

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A. NOs. 459/2004, 469/04, 358/05, 367/05, 375/05 & 810/05

TUESDAY THIS THE 22nd DAY OF AUGUST 2006.

C O R A M

**HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN
HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER**

O.A. NO. 459/2004

- 1 G. Sathish Kumar S/o Gopala Pillai
working as Diesel Assistant, Southern Railway
Quilon residing at Karuva Kizhakkethil
Kilikollur, Kollam-691 004
- 2 T.S. Jacob John S/o John
working as Diesel Assistant, Southern Railway
Quilon residing at
Eathen House, Kureeppally, Nedumpana PO
Kollam

Applicants

By Advocate Mr. M.P. Varkey

Vs

- 1 Union of India represented by the Chairman
Railway Board and Ex-Officio
Principal Secretary to the Government
Ministry of Railways
Rail Bhavan, New Delhi.
- 2 The Chief Personnel Officer
Southern Railway, Chennai-600 003
- 3 The Senior Divisional Personnel Officer
Southern Railway
Trivandrum-695 014.

By Advocate Mr. P. Haridas

O.A. 469/2004

- 1 M.M. Anil Kumar S/o Mani
working as Diesel Assistant, Southern Railway
Quilon residing at
Madhava Nivas, Karippadom PO
Thalayolaparambu
Kottayam-686 605

- 2 B. Suresh K umar S/o Balakrishna Pillai
working as Diesel Assistant, Southern Railway
Quilon residing at Suresh Bhavanam
Sooranad South, Kakkakunnu PO
Kollam.-690 522
 - 3 G.Madhusudanan Nair S/o Gopinathan Nair
working as Diesel Assistant, Southern Railway
Quilon residing at Kavinte Padeettathil
Pillarimangalam PO
Kollam-690 107
 - 4 J. Baiju S/o M.Janardhanan
working as Diesel Assistant, Southern Railway
Quilon residing at Manju Nivas, Chethana Nagar
Valathungal, Kollam-690 018
 - 5 S. Jayarajan S/o R.Sukumaran
working as Diesel Assistant, Southern Railway
Quilon residing at Tharayil Puthenveedu,
Cheruserry Bhagom,
Chavara, Kollam-691 583
- Applicants

By Advocate Mr. .MP Varkey

Vs.

- 1 Union of India represented by the Chairman
Railway Board and Ex-Officio
Principal Secretary to the Government
Ministry of Railways
Rail Bhavan, New Delhi.
- 2 The Chief Personnel Officer
Southern Railway, Chennai-600 003
- 3 The Senior Divisional Personnel Officer
Southern Railway
Trivandrum-695 014.

By Advocate Mr. P. Haridas

O.A. No. 358/2005

S. Biju S/o Soman
Working as Diesel Assistant
Southern Railway Quilon
residing at Kunnumpuzhathu
Kallumthazham PO
Kollam-691 004

Applicant

By Advocate Mr. M.P. Varkey

Vs.

- 1 Union of India represented by the Chairman
Railway Board and Ex-Officio
Principal Secretary to the Government
Ministry of Railways
Rail Bhavan, New Delhi.
- 2 The Chief Personnel Officer
Southern Railway, Chennai-600 003
- 3 The Senior Divisional Personnel Officer
Southern Railway
Trivandrum-695 014.

