

THE PROVINCE OF NOVA SCOTIA }  
 AND OTHERS ..... } APPELLANTS;  
 AND  
 THE CANADIAN NATIONAL RAIL- }  
 WAYS AND OTHERS ..... } RESPONDENTS.

1937

\* Feb. 2, 3.  
 \* Feb. 21.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS  
 FOR CANADA

*Railways—Maritime Freight Rates Act, R.S.C., 1927, c. 79, section 8—  
 Freight rates—Select territory—Reduced rates outside—Competitive  
 or reduced tariffs—Board of Railway Commissioners—Powers and  
 duties—Administrative and judicial—Prejudice or non-prejudice—  
 Question of fact.*

The appellants made an application to the Board of Railway Commissioners for Canada for an order requiring the respondent railway company to reduce the freight rates on potatoes in carloads from shipping points within "select territory" in the Maritime Provinces to points within certain areas of Ontario and Quebec in which the respondents had published reduced rates for the express purpose of meeting motor-truck competition. The Board found that the appellants had failed to establish that the competitive tariffs complained of had resulted in the destruction of, or to the prejudice of, the advantages given by the *Maritime Freight Rates Act* to shippers in the "select territory" in favour of persons or industries located elsewhere and dismissed the application.

*Held* that the judgment of the Board should be affirmed.

Competitive tariffs established outside of the "select territory" are within the contemplation of section 8 of the Act, and when such tariffs prejudicially affect "the statutory advantages," then "the Board shall not approve nor allow" such tariffs; and these words necessarily imply authority to cancel any rates having such effect; but whether any particular competitive rate has that effect must in each case be a question of fact to be determined by the Board itself.

The onus of establishing prejudice does not rest always upon the shipper or the complainants. The Board itself is a body invested with administrative as well as judicial powers and duties; and when a complaint is presented to the Board that any particular tariff constitutes an infraction of section 8, it is the duty of the Board to determine the question of prejudice or non-prejudice, keeping in mind that it is the intention of the Act to maintain the statutory advantages in rates given thereby to persons and industries located in the "select territory."

The authority of the Board under section 8 is limited to that which is given by or implied in the words "shall not approve nor allow any tariffs which may destroy or prejudicially affect such advantages"; and the Board, having decided the issue of fact adversely to the appellants, as regards the particular tariffs in question in this appeal,

\* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Hudson JJ.

1937  
 THE  
 PROVINCE OF  
 NOVA SCOTIA  
 ET AL.  
 v.  
 THE  
 CANADIAN  
 NATIONAL  
 RAILWAYS  
 ET AL.

was right in concluding that those tariffs ought not to be disallowed. APPEAL by leave of the Board of Railway Commissioners for Canada, from a decision of that Board dismissing the appellants' application for an order under the *Maritime Freight Rates Act* directing a specific or a percentage reduction in rates on potatoes from the "select territory" as defined by that Act to points in an area of the province of Ontario within which reduced rates had been made effective in the Canadian National and Canadian Pacific Railways for the express purpose of meeting motor-truck competition.

The materials facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

*C. J. Burchell K.C.* and *J. L. Ralston K.C.* for the appellants.

*I. C. Rand K.C.* for the Canadian National Railways.

*G. A. Walker K.C.* for the Canadian Pacific Railway Company.

*C. H. Bowyer K.C.* for the Ontario Potato Growers' Association.

*A. G. Blair K.C.* for the Board of Railway Commissioners for Canada.

The judgment of the court was delivered by

HUDSON J.—This is an appeal by leave from a judgment and order of the Board of Railway Commissioners delivered on the 3rd of January on an application by the appellants, upon the following questions of law and jurisdiction:

1. Whether, upon the facts as found by the Board, the Board was right—

(a) In holding that the *Maritime Freight Rates Act* does apply to competitive tariffs established by railway companies between points outside the "select territory" as defined in the Act, and that Maritime shippers, in respect of "preferred movements" over the "eastern lines" of the Canadian National Railways as defined in the Act, or in respect of movements similar to "preferred movements" over the railways of other companies which have filed with the Board tariffs of tolls meeting the statutory rates referred to in section 7 of the Act, are entitled to a reduction in the freight rates on such preferred movements proportionate to the reductions effected by such competitive tariffs in order to maintain the ratio of advantage accorded to them under the terms of the Act: provided, however, that it can be established that any such competitive tariff issued by a railway company outside the "select territory" "may destroy or prejudicially affect" the advantages given by the Act to Maritime shippers in favour of persons or industries located elsewhere than in the "select territory" as provided by section 8 of the Act;

(b) In adding the foregoing proviso to the decision giving rise to question (a), namely:—

“Provided, however, that it can be established that any competitive tariff issued by a railway company ‘may destroy or prejudicially affect’ the advantages given by the Act to Maritime shippers in favour of persons or industries located elsewhere than in the ‘select territory’ as provided by section 8 of the Act.”

