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Shri K.C.Sharma Applicant(s)

Union of India & Another. Respondent(s)

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

(M.S.DESHPANDE)
~~CHAIRMAN~~/VICE CHAIRMAN/
 Member

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BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL

BOMBAY BENCH.

Tr. Application No.141/87.

Shri K.C.Sharma.

..... Applicant.

V/s.

Union of India and Another.

..... Respondents.

Coram: Hon'ble Shri Justice M.S.Deshpande, Vice-Chairman,
Hon'ble Shri M.R.Kolhatkar, Member(A).

Appearances:-

Applicant by Shri L.M.Nerlekar.
Respondents by Shri S.C.Dhawan.

Oral Judgment:-

[Per Shri M.S.Deshpande, Vice-Chairman] Dt. 16.12.1993.

This application is directed against the finding of guilty recorded in respect of the charge that the applicant while functioning as Assistant Driver on 10.10.1988 in 16 to 24 shift at Kalyan Loco Shed was negligent in his working, insubordinate towards his superiors and also disregarded the lawful orders resulting in detention of the engines. He has thus violated the provisions of Rule 3(1) of the Railway (Service) Conduct Rules, 1966 and para 3 of the Lesson No.1 regarding the instructions of preparing electric freight engine.

2. The Enquiry Officer after recording the evidence of two witnesses S/Shri K.G.Mani and M.Y.Sheikh and examining the applicant and the documents produced before him found the applicant guilty of all the charges. The Disciplinary Authority by its order dt. 11.6.1984 accepted the findings of the Enquiry Officer and reduced the the applicant from the post of Assistant Driver Gr. 290-350 to the post of TNC grade Rs.260-400 (RS) on pay Rs.308/- plus 06 pp.p.m. in the basic cadre as a permanent measure. The appeal filed by the applicant

against this order was dismissed by the Appellate Authority without any speaking order.

3. Initially, when Shri Nerlekar learned counsel for the applicant opened the case we inquired from him whether he would like us to send the case back to the appellate authority for giving a personal hearing and then deciding the appeal by a speaking order ~~as~~ in pursuance of the decision of Ramchander's case (ATR 1986 (2) S.C.C. 252). But he urged that this will be an empty formality because it would be a mechanical order again which would result in the decision of the appeal and that he would be required to come back to the Tribunal with the same contentions. We therefore, heard Shri Nerlekar regarding the points which he has raised, but since we find that ultimately we will have to send the case to the appellate authority for disposing of the case by a speaking order we are not touching the merits of the case, but ^{would} only decide the points which were raised on the incidental aspects in respect of which our decision may not prejudice the appellate authority against the applicant on merits of the case.

4. The first contention was that the charge was not specific. We have already referred to the charge. The statement of imputations in support of the articles of the charges ~~were~~ included that while loco 4531 was given ready at 1600 hrs. on 10.10.1983 Shri M.Y.C.Shaikh after taking over the loco asked the Assistant Driver Shri K.C.Sharma (applicant) to lubricate Big Ends, Fork Ends, ^{kmacke} / Pins and side rods, but he refused to carry out the instructions. 'A' Grade Shunte Shri K.G.Mani, shed duty Foreman Shri Gheewalla also asked him to oil the bearings but he refused to oil the bearings stating that it was not his duty and he was thus negligent ⁱⁿ on his working and also disregarded the orders.

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On being informed by Shri Gheewalla, the latter advised him (the applicant) to oil the engine, but the applicant behaved in an insubordinate manner and ^{defied} ~~refused~~ the orders of AEE TRs(o) in the presence of both the Shunter and Foreman. Reliance was placed on behalf of the applicant on the observations of the Supreme Court in Surath Chandra V/s. State of W.B. (A.I.R. 1971 SC 752) to the effect that Rule 55 of the CCS (CCA) Rules embodies a principle which is one of the basic contents of a reasonable or adequate opportunity for defending oneself, and if a person is not told clearly and definitely what the allegations are on which the charges preferred against him are founded he cannot possibly, by projecting his own imagination, discover all the facts and circumstances that may be in the contemplation of the authorities to be established against him. The whole object of furnishing the statement of allegations is to give all the necessary particulars and details which would satisfy the requirement of giving a reasonable opportunity to put up defence.

