

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
JODHPUR BENCH: JODHPUR

2/13

ORIGINAL APPLICATION NO: 71/2003 & 72/2003

Date of decision: 14.9.2004

Bharat Lal and Ors. Applicants

Mr. B Khan & J K Mishra Advocate for the Applicants

V E R S U S

Union of India and Others Respondents.

Mr. Salil Trivedi Advocate for Respondents.

CORAM:

HON'BLE MR. J.K. KAUSHIK, JUDICIAL MEMBER.

HON'BLE MR. G.R. PATWARDHAN, ADMINISTRATIVE MEMBER.



1. Whether Reporters of local papers may be allowed to see the judgement? *No*
2. To be referred to the Reporter or not? *Yes*
3. Whether their Lordships wish to see the fair copy of the Judgement? *Yes*
4. Whether it needs to be circulated to other Benches of the Tribunal? *Yes*

[Signature]
[G.R. Patwardhan]
Administrative Member

[Signature]
[J.K. KAUSHIK]
Judicial Member.

2/14

**CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH: JODHPUR**

Original Application No. 71/2003 & 72/2003

Date of Decision: 14.9.2004

The Hon'ble Mr. J K Kaushik, Judicial Member.

The Hon'ble Mr. G.R. Patwardhan, Administrative Member.

Bharat Lal S/o Shri Kushal Ram Ji, aged about 55 years, r/o Goro Ka Chowk Jodhpur at present employed on the post of Pointsman in the office of Station Superintendent, Jalore, North West Railway, Jalore.

Hardan Ram S/o Shri Prabhu Ram aged about 52 years r/o Qr. No. T11/H Railway Colony Bhagat Ki kothi, at present employed on the post of Cabin men under S.S. Jodhpur, North West Railway, Jodhpur.

Applicants in O.A. No. 71/2003

Mahendra Singh S/o Shri Mangal Dan aged about 44 years, at present employed on the post of Cabin man at Merta Road, North West Railway Jodhpur Division, Jodhpur.

Applicant in O.A. No. 72/2003

Rep. By Mr. B.Khan and J K Mishra: Counsel for the applicants
In both the OAs.



VERSUS

1. Union of India through the General Manager, North West Railway, Jaipur.
2. Divisional Railway Manager, North West Railway, Jodhpur Division, Jodhpur
3. Divisional Personnel Officer, North West Railway, Jodhpur Division, Jodhpur
4. Shri Bansi Lal, S/o Shri Jogpal, Sr. Booking Clerk at Sri Balaji Railway station, through D.P.O., North West Railway, Jodhpur.

: Respondents in both the O.As

Rep. By Mr. Salil Trivedi: Counsel for the respondents.

175

ORDER

Mr. J K Kaushik, Judicial Member:

Shri Bharat Lal and another and Shri Mahendra Singh have filed O.A Nos. 71/2003 and 72/2003 respectively.

2. The factual matrix of these cases is almost common and same question of law is involved in these cases. It has been considered expedient to decide both the OAs through this common order.

O.A.No. 71/03:

The factual back-drop leading to the filing of this O.A are that the applicant No.1 is holding the post of Points man in the scale of pay of Rs. 4000-6000 and the applicant No.2 is presently employed on the post of cabin man in the scale of pay of Rs.4000-6000 with effect from 03.06.96. A notification came to be issued for organising a selection for the post of Goods Guard in the scale of pay of Rs.4500-7000. It was made for empanelling 11 persons. Candidates belonging to the following categories were asked to submit their applications/options:

- (i) Trains clerk/Senior Trains Clerk.
- (ii) Commercial Clerk/Senior Commercial Clerk
- (iii) Ticket collector/Senior Ticket Collector
- (iv) Switchman/Assistant Guard/Senior Assistant Guards

and persons employed in the yard in the scale of pay of Rs. 3050-4590/3200-4500/4000-6000.

Both the applicants have fulfilled the eligibility conditions and they were allowed to appear in the written test. They have passed the same and qualified for appearing in the viva voce test. They also



appeared in the viva voce but their names did not find place in the panel issued on 05.02.2003 at Annex. A/3.

