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**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

OA No.3022/2004

New Delhi this the 3rd day of February, 2006

Hon'ble Mr. V.K.Majotra, Vice Chairman (A)
Hon'ble Mrs. Meera Chhibber, Member (J)

Mukesh Chander Chaturvedi,
S/o Shri Jagdish Prasad,
Resident of L-7 A, Railway Colony,
Dehradun and employed as :
Crew Controller in Loco Shed,
Northern Railway at Dehradun.

..Applicant

(By Advocate Shri Ashtoush Sharma)

VERSUS

1. Union of India
Through the General Manager,
Northern Railway Headquarters, Baroda House,
New Delhi.
2. The Divisional Railway Manager,
Northern Railway, Moradabad.

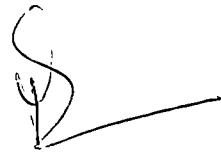
..Respondents

(By Advocate Shri R.L.Dhawan)

O R D E R

(Hon'ble Mrs. Meera Chhibber, Member (J))

By this OA, applicant has challenged the speaking order dated 30.1.2004 passed in compliance with Tribunal's order dated 12.10.2003.



The said order reads as under:

“Your promotion as Dr.Goods has been considered from the date of your junior Sh. Atique Ahmad was promoted, that is, 4.2.92 instead of 11.11.92 on proforma basis and actual from the date of your shouldering the higher responsibility vide this office notice No. 952E/EP-1/Driver/Selection dt. 9.1.04.

Your further promotion as Sr.Dr.Goods has already been made from the date of your junior Sh. Atique w.e.f. 14.7.1995.

Earlier you were given performa promotion compared to your junior Sh.Jagdish Singh-II as Dr.Goods as well as Sr. Driver Goods vide notice No.752E/EO-1/Dr./Selection dt. 17.1.03 whereas you have now claimed your promotion from the another junior candidate Sh. Atique Ahmad and accordingly your request has been considered and you have been given the promotion from the date Sh. Atique Ahmad was promoted as mentioned in the above said para. Your further promotion as Dr.Passanger in Gr.Rs. 1600-2660 will be made after passing the selection as this post is a selection post. On passing the above selection in first attempt you will be considered for promotion as Dr.Passanger from the date Sh. Atique Ahmad is promoted and your further promotion will be considered accordingly.

As regards you claim for payment of arrears, it is mentioned that arrear is not payable in such cases as per the instructions issued under Hd.Qr.letter No. 831E/63-2/XII/D/E4 dt. 16.7.2003 under PS No.12654. These instructions have been issued in compliance of the Supreme Court judgment under OA No. 8904/94 UOI Vs. P.O.Ahraham and Others”.

2. The main question argued by the counsel for applicant is whether a person who has lost promotion admittedly on account of department's mistake can be denied the backwages. It was strenuously argued by the counsel for applicant that since his juniors were given promotion ahead on



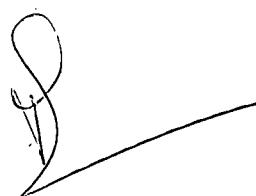
him for no fault on his part and because department needed his service at Dehradun, he cannot be denied the benefit of backwages from retrospective date when he has already been given promotion from retrospective date, nor can he be asked to pass any selection at this point of time.

3. It was contended by the learned counsel for applicant that rule 228 is statutory in nature, therefore, it is binding on the respondents and it clearly states that if due to administrative errors, staff are over-looked for promotion to higher grades either due to wrong assignment of relative seniority of the eligible staff or full facts have not been placed before the competent authority at the time of ordering promotion or some other reasons, the staff who have lost promotion on account of administrative error on promotion are to be assigned correct seniority vis-a vis their juniors already promoted, irrespective of the date of promotion. It was contended by the learned counsel for applicant that there is no stipulation for passing the selection, therefore, the condition put by the respondents in their order dated 30.1.2004 to pass the selection for getting next promotion as Driver (Passanger) at par with his junior Shri Atique Ahmad is not sustainable in law and is liable to be quashed. He further submitted that admittedly applicant had been given promotion as Driver (goods) w.e.f. 4.2.1992 at par with his junior Shri Atique Ahmad and as senior Driver (goods) w.e.f. 14.7.1995 there is no

justification whatsoever to state that he would not be entitled to get arrears from the said dates and would be entitled only for proforma fixation of his pay. In order to support his contention counsel for applicant relied on the judgment given by the Hon'ble Supreme Court in the case of Vasant Rao Roman Vs. The UOI of India through the Central Railway, Bombay reported in 1993 (66) SC FLR 932.