5. We have stated in detail both the charges, as well as, the imputations in support of the charges and we find that all the necessary particulars regarding the charge which would give notice to the applicant about what he has to meet were given and that there was no vagueness in the charge. We find that the charges were specific. Shri Nerlekar urged that the charge of negligence could not have been framed in the present case because the allegation was that the applicant had not done his duty and since negligence was part of the manner of doing one's duty, the charge of negligence would not be an ^{appropriate} ~~authority~~ in the present case. It must

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be noted that the negligence amounted in the manner of doing the duty or omitting to do it and it would depend on what facts are ultimately established, whether the charge regarding the negligence was made out or not. Since the applicant was dealing with the work of oiling the Engine, not oiling the engine may in the given circumstances also par-take of negligence. But as we have indicated it will depend ultimately on what view the appellate authority might take on the evidence and it would be upon that the question of vagueness of charge or the propriety of framing the charge which would arise in the present case. We do not think that the charge of negligence could not have been framed in the present case and that the inquiry should therefore be quashed. We would leave the matter open for the appellate authority to consider on the basis of view that he might take.

6. The next point urged was that the applicant was victimized. The victimization is said to be the result of the Insurance business which the wife of the applicant's superior was doing and Union rivalry. The allegations regarding victimization or bias were not directed against the Enquiry Officer or Disciplinary Authority. The allegations were made in the cross-examination against the witnesses who spoke for the department and they denied these allegations. The question whether the veracity of the witnesses was affected because ^{they} belonged to rival unions or because of the insurance business of the wife of the applicant's superior, would be a matter on the basis of which the evidence of the witnessess shall have to be weighed. These allegations were not directed against the Enquiry Officer or the Disciplinary Authority and we do not think, on the basis of the material which ^{has been} placed before us, that the inquiry against the applicant can be invalidated on the basis of these allegations.

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7. The next point urged was that certain documents were not produced inspite of the applicant's demand for the documents. In para 7 of the application the details of the documents which were called for were given as under:

- (1) The orders of allowing the freight engine on main line with their critical guarantee;
- (2) The duration after which the refresher course is ordered; and
- (3) Copies of the statements of Shri K.G.Mani, Shri M.Y.Sheikh and Shri Gheewalla.

Points No.1 and 2 were not pressed by Shri Nerlekar before us and that was obviously ^{because} / the duration and condition of engine was not a matter which could be the subject of a departmental inquiry in respect of the conduct of the employee and these points, in our view, were rightly given up by Shri Nerlekar. With regard to the 3rd point i.e. copies of the statements of S/Shri K.G.Mani, M.Y.Shailkh and Gheewalla, there is no dispute now before us that these documents had ~~not~~ been furnished. The grievance was that the appearance book had not been produced. The Respondents have denied that the appearance book was demanded by the applicant. This demand does not also figure in the item Nos. 1 to 3 which we have extracted out above. It was pointed ^{out} / to us that the diaries and the other documents were produced. With regard to the appearance book it was mentioned in the written ^{statement} / filed by the Respondents that its production was irrelevant. The appearance book if maintained could have at the most shown whether the two witnesses who spoke against the applicant were present on the spot or not. But in view of the production of the diaries, the non-production of the appearance book would not be significant in the present case and we do not think that its non-production by the Respondents would really affect the merits of the case or prejudice the inquiry against the applicant.

8. Another ground which the learned counsel for the

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applicant tried to make out was that the Enquiry Officer closely cross-examined the applicant when the Rule 9(21) of the Railway Servants (Discipline & Appeal) Rules, 1968 provided that only / the Enquiry Authority may, after the Railway servant closes his case, and shall, if the Railway servant has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the Railway servant to explain any circumstances appearing in the evidence against him. We find that the applicant had been closely questioned, but there is no prohibition to closely questioning the delinquent employee if the Enquiry Officer thought it necessary that such questions ~~to~~ be put to him to enable him to explain the circumstances in evidence against him. Closely examining, as was done in the present case would not be a factor which would justify our interference with the inquiry at this stage since we are disposed to send the matter back to the appellate authority.

