OFFICIAL OPINION NO. 2

January 17, 1963

Hon. Robert E. Hughes
Treasurer of State
242 State House
Indianapolis 4, Indiana

Dear Mr. Hughes:

This is in response to your letter requesting my Official Opinion upon questions concerning the duties of the Treasurer of the State of Indiana. Your specific question is as follows:

> "We respectfully request an official opinion concerning the present effect of the Acts of 1921, Chapter 76, as found in Burns' (1951 Repl) Section 55-1101 et seq, on the office of the Treasurer of the State of Indiana. Does this office have any powers and duties under such Act at the present time? If such powers and duties do exist, what procedures should be followed to develop forms and records necessary to administer the provisions of the Act?"

Your letter also states that you have determined that no permits have been issued pursuant to such statute by the Treasurer's office for a number of years in the past and that no old bond records have been located.

Acts of 1921, Ch. 76, Sec. 1, as found in Burns' (1951 Repl.), Section 55-1101, which is referred to in your question, reads as follows:

> "No person, firm or corporation shall engage in the business of selling steamship or railroad tickets for transportation to or from foreign countries, or in the business of receiving money for the purpose of transmitting the same, or the equivalent thereof, to foreign countries, until such person, firm or corporation shall have obtained from the treasurer of state a certificate authorizing the carrying on of such business, which certificate shall be conspicuously displayed in the place of business of such person, firm or corporation.

> "No person, firm or corporation shall transact any business of the character contemplated in this section, as agent for another, unless the principal of such agent shall have complied with the provisions of this act and shall have received from the treasurer of state a certificate as hereinbefore provided."

This act further provides for certain exemptions to the provisions of the act and requirements as to the furnishing of a bond.

In connection with this question, two decisions of the Supreme Court of the United States are of interest.

The first of these was decided in 1929 and is Di Santo v. Pennsylvania, 273 U. S. 34, 36, 71 L. Ed. 524, 47 S. Ct. 267. The court was required to pass on the constitutionality of an act of the Pennsylvania Legislature which was similar to the one adopted in Indiana and was passed in the same year. The majority of the court held, in part, as follows:

> "The soliciting of passengers and the sale of steamship tickets and orders for passage between the United States and Europe constitute a well-recognized part of foreign commerce. See *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, 315. A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed, *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 199, and cases cited. Such legislation cannot be sustained as an exertion of the police power of the State to prevent possible fraud. *Real Silk Mills* v. *Portland*, 268 U. S. 325, 336. The Congress has complete and paramount authority to regulate foreign commerce and, by appropriate measures, to protect the public against the frauds of those who sell these tickets and orders. The sales here in question are related to foreign commerce as directly as are sales made in ticket offices maintained by the carriers and operated by their servants and employees. The license fee and other things imposed by the Act on plaintiff in error, who

> initiate for his principals a transaction in foreign commerce, constitute a direct burden on that commerce. This case is controlled by *Texas Transport Co.* v. *New Orleans*, 264 U. S. 150, and *McCall* v. *California*, 136 U. S. 104."

Mr. Justice Brandeis and Mr. Justice Holmes dissented, but, based on the majority decision, it would have been clear at that time, that the Acts of 1921, Ch. 76, *supra*, would have been held unconstitutional if the question were properly raised in our courts. From a factual standpoint, it can be surmised that, as a result of this decision, the Treasurer of the State of Indiana ceased performing all duties authorized by the Acts of 1921, Ch. 76, *supra*.

The second of these decisions was decided in 1941 and is California v. Thompson, 313 U. S. 109, 116, 85 L. Ed. 1219, 61 S. Ct. 930. The court considered the case of Di Santo v. Pennsylvania, *supra*, and stated, in part, as follows:

> "If there is authority in the state, in the exercise of its police power, to adopt such regulations affecting interstate transportation, it must be deemed to possess the power to regulate the negotiations for such transportation where they affect matters of local concern which are in other respects within state regulatory power, and where the regulation does not infringe the national interest in maintaining the free flow of commerce and in preserving uniformity in the regulation of the commerce in matters of national concern. See *Hartford Accident & Indemnity Co.* v. *Illinois*, 298 U. S. 155.
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> "The decision in the *Di Santo* case was a departure from this principle which has been recognized since *Cooley* v. *Board of Port Wardens*, *supra*. It cannot be reconciled with later decisions of this Court which have likewise recognized and applied the principle, and it can no longer be regarded as controlling authority."

