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**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK**

ORIGINAL APPLICATIONS NO.910/06

Cuttack, this the 30th Day of January, 2008

Akhelesh Dhan

Applicant

Vs.

Union of India & Others

Respondents

FOR INSTRUCTIONS

1. Whether it be referred to reporters or not? - *yes*
2. Whether it be circulated to all the Benches of the Central Administrative Tribunal or not? - *yes*


(GAUTAM RAY)
MEMEBR (A)


(G. SHANTHAPPA)
MEMBER (J)

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**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK**

ORIGINAL APPLICATION NO.910/06

Cuttack, this the 30th Day of January, 2008

**CORAM: HON'BLE SHRI G. SHANTHAPPA, MEMBER (J)
&
HON'BLE SHRI GAUTAM RAY, MEMEBR (A)**

.....

Sri Akhelesh Dhan, aged about 33 years, Son of Jolen Dhan, At-Missionheta, P.O-Rajgaonpur, Dist-Sundegarh, Orissa, presently working as Ex-LOCO Pilot, H.Q-Sambalpur..... ..Applicant

By the Advocate(s) M/s. G. Rath,
S.N. Mishra
T.K. Praharaj,
S. Rath.

Vs.

1. Union of India represented by General Manager, East Coast Railway, At-Chandra Sekharpur, Bhubaneswar, Dist-Khurda.

2. Divisional Railway Manager (P), East Coast Railway, Sambalpur Division, Sambalpur, Orissa...

Respondents

• By the Advocate(s).....Mr S.K. Ojha

O R D E R

SHRI G. SHANTHAPPA, MEMBER (J)

1. The above application has been filed under Section 19 of the Administrative Tribunals Act, 1985.



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2. We heard Mr. G. Rath, Learned Counsel for the applicant and Mr. S.K. Ojha, Learned Standing Counsel for the Railways.

3. The applicant was selected as Assistant Driver and joined on 10.06.97 in the pay scale of Rs.950-1500 (pre revised scale). The applicant has been discharging his duties at different places of posting. On 26.05.01 the applicant was transferred to East Coast Railway on mutual transfer with P.S. Yadav of East Coast Railway and on being transferred to East Coast Railway as Assistant Driver he was posted at Sambalpur. The applicant was put to regular medical check up at Chief Medical Superintendent, Sambalpur on 06.02.06 and was declared as medically de-categorized from A-I category to C-I category.

4. The Railway Establishment Sl.No.122/99 dated 27.05.99 envisages that a person who has been declared medically de-categorized will not be allowed to continue as running staff, but he will be allowed in a suitable alternative appointment by a Screening Committee.

5. Para 1303-1307 of IREM prescribe the procedure for finding out a suitable alternative appointment for all medically de-categorized employees.

6. The Applicant was called before Screening Committee, and recommended vide letter dated

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26.09.06 for appointment of the alternative as CTI-II in the scale of Rs.5,500-9000/- which is a stationary post. The Respondent No.2 has issued an order dated 4.10.06.

7. The Railways Establishment Letter Sl. No.90/2000 dated 13.06.2000 envisages, the equivalence of different running post to that of stationary posts. Without any rhyme and reasons and without notice, the respondent No.2 has kept the said order dated 04.10.06 in abeyance until further orders vide order dated 16.10.06, in other words the applicant was reverted back to his old post without any actual posting. The said order dated 16.10.06 is bad and illegal, in violation of principles of natural justice. The respondent-2 has no authority to review his own order for that he has no power and making the recommendation of the screening committee and as such the said order is liable to be set aside. On 12.10.2006 a notification was issued to apply for the post of Power Controller/Crew Controller in Mechanical Department (Estt. Srl. No.38/98). In response to the said notice, the applicant has not applied to be screened to the post of PC/CC as his case is sub judice before this Tribunal. A panel was prepared by the authority on 30.11.06 to hold a screening test for filling up of 09 posts of PC/CC, wherein the name of the applicant is at Sl. No.99. The notice dated 30.11.06 (Annexure-A/2) empanelling the applicant for the post of PC/CC is made. The action of the respondent No.2 is malicious and

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biased. Under the said illegal order, the applicant will be deprived of promotional prospect in the Mechanical Department which he can get in due course of time if he is allowed to continue in the Commercial Department. Challenging the action of the respondents and seeking direction as prayed. The reliefs in this OA are as mentioned below:

"(a) To direct the Railway Authority to delete the name of the applicant from the panel list dt.30.11.2006 as per Annexure-A/2 of the Original Application.

(b) To direct the Railway Authority to post him in suitable alternative post except the Power Controller/Crew Controller.

(c) To give any other relief/reliefs, direction/directions, order/orders as the Hon'ble Tribunal deems fit and proper.

8. Per Contra the respondents have filed a detailed reply statement by rejecting the relief of the applicant. In pursuance to the orders of this Tribunal dated 01.02.07 the posting order issued in favour of the applicant vide order dated 12.01.07 and office order dated 17.01.07 was kept in abeyance for a period of 14 days vide order dated 02.02.07. At the same time based upon the extension order granted by this Tribunal various office orders were issued extending the office order issued on 02.02.07.

