

No. 5, 1965.]

Please note that most Acts are published in English and another South African official language. Currently we only have capacity to publish the English versions. This means that this document will only contain even numbered pages as the other language is printed on uneven numbered pages.

ACT

To provide for the construction and equipment of certain lines of railway and for matters incidental thereto.

*(Afrikaans text signed by the State President.)
(Assented to 19th February, 1965.)*

BE IT ENACTED by the State President, the Senate and the House of Assembly of the Republic of South Africa, as follows:—

Construction and equipment.

1. (1) The State President may, as soon after the commencement of this Act as to him may seem expedient, cause to be constructed and equipped, upon a gauge of three feet six inches, the lines of railway mentioned in column 1 of the First Schedule to this Act, of the approximate length set out, as to each line, in column 2 of that Schedule opposite the description of the line in question, and at a gross cost not exceeding, in the case of each line, the amount set out in column 3 of that Schedule opposite the description of the line in question.

(2) The powers conferred by this section shall include the power to construct and equip all sidings, stations, buildings and other appurtenances necessary for or incidental to the proper working of every such line of railway.

(3) The expression "construct and equip" shall include "maintain" while the lines are in course of construction and equipment.

Cost of construction and equipment.

2. The cost of construction and equipment of the lines of railway authorized by section *one* shall be defrayed out of any loan raised by the State President under the authority of law and appropriated for that purpose by Parliament, or out of any other moneys so appropriated.

Powers incidental to construction and equipment.

3. In respect of the construction and equipment of the said lines of railway, the State President shall have the powers conferred by the Railway Expropriation Act, 1955 (Act No. 37 of 1955), but subject to the obligations imposed by that Act: Provided that the width of the land taken shall not exceed one hundred Cape feet for the construction of each line, together with such additional land as may be required for the slopes, cuttings, drainage, stations, approach roads and other works and matters which may be necessary for the purpose of the lines.

Ratification of certain agreement relating to line of railway from Kensington to a terminal at Montague Gardens.

4. The agreement concluded on the fourth day of January, 1965, between the Government of the Republic in its Railways and Harbours Administration (hereinafter called "the Administration"), and Fisons (Proprietary) Limited, a copy of which is set out in the Second Schedule to this Act, is hereby ratified and confirmed, and the Administration is hereby empowered to do all such things as may be necessary to give effect to the said Agreement.

Short title.

5. This Act shall be called the Railway Construction Act, 1965.

First Schedule.

LINES OF RAILWAY AUTHORIZED BY SECTION ONE.

Column 1.	Column 2.	Column 3.
Description of line.	Approximate length.	Estimated cost.
	Miles.	R
1. From a junction at Chiselhurst with the line between East London and Blaney to a terminal point in the East London harbour area (Province of the Cape of Good Hope) ..	3.6	1,053,306
2. From a junction at Kensington Cabin with the avoiding line between Cape Town and Woltemade to a terminal point at Montague Gardens (Province of the Cape of Good Hope)	4.86	800,073

Second Schedule.

MEMORANDUM OF AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA IN ITS RAILWAYS AND HARBOURS ADMINISTRATION, OF THE ONE PART, AND FISONS (PROPRIETARY) LIMITED, OF THE OTHER PART.

MEMORANDUM OF AGREEMENT made and entered into between the GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA in its RAILWAYS AND HARBOURS ADMINISTRATION (hereinafter referred to as "the Administration"), herein represented by the MINISTER OF TRANSPORT of the Republic of South Africa, of the one part, and FISONS (PROPRIETARY) LIMITED, being a company incorporated with limited liability under the Companies Act, 1926 (hereinafter referred to as "the Company"), of the other part.

WHEREAS the Company has petitioned the Administration to construct, equip, maintain and work a line of railway of a gauge of three feet six inches from Kensington to a terminal point in the Montague Gardens area, in the Magisterial District of Cape Town, Province of the Cape of Good Hope, a distance of approximately five miles (hereinafter termed "the railway") for the purpose of conveying traffic to and from an area in which the Company is carrying on, or is otherwise interested in, certain manufacturing operations;

AND WHEREAS the Administration has agreed, if and when authorized by Parliament to do so, to construct, equip, maintain and work the railway, subject to the terms and conditions hereinafter set forth;

Now, THEREFORE, the parties do hereby agree as follows:

1. Pending the approval and sanction of Parliament, which the Administration proposes to seek as soon as may be practicable after the execution of this Agreement, the obligations of the Administration under this Agreement shall be taken to be provisional only. Should the construction of the railway not be authorized by Parliament within a period of twelve months from the date hereof, this Agreement shall lapse, unless renewed by mutual consent.

