arise under the general supervision of the Division of Education and in accordance with its rules and regulations.

As to your last question as to the right to refuse a new transfer to a child who had attended the previous year, it is important to note that under the general transfer statutes a transfer is only for the one school year and a right to a transfer for each succeeding school year must be passed upon each year to determine if the child can be best accommodated and educated in that particular school. Further, the conditions and circumstances of each case should be determined by the local school authorities, subject, however, to review by the State Division of Special Education and subject to said Division's rules and regulations, and its action thereon, in its general supervision and coordination of such program.

OFFICIAL OPINION NO. 42

October 6, 1955

Mr. Warren Buchanan, Chairman
Public Service Commission of Indiana
401 State House
Indianapolis, Indiana

Dear Mr. Buchanan:

In your letter concerning the Acts of 1937, Ch. 58, Sections 10 and 11, as found in Burns' Indiana Statutes (1951 Repl.), Sections 55-1335 and 55-1336, you asked the following questions directly relating to the enforcement of this "full crew" enactment:

"1. What means may the Commission use to obtain the facts?

"2. Does the Commission have the authority to entertain a petition, and if so, what procedure should be followed in respect to notice, subpoenas and hearings?

"3. Since your office has the authority to file the action, in the name of the State of Indiana, on relation of the public service commission of Indiana, under the provisions of § 55-1336, is it necessary for this Com-
mission to formally order such action filed; and if not, by what means should the information which we acquire be transmitted to you for action?"

You have also stated in your letter that your particular problem at the present time arises out of a possible violation of this statute in respect to use by a railroad corporation of other than competent employees as an operating crew; that your Railroad Inspection Department has made a preliminary investigation, reporting that violations did occur, but without gathering or presenting facts concerning the competency of the employees involved; that the Director of that Department has indicated to the railroad brotherhoods, interested in enforcement, that the Commission would entertain a formal petition; and that they have declined to file such a petition on the ground that unless there is some question of accuracy of the Commission inspector’s report, there could be no basis or reason for such a procedure.

The two sections to which you have referred read as follows:

* * *

"It shall be the duty of the public service commission of Indiana to enforce the provisions of this act.

"Any carrier operating in the state of Indiana, who shall willfully violate any of the provisions of this act, shall be liable to the state of Indiana for a penalty of not less than one hundred dollars [$100], nor more than five hundred dollars [$500], for each offense, and such penalty shall be recovered, and suits therefor brought by the attorney-general, or under his direction, in the name of the state of Indiana, on relation of the public service commission of Indiana, in the circuit or superior court of any county through which such railroad may be run or operated."

Without herein setting out all the sections of the statute relating to different situations and circumstances in which the number of competent employees making up the crew is prescribed, I call your attention to the fact that all such sections clearly set out what action is unlawful on the part of the car-
rier, and also, affirmatively state the number and classification of competent employees of which the crew "shall consist."

It should also be noted that the term "competent employee," for the purpose of this Act, is specifically defined, and particular qualifications in respect to competency are set out.

Acts of 1937, Ch. 58, Sec. 1 (n), as found in Burns' Indiana Statutes (1951 Repl.), Section 55-1326, subsection (n).

Whenever the Commission has reliable information, or, because of reports made by its inspectors, the Commission has reason to believe that a dangerous neglect or fault exists in the management of any railroad, it is the duty of the Commission to cause such investigation to be made as it may deem necessary.

Acts of 1905, Ch. 53, Sec. 23, as amended, as found in Burns' Indiana Statutes (1951 Repl.), Section 55-130 (b) 1.

For this purpose, the Commission has the power to require, by subpoena, the attendance and testimony of witnesses and the production of documentary evidence at any designated place of hearing in this state,

Acts of 1905, Ch. 53, Sec. 12, as amended, as found in Burns' Indiana Statutes (1951 Repl.), Section 55-119, and also has the duty to keep itself informed as to the manner and method in which the management of the railroads is conducted, and has the right to obtain from such carriers full and complete information necessary to enable it to perform this duty and to enforce the "Full Crew" Act and all the other laws of this state, the enforcement of which is devolved upon the Commission.

