

4563.

APPROVAL, NOTES OF NORTON TOWNSHIP RURAL SCHOOL DISTRICT, SUMMIT COUNTY, OHIO—\$7,000.00.

COLUMBUS, OHIO, August 10, 1932.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

4564.

DISAPPROVAL, FORM OF CONDITION TO BE INCORPORATED IN LEASES TO BE EXECUTED TO RAILWAY COMPANIES COVERING ABANDONED CANAL LANDS NOW OCCUPIED BY TRACKS OF SUCH RAILWAY COMPANIES.

COLUMBUS, OHIO, August 11, 1932.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication submitting for my examination and approval the form of a certain condition which you propose to incorporate in certain leases which you desire to execute to railway companies, covering parcels of abandoned canal lands now occupied by the tracks of such railway companies. By the proposed condition in the form submitted, it is provided that the lease may be cancelled upon abandonment of the railroad line or branch thereof occupying the parcel of abandoned canal lands covered by the lease.

With respect to the question as to the validity of a condition of this kind, it is to be observed that the Supreme Court of this state in a number of decisions has held that the state in transactions relating to its canal lands acts in a proprietary capacity and that with respect to such transactions it is ordinarily amenable to the same rules as those governing its citizens in like situations. Moreover, it is to be observed that provision is made by the statutory law of this state authorizing a railway company to abandon a line of its railroad or a branch thereof on the approval of such abandonment by the Public Utilities Commission. It would seem, therefore, that if it is necessary for a railway company holding a lease of this kind to abandon a railroad line or branch thereof using or occupying a parcel of abandoned canal land and such abandonment is approved by the Public Utilities Commission, there would, in a legal sense, be a failure of consideration with respect to the unexpired term of the lease which would legally justify the inclusion in the lease of a condition providing for its cancellation in such event.

The form of the condition which you propose to incorporate in the leases above referred to, is as follows:

“This lease is granted with the mutual understanding that if at any time within the term of this lease, the said second party, its successors or assigns, finds it necessary to abandon this branch of its railroad system for economic reasons, it may surrender the same to the Superintendent of Public Works for cancellation, at least sixty days prior to any rental payment date, with a statement of facts that warrant the annulment