

(19)

CENTRAL ADMINISTRATIVE TRIBUNAL

BOMBAY BENCH

O.A.NO. 20 OF 1988

DATE OF DECISION: 31.1.1994

P.S. OBEROI & 38 ORS. ..APPLICANTS

MR. G.K. MASAND, COUNSEL FOR APPLICANTS

v/s

Union of India
through General Manager
Western Railway & 57 ors. ..RESPONDENTS

MR. R.K. SHETTY COUNSEL FOR RESPONDENTS 1-3
MR. G S WALIA COUNSEL FOR RESPONDENTS 4 TO 57

CORAM:

Hon. Shri Justice M.S. Deshpande, Vice Chairman
Hon. Shri N.K. Verma, Member (A)

1. To be referred to the Reporter or not? *NO*
2. Whether it needs to be circulated to other Benches of the Tribunal? *NO*


Vice Chairman

trk

(20)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH, 'GULESTAN' BUILDING NO.6
PREScot ROAD, BOMBAY 400001

ORIGINAL APPLICATION NO. 20 OF 1988

PRITHIPAL SINGH OBEROI & 38 ORS. ..APPLICANTS

v/s.

Union of India
through General Manager
Western Railway & 57 ors. ..RESPONDENTS

Coram: Hon. Shri Justice M.S. Deshpande, V.C.
Hon. Shri N.K. Verma, Member(A)

JUDGMENT: DATED: 31.1.1994
(Per: M.S. Deshpande, Vice Chairman)

By this application the 39 applicants seek a declaration that the benefits conferred by the Railway Board by its letters dated 15.6.79 and 5.8.82 granting added weitage to the running staff which was not intended to be made available to motormen and that the motormen who were placed in the lower pay scales of Rs. 425-640 and Rs. 455-700 in the higher scale of Rs. 550-700 do not deserve any additional weitage in the matter of promotion and to declare respondent nos. 4 to 58 ineligible for the post of Assistant Electrical Engineer (Class II) in the Bombay Division of the Western Railway and for a direction to the Respondents nos. 1 to 3 to consider the applicants eligible as they have been working in the scale of Rs.700-900 and above and for an injunction restraining the respondent no. 1 to 3 perpetually from considering the motormen for promotion to the post of Assistant Electrical Engineer (Class II) service.

(nl)

2. The applicants are working as Supervisory staff in the electrical department of Bombay Division of Western Railway and except the applicant no. 16, were in the pay scale of Rs.840-1040(R) revised to Rs.2375-3500 (RPS), whereas applicant no.16 is in the pay scale of Rs. 700-900(R) revised to Rs.2000-3200 (RPS). The eligibility for promotion to the Class II post of Assistant Electrical Engineer, was working in the pay scale carrying Rs. 700-900 revised to Rs.2000-3200. The grievance of the applicants is that they were not invited to appear for the selection to that post but the respondents nos. 4 to 58 who were junior and otherwise ineligible were invited to appear for this selection vide notification No. E(G)/1024/7/1 dated 13.7.1987. Some of the applicants were holding Bachelors degree in Electrical Engineering while others are diploma holders and some are rankers after undergoing training in the Electrical department. Each of the applicants is to supervise over the work of not less than 50 persons and their supervisory job involved several aspects, while the motormen's job did not involve this aspect which should be prerequisite qualification for the post of Assistant Electrical Engineer. The motormen working in the pay scale of Rs.550-750 in the Bombay Division of the Western Railway by virtue of their pay scales were ineligible for promotion. Prior to 15.6.79 running staff consisting of Guards and Drivers represented to the railway authorities that while competing with the non-running categories they are not selected and so the Railway Board by the letter dated

15.6.79 directed that the disadvantage suffered by the running staff should be removed by adding to the pay scale 30% for the purpose of comparison with non-running category for promotion/selection. By the letter dated 5.8.82, Exhibit C, the Railway Board directed that comparison for the purpose of selection should be made also available in the case of selection to Class II post. These instructions excluded the category of motormen from the benefits to be so conferred, but by the letter dated 30.9.81, Exhibit D, the two scales of pay Rs.425-640 and Rs.455-700 came to be upgraded to Rs.550-700 with effect from 1.6.81 despite the fact that no such upgradation was made in the pay of the supervisory staff at any time. In spite of this position by the letter dated 13.7.87 by which a process of selection was initiated, the senior supervisors such as the applicants were excluded though they had rendered more than 20 years of service in the zone of consideration while respondents nos. 4 to 58 were granted the double benefit and were sought to be considered for promotion.

3. The contention of the applicants is that the running allowance is like any other allowance like the Dearness Allowance, House Rent Allowance and cannot be considered as part of pay and by including this in the substantive pay artificial seniority was being granted to the respondents nos. 4 to 58 though the Railway Board's letters referred to above were not intended to confer that benefit on them. If the respon-

23

dents nos. 1 to 3 are allowed to initiate the process of selection by including respondents nos. 4 to 58, the applicants would be deprived of the upgradation for more than 20 years. It is, therefore, urged firstly that the respondents nos. 4 to 58 and other motormen numbering about 220 men will be gaining seniority over applicants by a stroke of pen ^{and} _{made} eligible for promotion. Secondly, the applicants had been working in the pay scale of Rs.700-900 on ad hoc basis for a number of years and were regularised by selection initiated in November 1991 and that finally came to be notified in May 1992. By virtue of their continuously working in the scale Rs.700-900, prior to the deemed date of June 1991 granted to the respondents nos. 4 to 58, the applicants were entitled to claim seniority over the respondent nos. 4 to 58. Contending that the action of the respondents 1 to 3 was violative of articles 14 and 16 of the Constitution of India the applicant seek the aforesaid reliefs.