3. The applicants have challenged the aforesaid panel on diverse grounds some of which are intermixed with the facts of the case. The main grounds of assailing the impugned order are that the post of Goods Guard is a general selection post where the seniority has no role to play, but in the instant case, marks for seniority was given while preparing the merit list and number of persons were called for viva voce test after giving them notional seniority marks along with the marks obtained in the written test. The other ground has been that the applicants are much senior to the candidates who have been selected and they have spotless service career. They have been awarded deliberately less marks in viva voce test to extend undue favour to junior persons. It has also been averred that even after declaring the results and publishing the panel a supplementary examination was conducted and to the knowledge of the applicants the question paper was the same as given for the main examination. The respondents have even disregarded the circular No.11499/97. A number of other irregularities have been pointed out.

4. The official respondents have resisted the claim of the applicants and have filed a detailed and exhaustive reply to the Original Application. The private respondent i.e. Respondent no.4 has not chosen to contest the case. As per the reply filed on behalf of the official respondents certain preliminary objections have been taken regarding the maintainability of the very original application. The first preliminary objection is that the O.A cannot be entertained in the



absence of those who were empanelled after the selection and the Original Application deserves to be dismissed for want of non-joinder of necessary parties. The other preliminary objection is that it is not open to the applicants to challenge the selection process as they are estopped from challenging the same by virtue of principle of estoppel since they have gone through the entire selection and could not find place in the panel of selected candidates.

5. As regards the factual matrix of the case, it has been averred that Shri Hardan Ram is holding the post of Cabin man in the scale of pay of Rs. 3050-4590 and was given the benefit of ACP in the grade of Rs. 4000-6000 and candidates at Sl. No. 4 to 11 and 17-19 at Annex. A/1 were assigned notional seniority marks and they were found eligible for appearing in viva voce test as per PS 8644 at Annex. R/1. The viva voce test had to be postponed due to emergent circumstances and none of the applicants could qualify in the viva voce test and therefore their names did not find place in the panel. One of the candidates belonging to SC/ST category who qualified in the examination as a general candidate and one was empanelled against reserved post. The selection is made in accordance with rules and regulations made by the Railways in this regard. PSS 11499/97 pertains to selection for general posts and as such it is not applicable to the instant case. The post of Goods Guard does not fall in the category of general posts in terms of Railway Board's circular No. 9518 dated 28.01.88. The channel for promotion to the post of Guard is provided in Annex. A/6 and general posts are like that of Welfare Inspector and Law Assistant where employees of different departments and categories are considered and for selection to those posts



2

candidates who fulfil the eligibility conditions can apply. The grounds raised in the O.AS have generally been denied.

6. A short rejoinder has been filed, meeting out the preliminary objections and controverting the facts and grounds of the defence as set out in the reply. It has been enunciated that notional seniority marks has been assigned after appearing in the examination. One of the selected candidates i.e. Respondent No. 4 has been impleaded as a party in the representative capacity. It is wrong to state that the post of Guard is not a general post since candidates from different categories are called for selection to the said post and marks for notional seniority should not have been given for calling persons for viva voce test even after adding the notional marks of seniority..



O.A. No.72/2003:

Shri Mahendra Singh is at present holding the post of Cabin man in the scale of pay of Rs. 4000-6000. As per the averments made in the reply to the corresponding para, the applicant is holding the post of Cabin man in the scale of pay of Rs. 3050-4590. In the instant case also the applicant has appeared in the written test held on 24.03.2002 and did not qualify for appearing in the viva voce test.

7. This Bench of the Tribunal passed the following interim order in both the OAs on dated 25.03.2003

" In the facts and circumstances of the case, I consider it appropriate to order that any promotion made in pursuance of the selection panel dated 05.02.2003(Annex. A/3), shall be subject to out come of this OA and the factum of filing of this OA, shall be annotated on each subsequent orders, if any, made thereof. "

2/19

8. We have heard the elaborate arguments advanced by both the learned counsel and have anxiously considered the pleadings as well as records of this case. The learned counsel for the respondents has been fair enough to make available the original records relating to the selection in question.

9. The learned counsel for the applicants while reiterating the facts and grounds raised in the O.A has endeavoured to persuade us that none of the preliminary objection was sustainable. He has submitted that one of the selected candidates, who were given marks for notional seniority even for calling for the viva voce test and have been finally included in the panel has been impleaded as respondent No.4.

He has also submitted that vide interim order dated 25.03.2003, this Tribunal made it clear that any promotion made in pursuance with the impugned selection shall be subject to the result of these OAs, and the factum of the filing of these OAs shall be annotated on each subsequent orders, if any made thereof. The promotion orders which have been issued subsequently must contain the said annotation and if any of the selected candidates had any grievance, nothing prevented him from getting himself impleaded as party respondent to these OAS.

In this view of the matter, the objection regarding the non-joinder of necessary parties cannot be sustained.

