purposes a strip of real estate devoted to school purposes, where it is found that the use for highway purposes is important and the injury to the school is not serious. That is, there would be a question of fact, in each condemnation case of the necessities for the two uses.

East Hampton v. County Commissioners, 28 N. E. 298 (Mass.).

Rominger v. Simmons, 88 Ind. 453.

DEPARTMENT OF INSURANCE: Has jurisdiction in rate making, under Workmen's Compensation Rating Bureau law, and stock company is authorized to write participating policy.

March 31, 1941.

Honorable Frank J. Viehmann,
Insurance Commissioner,
The Department of Insurance,
State House,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter of January 14, 1941, which in part reads as follows:

"In connection with this proposed rider to be attached to certain specific policies, we would desire an opinion as to whether or not jurisdiction over the contents of a compensation policy or provisions thereof falls within the provisions of the Indiana Insurance Law and, therefore, under the jurisdiction of this Department, or is such authority vested only in the Industrial Board.

"Second, if the jurisdiction over the contents of such policy and rider attached thereto falls under the provisions of the Indiana Insurance Law, as administered by this Department, does the rider by its specific provisions violate or contravene the statute relative to discrimination in rates which may be charged by companies licensed by this Department."
"To avoid repetition we do not list herein the pertinent sections of the Indiana Insurance Law, as these are covered specifically in the memo attached."

A brief review of the plan of operation of this company, the American Motorists Insurance Company, is to the following effect. It is a stock company, and issues, with respect to its workmen's compensation insurance, a "participating policy." As a member of the Indiana Workmen's Compensation Rating Bureau the company's compensation insurance policies are issued at rates fixed by the Bureau, but under a so-called "contributory dividend plan" it returns to its policyholders at stated intervals a proportionate share of the earnings of the company, such returns being based upon the company's "contributory dividend schedule."

This schedule provides for dividends which vary according to a "Loss Ratio Group" and "Premium Size Group." Without setting forth the schedule in full, and omitting certain details, it may be said that the Loss Ratio Group is graduated from 0-5% to 78-80%, the Premium Size Group from $1,001-$2,000 to over $200,000; that is, dividends vary according to the size of the premium and the loss ratio of the risks. The dividend schedule has been changed by the Board of Directors of the company from time to time resulting from periodical reviews of the experience to determine justification for any such change.

The purpose of the company to issue participating policies is evidenced by the use in each policy issued of the following:

"This policy shall participate in profits, as apportioned by the directors."

There is also attached to the policy an explanatory rider or endorsement, which reads:

"The employer insured under this policy shall be entitled to receive such refunds of unabsorbed premium as shall be determined in the absolute discretion of the Board of Directors under the contributory dividend plan adopted by the Board of Directors and which may be in effect and applicable to this policy at the time of the expiration of the policy. The contributory dividend plan is one under which premium earnings in excess of requirements of losses, expenses, reserves and surplus
additions are apportioned to the policyholders who are entitled under the rules of the company to participate therein."

The questions to be answered are: First, whether the Department of Insurance, by virtue of the provisions of the Indiana Insurance Law and of the Workmen's Compensation Rating Bureau Law, has authority in the matter of the issuance of such compensation insurance policies, or whether such authority is vested in the Industrial Board; and second, if the Department of Insurance has jurisdiction, whether the plan and therefore the issuance of such policy violates the provisions of either or both of such laws relating to discrimination in rates.

As to your first question, the Workmen's Compensation Rating Bureau Law provides for the establishment and operation of a Rating Bureau to determine and fix minimum premiums, and minimum premium rates, pertaining to compensation insurance. Although a separate law, it has the effect insofar as compensation insurance rates are concerned to supplement the Indiana Insurance Law. It applies to companies all of which are required, in order to do business in Indiana, to be licensed under the Indiana Insurance Law. By the terms of the Rating Bureau Law, broad powers are given to the Department of Insurance. Practically every operation of the Rating Bureau with reference to rates, is subject to the supervision and approval of the Department of Insurance, as provided in Sections 10, 11, 12, 13, 14 and 15 and other sections. Definite jurisdiction, in my opinion, is given the Department of Insurance to act with reference to such policies, and at the same time there would seem to be no conflict of jurisdictions as between that to be exercised by the Department and by the Industrial Board.