Acts of 1905, Ch. 53, Sec. 20, as amended, as found in Burns' Indiana Statutes (1951 Repl.), Section 55-127.

The purpose of the investigation, authorized by Section 55-130 (b) 1, supra, is a "report" containing a statement of the existence in fact of the dangerous neglect or fault and
"recommendations" of reasonable changes and improvements to be made within a specific reasonable time, enforceable in a court of law without further hearing of any kind in respect to the existence of such conditions or need for change by the railroad. Therefore, even though such investigation may not have the status of a "proceeding instituted against a railroad" within the meaning of the Acts of 1941, Ch. 101, Sec. 8, as amended, as found in Burns' Indiana Statutes (1951 Repl.), Section 54-115, yet the basic requirements of due process will require that any determination of either civil or criminal wrongdoing must be based upon adequate notice and an opportunity to be heard. It therefore would seem that such investigation should not culminate in any finding and "recommendations" adverse to the railroad unless a hearing is held with notice in accord with said Acts of 1941, Ch. 101, Sec. 8, supra, and including a statement of the Commission's order under your own Rule IX, which order shall set forth a statement of the matters to be investigated.

Such "report" and "recommendations" of the Commission will be subject to judicial review, under the provisions of the Acts of 1929, Ch. 169, as found in Burns' Indiana Statutes (1951 Repl.), Sections 54-429 to 54-438, and it would also seem that the Commission, as defendant, would be fully authorized by the provisions of said Section 55-130 (b) 1, to seek enforcement of said "recommendations" by way of cross-complaint in the same cause.

It may be true that an isolated instance or two has occurred in which other than competent employees were used by the railroad, yet with no indication whatsoever that such neglect or fault will continue or occur again. In such case, no formal investigation is justified, yet the use of such incompetent personnel by the railroad may have been wilful.

The Legislature has seen fit to distinguish between a mere unlawful use of other than competent employees and a wilful use of same, and has not only provided a specific civil penalty for such a wilful violation, but has provided that the proceeding to determine liability lies in the courts and not before the Commission. For the purpose of such proceedings, no formal investigation is required or authorized to be made by the Commission on its own motion, and unless a petition has been filed
or the Commission determines to institute an investigation for safety reasons under the provisions of the Acts of 1905, Ch. 53, Sec. 23, *supra*, there is no authority to subpoena witnesses and documentary evidence.

In respect to continuing violations, without regard for the specific intent of the railroad, and for the purpose of halting the unlawful practice rather than collecting a civil penalty, the Commission has authority, under the provisions of the Acts of 1905, Ch. 53, Sec. 20, *supra*, to enforce this "Full Crew" Act by an action in any appropriate court against the offending railroad, to enjoin the same from so violating the statutory provisions.

Any pertinent information gained by the Commission from the railroad under the authority of said Acts of 1905, Ch. 53, Sec. 20, *supra*, to keep itself informed as to the manner and method in which the management of the railroad is conducted, may be used either in a proceeding before the Commission, or in an action in the courts, subject, however, to the rules of evidence in the latter case.

In answer to your second question, any person may complain to the Commission of anything done or omitted to be done by the railroad, stating the facts in a petition.

Acts of 1905, Ch. 53, Sec. 3, as amended, as found in Burns’ Indiana Statutes (1951 Repl.), Section 55-101 (h).

In such case you will note that a statement of the charges shall be forwarded by the Commission to the carrier, which is then called upon to "satisfy the complaint," or to answer same in writing within a reasonable time to be specified by the Commission. If the complaint is not satisfied, i.e., if the authorized action is not halted, "or there shall appear to be any reasonable ground for investigating said complaint," the Commission has the affirmative duty to so investigate. The investigation of the matters complained of is not, strictly speaking, one made "on its own motion." Since such proceeding is adversary in nature, any orders made by the Commission must be based upon facts impartially found by it, and the Commission cannot act in the role either proponent or opponent during any hearing, on any issue to be decided by it.
If "injustice" or "discrimination" against any person, firm, or corporation is found, the Commission has the power to make such corrections, alterations, changes or new rules or regulations as may be necessary to prevent the same.