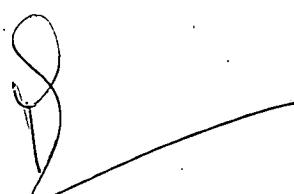
4. Counsel for respondents, on the other hand, opposed this OA by submitting that promotion to the post of Driver (Passenger) in Grade Rs. 1600-2660 is a selection post and promotion to that post can be given only after passes in the selection. However if applicant passes the above selection in the first attempt, he would be given promotion as Driver (passenger) from the same date when his immediate junior Shri Atique Ahmad was promoted and he would also be considered for further promotion in accordance with law.

5. They have further explained that applicant was never promoted as Driver goods initially as he did not undergo the pre requisite training/promotional courses. In the order dated 16.10.1995 (Annexure A 4) it was erroneously written as Driver (goods) in scale Rs.1350-2200 instead of Sr. Shunter grade Rs. 1350-2200 due to clerical error which was proved from his own representation dated 2.2.1995 wherein he had himself sought



promotion as Sr. Shunter. It was only after the driving skills of the applicant were assessed by Sr.DME vide his letter dated 7.5.2002 and was found fit to handle train independently, instructions were issued that he may be promoted to work on train independently as Driver (goods). In any case now that he has been promoted at par with his junior Shri Atique Ahmad as Driver (goods) w.e.f. 4.2.1992 and w.e.f. 14.7.1995 as Sr. Driver (goods). The only thing is whether he can be granted promotion as Driver (passenger) without undergoing selection or not? Counsel for respondents relied on para 215 of IREM which is relevant for this purposes because the post of Driver (Passenger) is not only selection post but is also a safety post. He, therefore, submitted, unless he clears the selection, he cannot be allowed to be promoted as Driver (Passenger) in grade of Rs.1600-2660 (pre revised).

6. He further submitted that as far as the arrears are concerned Para 228 itself is very clear moreover para 228 of IREM has been held to be intra vires by the Hon'ble High Court of Rajasthan in batch of Writ petitions No.4227/2002 and others decided on 10.9.2003. Apart from it, the said issue has also been decided by the Hon'ble Supreme Court in its order dated 13.7.1997 in the case of UOI and Ors Vs. P.O.Abraham and Ors. which has been circulated by Railway Board's letter dated 21.7.2003 (Annexure R-2



and R-3), he, therefore, submitted that there is no merit in this OA. The same may accordingly be dismissed.

7. In rejoinder counsel for applicant submitted that at this distant time when applicant has already crossed peak of his life he would not be in a position to clear the selection which might he have done, when he was young enough and since he was not put to selection due to fault of the respondents themselves. Therefore, at this distant time, he cannot be made to suffer for the fault of the respondents or forced to pass the selection now. He also submitted that even the selection is not being carried out regularly and no body knows when respondents would hold next selection, therefore, he cannot be made to suffer and keep waiting in definitely for the selection to be carried out.

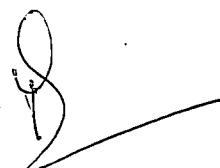
8. We have heard both the counsel and perused the pleadings as well. Respondents have categorically stated that the post of Driver (Passenger) is a selection post/safety post which is not even disputed by the applicant. The only contention is that since there is no provision made in Para 228 for passing any selection, therefore, any such condition put by the respondents now would be contrary to Para 228 and as such it is not sustainable in law. Such an argument cannot be accepted because Para 215 of IREM deals with selection post and it clearly states that selection post shall be filled by a



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positive act of selection made with the help of Selection Boards from amongst the staff eligible for selection. The positive act of selection consists of written test and/ or viva voce test and in every case viva voce being a must. The selection for promotion to selection post shall be made on the basis of merit.