By Advocate Mr. K. M. Anthur

O.A.367/2005

- 1 K.A. Geevarghese S/o Abraham
working as Assistant Loco Pilot Southern Railway
Quilon residing at Kunnathuparambil
Valanjavattom, Thiruvalla.
- 2 R. Sreesh Kumar S/o Rajagopalan Pillai
working as Assistant Loco Pilot Southern Railway
Quilon residing at Pavor Puthen Veedu,
Vadakkedathukavu PO, Adoor
- 3 Biju S.Paul S/o Paulose
working as Assistant Loco Pilot Southern Railway
Quilon residing at Tholanikunnel, Pyngottoor PO,
Ayankara. Ernakulam.
- 4 M. Anil Kumar S/o Sankaran
working as Assistant Loco Pilot Southern Railway
Ernakulam (Marshelling) residing at
Sruthi, Vadakkethil
Farooq College PO,
Kozhikode.
- 5 P.N. Prakash S/o Narayanan
working as Assistant Loco Pilot Southern Railway
Ernakulam residing at Pulickal Thekke Thuravu
Pudukkad PO, Trichur.
- 6 K.E. Mohammed Kunju S/o Ibrahim
working as Assistant Loco Pilot Southern Railway
Ernakulam (Marshelling) residing at
Marotichodu, Idappally PO
Ernakulam District.

Applicant

By Advocate Mr. M.P. Varkey

Vs.

- 1 Union of India represented by the Chairman
Railway Board and Ex-Officio

Principal Secretary to the Government
Ministry of Railways
Rail Bhavan, New Delhi.

- 2 The Chief Personnel Officer
Southern Railway, Chennai-600 003
- 3 The Senior Divisional Personnel Officer
Southern Railway
Trivandrum-695 014.

By Advocate Mr. P. Haridas

O.A. 375/2005

Jimmi Mathew S/o K.C.Mathew
Assistant Loco Pilot, Southern Railways
Palghat Division, Palghat
residing at Kootungal House, Thimmiri PO
Chappara Padava
Kannur-670 551.

Applicant

By Advocate Mr. Martin G. Thottan

Vs.

- 1 Union of India represented by

Secretary to the Government of India
Ministry of Railways
Rail Bhavan, New Delhi.
- 2 The Chief Personnel Officer
Southern Railway, Chennai-600 003
- 3 The Senior Divisional Personnel Officer
Southern Railway Palghat Division,
Palghat.

Respondents.

By Advocate Mrs. Sumathi Dandapani

O.. NO. 810/2005

P.T. Saji S/o Thankappan
Assistant Loco Pilot
Southern Railway, Qulion
residing at Chithira Bhavan,
Madappally PO, Kottayam-686 546

Applicant

By Advocate Mr. M.P. Varkey

Vs.

- 1 Union of India represented by
the General Manager
Southern Railway
Chennai-600 003

2 Senior Divisional Personnel Officer
Southern Railway
Trivandrum-695 014

Respondents

By Advocate Mr.K. M. Anthru.

ORDER

HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN

The applicants in all these OAs belong to the same category and are aggrieved by similar orders of the respondents and seek the same reliefs. Therefore the Applications were heard together and are being disposed of by this common order.

2 O.A. 459/04 is taken as the lead case and the service particulars of the applicants in this O.A. and other connected cases are narrated below.

O.A.NO. 459/04- The two applicants were appointed as Diesel Assistants/AC Assistants in the scale of Rs. 3050-4590 in the Madras Division of the Southern Railway. Soon after their appointment, they had applied for inter-divisional transfer to Trivandrum Division. Applicant No. 1 was promoted as Shunter in the scale of Rs. 4000-6000 from 26.6.2001 and applicant No. 2 was promoted as Senior Diesel Assistant in the same scale on regular basis against restructured vacancy w.e.f. 17.9.2001. The applicants joined Trivandrum Division on inter-divisional transfer as Diesel Assistant in the scale of Rs. 3050-4590 and their pay was reduced by Annexure A-1 order dated 27.11.2002/9.12.2002.

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OA No. 469/04- The applicants five in number, were appointed as Diesel Assistants/AC Assistants in the scale of Rs. 3050-4590 in the Madras Division of Southern Railway w.e.f. 9.6.1997. Soon after their appointment, they applied for inter-divisional transfer to Trivandrum Division. Applicant No. 2 was promoted as Shunter in the pay scale of Rs. 4000-6000 from 26.6.2001 and the other applicants as Senior Diesel Assistants w.e.f. 17.9.2003 against restructured vacancies. They were transferred to Trivandrum Division as Diesel Assistant and joined there on 23.9.02, 23.10.01, 30.5.02, 31.5.2002 and 4.6.2002 respectively. Their pay was reduced by Annexure A-1 order dated 28.10.2002.

