

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A. NO. 20/2005

TUESDAY THIS THE 12th DAY OF SEPTEMBER, 2006.

C O R A M

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

K.K. Rajan Nair S/o K. Paidal Nair
Diesel Assistant
Southern Railway, Calicut
now residing at Kuyya House
P.O. Kariyad, Kannur District

Applicant

By Advocate Mr. Dinesh P.T.

Vs.

- 1 Union of India represented by the
General Manager, Southern Railway
Headquarters Office, Park Town P.O.
Chennai.
- 2 The Chief Personnel Officer
Southern Railway
Headquarters Office Park Town PO
Chennai
- 3 The Divisional Manager
Southern Railway
Palakkad.
- 4 The Senior Divisional Personnel Officer,
Southern Railway,
Palakkad.
- 5 T. Pazhani JM 5008, Loco Pilot
Southern Railway,
Erode.
- 6 Gregory Kundulua, JM 5011, Loco Pilot,
Southern Railway,
Erode.

Respondents

By Advocate Ms. P.K.Nandini for R 1-4

ORDER

HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN

The applicant is aggrieved by the refusal on the part of the 4th respondent and the delay on the part of the 3rd respondent in re-fixing his seniority at Serial No. 33 instead of at Sl. No. 493, in the Seniority List of Diesel Assistants of Palghat Division after regularly absorbing him on 9.2.1993, the date of his inter-divisional transfer from Mysore Division to Palghat Division and reckoning his continuous and regular service in Palghat Division, which apparently resulted in the denial of his promotional avenues as well as by passing him by juniors who came into the service at Palghat Division much later than the applicant.

2 The case of the applicant is that he was qualified to become a Diesel Assistant on 14.5.1992. On 9.2.1993, he was temporarily transferred from Mysore Division to Palghat Division as Diesel Assistant and from then onwards he is continuously working there. On 21.3.1995, through Annexure A-3, DME/MYS informed Sr. DME/PGT that they have no objection in relieving three employees including the applicant to work in Palghat Division. On 12.7.1995 through Annexure A-4 Sr. DME/PGT informed the consent of Palghat Division and through Annexure A-5 dated 30.7.1995 applicant had given his consent. A

meeting was held on 5.2.1996 by the Senior Officers of Southern Railway when a decision was taken to transfer the three employees including the applicant from Mysore Division to Palghat Division as reflected in Annexure A-7 minutes but only on 22.11.1998, the actual transfer was effected. Because of this, the juniors who came much later than the applicant became seniors to him and his seniority in the seniority list of Diesel Assistant of Palghat Division became Serial No. 493 instead of 33. Even though so many representations and appeals were made this anomaly has not been rectified and Annexure A-20 and A-23 orders have been issued by the 4th respondent illegally without considering the claims of the applicant and the Annexure A-22 appeal filed by him against Annexure A-20 and A-22 is still pending before the 3rd respondent.

3 The respondents have filed a reply statement denying the averments of the applicant and taking a preliminary objection that the O.A is barred by limitation as it has been filed after a lapse of three years of passing the Annexure A-20 order. Further it has been submitted that the applicant has prayed for the re-fixation of his seniority as Item No. 33 instead of 493 in the Annexure A-7 seniority list without impleading the persons who would be adversely affected by such refixing and hence it is also liable to be dismissed on the ground of non-joinder of

necessary parties.

4 On the facts of the case it has been submitted that the applicant had joined the Railway as a Welder in the Engineering Department of Mysore Division. On being rendered surplus during 1980, he was transferred as Khalasi in Loco side and promoted to officiate as 1Ind Fireman in Mysore Division. He passed the training for Power running staff in Diesel operation in 1992. He was utilized for working as Diesel Assistant in Palghat Division in the year 1993 by the then Senior Divisional Mechanical Engineer (SDME) along with two similar employees of Mysore Division keeping their lien in the parent cadre namely Mysore Division for claiming salary and allowances. The applicant along with two others expressed their willingness for permanent absorption in Palghat Division and since there was no sanctioned post of second Fireman in the Division at that time, the same was not agreed to by Annexure R-1. While matters stood thus, the Chief Personnel Officer Madras vide letter dated 21.9.1997 called for volunteers from the Steam Surplus Staff for the post of Diesel/Electrical Assistants from all Divisions and the applicant was provisionally empanelled for the post and posted to Palghat Division by CPO letter dated 4.11.1998. The applicant had reported to the Division and was posted as Diesel Assistant w.e.f. 22.12.1998. The date of entry in the parent grade is the criterion for determining the seniority of the employee in the cadre and therefore his seniority position

was reckoned from the date of regular absorption as Diesel/Electrical Assistant in the Palghat Division. It is further submitted that the Railway Recruitment Board candidates mentioned by the applicant are not juniors to the applicant and they were appointed against the vacancies of Diesel Assistant in November, 1998. The applicant was only a 11nd Fireman at that time and he cannot be considered against the vacancies of Diesel Assistant in Palghat Division. The employees who are placed above the applicant in the seniority list have come to the cadre on regular basis earlier to the applicant. Hence the seniority assigned to the applicant is correct. Item Nos. 619, Shri Manivarnnan is the last person trained from Khalasi's and promoted as Diesel Assistant by Annexure A-17.