9. The applicant was working as Ex-Loco Pilot (goods) in the scale of Rs.5,000-8,000 (RPS) under the Senior Divisional Mechanical Engineer,

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Sambalpur. While working as such he had been medically de-categorized from A-1 (Ay one) mechanical category to C-1 (Cee one) and below category vide Chief Medical Superintendent, Sambalpur's letter dated 28.01.06/06.02.06. As per the instructions in Establishment Sl.No.122/99, the competent authority had formed a Screening Committee to conduct the screening test. Accordingly the applicant along with 2 others medically de-categorized Loco Pilot was conducted on 26.09.06 and the applicant was declared suitable for alternative posting as Crew Controller. He was posted as such vide order dated 04.10.06. Later on it was found that while conducting the screening test, Screening Committee has inadvertently over looked the instructions contained in Para 1304 and 1306 covered under Establishment Sl. No.122/99 and also Establishment Sl. No. 38/98 Para 2(g). The applicant has already been released from his parent Department on 16.10.06, however, efforts have already been taken to find out suitable alternative posts as per Para 1303, 1304 & 1306(3) of Estt. Sl. No.122/99 and Estt. Sl. No. 38/99 to adjust the applicant in his Parent Department, so that past experience of the applicant can be utilized in a better way in the interest of the Railway Administration. The applicant was allowed to work in Mechanical Department against the vacant post of Loco Pilot (goods) Grade-II in the Scale of Rs.5,000-8,000/- (RPS) without assigning the running duties which was performed prior to medically fit. There is no

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drop in pay or scale of pay of the applicant and he has been drawing the salary and other allowances as admissible in the case of medically de-categorized running staff. There is no mala fide intention/oblique motive to harass the applicant rather the case of the applicant and other de-categorized persons were considered sympathetically. The said posting order dated 04.10.06 was kept in abeyance on the basis of further order issued by the competent authority on 16.10.06.

10. The applicant was appointed as CTI-II mistakenly without following the Rules/Circulars enacted/issued for the purpose. Such an appointment against that post has already been effected in the interest of other persons who are already in the panel and continued for a long time. The Competent Authority has taken right decision and rectify the mistake committed by the Screening Committee.

11. Since the Committee was one and the decision making process was one, without canceling a posting order of any single person, the competent authority has taken a decision to cancel the entire exercise made by the said committee and also cancel the subsequent actions taken pursuant to committee recommendation. The case was reviewed in response to the notification dated 12.10.06, and the applicant was declared suitable for posting as Crew Controller by the Competent Authority i.e. Senior Divisional Mechanical Engineer, Sambalpur. The

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The previous posting orders issued in favour of the applicant vide order dated 04.10.06 has been cancelled vide office order dated 12.01.07 and the applicant has been drafted to work as Crew Controller at Sambalpur vide office order dated 17.01.07 (Annexure R-6).

12. In view of the instructions in Establishment Sl. No.38/98(g), even though the applicant has not submitted any option as indicated in the O.A. for the post of PC/CC in response to the said circular dated 12.10.06, then also the Administration is duty bound to consider his case for the post of PC/CC, only to adjust a medically de-categorized person against a suitable post. Accordingly, the applicant's case came within the zone and his case was considered by the Screening Committee duly constituted by the competent authority.

13. The post of PC/CC cannot be termed as ex-cadre, at the same time PC/CC will be eligible for appearing for the examination to the post of Group 'B' Services on promotion in Mechanical Department according to their eligibility criteria. There is no irregularity in drafting the applicant as PC/CC and there is no subsistence in the contention made in the O.A. and the same is liable to be dismissed in limine.

14. The applicant was appointed as CTI-II mistakenly without following the Rules/Circulars



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enacted/issued for the purpose. Such an appointment against that post has already been effected in the interest of other persons who are already in the panel and continued for a long period. The Competent Authority has taken a right decision to rectify the mistake committed by the Screening Committee.

15. The applicant has not filed rejoinder but the respondents have filed M.A.328/07 for modification/vacation of the order dated 01.02.07 without prejudice to the rights of the respective parties. The respondents have filed a separate objection to the interim prayer vide their counter dated 08.05.07.

16. The Learned Counsel for the applicant has relied on the judgments of the Hon'ble Supreme Court in the case of **Menaka Gandhi** reported in AIR 1978 SC 597 Para 57 and 58 and in the case of **Mukharji** reported in AIR 1990 SC 1984 Para 35. Per contra the Learned Counsel for the respondents has relied on the judgments of the Hon'ble Apex Court in the case of **Prabhashankar Dubey Vs. State of M.P. reported in 2004(2) SCC 56** and in an another case **State of Bihar Vs. Project Uchcha Sikshak Sangh and another reported in 2006 SCC (L&S) 355**. We perused the pleadings, documents, rules and the decisions referred from both sides. Since OA is taken up for final disposal, the learned counsels from either sides are not pressing order on MAs accordingly no order has been passed on MAs.



17. After perusal of the pleadings and the submissions made from either side -

- (i) whether the action taken by the respondents under the impugned order is based on the relevant provisions which extracted above? and
- (ii) whether the impugned order is violative of principles of natural justice?