OA No.358/2004 is filed by the applicant who was appointed as Diesel Assistant in the Hubli Division of South Central Railway on 1.8.1994 and soon after his appointment, applied for transfer to Trivandrum Division and was transferred to Madras Division of Southern Railway for want of vacancies in the Trivandrum Division. He was promoted to the post of Senior Diesel Assistant in the scale of Rs. 4000-6000 w.e.f. 13.3.2000 and while working there he was transferred to Trivandrum division, he joined there on 28.3.2001. His pay was reduced by Annexure A-1 order and his representation was rejected by Annexure A-6 order.

O.A. 367/2005 - is filed by six applicants who were appointed as Diesel Assistants in the Madras Division of the Southern Railway in

1993 and were promoted as Shunter as per order dated 29.8.1998. They were transferred to Trivandrum Division on 15.4.2000, 19.4.2000, 15.4.2000, 16.4.2000, 16.4.2000 and 16.4.2000 respectively. Their pay was reduced by the impugned orders Annexure A-1 and A-6 series.

O.A. 375/2005- The applicant was initially appointed as Diesel Assistant in the scale of Rs. 3050-4590 in Madras Division of Southern Railway on 16.6.1997. Thereafter he was promoted as Senior Diesel Assistant in the scale of Rs. 4000-6000 w.e.f. 17.9.2001 on regular basis under the cadre-restructuring scheme. He was posted as Shunter in the same scale by order dated 5.12.2002. While he was working as Shunter he was transferred to Palghat Division on his request by order dated 6.5.2003. He joined Palghat Division on 14.6.2003 as Diesel Assistant in the scale of Rs. 3050-4500. His pay was reduced by Annexures A-1 and A-2.

O.A No. 810/2005:- The applicant was appointed as a Diesel Assistant in the Madras Division of Southern Railway on 11.5.1996 and soon after his appointment he applied for inter-divisional transfer to Trivandrum Division. He was subsequently promoted to the post of Senior Diesel Assistant in the Madras Division w.e.f. 13.3.2000. He was transferred to Trivandrum Division on request as Diesel Assistant and joined there on 4.5.2001. He was reverted and pay reduced by Annexure A-1 order and his representation was rejected

by Annexure A-6.

3 It may be observed from the narration of facts above that all the applicants who are working as Diesel Assistants in the Trivandrum Division of the Southern Railway are aggrieved by the denial of pay protection on their inter-divisional transfer from Madras Division to Trivandrum Division and the treatment of their transfer as a case of reversion under Rule 1313 of the IREM Vol.II. The stand of the respondents is that they were transferred to the Trivandrum Division on their own request subject to usual terms and conditions applicable to such request transfers, and that the pay fixation has been done in accordance with Annexure A-2 and A-4 orders which do not permit any protection of pay in such cases. According to the respondents the appointment of all the applicants as Diesel Assistant in the Trivandrum Division amounts to reversion to a post which they were holding earlier and hence their case specifically falls under category (i) in the clarificatory letter at Annexure A-2 dated 29.10.2002 and this position was further reiterated by Annexure A-4 order dated 12.12.1991.

4 Identical replies have been filed in all the above OAs. The respondents have also pointed out that the Tribunal dismissed O.A. Nos. 1126/97 and 1151/97 earlier wherein similar prayers were preferred. In O.A. 956/2000 which was also dismissed by this Tribunal after taking the view that the ratio of the judgment of the

Hon'ble Apex Court in the case of Comptroller & Auditor General of India Vs. Farid Sattar (2000 SCC L&S 440) was against the claim of the applicant in the O.A. Therefore in the light of the Apex Court's dictum and the circumstances in the OAs, the present OAs also need to be dismissed. They have also taken the view that the challenge to the pay fixation orders in all the OAs are highly belated and the OAs are hit by limitation and even if the date of issue of Annexure A-2 orders was taken into account which is only a reiteration of the earlier orders, the delay in challenging the impugned orders cannot be overcome. Further all the applicants had understood and admitted that the inter-divisional transfer would result in reduction in pay and the delay in considering them for transfer was because several registrants who had requested for similar transfer were waiting and transfer could be ordered only on the basis of seniority of registration.