5 The applicant has filed a rejoinder denying the averment of the respondents that the O.A. is barred by limitation. It was pointed out that though Annexure A-20 order was passed rejecting the seniority claim of the applicant he had filed a review and the 4th respondent had rejected the Review petition by Annexure A-22 dated 20.8.2003 and as such Annexure A-22 order opened up a fresh cause of action and the Annexure A-23 appeal has been preferred by the applicant to the third respondent on 21.2.2004 within six months and it is still pending before the third respondent. Since the O.A. has been filed on 5.1.2005 after 11 months of preferring the appeal, the

OA is within the limitation period of Section 20(2)(b) of the Administrative Tribunals Act.

6 It was further stated that the applicant could not implead the other persons in the seniority list from item 33 to 492 as party respondents as it was practically impossible to obtain correct address^s and serve notices on them and hence an M.A. has been filed for impleading Sl. Nos. 33 and 34 in the seniority list as additional respondents 5 & 6 in their representative capacity and news paper publication was made by a public notification, pertaining to the challenge against Annexure A-17 seniority list.

7 On merits, it was pointed out that no evidence has been produced by the respondents to show that a reply was given to the applicant that Palghat Division is not agreeable for the transfer unless they are promoted as Diesel Assistant in the Mysore Division and it was clear from Annexure A-7 minutes of the meeting that it was agreed by the Senior Officers on both sides that Diesel Assistants numbering three of Mysore Division being utilized in Palghat Division may be transferred to Palghat Division on their option to be assigned seniority from the date of issue of order in Palghat Division and because of the delay, injustice was shown by the respondents the applicant was absorbed only in 1998, whereas the RRB recruits in November,

1997 have been placed above the applicant though he had been working in the Division from 1993 onwards. The fact that the applicant and two others had been working as Diesel Assistants continuously has been found to be correct by the findings of this Tribunal in O.A. 352/1997 and they have been paid the emoluments of Diesel Assistant from 2.1.1993 onwards. The applicant has also relied on the judgment of the Apex Court in (1987) 4 SCC 566 holding that when a Government servant holding a particular post is transferred to an equivalent post in another Department the transfer cannot wipe out his length of service in the office from which he has been transferred.

8 The respondents have filed additional reply contending that the reasons now stated by the applicant do not form sufficient grounds for not approaching the Tribunal in time and that the delay was due to negligence on the part of the applicant. They have relied on the ruling of the Hon'ble Supreme Court in AIR 1990 (2)SCC 715 to contend that the applicant cannot be regularly absorbed w.e.f. 9.2.1993 as there was no order issued by any competent authority transferring him as Diesel Assistant from Mysore Division to Palghat Division. They have also reiterated the earlier conventions regarding seniority. In a second additional reply statement filed pursuant to the directions of the Tribunal the respondents have clarified the

procedure adopted in the selection made in 1997 duly enclosing Annexure R-3 letter calling for willingness of the candidates and intimating the procedure consisting of written, viva voce and psycho tests.

9 In answer to the contentions raised in the additional reply statement, the applicant has filed an additional rejoinder stating that he had not attended any written test or viva voce but had attended a Psycho test, the psycho test became mandatory only from 1997 and that the respondents are trying to mislead the Tribunal by making an attempt to show that the applicant had participated in the selection process.

10 We have heard the learned counsel on both sides. The learned counsel for the applicant stated that the applicant became qualified as a Diesel Assistant in 1992 as evidenced by the certificate produced at Annexure A-9. It could be clearly seen from the orders at Annexures A-2, A3 and A-4 that he was treated as a Diesel Assistant and continued to work as such from 1993 onwards in the Palghat Division. By the decision of this Tribunal in O.A. 352/1997 filed by the applicant and two others who were working in the same capacity in the Palghat Division, the finding was arrived at that the three applicants therein including the applicant in this case had been continuously working as Diesel Assistants in the Palghat

Division and hence they are entitled to fixation of their pay under paragraph 913 (1)(b) read with (iii) of IREM Vol.I and accordingly they were granted revised pay as Diesel Assistant in the scale of Rs. 950-1500. Hence it was argued that the respondents cannot now contend that the applicant was only a Fireman and the service after regularisation in the grade of Diesel Assistant could only be considered for seniority. The Apex Court has in several judgments laid down the dictum that seniority is based on the length of continuous officiation in a post. When the applicant had been already held to be officiating in a higher post from 1993 onwards, the respondents are bound to consider the services so rendered for seniority purposes. The following judgments to that effect were relied upon by the learned counsel for the applicant:

- 1 N.K. Chauhan and Ors. Vs. State of Gujarat (1977 (1) SCC 308)
- 2 S.B. Patwardhan & Ors. Vs. State of Maharashtra (1977(3) SCC 399)
- 3 Baleswar Dass & Ors Vs. State of U.P. & Ors. (1980(4)SCC 226)
- 4 A. Janaradhana Vs. UOI & Others (1983(3)SCC 601)
- 5 G.S. Lamba & Ors. Vs. UOI (1985 (2)SCC 604)
- 6 Narender Chadha & Ors. Vs. UOI (1986 (2)SCC 157)
- 7 Vasantha Kumar Jaswal VS. State of M.P.(1987 (4) SCC 450)
- 8 G.C. Gupta & Ors. Vs. N.K.Pandey & Ors (1988 (1) SCC 316)
- 9 Delhi Water Supply & Sewage Disposal Committee and Others Vs. R. K. Kasyap & Ors.(1989 SUPP (1)SCC 194)
- 10 Direct Recruit Class II Engg. Officers' Assocn. Vs. State of Maharashtra and Ors. (1990(2)SCC 715)
- 11 Rudrakumar Sain &Ors. Vs.UOI (AIR 2000(SC)2808)
- 12 AIR 2003(SC)2036
- 13 2003(10) SCC 269
- 14 K. Madhavan & Ors. Vs UOI & Ors (1987(4)SCC 566)
- 15 2000(1)SCC 644
- 16 Union of India Vs. Kuldip Singh Perner & Ors.(2003 SCC L&S 1132)
- 17 S.S.Rathore Vs.State of M.P. (1989(4)SCC 582)

11 The learned counsel for the respondents maintained that the applicant had been subjected to a regular selection only in 1998 which consisted of a written examination, viva and psycho tests and after the selection conducted by the committee the candidates were selected and appointed on a regular basis to the division and the applicant joined the post and only the date of his regular appointment can be counted for seniority.

12 The relevant file of the Department was produced before us and the learned counsel took us through the various stages of the selection. It was pointed out that for filling up of the vacancies of Diesel Assistants from the Steam Surplus Staff the staff whose names figured in the list appended were alerted to be in readiness vide circular dated 22.1.1998. The applicant was at Sl. No. 9 in that list. The written examination was conducted on 7.3.1998 but the candidates including the applicant abstained from writing the examination. On the basis of the representations made by the Union in this regard, the General Manager considered waiver of examination and only psycho test was conducted in which the applicant also participated and he was found suitable with the observation "SWR" and the final panel was published by the Headquarters office by order dated 16.9.1998 in which the applicant figured at Sl. No. 75 and he was issued with posting orders by the office order dated 6.11.1998 to Palghat Division. Hence it was argued

that the applicant had volunteered for the selection process and when he was empanelled and absorbed on a regular basis thereafter cannot claim the seniority on back date. The respondents also relied on the judgment of the Apex Courts in

- 1 Sapan Kumar Pal Vs. Samitabhar Chakraborty (2001) 5 SCC 581)
- 2 A.K. Saramma & Ors. Vs. UOI (AIR 1999 SC 897)

13 We have gone through the judgment produced by both the sides in detail and also the file P(S)608/VI/5/DAT Vol.III relating to the selection to the post of Diesel Assistants in the Southern Railway which was produced by the respondents.

14. The applicant has prayed for the following reliefs.

"(i)Declare that refusal on the part of the 4th respondent and inordinate delay on the part of the 3rd respondent in refixing the seniority of the applicant as item No. 33 instead of item No. 493 in the seniority list of the Diesel Assistants of Palghat Division (Annexure A-17) without reckoning the continuous service rendered by the applicant from 9.2.1993 as illegal, arbitrary and unjust.

(ii)Declare that discrimination shown towards the applicant by way of regularising his juniors who came into the service later than the applicant on the date of their initial appointment is violative of Article 14 and 16 of the Constitution of India and also against the principles of equity and fairness.

(iii)Direct the respondents to regularly absorb the applicant from 9.2.1993 onwards at Palghat Division and re-fix his seniority, and provide promotion and all other consequential benefits to the applicant and all the arrears with an interest @ 15% per annum.

(iv) Call for the records leading to Annexure A-17, A-23 and A-22 and quash the same

(v) Direct the 3rd respondent to consider and pass appropriate orders on Annexure A-23 Appeal expeditiously in a just, fair and reasonable manner after hearing the applicant

(vi) To grant such other reliefs as may be prayed for and the court may deem fit to grant, and

(vii) Grant the cost of this O.A."

15 From the above it may be seen that the applicant is mainly aggrieved by the provisional seniority list of Diesel Assistants of Palghat Division published in Annexure A-17 in which his seniority has been fixed at Sl. No. 493 whereas according to the applicant it should have been at Sl. No. 33. This reversal of the seniority has occurred due to non-consideration of his service as a Diesel Assistant in Palghat Division which had been rendered by him from 1992-93 onwards and as a result of his juniors who came to service later than him being regularised from the dates of their initial appointment. His representation with regard to seniority had been rejected once and he preferred an appeal (Annexure A-23) to the third respondent which is stated to be still pending. The questions which arise for consideration are whether the applicant is entitled to count seniority from the date of his initial appointment to the higher grade or only from the date of his regular appointment to the higher post/grade and further whether his initial appointment to

the post itself was valid or not. We are taking up the question of seniority first. Both sides have relied on the various judgments of the Apex Court and the dicta laid down therein. Since a large number of judgments have been cited by the learned counsel for the applicant on the same issue, we would refer to only some important judgments on the question of seniority which have laid down the settled law in this matter. The most important judgment as far as seniority is concerned was rendered in the Direct Recruit Class II Engineering Officers' Association case (1990 2 SCC 715) which also considered various other judgments rendered prior to that judgment and laid down certain principles for determination of seniority. The Court summarised the basic principles thus:

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only adhoc and not according to rules and made as a stop gap arrangement, the officiation such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continue in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted."