It is an admitted fact that the applicant was working as Loco-Pilot-II (Driver) in the pay scale of Rs.5000-8000/- before posting as CTI-II, he belongs running staff. The applicant was put to regular medical check and he was declared as medically de-categorized on 10.04.06 from A-1 to B-1 category.

18. The applicant was called before the Screening Committee and recommended vide letter dated 26.09.06 for appointment of the alternative as CTI-II in the scale Rs.5500-9000/-. Accordingly, the 2nd respondent has issued an order dated 04.10.06 (Annexure-A/3) and the applicant was appointed and he joined on 05.10.06. The respondents have contended that a person who has been declared medically de-categorized will not be allowed to continue as running staff. The said decision was taken under the Railway Estt. Sl. No.122/99 dated 27.05.99. It is relevant to extract the said provision here under:

"Estt. Sl. No.122/99

No.P/R/4/31/Pt.III

dated 27.05.99.



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A copy of Railway Board's letter No.E(NG)1/96/RE3/9 dated 29.04.1999 (RBE No.89/99) along with Advance correction slip No.77 is published herewith for information, guidance and necessary action.

Copy of Railway Bd.'s letter No.E(NG)1/96/RE3/9(2) dt.29.04.99 from the Railway Board to the GM(P)/E.E. Rly/GRC & copy of others.

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 - Absorption of disabled/medically de categorized staff in alternative employment-Amendment to IREM

The enactment of the persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, has necessitated modification of the existing scheme of absorption in alternative employment of staff medically de-categorized.

2. The Ministry of Railways have considered the matter and have decided that the Indian Railways Establishment Manual, Volumes-1 (Revised Edition 1989) may be amended as in the Advance Correction Slip No.77 enclosed."

19. The persons who are medically de-categorized are considered to find out a suitable alternative appointment under Para 1303 to 1307 of IREM. The Screening Committee has to examine the medically de-categorized person. Accordingly, the applicant was called before the Screening Committee and recommended for appointment in an alternative post as CTI-II in the scale of Rs.5500-9000/-. It is relevant to extract Paras 1303 to 1308 of Chapter XIII of IREM Vol. I here under:

"1303: The railway servants both in group (i) and group (ii) of para 1302 above cease to perform the duties of the posts they are holding from the date they are declared medically unfit for the present post. No Officer has the authority to permit the Railway servant concerned to perform the duties in the post beyond that date. If such a Railway servant

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cannot be immediately adjusted against or absorbed in any suitable alternative post he may be kept on a special supernumerary post in the grade in which the concerned employee was working on regular basis before being declared medically unfit pending location of suitable alternative employment for him with the same pay scale and service benefits; efforts to locate suitable alternative employment starting immediately. The special supernumerary post so created will stand abolished as soon as the alternative employment is located.

1304: Disabled Medically decategorised staff to be absorbed in posts they can adequately fill: In the matter of absorption of disabled/medically decategorised staff in alternative posts, Railway administrations should take care to ensure that the alternative employment offered is only in posts which the staff can adequately fill and as far as possible should broadly be in allied categories where their background and experience in earlier posts could be utilised. While finding alternative posts for absorption of disabled/medically decategorised staff, the Railway Administration should ensure that the interests of other staff in service are not adversely affected and no reversion of any officiating Railway servant is made to absorb the disabled/medically decategorised staff. For this purpose, attempts should be made to absorb the disabled/medically decategorised railway servant not only within the Unit/ Division or Department, but in other Unit/Division or Department.

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1306: Steps to be taken for finding alternative employment:-

- (1) With a view to determine the categories in which the disabled/medically decategorised Railway servant is suitable for absorption, a committee should examine him. The committee may consist of two or three officers posts at the headquarters of the officer under whom the disabled/medically decategorised Railway servant was working, the Railway servant's immediate officer being one of the members of the committee. After the committee has examined the Railway servant and determined his suitability for certain categories of posts, the Officer under whom the Railway servant was working will proceed to take further action to find suitable alternative employment for him.
- (2) The Officer concerned will prepare a list of vacancies within his jurisdiction in the



categories for which the disabled/medically incapacitated railway servant has been found suitable and a post with some scale of pay as was attached to the post he was holding on regular basis before being declared medically unfit, will be offered to him.

- (3) It will be the responsibility primarily of the Officer under whom the concerned Railway servant was directly working to find suitable alternative employment for him. This will be done first by trying to find alternative employment in the officer's own unit/division, office, workshop etc. and a register with the details as mentioned in sub-para (6) below will be maintained for this purpose.
- (4) If there is no immediate prospect of employment in his own unit/division, office, etc., the name of the Railway servant with particulars as given in sub-para (6) below will be circulated to all other offices or establishments where suitable employment is likely to be found.
- (5) Nothing in the previous paragraphs, however, debars a Railway servant from applying for a particular post for which he is likely to be deemed suitable and it is known to be vacant under any officer. Such an application must be addressed through the immediate officer of the Railway servant concerned and must contain full particulars of his service and must be forwarded to the officer to whom addressed or to the authority competent to make the appointment. The result of the application must be intimated to the Railway servant.
- (6) A register containing the names of all Railway servants declared medically unfit and to be absorbed in alternative posts will be maintained by Headquarters, Divisional and other extra-Divisional offices. These registers will contain not only the names of the staff of the particular division, etc., but also the names notified to the unit Officer concerned by other units/offices. This will not, however, absolve Officers under whom the Railway servant was last working from continuing their efforts to find suitable employment for the disabled/ medically decategorised employee. The particulars required to be maintained in registers and notified to other offices in accordance with the instructions above are as follows:-