10. As regards the other preliminary objection that the applicants are estopped from challenging the selection on the principle of estoppel. But as far as the said objection is concerned, in the instant



cases, the official respondents have thrown the mandatory rules overboard and have arbitrarily applied the rules, which have absolutely no applicability to the instant selection and the challenge goes to the root of the controversy i.e the procedure adopted was clearly illegal and the general rule, that the failed candidate cannot challenge the selection, cannot be applied to the instant cases. In this view of the matter none of the preliminary objection has any legs to stand.

11. As regards the merits of these cases, the learned counsel for the applicants has submitted that it was a general selection post since persons from number of categories were eligible to appear in the same. He submitted that the channel of promotion for the post of Guard has been placed on record vide Annex. A/6, wherein candidates belonging to 5 different categories are declared eligible to undertake the selection for the post of Guard. He has submitted that all these categories have got their independent regular channel of promotion. For e.g. Ticket Collector has got the channel of promotion to the post of Senior Ticket Collector/T.T.E, HTC/Sr. TTE, Conductor. TTI/CTI as per para 127 of Chapter I of IREM Vol. I, Commercial Clerks have specific channel of promotions as per para 128 of the aforesaid chapter. Trains Clerks have got their own channel of promotion as per para 142 of the said Chapter etc. Our attention was also invited to Annex. A/7 wherein, general posts has been defined. He has submitted that these are posts within the state of normal channel of promotion for which candidates are called from different categories from the same department or different departments and in the instant case, persons from different categories were called. Specific procedure in this respect has been provided in the circular bearing No. The Railway



Board on 16.11.98 has issued RBE No. 263/98, in pursuance to the judgement of the Apex Court in the case of M. Ramjayaram vs.

General Manager Southern Central Railway and others [1996

(1) SC SLJ 536]. There is a specific indication that marks for seniority will not be awarded. However, the official respondents have not acted according to the rules in force and therefore the complete selection deserves to be quashed.

12. Per contra, the learned counsel for the respondents have vociferously and vehemently opposed the contentions raised on behalf of the applicants. He has reiterated and stressed the preliminary objections taken in the reply regarding the maintainability of the very OAs. The learned counsel for the respondents has endeavoured hard to persuade us that there was absolutely no arbitrariness or illegality in conducting the selection. He has submitted that the post of Guard is not a general post since it has specific channel of promotions and it is not like the post of Law Assistant or Welfare Inspector, where persons fulfilling the eligibility conditions can apply even though they belong to another seniority unit or another department. He was confronted with a specific query as regards the factual aspect as to whether all these posts have their normal channel of promotion or not; as to whether the post of Guard is out side their normal channel of promotion or not. The learned counsel for the respondents has tried his hard to reply to our query by repeating the meaning of general posts as averred in Annex. A/7. However, he could not adduce any direct reply to the query. He has also submitted that the OAs are not maintainable for the reason that even if the contentions of the applicants are accepted, still no relief can be granted to them since



[Handwritten signature]

they have failed in the selection and did not find place in the panel and the applicants in fact have no locus standi to file such applications and ex facie no relief can be granted. He has cited in support of his contentions the judgements of Apex Court in cases of **Utkal University etc Dr. Nrusingha Charan Sarangi and others** [1999 AIR SCW 511] and **State of Bihar and others vs. Kameshwar Prasad Singh and another** [2000 AIR SCW 2389]

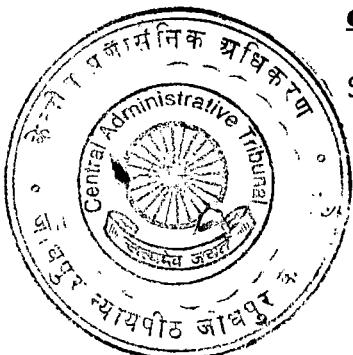
13. We have anxiously considered the rival submissions put forth on behalf of both the parties. Before advertiring to the factual aspect of the case, we would like to dispose of the peripheral issues relating to the preliminary objections. As regards the non-joinder of parties are concerned, one of the persons who has been selected has already been impleaded as party respondent and safe guard was provided by this Bench of the Tribunal by directing the authorities to make annotation of the factum of filing of these applications on the promotion orders. It is not a case of any of the parties that promotion order was issued before passing the said interim order. Further, mere empanelment per se does not give any right until any of the juniors in the merit list is promoted. We are persuaded with the submission of the learned counsel for the applicants that the safe guard which was provided by this Bench of the Tribunal would suffice and if any of the selected candidate felt aggrieved, he ought to have taken recourse to get implead himself as party respondent. The facts of the case of **Kameshwar Prasad Singh** (supra) are quite different from the case in hand and the judgement does not support the submissions made by the learned counsel for the respondents. Thus this preliminary objection of the respondents stands over-ruled.

