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CENTRAL ADMINISTRATIVE TRIBUNAL: PRINCIPAL BENCH

O.A. No. 1099/92

New Delhi, this the 11th day of ~~September~~, 1998

**HON'BLE SMT. LAKSHMI SWAMINATHAN, MEMBER (J)
HON'BLE SHRI N. SAHU, MEMBER (A)**

1. Smt. Bina, w/o (LR)
Late Shri Devinder Kumar,
S/o Shri Dharambir Singh,
Ex-Booking Clerk,
Muzaffar Nagar.

2. Sh. Sachin Saharau (LR)

3. Sh. Anuj Saharau (LR)

....Applicants

C/o Shri B.S. Mainee,
Advocate,
240, Jagriti Enclave,
Delhi-110092.

(By Advocate Shri B.S. Mainee)

Versus

Union of India through,

1. The General Manager,
Northern Railway,
Baroda House,
New Delhi.

2. The Divisional Railway Manager,
Northern Railway,
State Entry Road,
New Delhi.

....Respondents

(By Advocate Shri K.K. Patel)

ORDER

BY SHRI N. SAHU, MEMBER (A)

This O.A. is directed against the impugned order dated 31.12.90 (Annexure-A-1) passed by the Divisional Commercial Superintendent, Northern Railway, New Delhi removing Shri Devinder Kumar, Booking Clerk, from service and against the appellate order rejecting the appeal. After filing this O.A., Shri Devinder Kumar died in 1996 and his legal representatives are pursuing this O.A.

2. A decoy check was conducted in the Booking Office of Sakhoti Station manned by Shri Devinder Kumar, as booking clerk, on 22.4.89. One Shri Muktinath of Headquarters office was detailed to act as a decoy passenger and one Shri Chander Pal Singh was deployed as independent witness. Shri Muktinath purchased two tickets for Rs.18/- bearing no.86230 and 86231 from Sakhoti to Delhi and passed on an identifiable 50/- rupee currency note. Ten minutes later, he again went to the counter and returned the tickets for refund. Shri Devinder Kumar deducted Rs.4/- as clerkage charges and refunded the balance amount of Rs.14/- to the decoy passenger. After the departure of the train, the Ticket Window was subjected to a check. The check revealed that these very tickets were not available in the ticket tube. The charge against Shri Devinder Kumar was that these two tickets were resold and Rs.4/- collected was allegedly misappropriated by the booking clerk. At the time of inspection, the currency note of Rs.50/- was found in the Ticket Cash Counter to prove that the tickets were purchased by the passenger. The statement of the independent witness was that the tickets once purchased were returned. Non-availability of these tickets in the counter proved that they were resold with an intention to misappropriate the clerkage charges. They also found shortage of Govt. cash by 6/- rupees. As per rule, the ticket nos.86230 and 86231 should not have been issued and the clerkage of Rs.4/- should have been accounted for. These tickets were allegedly collected at Delhi.

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3. In the inquiry, three prosecution witnesses who were railway employees, supported the charges. Fourth independent witness Shri Chander Pal Singh did not. It was inferred that he turned hostile before the E.O. Penalty of removal from service was imposed on the ground that Shri Devinder Kumar did not maintain absolute integrity and devotion to duty and had conducted himself in a way which was unbecoming of a railway Govt. servant.

4. The learned counsel for the applicants submitted that the raid was not conducted in accordance with rules. Secondly no independent witness corroborated the charges. Only railway officers of the Vigilance Wing who were prosecution witnesses deposed against Shri Devinder Kumar. The third point raised is that the order of removal for alleged misappropriation of Rs.4/- is so harsh and draconian that it shocked the conscience.

5. In reply it is submitted by the learned counsel for respondents that Shri Chander Pal Singh was an independent witness at the time of raid. He deposed corroborating the charges at pages 23 and 25 of the report. Later on he turned hostile. It is stated that the charged officer was required to declare his private cash under the Rules. He did not do so which constituted an additional offence.

6. The contention of the applicants' counsel is that the departmental instructions for conducting raids were not observed. Extracts of the Railway Board's instructions are as follows -

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"704. Traps

When laying a trap, the following important points have to be kept in view :-

- (a) Two or more independent witnesses must hear the conversation, which should establish that the money was being passed as illegal gratification to meet the defence that the money was actually received as a loan or something else, if put up by the accused.
- (b) The transaction should be within the sight and hearing of two independent witnesses.