9. From the above, it is clear that no selection post can be filled unless the eligible candidates are selected by a positive act of selection. As far as para 228 is concerned, it only states that if due to administrative reasons, if a person is not promoted, the said person on promotion should be assigned correct seniority vis-a-vis their juniors already promoted irrespective of the date of promotion. Pay in the higher grade on promotion may be fixed proforma at the proper time. The enhanced pay may be allowed from the date of actual promotion. It clearly states that no arrears on this account shall be payable as he did not actually shoulder the duties and responsibilities of the higher posts. Therefore, this para does not state that promotion should be given automatically without putting the person concerned to selection even for selection post. The only thing which is clarified in Para 228 is that if a person is denied his promotion due to administrative errors, then after rectifying the mistake when such person is given promotion his seniority should be protected at par with his immediate junior and his pay should be



fixed notionally from the same date when his junior was so promoted. In these circumstances, the contention of counsel for applicant that respondents cannot ask the applicant to pass the selection has to be rejected.

10. Counsel for applicant also strenuously argued that since he was deprived his promotion illegally by the respondents themselves without any fault on his part he could not have been deprived of his actual wages. Even this contention cannot be allowed in view of the fact that applicant himself has contended that Para 228 of IREM is statutory in nature and is binding on the respondents. If it is binding on respondents it will equally be binding on the applicant as well. Para 228 for ready reference reads as under:

“228. Erroneous promotion: (1) Sometimes due to administrative errors, staff are over-looked for promotion to higher grades could either be on account of wrong assignment of relative seniority of the eligible staff or full facts not being placed before the competent authority at the time of ordering promotion or some other reasons. Broadly, loss of seniority due to the administrative error can be of two types:-

- (i) Where a person has not been promoted at all because of administrative error, and
- (ii) Where a person has been promoted but not on the date from which he would have been promoted but for the administrative error.

Each such case should be dealt with on its merits. The staff who have lost promotion on account of administrative error should on promotion be assigned correct seniority vis-a -vis their juniors already promoted, irrespective of the date of promotion. Pay in the higher grade on promotion may be fixed proforma at the proper time. The enhanced pay may be allowed from the date of actual promotion. No arrears on this



account shall be payable as he did not actually shoulder the duties and responsibilities of the higher posts".

Perusal of above para clearly shows that even though in such circumstances when a person has been deprived of his lawful promotion, his seniority has to be protected at par with his juniors and he is also to be placed in the same Pay scale from the same date when his junior was so promoted but his pay would be fixed notionally from the said date and actual payment has to be made only from the date when he shoulders the duties and responsibilities of the higher posts.

11. Counsel for applicant has relied on the order of Hon'ble Supreme Court in the case of Vasant Rao Roman Vs. UOI through the Central Railway, Bombay but perusal of the same shows that in the said case appellant had claimed his seniority to be fixed as Shunter B w.e.f. 12.6.1961 and Driver C w.e.f. 17.12.1965. Even though Tribunal had granted him seniority and pay fixation with dry increment but no arrears were granted by relying on Govt. of India's OM dated 22.12.1964. When the matter was challenged before the Hon'ble Supreme Court, Hon'ble Supreme Court observed that Tribunal was wrong in applying the Memo. dated 22.12.1964 because that OM applied to the case of an officer who remained suspended and could not be promoted due to his suspension or in case of



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officer who could not be got promoted due to departmental proceedings but since in the case placed before the Hon'ble Supreme Court, neither appellant was put under suspension nor any disciplinary proceedings were pending against him, therefore, it was held that the said OM was not at all applicable in the facts of the said case. It was further held that since appellant had been made to suffer for no fault on his part and his claim was ignored on account of having not completed the requisite number of firing kilometers thus it was a fit case where arrears ought to have been paid to appellant. Accordingly, it was held that appellant would be entitled to get all arrears of emoluments w.e.f. 12.6.2001 as Shunter B and with effect from 17.12.1965 as Driver 'C'. However, in the said case it was not even the case of respondents therein that the post of Shunter B or Driver 'C' was a selection post, whereas in the present case respondents have categorically stated that Driver (Passenger) is a selection post as it involves safety of thousands and thousands of passengers who travel in the train, therefore, the above judgment would not apply in the present set of facts.