If merely a dangerous neglect or fault is found, not specifically in violation of any law, the Commission has the authority, as aforesaid, to issue a "report" and "recommendations." See Chicago & E. I. R. Co. v. Public Service Comm. (1943), 221 Ind. 592, 49 N. E. (2d) 341.

If a specific violation of law is found, such as a clear violation of the "Full Crew" Act, the Commission has the implied power, under the provisions of the Acts of 1905, Ch. 53, Sec. 20, supra, to enforce the applicable statute by an order to cease and desist from such unlawful practice. The Commission also has the specific power and authority, after a hearing, to enter an order requiring carriers to comply with the duty, obligations and requirements of all laws of the state concerning the duties, obligations and requirements of carriers in the performance of their duties to the public as common carriers.

Acts of 1905, Ch. 53, Sec. 7, as amended, as found in Burns' Indiana Statutes (1951 Repl.), Section 55-113 (b).

This would include the "Full Crew" Act, even in respect to switching operations, which are an integral part of the performance of the duties of the railroads to the public as common carriers.

Your final question concerns the relationship between the Commission and the Office of the Attorney General of Indiana. As in many instances concerning litigation in the courts, this relationship is simply that of attorney-client. In the civil action to assess the penalty for wilful violation, the State of Indiana is the nominal plaintiff, the Commission is the relator, and the Attorney General is merely the attorney for the Commission in charge of the plaintiff's case.

In the original form of the Acts of 1905, Ch. 53, Sec. 20, as found in Burns' Indiana Statutes (1951 Repl.), Section 55-127, the Legislature deemed it necessary to affirmatively require the Commission to report all violations, with the facts in their...
of course, no action will be commenced by this office with the Commission as plaintiff or relator unless a request has been made by the Commission. There is no statutory requirement as to form or transmittal of such a request, and, unless the Commission should formulate a rule of its own concerning such matter, the matter should be considered by the Commission as a body. If upon vote taken, the Commission orders that the Attorney General be requested and authorized to commence the judicial proceeding, it will be sufficient to transmit to this office such information by a letter from you or the Secretary of the Commission. Such letter should set out the action requested and authorized by way of a copy of the order made, and should also include all documentary evidence and data concerning witnesses and material evidence within the possession of the Commission. Such a procedure would guard against any possible question concerning the authority of this office in the filing of a complaint, on the basis that the Commission consists of three members acting as a body and not separately.


Although the final determination as to whether or not a wilful violation has occurred is a matter within the jurisdiction of the court, the Commission must first determine whether or not there is sufficient evidence of such a violation to justify the filing of such a charge, and should also attempt to secure and make available to the Attorney General, material evidence on all essential elements of the unlawful act. As in any other relationship between attorney and client, the Attorney General
may decline to file such an action in the absence of sufficient evidence to establish all the essential elements of the unlawful act. For a similar construction of a statute relating to the discretionary power of the Attorney General concerning the question as to whether or not an action will be filed, see State ex rel. Licking Tp. v. Clamme et al. (1923), 80 Ind. App. 147, 134 N. E. 676.

OFFICIAL OPINION NO. 43
October 13, 1955

Honorable Leonard T. Conrad
State Senator
1528 South Center Street
Terre Haute, Indiana

Dear Senator Conrad:

This is in reply to your request for an Official Opinion in which you inquire as to the following:

"Pursuant to H. B. 168, Chapter 15 of the Acts of 1953, I desire an opinion from your office.

"As an example, I will use the Travelers Protective Association of America, commonly referred to as the T. P. A. The T. P. A. is a fraternal beneficiary association, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit.

"I submit the following questions:

"1. At the present time, the T. P. A. issues a certificate of membership to its members, as required by its bylaws and constitution. Would the T. P. A. be required, under this law, to issue a standard form insurance policy?

"2. Would the T. P. A. be required to submit for approval by the Commissioner of Insurance all changes in benefits before said benefits could be made applicable in Indiana?"