705. Departmental Traps.

For Departmental Traps, the following instructions in addition to those contained under para 704 are to be followed -

- (a) The Investigating Officer/Inspector should arrange two gazetted officers from Railways to act as independent witnesses as far as possible. However, in certain exceptional cases where two gazetted officers are not available immediately, the services of non-gazetted staff can be utilised.
- (b) The decoy will present the money which he will give to the defaulting officers/employees as bribe money on demand. A memo should be prepared by the Investigating Officer/Inspector in the presence of the independent witnesses and the decoy indicating the numbers of the G.C. notes for legal and illegal transactions. The memo, thus prepared should bear the signature of decoy, independent witnesses and the Investigating Officer/Inspector. Another memo, for returning the G.C. notes to the decoy will be prepared for making over the G.C. notes to the delinquent employee on demand. This memo should also contain signatures of decoy, witnesses and Investigating Officer/Inspector. The independent witnesses will take up position at such a place where from they can see the transaction and also hear the conversation between the decoy and the delinquent, with a view to satisfy themselves that the money was demanded, given and accepted as bribe - a fact to which they will be deposing in the departmental proceeding at a later date. After the money has been passed on, the Investigating Officer/Inspector should disclose the

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identity and demand, in the presence of the witnesses, to produce all money including private, Railway and bribe money. Then the total money produced will be verified from relevant records and memo for seizure of the money and verification particulars will be prepared. The recovered notes will be kept in an envelope sealed in the presence of the witnesses, decoy and the accused as also his immediate superior who should be called as a witness in case the accused refuses to sign the recovery memo, and sealing of the notes in the envelope."

7. In the case of Shri Devinder Kumar admittedly there was one independent witness and he later on turned hostile. There was no gazetted officer and only non-gazetted officers were available. The learned counsel for the applicants had cited a decision of this Court in O.A. No.2357/97 dated 2.6.1997 in the case of Narinder Kumar Vs. General Manager, Northern Railway. That was also a case where departmental enquiry was initiated against the applicant along with another on the charge of having taken Rs.20/- by way of bribe. A trap was also conducted in that case. There also the claim was that Para 705 of Chapter 4 of the Manual was not complied with. There were no independent witnesses. Only the vigilance officer appeared as a witness. In the absence of independent witnesses the proceedings were vitiated. The contention is that it is treated not as a trap case but as a case with no evidence. This Court stated that mere reliance on the evidence of the vigilance officer cannot be said to be an enquiry in accordance with rules. Absence of independent witnesses vitiated the proceedings. The punishment of dismissal from service was not commensurate

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with the misconduct alleged, namely, receiving Rs.20/- by way of bribe. The Bench directed the reviewing authority to pass the order of review in accordance with law.

8. All the lacuna pointed out in the above order disposed of by this Court, are present in this case also. The enquiry officer relied upon the testimony only of departmental witnesses. There was one independent witness, who turned hostile. Here also the charge is that a small amount of Rs.4/- was the gain Shri Devinder Kumar allegedly intended to benefit himself. This is too small an amount to merit a punishment of removal. It was pointed out by the learned counsel for the applicants that there were discrepancies in the statement of prosecution witnesses relating to the time of purchasing the tickets and refund of tickets. According to the learned counsel for the applicants, if he had resold the ticket there would have been excess cash with him but on the other hand a shortage of Rs.6/- was found. The vigilance inspector could have arranged collection of the said tickets from Delhi and produced them as evidence to prove the charge. The independent witness Shri Chander Pal Singh had stated in the enquiry that neither the tickets were purchased nor refunded by the decoy in his presence. He only signed the test check memo in good faith. The appellate order did not discuss the point that if the ticket had been resold there should have been excess cash and not shortage of cash. No justification was given to come to the conclusion as to how the independent witness could be considered as hostile. With regard to charge no.3, the charged officer accepted during enquiry that he did not declare his private cash because he had no private cash with him. The appellate

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authority held him guilty of this charge also. We do not think how an infraction of any rule can be inferred from this. If he had no cash on hand, he should have declared nil cash. Even if he had not declared nil cash, such an inference could be drawn. With regard to charge no.2 the enquiry officer stated that it was not proved.