2. (1) After the commencement of an Act of Parliament authorizing the construction and equipment of the railway and ratifying and confirming this Agreement, and subject to an appropriation by Parliament of funds for the purpose, the Administration shall proceed with all reasonable expedition to construct and equip the railway: Provided that the Administration shall not be liable for any delay in completing the construction and equipment of the railway owing to any cause whatever over which the Administration has no control.

(2) The Administration shall have the right, after consultation with the Company, to construct or provide from time to time such additional tracks or other facilities directly connected with the railway as it may deem necessary in order to enable it efficiently to cope with any increase in traffic over the railway. The cost of any additional tracks or other facilities so constructed or provided shall be deemed to form part of the cost of construction and equipment of the railway for the purposes of this Agreement.

3. (1) Subject to the approval of Parliament, the Administration shall provide the money necessary for the construction and equipment of the railway, estimated to amount to approximately eight hundred thousand and seventy-three rand (R800,073) excluding rolling stock.

(2) The route of the railway and the sites of stations and sidings shall be approximately as shown on the plan annexed hereto and signed by both parties: Provided that the Administration may, after consultation with the Company, modify, for engineering exigencies only, the route of the railway and the sites of stations and sidings, subject to any limitation imposed by the statutory authority under which the railway is constructed.

4. (1) The railway shall be constructed and equipped according to the standards adopted by the Administration for other lines of similar type, and shall be constructed with S.A.R. rails of a weight of not less than ninety-six pounds per yard.

(2) For the purpose of this Agreement the cost of construction and equipment of the railway shall comprise all items of expenditure, including interest, chargeable to the railway in accordance with the Administration's usual accounting practice, but excluding any amount/s repaid by the

Company to the Administration in terms of clause 9 hereof, and excluding also the capital cost of locomotives, other rolling stock and any equipment used in connection with rolling stock in the working of the railway after completion.

5. (1) When the railway has been completed and has been certified by the Administration's Chief Civil Engineer as being ready for the conveyance of public traffic, it shall forthwith be opened by the Administration for the conveyance of public traffic.

(2) Subject to the provisions of clause 6, the fares, charges and rates for the conveyance of passengers, parcels, livestock and goods of any description, and for the services incidental thereto, shall be those fixed by the Administration from time to time and applicable generally over its railway system.

(3) Nothing contained in this Agreement shall be deemed to diminish or restrict in any way the Administration's statutory power to fix and alter rates and fares.

6. (1) Subject to the provisions hereinafter set forth, the Company undertakes, for so long as a loss may be sustained in the working of the railway on the basis of the fares, charges and rates generally applicable over the Administration's railway system, to hold itself liable for, and to pay to the Administration, in respect of all traffic consigned by it or on its behalf by goods train over the railway or a portion thereof in the direction of Kensington, a special surcharge as hereinafter provided over and above the normal tariff prescribed from time to time in the Official Railway Tariff Book for the conveyance of any such commodity over the Administration's railway system generally. The moneys accruing to the Administration from such special surcharge shall be dealt with in the manner hereinafter provided.

(2) For a period of six months from the date on which the railway is opened for the conveyance of public traffic, the special surcharge mentioned in sub-clause (1) hereof shall be levied at the rate of nineteen cents (R0.19) per ton of 2,000 lbs. or at a proportionate rate per 100 lbs., as the case may be. At the expiration of the said period of six months, and every six months thereafter, for so long as may be necessary in accordance with sub-clause (1) hereof, the Administration shall, in consultation with the Company, review the rate of the aforementioned special surcharge in order to ensure that the amount accruing to the Administration by way of the special surcharge during the financial year in question, shall tally, as nearly as may be, with the amount by which the working costs of the railway exceed the revenue derived therefrom, without taking into account the amount accruing from the aforementioned special surcharge. Depending on what may seem to be necessary in order to attain this object, the rate of the aforementioned special surcharge shall, at the time of such review, be either increased or decreased or left undisturbed for the ensuing period of six months.

7. (1) From the date of opening of the railway for public traffic and for each financial year thereafter for a period of thirty (30) years, the Administration shall prepare and maintain accounts to indicate the results of working the railway, and a copy of each annual statement shall be supplied to the Company at its office in Johannesburg as soon as practicable after the close of each financial year. The accounts shall be prepared in accordance with the Administration's usual accounting practice and the annual statement shall give particulars of expenditure and revenue (with separate reference to the moneys accruing to the Administration from the aforementioned special surcharge) and shall indicate the rates of depreciation and interest charges applied on the capital cost of construction and equipment. It is specifically declared that, for the purpose of calculating such working results, the amount derived from the aforementioned special surcharge paid by the Company and the other senders referred to in clause 12, shall be regarded as part of the revenue earned by the railway.