- i. Serial number.
- ii. Date on which incapacitated.
- iii. Name and Father's name.
- iv. Post last held on regular basis with scale of pay and rate of pay.
- v. Educational qualifications - If no educational qualifications, then general remarks regarding knowledge of English, regional language etc.
- vi. Medical category in which placed.
- vii. Details of special supernumerary post till absorption in alternative appointment (para 1303).
- viii. Date from which absorbed in alternative appointment.
- ix. Nature and category of alternative appointment.
- x. Scale of pay of the alternative post and the pay fixed at.
- xi. Details of supernumerary posts, if any, after absorption in alternative appointment (para 1305).
- xii. Remarks.

(7) If and when a Railway servant is absorbed in an alternative post, intimation will be sent by the officer under whom he was previously working to all other officers to whom his name was notified. On receipt of such intimation, his name will be deleted from the registers.

(8) Before any post is filled or a promotion is ordered, Officers concerned will refer to their registers and satisfy themselves that no disabled/medically incapacitated railway servant who is suitable for the post is available. If any such disabled/medically incapacitated employee is available, he will be given preference over all other categories of staff for appointment.

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1308: Fixation of Pay. The pay of the disabled/medically decategorised Railway servant will be fixed on absorption in an alternative post at a stage corresponding to the pay previously drawn in the post held by them on regular basis before acquiring disability/medically de-categorisation. For running staff, the fixation will be based on the basic pay plus a percentage of their basic pay, representing the pay element of running allowance as may be in force. If the basic pay so arrived at does not correspond to any stage in the absorbing grade the pay may be fixed at the stage just below and the difference allowed as personal pay to be absorbed in future increase in pay. Similarly if the pay so arrived at exceeds the maximum of the absorbing grade, the pay may be fixed at the maximum and difference may be allowed as personal pay to be absorbed in future increments/increases in pay. Other allowances such as Dearness Allowance, City

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Compensatory Allowance and House Rent Allowance should be allowed on pay plus personal pay, if any, in the absorbing grade."

The said Board's letter relates to the benefits admissible to medically decategorised drivers.

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"(Authority: Section 47(1) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full participation) Act 1995 and Board's letter No. E(VG)1/96/RE3/9(2) dated 29.04.1999)."

20. While arguing the case, the specific contentions taken by the applicant the offer of an alternative appointment to be made in writing and consent of the employee to be obtained such a consent has been taken. Under Section 47(1) of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and the Board's letter dated 13.06.2000 (Annexure-A2), the equivalent scales of stationary posts have been extended for running staff i.e., Rs.6500-10500 for Mail Driver, in the case of Goods Driver Rs.5500-9000. The Railway Establishment Sl. No. 90/2000 dated 13.06.2000 envisages the equivalence of different running staff to that of stationary post, the said provision is mention here under:

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"Estt.Srl.No.90

RBE No.254/99

No.P/STHP/A7

Dated: 13.06.2000

Comparison of grade Running Staff with those of
Stationary Staff for the purpose of
promotion/selection

Ref:- Railway Board's letter No.E(NG)I-
89/PM2/8 dated 10.1.92 (Estt.Srl.No.27/92)

Railway Board's letter No. E(NG)I-98/PM2/8 dated
01.10.99 (RBE No.254/99) reads as under:-

As the Railway Administrations are aware, Board had under their letter No. E(NG)I-89/PM2/8-A dated 10.01.92 circulated the equivalence of grades of Running Staff with grades of Stationary Staff for the purpose of promotion for the stationary categories where both running and stationary staff are eligible and considered together.

2. The question of equivalence of grades has since been reviewed in the light of the scales of pay introduced on the basis of scales of pay recommended by the Fifth Central Pay Commission. The matter has been raised by NFIR also in the PNM meeting with the Board. The matter has been considered in consultation with Both the Federations. It has been decided that the grades of running staff may be equated with those of the stationary staff as indicated below:-

Category of Running Staff	Scales of pay Applicable	Scales of stationery Posts to which applicable
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1. <u>LOCO RUNNING</u>		
(a) Mail Express Drivers/ Sr.Passenger Drivers/ Sr. Motor men	6000-9800	6500-10500
(b) Passengers Drivers/ Motormen/Sr. Goods Drivers	5000-9000	6500-10500
(c) Goods Drivers	5000-8000	6500-9000
(d) Sr.Shunting Drivers	5000-8000	5500-9000"

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The learned counsel for the respondents contended that clarifications have been issued regarding absorption of medically de-categorized employees in alternate employment - creation of supernumerary posts. It is stated therein by Advance Correction Slip No.71 which provides that a Railway servant declared medically unfit for the post he is holding, should not be dispensed with or reduced in rank but should be kept on a special supernumerary post in the grade in which he was working on regular basis, pending location of suitable alternative employment for him with the same pay scale and service benefits. Efforts to locate suitable alternative employment should also be started immediately. Chapter XIII of IREM Vol. I has been substituted by Advance Correction Slip No.77 which provides that the employee who is either totally unfit for all categories or medically de-categorized has to be continued against supernumerary posts. We have come across, that "Doubts have been raised by various Divisions as to the modality of implementation of the instructions contained in the amended Rule 304 and amended Chapter XIII of IREM Vol. I. Instruction



No. 5 clarifies the stand taken by the respondents.