16 If the above principles are applied in the instant case, we would notice that when he was working as a 11nd Fireman in Mysore Division, he was transferred from the Mysore Division

where he was working to the Palghat Division by Annexure A-2 order by the Senior Division Mechanical Engineer with the consent of his counterpart in the Palghat Division. He continued there uninterruptedly as is seen from Annexures A-3 and A-4 and this fact has also been admitted by the respondents though they claim that it was only a working arrangement. This contention of the respondents is not tenable at all in the face of the order of this Tribunal in O.A. 352/97 in which the respondents had taken a plea that the applicant along with two others were performing the duties of 'Diesel Assistant' temporarily though they had not been regularly selected as Diesel Assistants. The Tribunal rejected the pleas of the respondents and came to the conclusion as under:

"As there is no dispute that the applicants have been transferred to Palghat Division as Diesel Assistants and there is absolutely no material to show that they have not continuously worked as Diesel Assistants and there is only a vague plea in the reply statement that they have not continuously worked as Diesel Assistants, the applicants are entitled to fixation of their pay under paragraph 913 (1) (b) read with (iii) of IREM Vol.I."

17 The respondents implemented the order by Annexure A-15(2) in the case of the applicant herein and granted him higher pay scale of Rs.950-1500. The above order in respect of the applicant is worth while to be re-produced here:

Sl No.	Name	Pay	Scale of pay	w.e.f	Designa- tion	Revised (1) or I.R.C.M.	As per Rule 913		Remarks Date from which officiated as DAT
							Pay	Scale of pay	
3	KK Rjan Nair, II F. Man	920	825- 1200	2.1.93	II.F.Man	950	950- 1500	12.2.93	As regular DAT in PGTdn w.e.f. 22.12.98
		940	"	1.1.94		970	:	1.2.94	
		960	"	1.1.95		990	:	1.2.95	
		3520	"	1.1.96		3575	:	1.1.96	
		3590	2750- 4400	1.1.97		3650	3050 4590	1.2.96	
		3660	"	1.1.98		3725	:	1.2.97	
			"			3800	:	1.2.98	Arrears of pay to be drawn

Upto 21.12.98 i.e till the date his
lien was maintained in MYS dn.
His pay w.e.f. 22.12.98 /1.2.99
& onwards is to be fixed in PGT
dn. and drawn accordingly.

18 The respondents had clearly stated in the above orders that the applicant had been officiating as Diesel Assistant from 12.2.1993 and the pay has been fixed accordingly. They have also admitted in para 6 of the reply statement that he was entitled to claim pay and allowances as a Diesel Assistant duly keeping the lien in Mysore Division and continued there. Therefore, Principle -B of the above mentioned judgment would become applicable for determination of the seniority, since all the three conditions mentioned therein namely, that (1) the initial appointment should have been made not following the procedure, (2) the appointee should have been continued in the post uninterruptedly and (3) his services should have been regularised in accordance with the rules, have been fulfilled.

19 When the appointment can be considered as 'adhoc', 'stop-gap' or 'fortuitous' has been considered by the Hon'ble Supreme Court in Rudra Kukmar Sain Vs. Union of India and

Others (AIR 2000 SC 2808)

"(A) Constitution of India- Art. 16- Appointment- When can be described as ad hoc,stop gap or fortuitous- Considerations that apply, indicated.

The three terms 'ad hoc' 'stop-gap' and 'fortuitous' are in frequent use in service jurisprudence. The meaning to be assigned to these terms while interpreting provisions of a Service Rule will depend on the provisions of that Rule and the context in and the purpose for which the expressions are used. The meaning of any of these terms in the context of computation of inter-se seniority of officers holding cadre post will depend on the facts and circumstances in which the appointment came to be made. For that purpose it will be necessary to look into the purpose for which the post was created and the nature of the appointment of the officer as stated in the appointment order. If the appointment order itself indicates that the post is created to meet a particular temporary contingency and for a period specified in the order, then the appointment to such a post can be aptly described as 'ad hoc' or 'stop gap.' If a post is created to meet a situation which has suddenly arisen on account of happening of some event of a temporary nature then the appointment of such a post can aptly be described as 'fortuitous' in nature. If an appointment is made to meet the contingency arising on account of delay in completing the process of regular recruitment to the post due to any reason and it is not possible to leave the post vacant till then and to meet this contingency an appointment is made then it can appropriately be called as a 'stop-gap' arrangement and appointment in the post as 'ad hoc' appointment. It is not possible to lay down any strait jacket formula nor give an exhaustive list of circumstances and situation in which an adhoc, fortuitous or stop-gap appointment can be made."