9. It is also urged that the findings recorded by the Enquiry Officer were perverse. We were taken through the evidence and it is difficult for us to say that the findings were perverse though it was possible that some other authority may have disagreed with the findings of the Disciplinary Authority. It is not for us to determine ~~with these proceedings~~ the question of adequacy or sufficiency of evidence or to re-appreciate the evidence. Suffice it to say that it would be open to the appellate authority to consider whether the material justified the findings recorded by the Enquiry Officer but we cannot interfere with the proceedings at this stage because of the allegation of perversity.

10. The contention of Shri Nerlekar was that the

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Disciplinary Authority did not apply its mind to the defence. However, since we are remitting the matter back to the appellate authority we will express no opinion on this point. The Supreme Court had set aside the order passed by this Tribunal based on the observations in Union of India V/s. Mohd. Ramzan Khan (1990(4) JT 456) because the directions in that case were to apply prospectively and remitted the matter to this Tribunal for a re-hearing on the other points which were raised and that is why we have dealt with other points which arise for decision so far.

11. The last point which was urged and which we have to consider is whether it was open ^{to revert the applicant} under the ^{No.9 conditions of} condition of the applicant's employment regarding building up of 50% Trainee Reserve Category of Assistant Drivers (Elect) Gr. 125-155(AS)-290-350(RS), which may be reproduced here:

"Once a candidate has been trained, he will not be permitted to withdraw under any circumstances and will have to work as Assistant Driver as and when posted, subject to fitness. In case any of the candidate desires to go back to his parent department after completion of training of Assistant Driver or even after he is posted as Assistant Driver, he will have to repay on demand all stipend or pay or any other amount drawn by him from the Government under these presents and also to refund to the Administration on demand, the whole cost of his training which will be understood as 12½ of stipend 'or pay and allowances', excluding travelling and Running allowance, if any, drawn by him."

It is apparent that a 'trainee reserve' was to be built up and therefore, appointments were sought to be made to the cadre which was to be created. The employee who opted to be included in the cadre was not given the option to return to his original cadre and the consequence of his returning to the cadre was to be visited with certain deprivation. It did not prohibit the department

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in a proper case from reverting to the original cadre and this is clear also from para 8(a) which is ~~the~~ part of the conditions for appointment in which it is stated that the appointment of candidates will be subject to successful completion of the training and the availability of vacancies after filling up the same by the Railway Service Commission, if any and the candidates failing in the first attempt will not be given a second chance under any circumstances and Passing of first year course on the part of all the candidates. It is therefore, clear that the department had reserved to itself the authority to send back the selected candidates to the basic cadre.

12. It cannot therefore, be said that the position of the applicant will be that of a direct recruit and that in the case of disciplinary action it was incompetent to the disciplinary authority to revert the applicant to a post to which he was originally recruited.

13. The learned counsel for the applicant urged that he belonged to a separate cadre and that he had spent about 7 years in the present cadre and therefore after such a long lapse of time he could not be reverted to the original cadre of Trains Clerk. It is difficult to agree with this contention because reversion is a penalty recognised by the Railway Servants Discipline & Appeal Rules. With regard to reduction in rank the Supreme Court observed in Ram Prakash Agnihotri V/s. District Judge U.P. and Others. ((1991) 17 ATC 268) as follows:-

"We had issued notice on the limited question as to why he should not be reverted to the post of Stenographer Grade II instead of being reverted to the post of Clerk/Typist. We have heard counsel for both the sides on this limited question and we think that the grievance of the petitioner in this behalf is fully justified. We, therefore, substitute the order of his reversion to the post of clerk/Typist to that of Stenographer Grade II with effect from the date on which he was so reverted."