Regarding your second question, pertaining to discrimination of rates, Section 13 of the Rating Bureau Law, Acts 1935, p. 1545, and Section 273 (a) of the Indiana Insurance Law, Acts 1935, p. 588, are in the main controlling as to this question. They will be considered separately. Section 13 of the Rating Bureau law reads:

"The department shall approve a minimum adequate premium rate for each classification under which workmen's compensation insurance is written. No person, firm, company, or corporation, lawfully writing workmen's compensation insurance wholly or in part shall
use a premium rate less than that approved by the department."

The wording of this section, and the general theory of the Workmen’s Compensation Rating Bureau Law, is that the Bureau with the approval of the Department of Insurance shall fix a minimum premium rate for each classification of hazard, and in writing risks that there shall be no deviation from the rates adopted by any company, which rates as adopted shall not be below the minimum as approved and established by the Bureau, the practice being, however, that the rates adopted by the companies are the minimum rates established by the Bureau.

Consideration of the American Motorists Insurance Company participating or dividend plan raises the question as to whether the plan in fact amounts to a valid dividend paying or profit sharing arrangement, or whether it actually is a rating plan providing for deferred rebates upon premiums, thereby violating not only the Rating Bureau Law but also the provisions of the Indiana Insurance Law which prohibits rebates, deviations, or discrimination in rates. In other words does the company thwart the law by doing indirectly what it may not do directly.

This at once raised the question as to whether any form of return, or any form of participation in profits, of an insurance business going to policyholders is permissible under the Indiana laws. Such participation has in fact been permitted, for both mutual companies and reciprocal exchanges licensed in Indiana are based upon the theory of a return, and they do in practice make return, to their policyholders. Certain stock life insurance companies licensed in this state likewise issue participating life policies. Examination of the Rating Bureau Law or the Indiana Insurance Law does not disclose any provision that either sanctions or prohibits a so-called participating policy except by quite indefinite implication. Also, what does appear in the Indiana law could hardly be construed as applying to any particular type of insurance carrier.

It appearing that mutuals and reciprocals, also certain stock life insurance companies, operate in this state by the issuance of participating policies, it is to be inquired as to why all stock companies may not operate through the issuance of such policies. Mutuals and reciprocals would appear to be in a class by themselves, so also the nature of life insurance is such that a participating policy might seem justified, but why stock companies
generally, irrespective of the type of insurance written, may not so operate, especially since our laws are practically silent on the subject, is certainly a question difficult to conclude in the negative.

Such a negative conclusion, however, has had rather widespread acceptance in many states which has included Indiana as well to a considerable extent.

But in this connection, it should be stated that the American Motorists Insurance Company, a stock company, has been licensed and has operated for a good many years in Indiana, and during this time has issued this same form of policy now in question. Although some objection in times past has been registered against the policy, the Department of Insurance it seems has never taken a stand either for or against the company's practice until question is now definitely presented.

It should be further stated that another company, the Merchants' Fire Insurance Company, of Indianapolis, an Indiana corporation, and a stock company, has been operating in this state for some years, and has throughout its existence issued a participating fire insurance policy.

Also, upon objection to this policy by the Department of Insurance of Ohio, the Supreme Court of that state, in a mandamus proceeding brought against the Superintendent of Insurance, upon provisions in the insurance laws of Ohio much similar to our own, relating to the general subject of discrimination in rates, upheld the Merchants' Fire Insurance Company policy, in the case of State ex rel Merchants' Fire Insurance Company of Indiana v. Conn, Superintendent of Insurance, 144 N. E. 130. This case, although varying slightly with the one presented here, was decided upon questions almost exactly similar to those here presented.

With reference to this general subject of participating policies, involving the question as to whether there is a difference between dividends and rebates, it is to be noted that while Indiana insurance laws are silent so far as any provision is concerned prohibiting participating policies, they do provide specifically and in detail against rebates and deviations. Thus, inferentially, if not otherwise, our laws would seem to recognize a difference.

Aside, however, from the implications of Indiana laws, it is at least to be conceded that there is a difference in principle between a rebate and a dividend. The former has relation to a more or less direct return involving definite discrimination
between favored individuals as against others in the same class or as affected by like circumstances, where the element of unfairness is present. The latter implies a return to all alike in the same class as a reward for something given or the result of gain legitimately to be realized.