It is clear from the above that the applicant's appointment was not an adhoc or stop-gap arrangement.

20 The relevance of officiating service in determination of seniority was also considered in Santhosh Kumar Vs. State of A.P. (AIR 2003 SCC 2036) and Baleswar Das and Others Vs. State of U.P. (1980 4 SCC 226). In the above judgments the

inclusion of officiating service for all practical purposes of seniority is as good as a service on a regular basis. The normal rule consistent with equity is that all officiating services even before confirmation of service has relevancy to seniority.

21 We would like to deal with in more detail the judgment in Santhosh Kumar Vs. State of Andhra Pradesh/ ^{rendered} in a similar situation where the respondents and others had been appointed temporarily as Sub Inspectors of Police, out of seniority based on outstanding merit on the basis of performance, to a direct ^{and} recruit^{the} relevant and the specific question which was considered by the Court was that whether officiating services of the promotee respondents could be counted for seniority. The appellant therein had challenged the/grant of regularisation of service w.e.f. the date of the temporary appointment which was made without following the Recruitment Rules, before the Andhra Pradesh Administrative Tribunal. The Tribunal held that the State had the power to relax the Recruitment Rules with retrospective effect but that the services rendered by the respondents and others could not be held as officiating service for determining their service as their appointments were not in accordance with the rules and they had not qualified for the appointment. Aggrieved by the order of the Tribunal the respondents and other promotees filed WP before the Hon'ble High Court of Andhra Pradesh and the High Court allowed the

WPs holding that the Recruitment Rules could be relaxed with retrospective effect. The High Court also held that even if their initial appointment was made by not following the Recruitment Rules, since they continued in the post till their services were regularised by relaxation of the rules, their officiating service have to be taken into account for the purpose of seniority. The Hon'ble Supreme Court relying on the judgment in Direct Recruit Class II Engineering Officers' Association Vs. State of Maharashtra and Others (1999) 2 SCC 715) as well as in other judgments upheld the judgment of the High Court of Andhra Pradesh and observed that:

"this being the factual position it could not be said that the corollary to Paragraph 47(A) of the aforementioned Constitution Bench judgment, applies to the facts of the present case. Once their services were regularised ,it cannot be contended that the initial appointment was only on adhoc basis and not according to the rules or made as a stop gap arrangement. On the other hand paragraph 47(B) supports the case of the respondents.

Paragraph 47(B) in the Direct Recruits' case reads as under:

"(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continue in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted."

22 The case of the applicant herein is very much similar in that he along with two others were deputed to work as Diesel Assistants in the Palghat Division with mutual agreement of

both the heads of offices in a situation which had arisen on account of the introduction of dieselisation of railways by which the staff working in the Steam Loco Division became surplus and had to be trained and adjusted in suitable posts in the Diesel Wing. That the applicant had undergone the diesel training is not in dispute and that he had been discharging the duties of the post of Diesel Assistant is also not disputed. His officiating service has the seal of approval given by this Tribunal in its judgment in O.A. 352/97 which has been implemented in his favour and hence the officiating service of the applicant from 1993 in the post of Diesel Assistant has attained a finality and this question cannot now be reopened.

23 Therefore, the ratio of the judgment in Santhosh Kumar's case will be applicable to the applicant on all fours. It is also brought on record that the applicant's service has been regularised following a due selection process in which they had also granted certain relaxations regarding the written examination and later waiver of appearance in the Psycho test etc. were also granted to the applicant and similarly placed others. Hence, even if such relaxations were granted with retrospective effect it would have been legally justifiable.

24 The respondents have raised the contention that the applicant cannot make a claim for counting his previous service

since he had subjected himself to a selection process in which he was found suitable and got empanelled in the year 1998 and therefore his seniority should take effect from 1998 only. It was also contended that the applicant had refused to participate in the written examination. In this regard, we have gone through the selection file in detail as produced by the respondents. From the proceedings and the note file, we have observed certain lacunae in the selection which have a direct bearing on the applicant's case. It is seen that filling up the posts of Diesel Assistants was governed by the Railway Board's Instructions E(NG)I dated 31.11.87, 16.7.91, 15.10.91, and 18.10.93 according to which the vacancies in the category of Diesel Assistants were required to be filled (a) 50% by lateral induction from amongst First Fireman who are at least 8th class pass and are below 45 years of age and shortfall if any by promotion by usual selection procedure from amongst the second Fireman who are 8th class pass and below 45 years of age and (b) balance 50% of the vacancies by lateral induction of Matriculate First Fireman with minimum three years continuous service and short fall if any by promotion of Matriculate Second Fireman through departmental examination. By letter No. E (NG)I-90-PM-7/34 Pt-II dated 25.4.1997, the mode of filling up the vacancies was revised in the context of phasing out of the Steam Locos and it was directed that the posts may be filled up from amongst volunteers from Diesel/Electrical Loco Fitters of

Diesel/Electric Loco Sheds/Outstate sheds subject to fulfilling certain conditions. However, para 4 of the above order provided that the Steam Surplus Staff if available should be considered first for filling up the vacancies in accordance with the earlier mode of filling up of posts and only after such staff are exhausted the revised mode may be resorted to. Para 4 is reproduced:

"To begin with, to the extent the steam staff, surplus or otherwise, is available, the existing mode of filling up the vacancies as per (a), (b) & © of para 1 above, may be followed and the entire short fall made good as per revised mode as contained in para 2 above. After the Steam staff is not available, all the vacancies in the category of Diesel Asstt./Electric Asstt. May be filled as per the revised mode."