Both of these cases are discussed in a historical analysis of the changing attitude of the United States Supreme Court

concerning activities incident to interstate commerce which is found in the Annotation in 152 A. L. R. 1078.

Although the Supreme Court in California v. Thompson, *supra,* did not expressly overrule Di Santo v. Pennsylvania, *supra,* the language in the dissenting opinion in the Di Santo Case would probably be most applicable to your question and represent the present attitude of the court on the subject.

Justice Brandeis in his dissenting opinion in Di Santo v. Pennsylvania, *supra,* says, in part, on pages 37 to 39, as follows:

> "The statute is an exertion of the police power of the State. Its evident purpose is to prevent a particular species of fraud and imposition found to have been practiced in Pennsylvania upon persons of small means, unfamiliar with our language and institutions. Much of the immigration into the United States is effected by arrangements made here for remittance of the means of travel. The individual immigrant is often an advance guard. After gaining a foothold here, he has his wife and children, aged parents, brothers, sisters or other relatives follow. To this end he remits steamship tickets or orders for transportation. The purchase of the tickets involves trust in the dealer. This is so not only because of the nature of the transaction, but also because a purchaser when unable to pay the whole price at one time makes successive deposits on account, the ticket or order not being delivered until full payment is made. The facilities for remitting both cash and steamship tickets are commonly furnished by private bankers of the same nationality as the immigrant. It was natural that the supervision of persons engaged in the business of supplying steamship tickets should be committed by the statute to the Commissioner of Banking.
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> "Although the purchase made is of an ocean steamship ticket, the transaction regulated is wholly intrastate—as much so as if the purchase were of local real estate or of local theatre tickets. There is no purpose on the part of the State to regulate foreign commerce.

The statute is not an obstruction to foreign commerce. It does not discriminate against foreign commerce. It places no direct burden upon such commerce. It does not affect the commerce except indirectly. Congress could, of course, deal with the subject, because it is connected with foreign commerce. But it has not done so. Nor has it legislated on any allied subject. Thus, there can be no contention that Congress has occupied the field. And obviously, also, this is not a case in which the silence of Congress can be interpreted as a prohibition of state action—as a declaration that in the sale of ocean steamship tickets fraud may be practiced without let or hindrance. If Pennsylvania must submit to seeing its citizens defrauded, it is not because Congress has so willed, but because the Constitution so commands. I cannot believe that it does.

"Unlike the ordinance considered in *Texas Transport Co.* v. *New Orleans,* 264 U. S. 150, this statute is not a revenue measure. The license is small. The whole of the proceeds is required to defray the expense of supervising the business. Unlike the measure considered in *Real Silk Mills* v. *Portland,* 268 U. S. 325, 336, this statute is not an instrument of discrimination against interstate or foreign commerce. Unlike that considered in *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189, 199, it does not affect the price of articles moving in interstate commerce. The licensing and supervision of dealers in steamship tickets is in essence an inspection law. Compare *Turner* v. *Maryland,* 107 U. S. 38.

"The fact that the sale of the ticket is made as a part of a transaction in foreign or interstate commerce does not preclude application of state inspection laws, where, as here Congress has not entered the field, and the state regulation neither obstructs, discriminates against, or directly burdens the commerce * * *"

In the case of Union Brokerage Co. v. Jensen *et al.* (1944), 322 U. S. 202, 88 L. Ed. 1227, 64 S. Ct. 967, 152 A. L. R. 1072, the court stated in part on pages 211 and 212 as follows:

> "* * * In the absence of applicable federal regulation, a State may impose non-discriminatory regulations on those engaged in foreign commerce 'for the purpose of insuring the public safety and convenience; . . . a license fee no larger in amount than is reasonably required to defray the expense of administering the regulations may be demanded.' *Sprout* v. *South Bend*, 277 U. S. 163, 169.
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> "The Commerce Clause does not deprive Minnesota of the power to protect the special interest that has been brought into play by Union's localized pursuit of its share in the comprehensive process of foreign commerce. To deny the States the power to protect such special interests when Congress has not seen fit to exert its own legislative power would be to give an immunity to detached aspects of commerce unrelated to the objectives of the Commerce Clause * * *"

It appears to me that these cases all affirm the right of the state, if properly exercised, to require a license in connection with activities incident to interstate commerce under the police power. The evil, which made such licensing necessary, is indicated in the dissenting opinion of Mr. Justice Brandeis and arose from sale of tickets for passage of immigrants and the necessity under the police power for such legislation rested with the Legislature. Such evil may not be as apparent under present conditions as in the past, but this is a determination which can only be made by the Legislature and not by the courts.