(c) In holding that the mere production of such competitive tariffs showing reductions in rates outside the select territory was insufficient, without more, to establish the contention of Maritime shippers, but that it is necessary to prove some actual or probable destruction of Maritime trade or some prejudicial effect thereupon, either heretofore sustained or likely to ensue as a result of such competitive tariffs;

(d) In holding that, if rates under such a competitive tariff outside the “select territory” are found to be such as the Board should not approve or allow, under section 8 of the Act, the Board has authority under the Act only to cancel such rates, and has not the authority to adjust or vary rates on the railway lines in the “select territory” by allowing a reduction therein proportionate to the reduction effected by the competitive tariff in the outside territory.

The railway companies established competitive tariffs reducing freight rates upon shipments of potatoes within certain areas in Ontario and Quebec but outside of the “select territory” as defined in the *Maritime Freight Rates Act*. While the immediate question before the Board was confined to this particular commodity and particular territory, it was admitted that the principle involved affected over 300 competitive freight rate tariffs having effect in various points of Canada outside of such “select territory.”

The appellants contended that the shippers from points on the “eastern lines” in the Maritime Provinces were entitled to a proportionate rate reduction in respect of all competitive tariffs which have been filed by the railway companies pertaining to freight traffic outside of the Maritime provinces. On the other hand, it was contended on behalf of the Canadian Pacific Railway Company that the above-mentioned Act was not applicable to competitive tariffs between points outside of the “select territory.”

The Canadian National Railways agree that the authority of the Board under section 8, which is reproduced below, is sufficiently comprehensive to bring such tariffs within its scope, and this view the Chief Commissioner accepted.

The purpose and the general provisions of the *Maritime Freight Rates Act* were fully discussed in the judgment of

1937  
THE  
PROVINCE OF  
NOVA SCOTIA  
ET AL.  
v.  
THE  
CANADIAN  
NATIONAL  
RAILWAYS  
ET AL.  
Hudson J.

1937  
 {  
 THE  
 PROVINCE OF  
 NOVA SCOTIA  
 ET AL.  
 v.  
 THE  
 CANADIAN  
 NATIONAL  
 RAILWAYS  
 ET AL.  
 —  
 Hudson J.  
 —

this Court delivered by the Chief Justice on the reference reported under that name (1).

The question immediately before this Court turns on the interpretation of section 8 of the Act as follows:

8. The purpose of this Act is to give certain statutory advantages in rates to persons and industries in the three provinces of New Brunswick, Nova Scotia and Prince Edward Island, and in addition upon the lines in the province of Quebec mentioned in section two, together hereinafter called "select territory," *accordingly the Board shall not approve nor allow any tariffs which may destroy or prejudicially affect such advantages in favour of persons or industries located elsewhere than in such select territory.*

It is conceivable that competitive tariffs as well as other tariffs outside of the select territory "might destroy or prejudicially affect," in favour of persons or industries located outside of such select territory, "the statutory advantages" which are given by the Act and which the rule prescribed by section 8 is intended to protect.

We agree that competitive tariffs established outside of the "select territory" are within the contemplation of this section, and when such tariffs prejudicially affect "the statutory advantages," then "the Board shall not," the statute directs, "approve nor allow" such tariffs, and we agree with the Chief Commissioner that these words necessarily imply authority to cancel any rates having such effect; but whether any particular competitive rate has that effect must in each case be a question of fact to be determined by the Board itself.

One of the main contentions of the appellants assumes that the onus of establishing prejudice rests always upon the shipper or the complainants. We do not think that this is so. The Board itself is an administrative body with very wide experience and assisted by a skilled technical staff and is invested with administrative as well as judicial powers and duties; and, when a complaint is presented to the Board that any particular tariff constitutes an infraction of section 8, it is the duty of the Board to determine the question of prejudice or non-prejudice, always keeping in mind that it is the intention of the Act to maintain the statutory advantages in rates given thereby to persons and industries located in the select territory.

We agree with the Chief Commissioner that the authority of the Board under section 8 is limited to that which

is given by, or implied in, the words "shall not approve nor allow any tariffs which may destroy or prejudicially affect such advantages."

The Board having decided the issue of fact adversely to the appellants, as regards the particular tariffs now in question, rightly concluded that those tariffs ought not to be disallowed. The issues of law substantially involved in the questions submitted are determined conformably to the views expressed in this judgment. There will be no costs.

THE  
PROVINCE OF  
NOVA SCOTIA  
ET AL.  
v.  
THE  
CANADIAN  
NATIONAL  
RAILWAYS  
ET AL.  
—  
Hudson J.  
—

*Appeal dismissed, no costs.*

Solicitor for the appellants: *C. J. Burchell.*

Solicitor for the Canadian National Railways: *I. C. Rand.*

Solicitor for the Canadian Pacific Railway Co.: *G. A. Walker.*

Solicitor for the Ontario Potato Growers' Association: *C. H. Bowyer.*

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