25 Regarding Steam Surplus Staff, the Railway Board issued order dated 15.3.1990 relaxing the minimum educational qualifications and age restrictions. According to the provision of this order, the minimum educational qualification should not be insisted for redeployment of surplus staff and that they may be given conversion training in Diesel/Electrical without insisting on age restriction.

"2 Ministry of Railways have carefully examined the matter. It is pointed out that para 3(ii) of this Ministry's circular No.E(NG)II/84/RLE1/10 dated 21.4.89 states that minimum educational qualifications should not be insisted upon for redeployment of surplus staff. At the same time it will be appreciated that running staff with experience in steam traction only, cannot be placed on the same footing as those with experience in diesel traction. Nevertheless, due consideration has to be shown to steam staff (in regular employment)

becoming surplus in the matter of their redeployment in suitable alternative jobs. Having regard to these aspects, Board have decided that the surplus steam staff may be given conversion training in Diesel/Electric Traction without insisting on any educational qualification and age restriction but subject to the following conditions.

- (i) the surplus steam staff selected for the conversion training should be screened properly to ensure that they have basic intelligence and literacy to absorb the conversion training
- (ii) Illiterate or semi-literate staff should first be given a special course (say for 3 months or so) to bring them to a minimum acceptable level of literacy. This opportunity need be given only once.
- (iii) the staff should give an undertaking before being nominated for conversion training that they may be transferred to other stations within the division.
- (iv) the concerned staff should not be given more than three chances to pass the conversion training.

26 A perusal of the above orders makes it clear that the applicant who was a Fireman and was declared surplus was eligible for redeployment in a suitable alternative post in relaxation of the minimum educational qualification and age restriction and was required only to undergo a training in Diesel/Electrical traction. That he has undergone the training is also evident from the records. All the relaxed standards were available to the applicant as per this order, but the respondents had not extended the benefit to the applicant.

27 By virtue of para 4 of the order dated 25.4.1997 the

applicant should have been considered under the Steam Surplus Staff to be eligible for consideration as per (a), (b) and © of para 1 of the above order according to which he should have been absorbed straight away by the general selection procedure which did not envisage passing of the Psycho test etc. which was a subsequent condition imposed in the year 1994. Having regard to this fact only perhaps the applicant and others had refused to appear for the written examination. The respondents have not made any specific averments regarding the contentions of the applicant and copy of the representation stated to have been given by him is also not available with them. However, we find in the detailed note at page 21 of the file they have considered the matter and placed in the right prospective the problems faced by the Fireman like the applicant and referring to the instructions in the Board letter dated ^{in view} 15.3.1990 it was proposed that keeping/ the problems of these trained Foreman who have been functioning as Diesel Assistants it was proposed that the same criteria as stipulated in Board's letter dated 15.3.90 may be followed for regularising/absorbing them as a one time measure. Since the note and the proposal which was later approved by the General Manager is self explanatory it is reproduced as under:

"Sub:- Absorption of Steam Surplus Staff as Diesel Assistants

Steam Traction was abolished in the Southern Railway progressively. By the year 1993 the last of the

steam locomotives went off from the Railways excluding the X Class locomotives of Palghat Division. As on that date, all the Drivers working steam locomotives were trained on diesel traction and deployed as Diesel Drivers.

2 With regard to Firemen, however, there have been problems. On the date of closure of Steam Traction there were 146 Firemen in TPJ and 141 in MYS. Since these Firemen did not have any other mode of promotion they were all sent to the Diesel Training School to prepare them for running diesel trains irrespective of availability of vacancies as Diesel Assistants. Over the years some of them who were trained as Diesel Assistants were regularised as Diesel Assistants against the vacancies that were available. At the same time, a large number of Firemen who were trained as Diesel Assistants and who were also working as Diesel Assistants were not regularised as Diesel Assistants in that capacity for want of vacancies. It is pertinent to note that MYS and TPJ Divisions the Running Staff position is far better than that of other Divisions and the arising of vacancies in these divisions has been quite low.

Generally, the requirement of educational qualifications expected of a Diesel Assistant is more than that of Steam Loco Fireman. Keeping this in mind Board vide their letter dated 15.3.1990 placed at Folio 161 had issued detailed instructions waiving the number of conditions in order to enable maximum number of such Firemen being converted as Diesel Assistants.