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The position therefore is clear that if the applicant was not directly recruited to the post of Assistant Driver he could have been reverted to the cadre from which he came to be promoted to the post of Trains Clerk. This question had to be decided because it was argued by both the sides and it is not a matter which could be left to be decided by the departmental authorities after so much time was spent before us. This would not amount however, to say that the applicant should be reverted to the post in the event of an order finding the applicant guilty were to be passed, because it will be for the appellate authority to decide whether the applicant was guilty on the basis of the findings which was recorded at the inquiry and impose such penalty as may be appropriate to the charge.

14. I would therefore, set aside the appellate order and direct the appellate authority to give a personal hearing to the applicant and then they may decide the appeal by a speaking order in accordance with law. The appellate authority should decide the appeal within three months from the date of communication of this order.

(Per Shri M.R.Kolhatkar, Member(A))

15. I agree with my learned senior brother so far as the final order^{in para 14} and the major part of the reasons for the final order are concerned. However I differ from him on the aspect of legality of ^{the} penalty imposed on ^{vide paras 11 to 13.} him / The Disciplinary Authority by its order dated 11.6.1984 (Ex. 'E' to the petition) imposed on the applicant the penalty in following terms:

"I have decided to impose upon you the penalty of reduction to the lower post permanently. Accordingly you are reduced from the post of Assistant Driver Grade Rs.290-350 (RS) to

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the post of INC grade Rs.260-400 (RS)"

The contention of the applicant in regard to this penalty as set out in the original application is as below:

"By this order the petitioner was put to a loss of Rs.500/- p.m. He was due for posting on "Ghat section" and as a result of his posting as Ghat Assistant Driver he would be entitled to mileage & other benefits and would earn Rs.700/- to Rs.800/- p.m. more by way of mileage. By posting the petitioner as Trains Clerk, he was made to suffer the loss of Rs.700/- p.m. in his wages. The petitioner states that even by way of punishment the respondents have no authority to change the cadre of the petitioner."

16. It is an admitted position that the petitioner was initially selected for the post of Probationer Trains Clerk Grade Rs.260-400 (RS) on 15.12.1975 and that he was selected for the post of Assistant Driver in terms of letter No.BB/P/Loco/41 dt. 8.1.1976 from Divisional Office, Central Railway, Bombay V.T. on the subject "Building up of 50% Trainee Reserve category of Assistant Drivers (Electrical) Grade Rs.290-350(RS)." and that he took charge on 15.12.1978. Thus on the date of imposition of penalty, he had completed 5½ years as Assistant Train Driver. Applicant contends that he was confirmed as such but Respondent denies this and contends that he continued to hold a lien in his parent cadre of Trains Clerk. It has been denied that there are no rules which prohibit the change of cadre or category by way of punishment.

17. At the argument stage the Applicant contended that the change over from the cadre of Train Clerk to the cadre of Assistant Train Driver did not represent a promotion and therefore his being

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reverted to the post of Trains Clerk was not covered by Rule 6(vi) which talks of "reduction to a lower time-scale of pay, grade, post or service". The applicant has relied on the following case law.

- (1) R.P.Agnihotri V/s. District Judge U.P. (1991) 17 ATC 268.
- (2) V.R.Dhuldhule V/s. Union of India (1988 Lab IC 1154) decided by Bombay Bench of CAT on 30.6.1987.
- (3) Dr.Chakradhar Paswan V/s. State of Bihar (1988 SCC (L& S) 516).

In Agnihotri's case, the Supreme Court upheld the contention of petitioner that reduction can be only to the next lower rank in the hierarchy & not to a post which is outside the hierarchy. Dhuldhule's case, was not a case of Departmental Enquiry but it has certain analogies to the present case. In that case, the petitioner had challenged his repatriation from a technical organization to his parent organisation which subjected him to a financial loss. The Department's case was that he had not passed the screening test and had not undergone training. The Tribunal repelled the contention of the Department on the ground that he had worked for 7 years in the organisation and the said organisation itself had recommended his absorption and quashed the order of the transfer. Paswan's case relates to reservation but is an authority for the definition of "cadre". The Hon'ble Supreme Court observed in para 8 of its Judgment "In service jurisprudence the term 'cadre' has a definite legal connotation. In the legal sense, the word 'cadre' is not synonymous with 'service'. Fundamental Rule 9(4) defines the word 'cadre' to mean the strength of a service or part of a service sanctioned as a separate unit. The post of the Director which is the highest post in the Directorate, is carried on a higher grade or scale,

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while the posts of Deputy Directors are borne in a lower grade or scale and therefore constitute two distinct cadres or grades".