It will not be necessary to enter into an academic discussion of this difference. As to the particular plan of the American Motorists Insurance Company, it is to be said that while the plan is perhaps somewhat unusual in its conception and structure, it does amount to a return depending upon a surplus accumulation. If a profit is made the policyholders benefit, the amount of the benefit depending upon the size of the premium and the loss ratio of the risk. If there is no profit, then there is no benefit. In other words, it is not an absolute return in all events. It is properly based upon contingency, the contingency of an accruing surplus and the further contingency of action to be taken by the Board of Directors. If it were absolute, or a binding obligation on the company, it could hardly be classed as a dividend since no dividend can be otherwise than contingent. This is certainly a feature of the plan that tends to distinguish the return as being a dividend rather than a rebate; and likewise as tends to distinguish the plan as not being a rating plan since the rate or formula that determines the premium charge is of necessity something fixed and unalterable.

True, it may be said that the so-termed dividends are not such in fact, but are actual rebates, because they amount virtually to a return of the purchase price of the insurance, or are paid from the premium earnings, and out of a surplus which is not strictly a surplus. But it seems to me that this raises principally the question of manner or method. A return might properly be a dividend even though not meeting the technical requirements of a dividend such as is returned to a stockholder of a corporation; and an accumulation that is made to materialize for a certain purpose might properly amount to a surplus even if not such a surplus as provided for in insurance laws to answer a recognized purpose. Also, irrespective of what the return springs from, it goes through a process, it may materialize or it may not materialize. It goes to policyholders only if conditions earn it for them, regardless of what it once was. These considerations, I believe, make the return a dividend even if not the customary dividend known in corporation parlance. It is hardly a logical conclusion that a profit sharing plan, or
"dividends," may not be such because violating precedent, customary thinking, or the orthodox.

For much the same reasons, and because the standard premium is charged, and the amount of the return is not fixed or certain, or the fact that there may be no return at all, the company is hardly open to the charge of using a premium rate less than that approved by the Department as provided in Section 13, above.

I am obliged to conclude that the plan is in fact a dividend plan, and is not or does not involve a rating plan.

A further question is whether the company's "contributory dividend schedule" does not in itself lead to inequalities and discriminations by reason of the make-up of the graduated loss ratio and premium size groups. I am obliged to conclude that no such results necessarily follow.

In this connection, I quote Sections 10 and 15 of the Rating Bureau Law, which supplement Section 13 pertaining to the establishment of a minimum premium rate for each classification of hazard, such two sections reading:

"Sec. 10. The bureau under the supervision of the department of insurance and to its approval shall arrange industries of this state into classes for compensation insurance, and make inspections of compensation risk or risks, and apply thereto the schedule or merit rating system; and establish charges and credits under such system as are approved by the insurance commissioner;" * * *

and

"Sec. 15. The department shall after consultation with members of the bureau and after investigation approve a system of schedule or merit rating for use in this state."

The theory and purpose of the statute being to take into account experience and establish charges and credits under a merit rating system, I can see nothing out of place with a "contributory dividend schedule" which, with reference to profit returns, attempts to carry out much the same system or principle as employed by the Bureau in its procedure with reference to rate making. Conceding that the theory of the statute is scientific and sound, and intended to eliminate inequalities and
discriminations, it is difficult to criticize the "contributory dividend plan" of the company based upon a like principle.

Bearing upon this general question, but as confined to rate making procedure, that the theory and system of applying charges and credits to individual risks depending upon size and other considerations, is sound, and that this system is non-discriminatory, I cite the following:

State ex rel. Zane Cab Corporation v. Industrial Commission (Ohio), 5 N. E. (2nd) 477;


State ex rel. Powhatan Mining Company v. Industrial Commission of Ohio (Ohio), 181 N. E. 99;


Reference is still to be made to Section 273 (a) of the Indiana Insurance Law, referred to above, relating to discriminations. So much of the Section as is applicable reads:

"No company acting through its officers or members, attorney-in-fact, or by any other party, no officer of a company acting on his own behalf and no insurance agent, broker, or solicitor, personally or by any other party, shall offer, promise, allow, give, set off or pay, directly or indirectly, any rebate of or part of the premium payable on a policy, or any agent's commission thereon, or earnings, profits, dividends or other benefits founded, arising, accruing, or to accrue thereon or therefrom, or any special advantage in date of policy or age of issue, or any paid employment or contract for services of any kind, or any other valuable consideration or inducement, to or for insurance on any risk in this state, now or hereafter to be written, or for or upon any renewal of any such insurance, which is not specified in the policy contract of insurance. * * *"

Comment as to this section is unnecessary other than to say that the policy in question meets the requirements of the section, in view of the last clause thereof, since the provision as
to participating in profits is included as a part of all policy contracts issued by the company. The exact amount to be distributed need not be specified, as held, under similar statutes, in General Insurance Company of America v. Earle, Insurance Commissioner (Oregon), 65 Pac. (2d) 1414, and State ex rel. Merchants' Fire Insurance Company of Indiana v. Conn, Superintendent of Insurance (Ohio), 144 N. E. 130.