9. We have carefully considered the submissions made by the rival counsel. We are unable to appreciate as to how the charges in this case were held to be proved. The main charge of the respondents is that the charged officer violated para 3(1) (i), (ii) & (iii) of Railway Services (Conduct) Rules, 1966 which require a Railway Servant to -

- (i) Maintain absolute integrity;
- (ii) Maintain devotion to duty; and
- (iii) Do nothing which is unbecoming of a Railway or Government servant.

10. We could not find any material that would show that the charged officer had violated these three provisions in the Conduct Rules. The admitted facts are that the decoy returned the tickets and took the refund minus the clerkage charges of Rs.4/-. The charge against Shri Devinder Kumar is that he had an intention to pocket this amount. The second charge is that he created a shortage of Rs.6/- in the Govt. cash at the time of check on 22.4.89. The third charge is that he did not declare private cash in private cash book on 22.4.89. Charge no.2 has been held by the Enquiry Officer to be not proved. The

reasons given by the E.O. are as under:-

"Charge no.2:- The allegation of creating shortage of Rs.6/- in the Govt. cash by the C.O. is based on the prosecution evidence that when the cash of the booking office was checked after departure of 306 down, the C.O. produced Rs.904/- against account of Rs.910/- as per DTC book. The C.O. has accepted the shortage but has denied that it was deliberate. He has stated that it was on account of some mistake in calculations while dealing with the passengers. In answer to Q.No.2 he has further explained that due to villages being very close to the Station the passengers arrive at the Station at the nick of the time causing sudden rush. The explanation sounds convincing and possibility of shortage in booking by mistake in transactions with the passengers cannot be ruled out. Also there is no concrete evidence on record that the C.O. had taken any amount from the Govt. cash. Hence the charge that the shortage of Rs.6/- was deliberately created by the C.O. is not proved."

11. That apart it is explained that the "shortage in booking" and "excess in booking" are two aspects which are generally noticed while issuing tickets and collecting money. It is for this reason that the Railway Administration provided two columns in Daily Train Cash Book (DTCB), one column for excess cash in booking and the second column for shortage of cash in booking. The booking clerks are supposed to fill up those columns after counting the cash. They normally record either excess in booking or shortage in booking. Excess in booking is surrendered to the Govt. while shortage is recovered from the booking clerk concerned. This is a regular feature noticed. The finding of the E.O. for the reasons mentioned by him and the usual practice of shortage and excess cash being a regular feature which are accounted for establishes that the particular shortage of Rs.4/- on that day is nothing unusual or strange and does not amount to a misconduct.

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This shortage might have occurred by any one or more of the factors mentioned by the E.O. The point to be noticed is that if the Vigilance squad did not make a surprise visit, count the cash, seize the books, the charged officer would have, as he had been doing earlier, shown shortage in the shortage column or excess in the excess column. That Shri Devinder Kumar intended to misappropriate a petty amount of Rs.4/- appears to us to be very far fetched. It was most unlikely that Shri Devinder Kumar would have resorted to pocketing Rs.4/- for himself. If the finding of shortage is a routine and usual feature and the accounting books themselves contemplate columns for the accounting of such shortage, the suspicion that the charged officer could have pocketed this small amount was unfounded. The sum of Rs.4/- is too small an amount to tempt a person to commit defalcation. If the finding on charge no.2 is that the charge is not proved on the ground that such a shortage is an usual phenomenon, then there is no basis in charge no.1 also. What all the charged officer had done was that he sold two tickets for Rs.18/- from Sakhoti to Delhi. These were returned. He refunded Rs.14/-. If these two tickets were again sold for Rs.18/-, there should have been an excess cash and not shortage of cash. This was not explained at all in the evidence. If the charged officer had the intention of pocketing the money, he would have pocketed the larger amount. The existence of shortage is more in the nature of wrong accounting. We are unable to agree with respondents contention that in the above background, the clerkage of Rs.4/- was misappropriated by the charged officer or he had the intention to pocket the same. This was improbable because he declared that he had no private cash.