The said para 5 is as follows:

"5. The operation of supernumerary post in the same grade (in the case of running staff with pay element of running allowance included as pay) is automatic. The change of designation is not warranted at this stage. The designation of the employees shall be mentioned as the designation at the time of medical unfitness/incapacitation suffixed by SNP in brackets (indicating that he is charged against supernumerary post."

The clarification further states as under:

"The cases of medical de-categorisation/incapacitation dated on or after 29-04-1999 are to be governed under these revised instructions. The cases dated earlier to 29-04-1999 are governed by the pre-revised policy in vogue.

21. After going through the relevant provisions which are referred above at paras 18 and 19 regarding medical de-categorisation and the averments made in the reply statement, the action of the respondents under the impugned order violates the provision under Act 1/1996 i.e., Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. To know the said provision it is relevant to extract the said provision viz., Section 47 and it reads as follows:-

"47. **Non-discrimination in Government employments**

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(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service;

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefit:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability;

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

22. In terms of para 1305 of IREM Vol. I 1989 as amended vide Advance Correction Slip No.77 dated 29-04-1999 to the effect that if a medically decategorised railway servant cannot be immediately adjusted against or absorbed in any suitable alternative post, he may be kept on a special supernumerary post in the grade in which the concerned employee was working on regular basis before being declared medically unfit, pending contesting the case on the basis of the averments made in the application straight away should have conceded for the contention taken by the applicant. The contention of the respondents for denying the

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relief of the applicant is not tenable and as such we reject the stand taken by the respondents. The special supernumerary post so created will stand abolished, as soon as the alternative employment is located. The service of the applicant was utilized to look after Crew Controller duties without absorption which violates Rule 1305 of IREM which is extracted above. We have carefully examined the impugned order dated 16-10-2006, the said orders violate the provisions paras 1301 to 1305 of Chapter XIII of IREM dated 29-04-1999, which does not amount to absorption in an alternative post. The authority has to create a supernumerary post for keeping the applicant against such post in terms of para 1303 as corrected by Advance Correction Slip No.77 which clears that pending applicant's absorption in any suitable alternative post, the applicant is kept in a special supernumerary post. Hence, under para 1303 the applicant is entitled for the same pay scale and service benefit as applicable to running staff.

23. After considering para 1303 medically decategorised railway servant, the respondents have



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to apply para 1306 of IREM. The impugned order dated 16.10.2006 and the order posting the applicant as PC/CC clearly violates the said provisions of IREM. When the respondents apply the correct provision, does not and cannot result in variation of pay of the applicant to his disadvantage in view of the clear position enunciated in para 1303. Hence, the applicant is entitled for the same pay scale and service benefits received by him prior to 16.10.2006. If the interest of the applicant was protected in the order dated 04.10.06 (Annexure-A3), there was no need to issue order dated 12.10.06 and to decide screening to the post of PC/CC vide order dated 30.11.06.

24. The case of the applicant, that he was considered and order dated 16-10-2006 (Annexure-A4) was issued on the basis of his placement in supernumerary post, which is likely to subject him to disadvantageous position with reference his further promotion, monthly emoluments and the same is likely to cause loss on permanent basis in his pension and pensionary benefits. The respondents have admitted in their reply statement that, while making selection to the post of CTI-II, the committee has overlooked the relevant Rules and



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circulars, which adversely affected the interest of many other staff those are already in that category, keeping in view the provisions contained in Estt. Sl.No.38/98(g) and Railway Establishment Sl. No.90/2000, to give scope for deciding their alternative posting in his parent department first i.e., Mechanical Department.

Estt.Srl.No.38/98

No.P/L/13/Mech/RG/SUVR/92

Dated: 24.2.1998

A copy of Board's letter No.E(P&A)II-83/RS/10 dt. 9.1.98 is published herewith for information, guidance and immediate necessary action.

This is in partial modification of Board's letter No.E(P&A)11-83/RS10(IV) dt. 25.11.92 published under Estt.Srl.No.22/94 in respect of filling up the posts of Loco Running Supervisors.

Copy of the Rly. Board's letter No.E(P&A)11-83/RS/10 dt. 9.1.98 (RBE No.9/98) addressed to the G.Ms./All Indian Railway and others.

Scheme for filling up the post of Loco Running Supervisors (Loco Inspector and Power Controllers/Crew Controllers) Modification thereof

...

Ref: Board's letter No.E(P&A) II-83/RS/10(iv) dated 25.11.1992.