18. The learned advocate for the Respondents invited our attention to the Govt. of India's instruction No.14 under Rule 11 of CCS(CCA) Conduct Rules, 1965 which corresponds to Rule 6 of Railway Servants (Discipline & Appeal) Rules, 1968 reproduced below:

"(14) Reduction to a lower grade/service/post not held before not permissible. - Supreme Court judgment in cases of Shri Nayadar Singh and Shri N.J.Ninama v. Union of India (Civil Appeal Nos.3003 and 889 of 1988). The judgment cited above related to two cases in one of which a Government servant who was initially recruited as a Postal Assistant and was later promoted as UDC, while working as UDC, was reduced in rank, as a measure of penalty, to the post of LDC, which was lower in rank than the post of Postal Assistant to which he had been recruited initially. In the second case, the disciplinary authority has imposed a penalty of reduction in rank reducing an officer from the post of Assistant Locust Warning Officer to which he was recruited directly to that of Junior Technical Assistant. The Supreme Court, while setting aside the penalty imposed in both cases, have held that a person appointed directly to a higher post, service, grade or time-scale of pay cannot be reduced by way of punishment to a post in lower time-scale, grade, service or to a post which he never held before.

(2) The rulings given by the Supreme Court in the above cases may be kept in view by all disciplinary authorities while deciding cases in future. However, past cases need not be reopened in the light of the aforesaid judgment"

19. I consider that the essential question to be decided is whether the post of "Train Clerk" to which applicant was reverted from the post of Assistant Train Driver (Electrical) is such lower grade, post or service to which applicant could be reverted in terms of Rule 6(vi), considering the ratio of Agnihotri's case. In my view, the post of Train Clerk was in different hierarchy than the post of Assistant Train Driver which the applicant was holding at the relevant time. Therefore reversion from the post of Assistant Train Driver was

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is
not such reduction as covered by Rule 6(vi). Applicant may or may not have been confirmed in the post of Assistant Train Driver but he had served in that post for a long period of 5½ years, a period comparable to the period in Dhuldhule's case. In any case, as observed by the Supreme Court in "AN Sehgal V/s. Raje Ram Sheoran and Ors. (1993 - 24 - ATC 559).

"confirmation is a glorious uncertainty depending neither on the efficiency of the Officer nor generally on the availability of the post"

Therefore, the fact of non-confirmation is immaterial. Of course, applicant could be repatriated to his original cadre of Train Clerk in terms of D.R.M's Circular dt. 8.1.1976. This circular's part of which are quoted in my learned senior Brother's order states in para 11 as below:

"Once a candidate has been trained, he will not be permitted to withdraw under any circumstances and will have to work as Assistant Driver as and when posted, subject to fitness."

It is not the case of the Respondents that the applicant was physically unfit. In the circumstances, I hold that the order of Disciplinary Authority imposing the penalty and the order of Appellate Authority confirming the same is also vitiated by the violation of Rule 6(vi) of Railway Servants (Discipline & Appeal) Rules, 1968 and is liable to be quashed and set aside on this ground as well as other grounds mentioned by my learned Senior Brother.

FINAL ORDER

20. We set aside the appellate order and direct the appellate authority to give a personal hearing to the applicant who may then decide

the appeal by a speaking order in accordance with law.
The appellate authority should decide the appeal within
three months from the date of communication of this
order.

M.R. Kolhatkar

(M.R. KOLHATKAR)
MEMBER (A)

M.S. Deshpande

(M.S. DESHPANDE)
VICE-CHAIRMAN

B.