- (2) (a) At the end of each period of five years, calculated from the date on which the railway is officially opened for public traffic, it shall be determined from the annual statements referred to in sub-clause (1) hereof, due regard being had to the provisions of paragraphs (b) to (f) of this sub-clause, whether the results of working the railway during the period of five years in question, show a loss or a surplus, and settlement between the parties shall then be effected as hereinafter set forth in this sub-clause.
- (b) If the working results of the railway for any financial year included in such period of five years show a surplus, such surplus shall be retained by the Administration but shall be set off against any loss which has been or may be incurred in the working of the railway during any other financial year included in the same period of five years.
- (c) If the working results of the railway show a surplus over any period of five years as set forth in paragraph (a) of this sub-clause, the Company and/or the senders referred to in clause 12, shall have no claim thereto but such surplus shall, depending on the circumstances, either be retained by the Administration or dealt with as prescribed in paragraph (d) of this sub-clause.
- (d) If the special surcharge was levied during any portion of such a period of five years it shall be determined whether a loss would have been incurred in the working of the railway during such period of five years had the special surcharge not been levied. Should it be found that no loss would have been incurred, the whole of the proceeds of the special surcharge during the said period of five years shall be used to defray any loss and/or interest on losses that may be incurred in the working of the railway during a succeeding period of five years. Should it be found that a loss would have been incurred, then so much of the said proceeds as exceeds that loss, shall be applied to the purpose aforementioned: Provided that any surplus that may

have accrued at the end of the sixth period of five years shall be retained by the Administration.

- (e) At the end of each month in each financial year, interest shall be calculated at the rate of five per cent. (5%) per annum on the amount by which the aggregate amount of the accumulated loss and the accrued interest up to the end of the preceding month, exceeds the aggregate amount of the profits, if any, up to the end of that month, and the amount of such interest shall be reflected on a separate statement, a copy of which shall be furnished to the Company as soon as practicable after the close of each financial year.
- (f) If the results of working the railway during any period of five years show a loss, the amount of such loss, together with the interest accrued during such period of five years, as reflected in the statements mentioned in paragraph (e), shall be paid by the Company to the Administration within thirty (30) days after the date on which a statement, certified by the Administration's Chief Accountant, indicating the amount for which the Company is liable, shall have been furnished to the Company at its office in Johannesburg. After settlement has been effected between the parties at the end of the sixth period of five years, the Company shall be under no obligation to reimburse the Administration for losses that may thereafter be incurred in the working of the railway.

8. The depreciation charges referred to in sub-clause (1) of clause 7 shall be assessed at the normal rates applicable to the Administration's assets, and the interest charges referred to in sub-clause (2) of clause 4 and sub-clause (1) of clause 7 shall be assessed at the average rate determined by the Administration in accordance with its usual procedure and shall not be specifically loaded against the railway.

9. (1) The Company hereby agrees to repay to the Administration on demand, or within such period as the Administration may in its discretion determine after consultation with the Company, but subject to the final proviso to sub-clause (3) hereof, the total amount of—

- (a) any compensation which the Administration may have paid to any third party or parties whose rights to mine ^{or} of whatever nature have been injuriously affected as a result of the construction of the railway, in that, by reason of the operation of the Mining Laws, the mining of such minerals under or in the vicinity of the railway is prohibited or restricted; and
- (b) any legal costs incurred by the Administration in settling or contesting any claim for compensation preferred against it by any such third party:

Provided that nothing in this sub-clause contained shall be deemed to impose on the Company any obligation with respect to any minerals, or the injurious affection of any rights to minerals, underlying any land traversed by the railway of which the Administration is the owner at the date of this Agreement.

(2) In the absence of such an agreement as is contemplated in sub-clause (3) hereof, the Administration shall forthwith take all reasonable and proper steps to settle, on the most advantageous terms, any claims for compensation preferred against it by third parties as aforesaid, and shall consult the Company before arriving at a final settlement with any such claimant. If any such claim cannot be settled out of court on terms which, in the opinion of the Company are fair and reasonable, the Administration shall, at the risk and expense of the Company, contest any legal proceedings which the claimant may bring against it for the determination of the amount of the compensation payable. The Administration undertakes that, in regard to the manner in which and the extent to which any such proceedings are to be contested it will, wherever practicable, act in accordance with and give effect to such directions as may be given to it by the Company from time to time during the course of the litigation, including directions to pay any amount into court, or to settle the claim at an agreed figure, or to appeal or not to appeal against any judgment or order of the court of first instance.