(g) Medically decategorised drivers will be eligible to be drafted to perform the duties of Power/Crew Controllers. In their case, the tenure rule of three years under Para (f) above will not be applicable. However, if their performance is not found satisfactory, in addition to action under D&AR, as they cannot go back to Running duties, they will be considered for alternative jobs following the rules applicable to medically decategorised employees.

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(1) The Drivers drafted to perform the duties hitherto being performed by Power/Crew Controllers

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will not be eligible to be posted as Loco Inspectors or to any benefit specifically admissible to the Loco Inspector, Power Controllers or Crew Controllers under the scheme of 25.11.92.

..."

25. The Railway Estt. Sl. No. 90/2000 dated 13.06.2000 envisages the equivalence of different running staff to that of stationary post the said provision is mention here under:

"Estt.Srl.No.90

RBE No.254/99

No.P/STHP/A7

Dated: 13.06.2000

Comparison of grade Running Staff with those of Stationary Staff for the purpose of promotion/selection

Ref:- Railway Board's letter No.E(NG)I-89/PM2/8 dated 10.1.92 (Estt.Srl.No.27/92)

Railway Board's letter No. E(NG)I-98/PM2/8 dated 01.10.99 (RBE No.254/99) reads as under:-

As the Railway Administrations are aware, Board had under their letter No. E(NG)1-89/PM2/8-A dated 10.01.92 circulated the equivalence of grades of Running Staff with grades of Stationary Staff for the purpose of promotion for the stationary categories where both running and stationary staff are eligible and considered together.

2. The question of equivalence of grades has since been reviewed in the light of the scales of pay introduced on the basis of scales of pay recommended by the Fifth Central Pay Commission. The matter has been raised by NFIR also in the PNM meeting with the Board. The matter has been considered in consultation with Both the Federations. It has been decided that the grades of running staff may be equated with those of the stationary staff as indicated below:-

Category of Running Staff	Scales of pay Applicable	Scales of stationery Posts to Which applicable
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2. LOCO RUNNING

(a) Mail Express Drivers/	6000-9800	6500-10500
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Sr. Passenger Drivers/ Sr. Motor men		
(b) Passengers Drivers/ Motormen/Sr. Goods Drivers	5000-9000	6500-10500
(c) Goods Drivers	5000-8000	6500-9000
(d) Sr. Shunting Drivers	5000-8000	5500-9000"

26. We carefully examined the provisions referred above, and perused the action by the 2nd respondent in which, without any rhyme and reasons and without notice, the 2nd respondent has kept the said order appointing the applicant in an alternative post i.e. CTI-II in the sale of Rs.5500-9000/- in abeyance until further orders vide order dated 16.10.06 (Annexure-A/4). In other wards the applicant was reverted back to their old post without any actual posting. The said order dated 16.10.06 is bad in law and in violation of principles of natural justice. The 2nd respondent has no authority to review his own order, he has no power for making recommendation of the Screening Committee hence the said order is liable to be quashed. The applicant will be deprived of promotional prospects in Mechanical Department which he can get in due course of time if he is allowed to continue in the Commercial Department. The said impugned order came to be passed only to satisfy the members of one of the rival union of the applicant. As per rules, medically de-categorized staff has to be immediately adjusted, if such adjustment or absorption is not adjusted

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the candidate may be kept in a special supernumerary post pending allocation of post for suitable alternative adjustment. The supernumerary post so created will stand abolished as soon as the alternative post is located.

27. It is further contended by the respondents that while conducting the Screening Test of the running staff, the objection for deciding alternative absorption in terms of rule 1304 and 1306(3) of IRMS (revised edition 1989) was not adequately addressed by the Committee to implement the said rules i.e. first by trying to find out alternative employment in the officers own Unit/Division, Office Workshop etc., and also whether their background and experience in earlier post should be utilized. The committee has overlooked the relevant rules and circulars resultantly, posting of the applicant to the post of TCI-II adversely affected. The case was re-examined by the competent authority and finally it was decided to keep the order in abeyance vide order no. 12/06 dt.16.10.06 keeping in view the provisions contained in Estt. Srl. No. 38/99 (g) to give scope for deciding their alternative posting in their parent department i.e. 1st Mechanical department. A



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circular has been issued to fill up the post of PC/CC vide circular dated 16.10.06 (Annexure R/1). The organized trade union as well other ticket checking staff of the division has also agitated and objected jointly the posting of the applicant as TCI-II in Commercial Department.

28. There is no drop in pay or scale of pay of the applicant as he has been drawing the salary and other allowance as admissible in the case of medically de-categorized running staff.