5 The further contention raised by the respondents is that in terms of the Railway Board letter No. F(E)11-91/Misc/2 dated 4.10.1994 and advance correction Slip NO. 19 forwarded by the Railway Board's letter dated 24.2.1995, pay of such employees may be regulated subject to the following conditions:

"(i) When a Government servant holding the higher post substantively on regular basis seeks transfer from that higher post to a lower post at his own request and the pay drawn in such higher post is less than or equal to the maximum of the scale of pay of the lower post, then the pay drawn in such higher post will be protected

(ii) When a Government servant seeks transfer to a post from which he was promoted, it will be treated as a case of reversion and his pay will be fixed at a stage what he would have drawn had he not been promoted

(iii) In other cases of transfer from higher to lower post on request in terms of FR 15(a) his pay will be regulated under the provisions of FR 22(1)(a)(3). Substantively on regular basis means one should complete 2 years service satisfactorily in that particular post.

6 As the applicants have not completed two years' service in Rs. 4000-6000, the pay drawn in that scale is not liable to be protected and accordingly, the pay fixation ordered in Annexure A-1 is correct and does not need any revision. The applicants have been transferred to Trivandrum Division on reversion to a lower grade. The Rule 1313 relied on by the applicants as per Annexure A-4 commences with a pre-condition that "(a) (1) where a Railway servant holding a post, other than a tenure post, in a substantive or temporary or officiating capacity...." Thus it may be seen that the provisions of Rule 1313 are applicable only to the case of an employee who is appointed substantively to a post in the time scale. Holding of a post substantively on regular basis in respect of an employee transferred on his request prior to 1.1.1989, the date on which the instructions contained in Railway Board's letter No. E(NG) 1/88/SN5/2 (RBE NO. 23/789) dated 20.1.1989 came into effect, means that he should have been confirmed in the higher grade in the parent unit. In respect of a person transferred on request after

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1.1.89, he should have held the higher post on regular basis for a period exceeding 2 years, to be treated as having held such post substantively on regular basis. The applicants, who have been transferred after 1.1.1989, do not have a case that they have held the post of Shunter or Goods Driver substantively for a period exceeding 2 years and hence, they cannot seek protection of the pay they received in that grade on transfer. The Rule 1313 (a)(3) deals with the cases appointed to a new post on transfer at his request and whose substantive pay in respect of the old post is more than the maximum of pay in the time scale of the new post. It stipulates that in such cases the employee's pay be fixed at the maximum as initial pay. The applicants herein have no such case. At this stage the applicants themselves have accepted this when they say that the 3rd respondent had stated the correct law and hence they did not agitate the issue.

7 More or less similar pleas have been taken in all the cases.

8 The applicants have filed rejoinder contesting the averments in the reply statement regarding the substantive pay of the applicant and argued that the question whether they have completed two years and became substantive etc. are extraneous matters and the Railway Board letter dated 4.10.1994 and 24.2.1995 (ACS No. 19) is no longer in force and it is only Railway Board's letter dated 18.7.2002 and A-2 Rules which hold the field.

9 They have also stated that the applicants have been promoted against regular vacancies and against upgraded/restructured vacancies and the Board's circular No. 106/96 will show that promotion against such posts is regular and substantive. They have also relied on the orders of this Tribunal in O.A. 1041/1995 wherein the Tribunal had quashed the stipulation prescribed by the Railways that in the case of inter-divisional transfer, protection is available only to those who have completed two years substantive service in the old post holding that there is no such stipulation in Rule 1313 of IREC Vol.II and therefore it is void.