(3) With the consent of the Company, the Administration may enter into an agreement with any such claimant whereby the payment of compensation to the claimant in respect of the injurious affection of his rights to minerals is postponed to some future date so as to permit of the amount of the compensation to which the claimant is entitled, being determined more readily and accurately. When the said date arrives, the Administration shall, with due regard to the terms of such agreement and in consultation with the Company, proceed to negotiate for the settlement of any such claim on the most advantageous terms, subject however to the second and third sentences of sub-clause (2) of this clause, which shall be deemed also to form part of this sub-clause, and provided further that the Company shall not be liable to repay to the Administration any amount which the Administration may pay to any such claimant whose claim for compensation is presented to the Administration for payment pursuant to any such agreement as aforesaid, after the lapse of a period of fifty years from the date of the opening of the railway for public traffic.

(4) It is hereby agreed that if, as a result of the construction of the railway, any rights to minerals of whatever nature vested in the Company (whether such rights were acquired before or after the date of this Agreement) are injuriously affected in that, by reason of the operation of the Mining Laws, the mining of such minerals under or in the vicinity of the railway is prohibited or restricted, the Company shall and hereby does unconditionally release the Administration from any and all liability to compensate it, its successors or assigns, in respect of the injurious affection, as aforesaid, of such rights to minerals.

10. The Company agrees that, if at a future date after thirty years but within fifty years of the date of opening the railway for public traffic, the traffic falls off to such an extent that the total volume of traffic carried

over the railway is, in the opinion of the Administration after consultation with the Company, insufficient to justify the operation of the railway, the Administration shall, unless the Company is prepared to enter into a fresh agreement with the Administration guaranteeing to meet any future losses incurred in working the railway, have the right to uplift the whole or any portion of the railway and, if so uplifted, to recover from the Company an amount equal to the total of the original cost of construction plus any amount subsequently expended on the railway (including expenditure financed from the Administration's Renewals Fund or Betterment Fund) which, in terms of sub-clause (2) of clause 2 hereof, is deemed to form part of the cost of construction and equipment of the railway, less the total of

- (a) the depreciation charges raised in respect of the cost of construction and equipment of the railway (including any amount deemed in terms of clause 2 (2), to form part of such cost), from the date of the opening of the railway to such aforementioned future date; and
- (b) the total residual value, determined in accordance with the Administration's usual accounting practice, of such assets or items of material or equipment (included or deemed to be included in the cost of construction and equipment of the railway for the purposes of this Agreement), as the Administration may decide to retain. Any of the aforementioned assets, material and equipment not so retained by the Administration shall become the property of the Company, subject to any conditions of title under which the assets are held by the Administration.

11. If the whole or any portion of the railway is uplifted by the Administration in terms of clause 10, the cost incurred shall be borne by the Company.

12. The Administration undertakes that during such time as the Company remains bound to pay the special surcharge provided for in sub-clause (1) of clause 6, it will make provision in the Official Railway Tariff Book for the payment of a like surcharge at the same rate per ton or at a proportionate rate per 100 lbs., as the case may be, on all traffic consigned by or on behalf of any other senders by goods train over the railway or any portion thereof in the direction of Kensington, and that all moneys derived from such surcharge will be dealt with as provided in clause 7 of this Agreement.

13. There shall be no restriction on the running powers of the Administration in respect of any class of traffic whatever over the railway, and the Administration may construct any line or lines of railway, and consent to the construction of private sidings, in continuation of or as a branch from the railway: Provided that before constructing any such line/s of railway or consenting to the construction of any such private siding, the Administration shall consult the Company and shall take into consideration any representations that the Company may make with respect thereto.

SIGNED for and on behalf of the Government of the Republic of South Africa in its Railways and Harbours Administration at Pretoria on this the 4th day of January, 1965.

AS WITNESSES

1. (Sgd.) L. M. Engelbrecht
2. (Sgd.) J. H. Viljoen

(Sgd.) B. J. Schoeman
Minister of Transport.

SIGNED for and on behalf of FISONS (PROPRIETARY) LIMITED, at Johannesburg on this the 23rd day of December, 1964, under the authority of a resolution of the Board of Directors of the Company dated the 4th day of November, 1964.

AS WITNESSES

1. (Sgd.) J. S. Pilkington
2. (Sgd.) L. A. O'Connor

(Sgd.) R. W. Mills
Director.