29. The respondents have admitted, no opportunity was given to the applicant before passing the impugned order which adversely affects in his service. The impugned order dated 16.10.2006 issued with the approval of DRM/SBP, the posting order issued in favour of the applicant in terms of the order dated 4.10.2006 is kept in abeyance on the ground the organized trade union as well as other ticket checking staff of the division agitated and objected jointly. The said order came to be issued under pressure which shows, only to favour a group of persons and without notice as admitted in their reply statement that in view of the instructions in Establishment Sl. No.38/98(g), even though the applicant has not submitted any option as indicated in the O.A. for the post of PC/CC in response to the said circular dated



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12.10.06, then also the Administration is duty bound to consider his case for the post of PC/CC, only to adjust a medically de-categorized person against a suitable post. Accordingly, the applicant's case came within the zone and his case was considered by the Screening Committee duly constituted by the competent authority. The post of PC/CC cannot be termed as ex-cadre, at the same time PC/CC will be eligible for appearing for the examination to the post of Group 'B' Services on promotion in Mechanical Department according to their eligibility criteria. The stand taken by the respondents is clearly violative of the provisions of Sec. 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and Establishment Srl.No.122/99 dated 27.5.1999 and Advance Correction Slip No.77 which are extracted above.

30. A similar case has been decided by the Bangalore Bench in O.A.148/05 dated 9.11.2005 A.S. Mohan v. Union of India and others in which one of us is a party to the said judgment. As per the Board's Letter dated 14.01.04 (RBE No.12/04) benefits admissible to medically de-categorized drivers drafted to perform the duties of power Crew Controller in which under para 1303 the applicant is entitled for the same pay scale and service benefit as applicable to running staff. In the said OA was the applicant was medically decategorised, has already retired and prayed for pay fixation, the relief was granted.



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31. We gain knowledge by citing the judgment on the issue. As per the judgment of the Hon'ble Apex Court in the case of **Kunal Singh v. Union of India reported in JT 2003 (2) SC 132** it was held that -

merely because the appellant got invalidity pension is no ground to deny the protection, mandatory made available to him under the Act. Once he was found not suitable for the post he was holding, he could be shifted to some other post with same pay scale and service benefits and if that was not possible he should be kept on supernumerary post until a suitable post is available or he attained the age of superannuation.

On the basis of the said judgment of the Hon'ble Apex Court a Division Bench of the Hyderabad Bench of this Tribunal held in the case of **G.Prabhakara Rao v. Union of India and others [(2004) 1 ATJ 32]** at para 10 as follows:-

"10. The Hon'ble Supreme Court in the case of Kunal Singh v. UOI has held that once it is held that employee has acquired disability during his service and if found not suitable for the post he was holding, he could be shifted to some other post with same pay scale and service benefits, if it was not possible to adjust him against any post, he could be kept on a supernumerary post until a suitable post was available or he attains the age of superannuation, whichever is earlier. This Tribunal has also taken the same view in O.A.No.1368/2002 and has held that when once it is found that the person has developed serious disability during the course of the employment on account of nature of duties performed by him and was medically decategorised after adjusting him for medical examination by the Medical Officer of the Railways, the said benefit is to be extended to him and the employee is to be provided alternate job protecting his scale of pay and the actual pay drawn by him at

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the time of medical decategorisation and if it is not possible to adjust the employee against any post he is to be kept on supernumerary post until a suitable post is available or on attaining the age of superannuation whichever is earlier as per the provisions of Section 47 of the "Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995" and has quashed the impugned order therein declaring the same as illegal and violation of Section 47(1) of the "Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995" and the circular instructions issued by the Railway Board in Serial Circular No.68/97, circular dated 15.04.1997 and the Railway Board's letter dated 21-02-1997."

32. In another judgment of Jaipur Bench of this Tribunal it was held that if a person acquires disability during his service he cannot be allowed to suffer - it is the duty of the employer to provide him the same pay scale and service benefits by shifting him to some other post - order retiring the applicant on invalid pension is not sustainable and quashed.

33. The impugned order is clearly unsustainable and violates the relevant paras of IREM which are extracted in the earlier paras. The impugned order does not speak in accordance with the contention taken in the reply statement. If the respondents had considered the Board's letter dated 29.4.1999, they would not have issued the impugned order. The impugned order is not a speaking order, no reasons are assigned hence it violates the principles of

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natural justice and accordingly not sustainable as violative of Articles 14 and 16 of the Constitution of India, in this aspect, the judgments of the Hon'ble Apex Court which are cited by the applicant in Menaka Gandhi AIR 1978 SC 597 at paras 57 and 58 and the case of Mukherji AIR 1990 SC 1984 at para 35 are applicable.

34. The stand taken by the respondents that while conducting the Screening Test of the running staff, the objection for deciding alternative absorption in terms of rule 1304 and 1306(3) of IRMS (revised edition 1989) was not adequately addressed by the Committee to implement the said rules i.e. first by trying to find out alternative employment in the officers own Unit/Division, Office Workshop etc., and also whether their background and experience in earlier post should be utilized. The committee has overlooked the relevant rules and circulars resultantly, posting of the applicant to the post of TCI-II adversely affected. The case was re-examined by the competent authority and finally it was decided to keep the order in abeyance vide order no. 12/06 dt.16.10.06 keeping in view the provisions contained in Estt. Srl. No. 38/99 (g) to give scope for deciding their alternative posting in their parent department i.e. first Mechanical department. A circular has been issued to fill up the post of



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PC/CC vide circular dated 16.10.06 (Annexure R/1). The organized trade union as well other ticket checking staff of the division has also agitated and objected jointly the posting of the applicant as TCI-II in Commercial Department.