This discussion has been extended to some length because of the obvious importance of the subject, and because of the difficulties which the problem, relating to the use by stock companies of participating policies, has presented in times past to your Department as well as insurance departments of other states. From the reading of analyses and rulings of insurance commissioners in the various states, opinions from Attorneys General, and court decisions, it is to be observed that only in recent years has a solution appeared definitely to crystalize.

It may be of some value to quote from several of these rulings and authorities relating to this general subject.

The latest ruling, as happens to pertain to this same company, was made March 3, 1941. After an extended analysis of the subject by the Superintendent of Insurance, of New York, the ruling concludes:

"Inasmuch as we have not found that the dividends referred to are not earned or that the payment thereof would be inequitable or unfairly discriminatory with respect to other policyholders, the Superintendent gives his approval to the payment of said dividends by the American Motorists Insurance Company."

The Attorney General of Kansas, in an opinion of January 23, 1939, upon rate provisions similar to those in Indiana, relating to the policy of a stock fire insurance company, states his conclusions:

"It is therefore my opinion that the participating provisions in the policies submitted by the General Insurance Company of America do not violate the provisions of our statute relating to rates and filing of schedules, and the adherence to such schedules; nor do they constitute a discrimination in violation of 40-917 of our statute."

From an opinion of June 1, 1939, by the Attorney General of Minnesota, which overruled a former opinion of December 10, 1938, I quote the following:
“Nothing in the act prohibits carriers from returning part of the profits to policyholders. The Rate Law only prescribes the rate to be charged in the first instance and states that no other rate shall be charged. The distribution of surplus, if any, is left entirely to the carriers.

“Under our economic system, profits of private enterprise belong to the one who has earned them and he may dispose of such profits as he wills. Private corporations, by the same token, but within the confines of the law creating them, may distribute their surplus earnings as their best judgment dictates so long as such is done pursuant to the proper charter authority. A corporation charter represents the contract between the stockholders and corporations; in the instant case the stockholders, through their charter, have specifically authorized their board of directors to issue participating policies of workmen’s compensation insurance.

* * * *

“We therefore advise you that a foreign stock company, when authorized by its charter, may issue a policy of workmen’s compensation insurance in this state which provides for policyholder participation in the profits as and if apportioned by the directors of such company, and that such provision is not violative of the Minnesota Rate Law.

“This reversal of the opinion of the attorney general dated December 10, 1938, necessitates a review of the previous opinion.

* * * *

“Moreover, the logical effect of granting a return in the form of participation of profits based on a loss ratio is to encourage policyholders to exercise greater caution in the management of their businesses. It fosters safety campaigns on the part of employer and employee alike. This leads to fewer losses and thus to fewer claims against the insurers. It is common sense that fewer liabilities creates a better business balance sheet.

* * * *

“Insofar as the opinion of December 10, 1938, is inconsistent herewith, it is overruled.”
With reference to the "public interest" consideration of the policy, suggested in the preceding opinion of the Attorney General of Minnesota, I quote briefly from General Insurance Company of America v. Earle, Insurance Commissioner (Oregon, 1937), 65 Pac. (2d) 1414, which, in holding valid a similar policy, under a similar statute, had this to say:

"Whatever sum would later be repaid to the policyholder under this participating clause was of benefit to the policyholder and in the public interest."

Answer to your second question, in specific form, is that issuance of the participating policy of the American Motorists Insurance Company does not, in my opinion, violate the provisions relating to rates or discrimination of either the Indiana Workmen's Compensation Rating Bureau Law or the Indiana Insurance Law.

ADJUTANT GENERAL: Transfer of enlisted personnel and re-commissioning of officers to conform to the Indiana State Guard Act of 1941.

April 2, 1941.

Colonel J. D. Friday,
Acting Adjutant General,
State House,
Indianapolis, Indiana.

Dear Colonel Friday:

I have before me your letter of March 26 requesting an official opinion, which follows:

"Pursuant to Executive Order issued effective November 19, 1940, there was created in the State of Indiana the Indiana Civil Defense Force, to be commonly known as the "home guard." Under date of December 19, 1940, the Adjutant General, State of Indiana, attempted to amend the Executive Order by informing the personnel of the Indiana Civil Defense Force that they were to be known from that date as the Indiana State Guard.

"Under the provision of this Executive Order, officers were appointed and enlistments were taken and full