10 We have heard the learned counsels appearing for the applicants and the Counsels appearing for the respondents. The learned counsel for the applicants stressed the fact that in the light of Annexure A-2 clarification of the Railway Board it is only the amended rules notified in Board circular No. 198/1991 Annexure A-4 and the clarification at Annexure A-10 which hold the field and the respondents were relying on a decision in the O.A. which was dismissed before these clarifications were issued. He also brought to our notice the orders of this Tribunal in O.A. 761/2003 which was allowed by this Bench of the Tribunal in which the dictum laid down by the Hon'ble Apex Court in Comptroller and Auditor General of India and Others Vs. Farid Sattar referred to by the respondents was distinguished and the case of the applicant therein was held to be falling under the purview of Rule 1313 1(a)(2) corresponding to

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provision (i) in Annexure A-2. Decision in O.A. 956/2000 of this Bench of the Tribunal which had relied on the above decision of the Hon'ble Supreme Court in C&AG and Others Vs. Farid Sattar was also distinguishable on the same ground. O.A. 956/2000 was also considered by this Tribunal in O.A. 761/2003 and it was held that the transfer from one unit to another on request is different from a transfer back to the old post on the basis of reversion.

11 The respondents' counsel mainly relied on the judgment in O.A. 956/2000 and judgment of the Hon'ble Apex Court in Farid Sattar's case and argued that the case of the applicants would fall under provision (ii) in Annexure A-2 letter dated 29.10.2002 as the applicants have sought a transfer to a lower post from which they have been promoted and therefore should be treated as a reversion.

12 As seen from the facts of the case submitted by the applicants and admitted by the respondents, the applicants in all the OAs have preferred the request for inter-divisional transfers when they were holding the post of Diesel Assistant in the Madras Division of the Southern Railway including applicant in O.A.358/2004 working in Hubli Division of South Central Railway. Their claims could not be considered for transfer and in the meantime they were all promoted to the higher scales of Rs. 4000-6000 against regular vacancies. Though the respondents have in the letters rejecting their representations, stated that their promotions cannot be held to be

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on regular basis as they were not holding the post substantively as they had not completed a period of two years and they could not seek protection of pay in that grade on transfer; this objection was not seriously pursued later in the arguments. It was also noticed that the instructions contained in Railway Board's letter dated 20.1.1989 to the effect that the employee should have been confirmed in the higher grade in the parent unit after completion of two years did not find favour with this Tribunal and in O.A. 1041/1995, it was held that such clarifications cannot modify the rules and the instructions to the extent it prescribes the period of two years in the higher post was quashed. The respondents therefore cannot take shelter under that argument any more. Moreover, the policy of confirmation has been given up long ago and confirmation is only now required in the entry cadre. It has also come to the notice that all the applicants were promoted to the higher post in the parent division in the wake of the restructuring of the cadres and therefore it has to be presumed that the posts against which they were promoted are regular posts. Therefore they have to be treated as holding these posts substantively on a regular basis.

13 The respondents by virtue of their contentions that the applicants herein are governed by provision (ii) of the Railway Board's letter at Annexure A-2 they have conceded that the issue arising in these cases has to be decided in accordance with the provisions of Annexure A-2 and A-4 as prayed for by the applicants.

As there is mutual agreement in this regard the provision of these two rules have to be examined in relation to the pleadings on both sides. For facility of reference and comparison the full text of these orders are reproduced below:

Annexure A-2

**Deletion of ACS 19 from para 604 of IREM Vol. I (1989 Edition)
clarifications regarding**

Many queries are being received from different quarters regarding the reasons for deletion of ACS 19. Presumably there is a misunderstanding that the protection of pay provided for under para 604(a)(iii) included in the Indian Railway Establishment Manual by ACS 19 has now been withdrawn. That certainly is not the case and no benefit has been withdrawn. Rule 1313 (I)(a)(3) brought into force by ACS 14 issued vide Board's letter No.F (E)II/89/FR I/1 dated 12.12.91, already provided for protection of pay. ACS 19 only brought into force what was already in existence in the form of FR 22 adopted as Rule 1313 vide ACS 14 issued on 12.12.91.