35. We have carefully examined the contention taken by the respondents and the case of the applicant based on the reference made in the paras supra. We are of the considered view based on the admission of the respondents that their stand is not sustainable in the eyes of law, since the Rules framed under Article 309 i.e., Advance Correction Slip No.77 which is applicable has not been followed. When the respondents have received the notice from this Tribunal in the O.A., without contesting the case, on the basis of the averments made in the application straight away should have conceded for the contention taken by the applicant. The contention of the respondents for denying the relief of the applicant is not tenable and as such we reject the stand taken by the respondents.

36. When the respondents have applied the correct provision as per Advance Correction Slip No.77, if the said correction slip was issued under Article



309 of the Constitution of India, there was no need to issue the impugned order. In the reply statement, they have admitted, the Rule 1304 & 1306 (3) of IREM (Revised Edition 1989) was not adequately addressed by the Screening Committee and without issuing notice and hearing the applicant, step was taken under Estt.Sl.No.38/98(g) to fill up the post of PC/CC (Annexure-R-1) based on the agitation and objection of the Trade Union and Ticket checking staff.

37. On the submission made by the Learned Counsel for the respondents and the stand taken in their reply statement that the Assistant Personal Officer, Sambalpur, who has issued the order dated 4.10.06 (Annexure A/3) with the approval of the competent authority, i.e., DRM, the same officer has kept the order dated 4.10.06 in abeyance till further orders. The impugned order dated 16.10.06 (Annexure-A4) was issued by the Assistant Personnel Officer, Sambalpur, for Divisional Railway Manager (P). The authority who passed the order has no authority to keep the orders in abeyance since the power was exercised under a provision framed under Art.309 of Constitution of India, unless the power is given under the relevant provision to the same authority. Hence, the respondent No.2 has no authority to exercise his power to issue impugned

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order. Therefore, the order passed by the DRM has "functus officio". The authority who is above the DRM is the competent authority who has to modify or keep the orders in abeyance. The respondents are not able to show the Rule position, the powers exercised by the DRM to keep his order in abeyance. Under the impugned order the applicant was not given an opportunity by applying principles of "Audi Alteram Partem". In this aspect reference is made to H.W.R. Wade's Administrative Law, Fifth edition 1982 - pages 471-472 wherein it is stated-

"Ridge v. Baldwin reinstated the right to a fair hearing as 'a rule of universal application' in the case of administrative acts or decisions affecting rights; and, in Lord Loreburn's oft-repeated words, the duty to afford it is 'a duty lying upon every one who decides anything'. The decision gave the impetus to a surge of litigation over natural justice, in which the courts have been able to consider many of its facets and to build up something like a canon of fair administrative procedure. For the most part the numerous decisions have served only to show the correctness of the above-quoted words, sweeping though they are." The impugned order is capricious, whimsical and violative of principles of natural justice.

Hence we are of the view the impugned order is not sustainable in the eyes of law. We carefully examined the impugned order, the judgments of the Hon'ble Apex Court cited by the learned counsel for the applicant. The ratio of the judgments is applicable to the facts of these cases, but the ratio of the judgments referred by the learned counsel for the respondents reported in 2004(2) SCC 56 and 2006 SCSL 368 in the cases of Prabhashankar Dubey and State of Bihar respectively are not applicable to the facts of these cases. We have considered the authority who exercised his powers

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under a particular provision vested in him, the same authority cannot revise/modify/recall including to keep the order in abeyance unless the Rules provides to exercise such powers. The learned counsel for the respondents has not referred to the rule, to exercise the power of the DRM the officer who has issued to keep the order in abeyance.

38. We carefully examined the impugned order, the respondents have not assigned the reasons, the provisions of 47 of the said Act 1/96, i.e. Persons With Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995, and other rules and instructions of the Railway Board are not taken into consideration. The objects of the provisions are very important and should be followed by the competent authority. The medically de-categorized staff can be shifted to any other post in the same pay scale or action to be taken to keep him in supernumerary post under the provisions of the said Act by the competent authority other than the authority who passed an order by exercising his powers vested in him. The applicant's service is to be protected as if he was




getting all the benefits available to the running staff.

39. After careful consideration of the contentions of either side, citations referred to above and the relevant provisions of IREM, we are of the considered view that the applicant has made out a case for grant of relief and the stand taken by the respondent is absolutely illegal. The respondents are not justified in considering the case of the applicant while issuing the impugned order and the applicant is placed in the list for screening to the post of PC/CC in Mechanical Department. We are of the considered view that the applicant is entitled for the relief as prayed for. Accordingly we direct the competent authority, i.e., respondents to delete the name of the applicant from the panel list dated 30.11.2006 (Annexure A-2) and post the applicant in suitable alternative post, if suitable post is not available, create supernumerary post in accordance with Chapter XIII of IREM Vol.I and Section 47 of Act 1 of 1996.

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40. Accordingly the O.A. is allowed to the extent as indicated above. No order as to costs.


(GAUTAM RAY)
MEMBER (A)


(G. SHANTHAPPA)
MEMBER (J)

Kalpeswar