Although Burns' 55-1101, *supra*, had been enacted prior to Di Santo v. Pennsylvania, *supra*, it was never declared to be unconstitutional and remained in effect. At the present time, it would be incumbent upon the Supreme Court of Indiana, if the question were presented, to follow the ruling in California v. Thompson, *supra*. In the case of Bourjois Sales Corporation v. Dorfman (1937), 273 N. Y. 167, 7 N. E. (2d) 30, the New York Court stated, in part, as follows:

> "* * * The complaint in this appeal now before us is in no way different from that before the Supreme Court under the Illinois act, so that we feel it to be

> our duty to submit our own judgment to the rulings of the Supreme Court on the Constitution of the United States and the interpretation of its own decisions. People ex rel. Tipaldo v. Morehead, 270 N. Y. 233, 235, 200 N. E. 799. True it is that the facts of the Doubleday Case are much bolder than those in the Seagram Case, and distinctions may be drawn; but these are matters of emphasis, not of principle. The Seeck & Kade, Inc., v. Tomshinsky Case, 269 N. Y. 613, 200 N. E. 23, decided at the same time on the authority of the Doubleday Case, was similar to the Seagram Case in that the fact establishing good will were set forth in full. Had the Seagram Case been decided before argument in the Doubleday Case, we certainly would have followed the Supreme Court's ruling on the Federal Constitution. We do so now by sustaining the complaint in this case and reversing the order of the Special Term."

A review of federal legislation does not reveal any attempt by Congress to control and regulate persons engaged in the business of the sale of steamship and railroad tickets to or from foreign countries, which is the subject of Burns' 55-1101, *supra,* although regulations of similar occupations have been adopted in the Interstate Commerce Act in regard to Motor Carriers and in the Federal Aviation Act.

Necessary forms and records required to be used in connection with the administration of this act are a bond book, permits and a bond form. In addition to the statutory requirements, it would seem desirous to create a form for an application for the permit. The statute itself does not make provision for approval of such forms by any agency of the state. These forms and records are of an administrative nature and there is no general statute which requires such proposed forms to be approved by any agency as is required in reporting and accounting forms generally. Since no such technical requirements must be met, it falls within the duties of your office to devise the necessary forms which will contain information required by the statute and also any additional information your experience in the office dictates as necessary from a practical standpoint.

In summation hereof, it is my Official Opinion that:

1. The provisions of the Acts of 1921, Ch. 76, as found in Burns' (1951 Repl.), Section 55-1101 *et seq.* are still in effect and the powers and duties imposed on the Treasurer of the State should be exercised by such office.

2. The forms and records which are necessary to properly administer the act should be developed by your office, and be based on the information required by the act and your experience in similar matters.

OFFICIAL OPINION NO. 3

January 21, 1963

Mr. Edwin Steers, Sr.
Member, State Election Board
108 E. Washington Street
Indianapolis 4, Indiana

Dear Mr. Steers:

This is in response to your letter of December 17, 1962, wherein you request an Official Opinion. Your request pertains to the amount of compensation that could be authorized and paid certain precinct election officials in connection with the 1962 primary election, which was also an election for members of the Board of School Trustees of The Vigo County School Corporation, a county unit organization.

Attached to your letter and serving as a basis for your request, is a letter dated April 5, 1962, from Mr. Leonard F. Conrad, Clerk of the Vigo Circuit Court, and a letter dated December 14, 1962, from Mr. Leonard P. Kincade, County Attorney for Vigo County.

The factual circumstances, as shown from the above correspondence, appear to be as follows: Australian ballots were used throughout the county for the election of members of the board of school trustees. Voting machines were used throughout the county in connection with the primary election. In view of the use of Australian ballots, the county election board procured an order from the board of county commis-