In order to have a very clear view, the provisions contained in the erstwhile ACS 19 and those already existing under FR 22 i.e. Rule 132 of R-II are shown below in juxtaposition.

Provision of erstwhile para
604(a)(iii) inserted in IREM
Vol.I(1989) by ACS 19

Rules under which the
provision already
existed in FRs

(i) When a Govt. servant holding the higher post substantively on regular basis seeks transfer from that higher post to a lower post at his own request and the pay drawn in such higher post is less than or equal to the maximum of the scale of pay of the lower post, then the pay drawn in such higher post will be protected.

FR 22(I) (a)(2) i.e.
Rule 1313(I)(a)(2) of
R-II (incorporated vide
ACS-14)

(ii) When a govt. servant seeks transfer to a post from which he was promoted, it will be treated as a case of reversion and his pay will be fixed at a stage what he would have drawn has he not been promoted

FR 22(I)(b) i.e. Rule 1313
(I)(b) of R-II (Incorporated
vide ACS-14)

(iii) When appointment on transfer from a higher post to a lower post is made on his own request under Rule 227(a)(2) R-1 (FR 15-A(2) and the maximum pay in the time scale of that post is lower than his pay in respect of the old post held regularly, he shall draw that maximum as his initial pay, in accordance with FR 22(I)(a)(3).

FR 22(I)(a)(3) i.e. Rule
1313(I)(a)(3) of R-II
(incorporated vide ACS-14)

It may be seen that cancellation of ACS 19 has not resulted in any kind of withdrawal of any benefits. Railways should continue regulating pay fixation in accordance with the provisions already contained in Rule 1313 of R-II without any apprehension.

Annexure A-4

Advance correction slip No. 14

The existing Rule 1313 (FR 22) of the Indian Railway Establishment Code Vol.II (Sixth Edition 1987) shall be substituted by the following

Rule 1313(FR 22(I))

The Initial pay of a Railway servant who is appointed to a post on a time scale of pay is regulated as follows:

(a)(1) Where a Railway servant holding a post, other than a tenure post, in a substantive or temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity as the case may be, subject to the fulfillment of the eligibility conditions are prescribed in the relevant Recruitment; Rules to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time scale of the higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued or rupees twenty five only, whichever is more.

Save in cases of appointment on deputation to an ex-cadre post, or to a post on ad hoc basis, the Railway servant shall have the option, to be exercised within one month from the date of promotion or appointment as the case may be, to have the pay fixed under this rule from the date of such promotion or appointment or to have the pay fixed initially at the stage of the time scale of the new post above the pay in the lower grade or post from which he is promoted on regular basis, which may be refixed in accordance with this rule on the date of accrual of next increment in the scale of the pay of the lower grade or post. In cases where an ad hoc promotion is followed by regular appointment without break, the option is admissible as from the date of initial appointment/promotion, to be exercised within one month from the date of such regular appointment.

Provided that where a Railway servant is, immediately before his promotion or appointment on regular basis to a higher post, drawing pay at the maximum of the time scale of the lower post, his initial pay in the time scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post held by him on regular basis by an amount equal to the last increment in the time scale of the lower post or rupees twenty five whichever is more.

(2) When the appointment to the new post does not involve such assumption of duties and responsibilities of greater importance, he shall draw as initial pay, the stage of the time scale which is equal to his pay in respect of the old post held by him on regular basis, or, if there is no such stage, the stage next above his pay in respect of the old post held by him on regular basis:

Provided that where the minimum pay of the time scale of the new post is higher than his pay in respect of the post held by him regularly, he shall draw the minimum as the initial pay

Provided further that in a case where pay is fixed at the same stage, he shall continue to draw that pay until such time as he would have received an increment in the time scale of the old post in cases where pay is fixed at the higher stage, he shall get his next increment on completion of the period when an increment is earned in the time scale of the new post.