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12. With regard to punishment, we are of the view that the order of removal from service was draconian and was wholly disproportionate to the lapse, if any, found. The charged officer was probably guilty of reselling once again the returned tickets. This may be a technical infringement of an instruction, but how does it amount to a misdemeanour? Even if he had sold the refunded tickets, we fail to understand as to how the charged officer's conduct caused loss of revenue or was an action that would be considered as violation of any Rule. In B.C. Chaturvedi vs. Union of India - (1996) 32 ATC 44 it is held that where the penalty imposed by the disciplinary authority in a departmental inquiry against a public servant is disproportionately excessive so as to shock the judicial conscience, the High Court can modify the punishment/penalty by moulding the relief. We do not see any material to show that the charged officer had acted in a manner as would cause a violation of any of the three Conduct Rules mentioned above. There is no evidence to show that he acted in a way that would lead to the inference that he had misappropriated the money for his personal benefit. There was nothing to show that he did not maintain devotion to duty. There was nothing to show that he acted in a manner unbecoming of a Govt. servant. Even if we assume that there was a minor technical lapse of issuing sold tickets, it should not have invited such a major punishment as removal from service. In Bhagat Ram vs. State of Himachal Pradesh - ATR 1983 SC 454, the Hon'ble Supreme Court while holding that the High Court did not function as a court of appeal, concluded that when the finding was utterly perverse, the High Court could always

interfere with the same. In that case the finding was that the appellant was to supervise felling of trees which were not hammermarked. The Govt. had recovered the loss caused by illicit felling of trees from the accused. Under those circumstances, their Lordships held that the finding of the guilt was perverse and unsupported by facts.

13. In the case of Union of India & anr. vs. G. Ganayutham - 1997 (2) SCSLJ 347, their Lordships were dealing with the order of the Tribunal quashing the penalty of withholding of 50% of pension and 50% of gratuity on the ground that it was too severe and disproportionate to the gravity of the charges proved. That was a case where the finding was that the Government suffered substantial loss of revenue due to misconduct of the charged official. In that case, the Tribunal failed to record a finding "that the punishment was an outrageous defiance logic and was shocking." Their Lordships have laid down the following principles that would justify interference in the punishment:-

"(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision maker could, on the material before him and within the frame work of the law, have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bonafide. The Court would also consider whether the decision was absurd or perverse. The Court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the Court substitute its decision to that of the administrator. This is the Wednesbury test.

(2) The Court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English Administrative law in future is not ruled out. These are the CCSU principles."

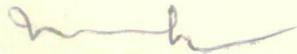
14. The above discussion would show that on the facts and evidence gathered, it could not be held to be a case of either loss of revenue or misappropriation or lack of integrity. The only technical violation of the Rule was that the charged official should not have resold the tickets returned to him. It is stated that even if it is resold, he did not misappropriate the money but accounted for the same in full measure. The petty deficit of Rs. 6/- was neither unusual nor unexpected. We hold that the punishment is shockingly disproportionate to the guilt. It was illogical and irrational on the part of the respondents to dismiss a person from service on a technical violation of some obscure instruction that returned tickets should not be resold.

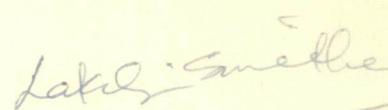
15. In Ganayutham's case (supra), the Supreme Court further held that where such a finding of irrationality as recorded by us is given, then the proper course would be to remit the matter to authorities for reconsideration. We accordingly remit this case back to the authorities to reconsider the punishment in the light of the above discussion. The respondents should keep in view that the delinquent employee died in 1996 and there can be no question of his reinstatement. That apart, we quash this removal order on the ground that it is shockingly excessive and disproportionately high to the minor infraction, if

any. We also hold that this is not a fit case for levy of any of the major penalties. The case is remitted to the respondents to choose any one of the minor penalties that they consider appropriate in the facts and circumstances of the case.

16. With the above directions, the respondents shall pass such an order of minor penalty as they think appropriate commensurate with the infraction indicated by us within 12 weeks from the date of receipt of a copy of this order. Whatever retirement benefits are payable including family pension (alongwith arrears), should be considered and remitted within 16 weeks from the date of order passed by the respondents in respect of punishment, to the legal representatives of late Shri Devinder Kumar, the applicant. If the respondents do not decide to levy the penalty within the stipulated time, the said proceedings will stand abated and the respondents shall forthwith pay all the retiral benefits.

17. The O.A. is disposed of as above. No costs.


(N. Sahu)
Member (Admnv)


(Smt. Lakshmi Swaminathan)
Member (J)

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