<u>Position as on dated</u>	<u>TPJ</u>	<u>MYS</u>
a) Total number of Firemen available in 1992-93	146	141
b) Firemen already regularised	70	116
c) Firemen yet to be regularised	76	25
d) Actual number of vacancies	91	38

It may be seen from the above that the vacancies available are far in excess of the Firemen who have been trained and working in trains for a long time. Difficulties arose, however, and Board issued a letter dated 21.4.1997 stipulating certain conditions for absorption as Diesel Assistants. These conditions are more stringent

than those applicable in 1990 based on Board's letter dated 15.3.1990. We are therefore in an anomalous situation that we trained a set of Firemen as Diesel Assistants and some of them we have regularised while the others we are not able to regularise in view of the conditions that has arisen. In this connection, subsequently it must be noted that Board's letter dated 15.3.1990. In other words, it may be assumed as far as the Firemen are concerned we may adopt the same criteria as was stipulated in Board's letter dated 15.3.1990.

6 The problem of absorption of Fireman as Diesel Assistants in a one time measure/problem and once all these Firemen are regularised no further arising will be there. Regularising these Firemen as Diesel Assistants against the available vacancies will solve the problem of Steam Surplus Running Staff once for all

7 There has been a discussion between the CPO and CME on this and it was recommended that:

(a) All the 25 Diesel trained fireman of Mysore Division and all the Firemen of TPJ Division except the eight who have not qualified in the psycho test and the others who have been declared untrainable maybe regularised as Diesel Assistants duly waiving written test and viva.

(b) The 8 Firemen of TPJ division who failed in the psycho test and those of others who have not undergone psycho test prior to 4/11/94 may be subjected to the psycho test and be absorbed if found successful.

© All the above Firemen of TPJ and Mysore divisions will be subjected to Medical Examination before being regularised as Diesel Assistants.

(d) Those Firemen in TPJ and Mysore divisions who have not been trained in Diesel will be posted to ONR shed.

(e) Those Firemen who have qualified in all the above selections will be placed senior to those who will now be absorbed as Diesel Assistants with the relaxations discussed above.

Further those who will qualify in the selections conducted from among the shed staff will be placed after both the classes of Steam surplus staff discussed above.

8 The post of Diesel Assistants is division controlled. Hence the order of placement of seniority is not expected to lead to Industrial problems. The Board's letter dated 25.4.97 also states that the vacancies in the diesel Assistants category are to be filled by steam staff first before drawing from the Artisans.

9 The GM may please give orders with respect to the above recommendations. However, since the relaxations sought for have safety, implications it is felt that CME, COM and CPO may please record their specific views before the case is put up to GM for orders.

The organised labour who attended the meeting on 3.7.98 has asked for regularisation of all Fireman of TPS and MYS Division without further medical and psycho tests – provided they were trained before Nov. '94 (when orders regarding Psycho test came into effect). If it was agreed to by CPO, the note may be recast. If not, CPO may pass this on to GM for further ratification.

There are no Safety implications in this as much as these men are working as Diesel Assistants and for ages, firemen were promoted as D. Assts. Without psycho tests. As regards medical examination, in any case, these staff are periodically tested every year.

We will however, abide by CPO's decision on this.

Sd/- CME
7.7.98

Discussed with CME. Clarified that I did not agree with organised unions for complete waiver of medical and psycho tests. Hence items 1) to 9) stand. COM to please give his remarks before putting up to GM

Sd/- CPO
8.7.98

.....
1 7(a) to 7(e) approved.

2 Reg. 7(b) a list may be made indicate the Firemen who have not undergone psycho test (prior to 4.11.94) and working continuously as Diesel Assistants as also their

record of service as Diesel Asst. (like punishment, any reported irregularity, etc.)

Sd/- GM
18.7.98

28 It is thus observed that there were a number of vacancies (38 to be exact) in Mysore Division and there were only 25 Firemen who were working as Diesel Assistants like the applicant. The services of some were regularised but others were not considered and after the instructions dated 25.4.1997 introducing a revised mode of selection, a confusion had arisen whether the mode of selection prescribed in the letter dated 25.4.97 should be followed or not and it was rightly pointed out that the Board's letter dated 25.4.97 is not in supersession of their earlier letter dated 15.3.1990. That this is the correct position could be asserted by the condition stipulated in para 4 thereof that only after regularisation of the whole existing Steam Surplus Staff the revised mode of selection should be implemented. Though the ~~xxxxxxxxxxxxxx~~ written test and viva voce were waived, the psycho test was insisted upon which was also not in accordance with the direction of the Board. However, since the applicant had passed the psycho test, this fact would not affect his position.

29 Looking to all the above events which transpired after the declaration of the Steam staff as surplus, it is seen that even

after the issue of directions in 1997, despite various clarifications and representations of the Union, the process could not be completed till 1998. The applicant and other similarly placed who had also completed the training prescribed in the 1990 orders would have been eligible for regularisation straight away in the vacancies available in the Division.