On appointment on regular basis to such a new post, other than to an ex-cadre post on deputation, the Railway servant shall have the option to be exercised within one month from the date of such appointment for fixation of his pay in the new post w.e.f. The date of appointment to the new post or with effect from the date of increment in the old post.

(3) When appointment to the new post is made on his own request under (Rule 227(a)(2)-R1(F-15-A)(2) and the maximum pay in the time scale of that post is lower than his pay in respect of the old post held regularly, he shall draw that maximum as his initial pay

(b) If the conditions prescribed in clause (a) are not fulfilled, he shall draw as initial pay on the minimum of the time scale

Provided that, both in cases covered by clause (a) and in cases, other than the cases of reemployment after resignation or removal or dismissal from the public service covered by clause (b), if he

(1) has previously held substantively or officiated in

(i) the same post, or

(ii) a permanent or temporary post on the same timescale; or

(iii) a permanent post or a temporary post (including a post in a body, incorporated or not, which is wholly or substantially owned or controlled by the Government) on an identical timescale or

(2) is appointed subject to the fulfillment of eligibility conditions as prescribed in the relevant recruitment rules to a tenure post on a time scale identical with that of another tenure post which he has previously held on regular basis, then the initial pay shall not, except in cases of reversion to parent cadre, governed by proviso (1)(iii) be less than the pay other than special pay, personal pay or any other emoluments which may be classed as pay by the President under (Rule 1303 (iii) R-II (FR-9(21(a)(iii) which he drew on the last occasion, and he shall count the period during which any previous occasions for increment in the stage of the time scale equivalent to that pay. If, however, the pay last drawn by the Railway servant in a temporary post had been inflated by the grant of premature increments, the pay which he would have drawn but for the grant of these increments shall, unless otherwise ordered by the authority competent to create the new post, be taken for the purposes of this proviso to be the pay which he last drew in; the temporary post which he had held on a regular basis. The service rendered in a post referred to in proviso (1)(iii) shall, on reversion to the parent cadre, count towards initial fixation of pay, to the extent and subject to the conditions indicated below:-

(a) The Railway servant should have been approved for appointment to the particular grade or post in which the previous service is to be continued.

(b) all his seniors, except those regarded as unfit for such appointment were serving in posts carrying the scale of pay in which benefit is to be allowed or in the higher posts whether in the Department itself or elsewhere and at least one junior was holding a post in that Department carrying the scale of pay in which the benefit is to be allowed and

(c) the service will count from the date his junior is promoted on a regular basis and the benefit will be limited to the period the Railway servant would have held the post in his parent cadre had he not been appointed to the ex-cadre post.

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14 It can be made out from the wording of Annexure A-2 that it is only a clarification intended to put in the proper perspective, the orders issued earlier on the subject some of which had also been withdrawn. There is a reference to order of ACS -19 which was deleted from Para 604 of IREM Vol. I which provided for protection of pay in such cases. Annexure A-4 contains the advance copy of

correction slips 14 and 15 which is an amendment to Rule 1313 of IREC Vol.II which is corresponding to the Provisions of FR 22. These amendments were introduced by Annexure A-4 Board's order NO. 198/91 dated 12.12.1991. Therefore, it may be given to the fact that with the withdrawal of ACS 19 the Rule 1313 as amended by ACS 14 at Annexure A-4 holds the field in this matter. The first para of the Annexure A-2 order only intends to clear the misunderstanding caused in some quarters that by withdrawal of ACS-19 which earlier provided for the protection of the pay, this benefit has been totally withdrawn. Therefore, it only seeks to emphasise by giving a comparative picture of what had existed by virtue of ACS 19 before its withdrawal and what is now provided for under the amended rule 1313. This amounts to saying that the rules under which the pay protection can now be given would be only in terms of Rule 1313. Therefore there is some confusion in both the parties ×× pleading to be considered under provisions (i) and (ii) in the first column of Annexure A-2. These are the provisions which are no longer in force by the withdrawal of ACS-19. Column 1 in Annexure A2 is only intended to give a comparative picture that though the order is withdrawn, the same protection is available under a different provision.