[Signature]



14. As far as the other preliminary objection is concerned in normal course, failed candidates cannot challenge the selection proceedings. But in the case in hand there is gross illegality in as much as an invalid procedure is alleged to have been adopted, there should not be any difficulty in righting the wrong by the Court of law, if any perversity or arbitrariness is brought to the notice of the Court of law and the Court cannot be a mere spectator since they are to ensure that it is the rule of law that should govern and not the rule of thumb. In this view of the matter, we cannot leave and allow the respondents to invent their own system to conduct the selection in a whimsical manner. We are supported of this view from a very recent judgement of this Bench of the Tribunal vide order dated 12.09.2003 in O.A. No. 226/01 **Rajesh Rai vs. Union of India and others** wherein the respondents deviated from the relevant rule in conducting the selection. This Tribunal ordered holding fresh selection as per the rules applicable therein. We are fortified to our view from a decision of the Supreme Court in the case of **Rajkumar and others vs. Shakti Raj and others** [AIR 1999 SC 2110- para 16], wherein their Lordships of the Supreme Court have observed as under:

" It is true, as contended by Shri Madhava Reddy, that this Court in *Madan Lal vs. State of J and K* (1955) 3 SCC 486: 1995 AIR SCW 1109) and other decisions referred therein had held that a candidate having taken a chance to appear in an interview and having remained unsuccessful, cannot turn round and challenge either the constitution of the Selection Board or the method of selection as being illegal; he is estopped to question the correctness of the selection. But in this case, the Government have committed glaring illegalities in the procedure to get the candidates for examination under 1955 Rules, so also in the method of selection and exercise of the power in taking out from the purview of the and also conduct of the selection in accordance with the Rules, Therefore, the principle of estoppel by conduct or acquiescence has no application the facts in this case. Thus we consider that the procedure offered under the 1955 Rules adopted by the Government or the Committee as well as the action taken by the Government are not correct in law "



2

Thus this preliminary objection also stands repelled and we proceed to examine these cases on their merits.

15. As far as the factual matrix of the case is concerned there is hardly any quarrel. It is true that notional seniority marks have been assigned while calling some of the candidates for interview and also seniority marks in respect of the candidates have been taken into account while preparing the final merit. Now, we shall come to the crux of the matter. The first and fore-most question we are required to answer is as to whether, the post of Goods Guard is a general selection post or not. As far as the definition of the general selection post is concerned, the same has not been exhaustively defined. However, from the very Annex. A/7, we find that general posts is stated to be "those outside the normal channel of promotion for which candidates are called from different categories, whether from the same department or from different departments". This is the touchstone of deciding the post of Guard, whether it is a general post or not. As we noticed above, that a specific channel has been provided for the post of Guard and candidates belonging different categories have been held to be eligible for undertaking the selection on option basis. All these posts have their own regular channel of promotion. It is also evident that there are number of categories which fall within the channel of promotion to the post of Guard. Hence there is no difficulty in concluding that the post of Guard is a general post. If we were to take the defence of the respondents and the submissions of their learned counsel that there is specific channel of promotion to the post of Guard and therefore the post of Guard is not a general post and if such submissions are taken to their logical conclusion, the result would



be absurd in as much as the post of Guard would become a normal channel of promotion to all the posts which are stated to be in the channel of promotion for the post of Guard as indicated in Annex. A/7 and in that case what would happen to the specific channel of promotion which have been provided in the IREM, as disclosed by the learned counsel for applicant and indicated above. Thus by no stretch of imagination, the post of guard can be said to be normal channel for various categories. Once a specific normal channel has been provided for the various categories and there is a provision of option for appearing in the selection test to the post of Guard, the post of Guard shall have to be treated as general post. Had it been the normal channel of promotion as adduced by the learned counsel for the respondents, all the persons holding the posts which the consideration zone as per the prescribed ratio ought to have been called for the selection and there is no question of any option, but such a course of action has not been followed; rightly so because, in the case of posts which are out side the channel of promotion, the requirement of option is inevitable. Thus the submission of the learned counsel for the respondents does not have our concurrence and in this view of the matter, the post of Guard, falls in the category of general selection post.