12. On the contrary, it would be relevant to quote the order passed by the Hon'ble Supreme Court in the case of UOI & Ors. Vs P. O. Abraham and

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Ors. which reads as under:

"By the order under appeal, the Tribunal has allowed the application which challenged the Railway Board Circular dated 15/17 September, 1964. The said Circular stated:

"No arrears on this account shall be payable as he did not actually shoulder the duties and responsibilities of the higher posts".

Consequent to the deletion of the above clause further directions were given. Learned counsel submits that the clause, which has been directed to be removed, is in accordance with the judgment of this Court in Virender Kumar, General Manager, Northern Railways, New Delhi Vs. Avinash Chandra Chandra and Ors (1990) 2 SCRb 769. This Court, in that case held on principle of 'no work no pay' that the respondents will not be entitled to the higher salary as they have not actually worked in that post. The clause, which has been directed to be deleted by the Tribunal being in consonance with the ruling of this Court, we are of the opinion that the Tribunal was not right in directing the deletion of that clause. Accordingly, to that extent this appeal is allowed. The result is that the respondents will be given deemed promotion, if any, before retirement and also the benefit in the matter of fixing pensions. No costs".

Pursuant to this order, Railway Board's issued letter dated 2.7.2003 to the following effect:

"In terms of provisions of para 228 of IREM ,Vol.1 1989, the staff who lose promotion on account of administrative error, should on promotion be assigned correct seniority vis-a vis their juniors already promoted, irrespective of the date of promotion. However, pay in the higher grade on promotion may be fixed proforma at the proper stage but no arrears on this account shall be payable as the concerned staff did not actually shoulder the duties and responsibilities of the higher post.

2. Notwithstanding the above provision in the recent past, a number of employees have approached CAT/Courts and secured judgments in their favour for payment of arrears. However, in one of



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the SLPs filed against order dated 30.9.1991 of CAT/Ernakulam Bench in OA No. 640/90, the Hon'ble Supreme Court by their judgment dated 13.8.1997 in Civil Appeal No. 8904 of 19934 (Union of India and Ors. Vs. P.O.Abraham and Ors) have upheld the above provision regarding non-payment of back wages on proforma promotion. A copy of the judgment is sent herewith for information and guidance.

3. The above judgment of the Hon'ble Apex Court should be the guiding factor while defending the pending CAT/Courts cases (including SLPs, if any) and that may arise in future on the issue. The CPOs should ensure that in all such cases, the judgment is invariably connected and cited to counter the claim for payment of arrears in the type of cases referred to in para 1 above".

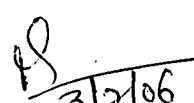
Meaning thereby, that para 228 of IREM has been upheld by Hon'ble Supreme Court. In view of para 228 of IREM, the latest judgment given by Hon'ble Supreme Court in the case of P.O. Abraham and others case and the Railway Board's letter dated 2.7.2003 it is clear that applicant would not be entitled for arrears of back wages on account of his proforma promotion given to him from a retrospective date. Therefore, the 2nd contention of the learned counsel for applicant is also rejected.

13. However, we find some substance in the last submission made by counsel for applicant that he cannot be made to wait indefinitely for the respondents to hold selection for the post of Driver (Passenger). It is an admitted case that applicant was not given promotion at par with his junior due to mistake of respondents. Now that, respondents have already granted him promotion at par with his junior Shri Atique Ahmad as Driver (goods)

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and Sr. Driver (Goods) naturally applicant would have expectation for further promotion as well. It is stated by the learned counsel for applicant that selection is not being held regularly. Counsel for the respondents did not have any instructions on this point, we therefore would like to clarify that respondents should initiate selection process for the post of Driver (Passenger) within a reasonable period, preferably within a period of 6 months from the date of receipt of a copy of this order by giving due intimation to applicant to appear in the said selection. In case applicant passes the said selection in the first attempt, as stated by the respondents themselves, in the impugned order he should be promoted as Driver (Passenger) with effect from the same date when Shri Atique Ahmad was promoted as Driver (Passenger) by giving him notional increment and actual pay from the date he actually shoulders the duties and responsibilities of the higher post. He would also be entitled to the next promotion in accordance with rules.

14. With the above directions, this OA stands disposed of. No order as to costs.


3/2/06
(Mrs. Meera Chhibber)
Member (J)

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(V.K. Majotra)
Vice Chairman (A)

3/2/06