15 For determination of this case therefore we go by the Rule 1313 as it stands amended by Annexure A-4. In dealing with the rival contentions according to the respondents the case of the

applicants fall under (ii) of Annexure A-2 by the above clarification they would ~~xxxxx~~ be covered under Rule 1313(1)(b), whereas according to the applicants they would be covered under Rule 1313 (1)(a)(2). The juxtaposition of these two provisions as seen from Annexure A-2 will show that FR 22(1)(a)(2) and corresponding provision of Rule 1313 (1)(a)(2) deal with transfer from a higher post to a lower post on request and cases under FR 22 and Rule 1313 1 (b) are cases of unilateral transfers when a Government servant seeks specific transfer back to the post from which he was promoted. The judgment of the Apex Court in Farid Sattar's case evidently applies to the latter category which has been made clear by the Hon'ble Apex Court wherein it was observed that when an employee seeks a transfer to a lower post, he is required to tender a technical resignation from the post with a view to join the lower post as a direct recruit and accepting such conditions as ranking junior to the juniormost employee and in such a situation the pay has to be fixed with reference to the lower pay scale only. The applicants have requested for transfer when they were holding the post of Diesel Assistant in the Madras Division to the ^{same} grade and it cannot be said that just because the transfer materialised at a later stage that their request was for a transfer which falls under the latter category and would amount to reversion. It is true that before the transfer materialised all the applicants came to be promoted to a higher post on a substantive basis and by virtue of the rules regarding inter-divisional transfers in the Railway, such transfers can be effected

only to a lower post and therefore a situation arose that they could be transferred only ~~xx~~ against a lower post. In such a situation, if the provisions of Rule 1313 correspond^{ing} to FR 22 is to be applied, it can only be done under sub rule (2) of the rule according to which if the appointment to the new post does not involve assignment of duties and responsibilities of greater importance the pay has to be fixed in the stage of the timescale in the lower pay scale which is equal to the pay in the lower scale and if there is no stage the stage next above the stage, or under sub rule (3) thereof. But sub rule (3) cannot apply in this case as the maximum pay in the time scale of the post of Diesel Assistant which is in time scale of Rs. 3050-4590 is not lower than the pay in the higher post held by the applicants in the scale of Rs. 4000-6000. Hence Rule 1313 1(a)(2) only is applicable to the applicants in these OAs and the objection of the respondents to the effect that they have sought a transfer to a lower post and have to be treated as posted on reversion and also the argument that they were not holding the higher post on regular basis have no force. The decision in O.A. 956/2000 is also be distinguished as it was rendered on the basis of the instructions of the Railway Board dated 29.4.1994 which was withdrawn and the judgment of the Apex Court in Farid Sattar's case which we have already dealt with supra.

16 Besides, the first para of the Annexure A-2 letter dated 20.10.2002 of the Railway Board makes it obvious that such pay

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protection was available under the erstwhile provisions in Para 604 (a)(ii) and states "that no benefit has been withdrawn" by deletion of the same. Therefore the intention is clearly to continue the benefits and not to negate the same.

17 In the light of the above discussions the impugned orders in these OAs are quashed. We declare that the applicants are entitled to have their pay fixed in terms of Rule 1313 (1)(a)(2) of Indian Railway Establishment Code Vol. I corresponding to FR 22 1(a)(2) w.e.f. the dates on which they were transferred to the Trivandrum Division and we direct the respondents to issue the orders accordingly and disburse the arrears as admissible within a period of three months from the date of receipt of this order. No costs.

Dated 22 -8-2006


GEORGE PARACKEN
JUDICIAL MEMBER


SATHI NAIR
VICE CHAIRMAN

kmm