16. Since we have come to the positive conclusion that the post of guard is a general selection post, the specific rule framed by the Railway Board for general selection posts vide order No. RBE, 263/98 shall apply. The contents of the relevant portion of the same are reproduced as under:

"2. The above procedure for filling up general selection posts has been reviewed pursuant to the Hon'ble Supreme Court's order dated

12.03.96 in *M. Ramjayaram vs. General Manager, South Central Railway and others* [1996 (1) SC SLJ 536] holding inter alia that in the impugned selection for appointment to the post of Law Assistant it is illegal to award marks for seniority. The Ministry of Railways have accordingly decided to modify the existing procedure for filling up "general selection" posts for which staff of different categories/departments fulfilling the conditions are eligible to volunteer, as follows:

(i) Marks for seniority will not be awarded and accordingly distributions of marks allotted to various factors of selection will be as under:

		<u>Maximum Marks</u>	<u>Qualifying Marks</u>
(1) Professional ability Consisting of			
(a) Written test and	35	21	30/50
(b) Viva voce test	15	--	
(2) Personality, address, Leadership, academic Technical qualifications	30	--	
(3) Record of service	20	--	
(ii)	The final panel will be drawn up from amongst those securing 60% marks in the aggregate, in the order of seniority, provided that those securing a total of more than 80% marks will be classed as outstanding and placed on top of the panel in order of seniority.		

A mere perusal of the aforesaid would reveal that there is

prohibition of awarding seniority marks in the selection. Admittedly the official respondents have awarded seniority marks on notional basis to some of the candidates while calling for interview as well as seniority marks has been awarded while preparing the final merit list.

Had the marks for notional seniority not been so counted, marks for personality, address, leadership, academic/technical qualifications would be 30 instead of 20 and for record of service it would have been 20 instead of 15, and not the one as awarded in the instant case. Therefore the complete selection is vitiated and this is well supported by the judgement of the Apex Court in the case of **M. Ramjayaram** (supra). Thus the awarding of 15 marks for seniority is obviously illegal. On this count alone the impugned order cannot be sustained.

727

17. We got the privilege of going through the result of the written test conducted in the instant case. We find that the respondents have fixed the maximum marks 100 instead of 35 as per the rules in force. It seems that the marks obtained by the individual candidates out of 100, has been converted into for 35 marks and this process has been done in respect of all the candidates. The respondents should not have adopted this process. We fail to understand as to why earlier 100 marks were prescribed for the written test and subsequently another exercise is carried out for converting the same for 35 marks. Once a particular mode has been provided to do a thing in a particular manner, the other modes are necessarily forbidden. The respondents cannot be allowed to have their own way of prescribing marks as per their whims and fancies. This is what seems to have been done in the instant case. We have anxiously gone through the various provisions for regulating the various selections in the Railways and we find that nowhere such procedure has been prescribed. On this count also, the impugned selection cannot be sustained.

18. As regards the submission of the learned counsel for the respondents that the applicants have no locus standi to file such "applications where they cannot be granted any relief and since in the instant cases they failed in the selection and such applications cannot be maintained. Firstly, we find that this argument has been developed only at the time of hearing and the respondents have taken no such plea in the reply. Hence no arguments could be advanced on behalf of the applicants since the learned counsel for the applicants was perhaps taken by surprise. However, we find that this is a peculiar argument

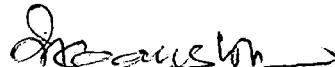
23

I/28

advanced on behalf of the learned counsel for the respondents. However, in the instant case, a grave perversity and illegality as pointed out above has been committed by the official respondents in as much as the mandatory procedural rules have not been followed. The complete selection is nullified and cannot be sustained. The decision in case of **Utkal University etc. (supra)** relied upon on behalf of the respondents has no application to the instant case being distinguishable on facts.

19. In the premises, we think it apposite to direct the official respondents to hold the selection afresh keeping in view the requirements of the provisions of RBE No. 263/98 dated 16.11.98 as extracted above and the aforesaid observation in respect of the candidates as per the eligibility list issued vide letter dated 21.02.2002. The persons, who had been given promotion in pursuance with impugned selection published on 05.02.2003, at Annex. A.3, shall continue to hold the post of Guard till the results of fresh selection to be held in pursuance to this order, is declared. This exercise shall be completed within a period of four months from the date of communication of this order. No costs.


(G.R. Patwardhan)
Administrative Member


(J K Kaushik)
Judicial Member.

Jsv.

Received copy
15/9/09

R. Leedy
16/9/09