30 It is clear from the noting reproduced above that the transition to the dieselisation had been completed in Palghat Division by 1993. There were several vacancies in PGT Division against which the applicant and others who could not be absorbed in Mysore Division were sent keeping their lien in the parent cadre. The Board's letter dated 15.3.1990 prescribing the method for absorption of such surplus staff was very much in force from 15.3.1990 onwards and even after issue of order dated 25.4.1997. The letter dated 15.3.1990 underlined the urgency to absorb the surplus staff by giving them training and to complete this exercise as a one time measure. The respondents should have shown some urgency in that context to assess the vacancies and absorb all those who remained in the appropriate posts. But they simply delayed the matter and allowed the temporary arrangements to continue and woke up after issue of 1997 instructions, only to subject them again to the selection procedures meant for filling up the ^{in the} vacancies/ normal course. Finally after giving some

relaxations, they have empanelled them along with others who went through the selection process and the latter were also given seniority above these "surplus candidates." In our view, the surplus candidates should have been treated in a separate footing under the instructions dated 15.3.1990.

31 Due to the inordinate delay which is totally administrative and having regard to the service rendered during the period and having drawn the pay applicable to the post of Diesel Assistant, the benefit of service cannot be taken away on the plea that regular appointment could be made only later. This is exactly the ratio of the judgments of the Hon'ble Supreme Court also that where regularisation is done subsequently by giving relaxation of rules, such regularisation even if given with retrospective effect would be in order. It is therefore our observation that the respondents have not clearly followed the directions in the Railway Board's letters dated 15.3.1990 and 25th April, 1997 and have caused delay in the screening of the Steam Surplus Staff which was totally unwarranted. These staff should have been treated on a different footing and the later rules regarding Psycho test etc. should ^{not} have been made applicable to them. It was also one of the decisions that all such staff who are granted relaxation would be given seniority immediately below those who have qualified in the above selection. Though it is our view that since the requirement of

the written test and viva voce and also the psycho test have been relaxed for the entire surplus category, as they already stood relaxed vide Railway Board's letter dated 15.3.1990 they should have also been accorded seniority enblock over those who came up for regular promotions against later vacancies.

32 It is also seen from the file that while the process of selection was on, several Diesel Assistants have registered for inter-divisional transfers, and these transfers were also considered and orders issued posting them to various Divisions, it is possible that many of these orders also would have been issued before the orders of regularisation of the Steam Surplus Staff and thus interfered with their seniority.

33 In the light of these observations we find that the selection process has been a mixed up affair and if the seniority is considered on the basis of the empanelment made as a result of these selections, there will be substantive anomalies like that of the applicant's case. Therefore the entire provisional seniority list as it stands in Annexure A-17 has to be examined afresh.

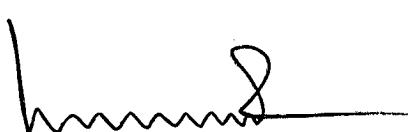
34 It is also significant that though paper publication was made, none of the private respondents impleaded later have appeared before this Tribunal or filed any written statement.

There seem to be merit in the applicant's contention that those who were empanelled as a result of the revised mode of selection have been placed above the surplus staff absorbed in the order dated 4.11.1998 (A10) vide conditions (i) and (ii) of the above. The applicant has contended that he should be placed at Sl. No. 33. Since details of the incumbents between Sl. No. 33 and Sl. No. 493 whom he has impleaded now are not available before us, it is not thus possible for this Tribunal to give any specific direction regarding the exact placement of the applicant in the seniority list. We have already held that the officiating service of the applicant as Diesel Assistant in Palghat Division has to be counted for granting him seniority and how this will effect and whom this will affect those in the list who are not before us, cannot be determined by this exercise which would have to be done by the respondents themselves. In the applicant's case there is already an order at Annexure A-4 by which it was decided that he will be entitled for seniority as Diesel Assistant in the Palghat Division below the Khalasis trained as Diesel Assistants. This was to take effect from the date they give a declaration that they are willing to be transferred in the Palghat Division. The applicant had accepted this position and given his willingness for permanent absorption by Annexure A-5 which is dated 30.7.1995. This fact also will have to be kept in mind by the respondents while determining the seniority of the applicant as it has been observed that the

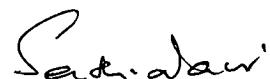
seniority of Diesel Assistant is maintained on divisional basis. The respondents shall therefore, keeping in view the above observations conduct a revised exercise for determination of seniority.

35 In the result, we quash Annexures orders at A-20 and A-22 and direct the respondents to re-fix the seniority of the applicant on the basis of the appeal presented by him in Annexure A-23 and the observations made above and to finalise the provisional seniority list at Annexure A-12 in the light of our observations in this judgment by following the prescribed procedure and with due notice to the affected parties. This exercise shall be complied by the respondents within a period of four months. We also declare that the applicant shall be eligible for consequential benefits including notional promotion based on the re-fixed seniority. The O.A. is allowed with the above directions. No costs.

Dated 12th September, 2006.



GEORGE PARACKEN
JUDICIAL MEMBER



SATHI NAIR
VICE CHAIRMAN

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