently considered all ground commodities to be not exempt. In Herrett, 69 M.C.C. 487, (January 29, 1957) the Commission, Division 1, held ground oat hulls not within the exemption. This, however, was prior to the expiration of the date for appeal in Frozen Food Express vs. U.S. and I.C.C., 148 F. Supp. 399, in which the court held, among other things, that ground peanut shells, dried egg powder, and powdered milk are within the exemption. No appeal was taken as to ground peanut shells, and on appeal the U. S. Supreme Court affirmed the decision as to the two powdered commodities. The Court opinion does not describe the grinding and powdering processes there involved, but in an early Commission case, Harris and Callis, 4 M.C.C. 169, it was said that ground peanut shells are produced by pulverization in a hammer mill.

Note 4. (cont'd.)

In view of the Court holdings, which now are final, the Bureau no longer considers that grinding alone removes a commodity from the exemption. However, manufacturing which follows or precedes grinding may have this effect. Thus, the bolting which produces flour would make that commodity non-exempt. Also, meals produced by grinding commodities from which the oil has been extracted are considered not within the exemption. Thus, in the Frozen Food case, mentioned above, the court held cottonseed meal not to be within the exemption.

Note 5.

In view of the "substantial identity" test of the U. S. Supreme Court in East Texas Motor Freight Lines, Inc. vs. Frozen Food Express, 351 U. S. 49, the Bureau takes the view that the exemption includes cotton or wool which has been combed or carded but not spun, woven or knitted. Thus, wool tops and noils are now considered within the exemption. Also, considered within the exemption is waste which consists of scraps or discards of cotton or wool fibers resulting from the handling and processing in mills, but not waste made up of scraps of thread, yarn, or cloth.

Note 6.

This holding was made in Hughes, 71 M.C.C. 457, which proceeding later was reopened for further hearing. Pending final determination of the proceeding the holding cannot be considered an authoritative decision of the Commission. However, these same commodities were held not exempt in Bureau opinions rendered previous to the decision. Compare Administrative Ruling No. 98.

Ruling No. 91
Section 203(b) (4b) - 3

July 17, 1940

INTERSTATE COMMERCE COMMISSION

BUREAU OF MOTOR CARRIERS

The following is an administrative ruling of the Bureau of Motor Carriers, made in response to questions propounded by the public, indicating what is deemed by the Bureau to be the correct application and interpretation of the Act. Rulings of this kind are tentative and provisional and are made in the absence of an authoritative decision upon the subject by the Commission.

Question:

What type of cooperative association is referred to in section 203(b)(4b) of the Motor Carrier Act, 1935, the motor vehicles of which are exempt under that section from the general provisions of the Act?

Answer:

The following conditions must exist in order that vehicles of cooperative associations as defined in the Agricultural Marketing Act,[2/] approved June 15, 1929, as amended, may be exempt as specified in the Motor Carrier Act:

(1) The vehicles must be controlled and operated by the cooperative association. That is to say, the association, as distinguished from its members or from any subordinate corporation or other entity, must own or have the legal right of possession of the vehicle and direction and control of its operations and the person who operates it must be one who is an employee of the association.

(2) The association must be one in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, or any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services.

(3) The association must be one which neither deals (as described in (2)) in the products of, or supplies for, nor furnishes farm business services to, nonmembers to any amount greater in value than such as are handled by it for members.

(4) The association must either provide that no member may have more than one vote in the affairs of the association, or limit its dividends on stock or membership capital to 8% a year, but it may impose both restrictions.

(5) The association must limit its powers and authority, and, if incorporated, its articles of incorporation and by-laws, to the letter of the Agricultural Marketing Act. Its activities and powers must not in any case be so extended as to result in a business concern conducted for profit as distinguished from a cooperative enterprise for the mutual benefit of the farmer members thereof as producers or purchasers. The association must not only conduct its business within the limitations of the statute but must be so organized as to be restricted to its terms. The business must be primarily that of farmers acting together in marketing farm products and/or furnishing farm supplies and farm business service.

The character of the organization of the cooperative association, its powers, functions, volume of business and other relevant factors must be in complete accord with the foregoing conditions before exemption of the motor vehicles operated by such associations can be said to exist.

A federation of cooperative associations is to be regarded as itself a cooperative association within the meaning of section 203(b)(4b), provided each of the associations which compose the federation meets the conditions set out above.

This ruling supersedes Administrative Ruling No. 61, issued August 3, 1937, and Administrative Ruling No. 71, issued February 7, 1938.

W. Y. Blanning

Director