4. Respondent nos. 1 to 3 and the other respondents by their separate written statements denied the averments of the applicants and urged that the respondents nos. 4 to 58 were entitled to the benefit of the Railway Boards letters dated 15.6.79 and 1.6.81 and since the applicants were aware of this position since 17.12.1985, the present application was barred by limitation under section 21 of the Administrative Tribunals Act, 1985. It was urged that the motormen fell

(26)

into the category of running staff and by virtue of the two benefits conferred on them they were eligible for selection to the post of Assistant Engineer and since the Railway Board was the sole policy framing body for the whole railway its decision was final and that there was no violation of the Articles 14 and 16 of the Constitution. From the chart which was annexed as Exhibit A to the application it is apparent that the applicants held the ad hoc appointments in the grade Rs.700-900 from 20.3.1976 onwards from various dates though their original dates of appointment in the lower cadres were much earlier.

5. The contention of Shri Masand, learned counsel for the applicants was that if the applicants were given the benefit of their previous ad hoc appointment they would rank senior to respondents nos. 4 to 58. It may be noted that there is no averment in the application that the applicants had undergone a process of selection before they were appointed on ad hoc basis in the grade of Rs.700-900 and that the appointments were made against substantive vacancies. The learned counsel for respondents nos. 4 to 58, Mr. Walia, urged that though he had served a notice on the applicants to furnish the dates on which they came to be appointed and the orders by which they had been appointed, no such particulars had been given. We must, therefore, proceed on the basis that there was no allegation that the applicants came to be appointed in the grade of Rs.700-900 in substantive vacancies, their appointments admittedly were made on ad hoc basis

(25)

and were ^{not} in accordance with the rules. The applicants came to be regularised from the year 1992. The chart, Exhibit A, shows that two of the applicants were appointed on ad hoc basis in March and December 1976, two in the year 1978, one in 1979 and the others from 1981 onwards. It is apparent the Full Bench of this Tribunal in SHRI ASHOK MEHTA & ORS. V. REGIONAL PROVIDENT FUND COMMISSIONER & ANR., 1993(2)(CAT) AISLJ 47, after considering the law in THE DIRECT RECRUIT CLASS II ENGINEERING OFFICERS' ASSOCIATION AND OTHERS V. STATE OF MAHARASHTRA & ORS., 1190(2) SLJ 40(SC) and KESHAV CHANDRA JOSHI & ORS. V. UNION OF INDIA & ORS., AIR 1991 SC 284 held that principle in direct recruits case will apply only to cases where initially appointment is made deliberately in disregard to rules and the incumbent allowed to continue in the post for long periods like 15 to 20 years without reversion till the date of regularisation of service in accordance with rules, there being power in the Government to relax the rules. This principle would directly apply to the present case and the applicants would not be entitled to count their service on ad hoc basis for determining their seniority. Their seniority can be reckoned only from the date from which they came to be appointed regularly. The applicants are therefore not entitled to succeed on the first point raised on their behalf.

6. It would be useful to extract the Railway Board's letter dated 15.6.1979, Exhibit B in some details, and it reads:

"Complaints have been received from time to time from running staff that when they have to compete for promotion with non-running categories they are often not selected and placed on the panels or get very low positions on the panels because their scales of pay being the lowest among the other eligible categories. The Railway Board have after careful consideration decided that this disadvantage should be removed by adding to the pay scales of the running staff roughly 30% of the same (in lieu of running allowance) for the purpose of comparison with non-running categories for promotion/selections. The occasion for comparison normally arises in the following grades, where equivalence of grades should be taken as below:"

The letter then refers to the four categories of Guards and four categories of Drivers and the scale of Driver A spl. and Driver A as being Rs.550-750 / Rs.550-700 which after adding 30% will be treated as equivalent to scale Rs.700-900. Motormen were not expressly included in the list which was given in the letter and the contention on behalf of the applicants was that if the motormen were to be benefited there was no reason why they would not have been included in the list. What is overlooked is that on 15.6.79 motormen would not have been eligible because as is apparent from the Railway Board's letter dated 30.9.81, Exhibit D, the Railway Ministry decided that motormen in Rs.425-640 on Railways and in selection grade Rs.455-700 in Western Railway only may also be upgraded to revised scale of Rs.550-700 with effect from 1.6.1981 and the arrears of pay and allowances due to the staff may be paid as early as possible. The question of applicability of the letter dated

15.6.1979, Exhibit B, could have arisen only after the upgradation of the post of motormen by the letter dated 30.9.1981, Exhibit D. The Railway Board's letter dated 5.8.82, Exhibit 'C', shows that the Railway Ministry decided that the equivalence of grades prescribed in the Ministry's letter quoted above will apply for purpose of selection to the Group B posts also i.e., for determining the relative position of running staff in the combined seniority list of staff eligible to be considered in the selection.

7. The contention on behalf of the applicants was that since the category of motormen has not been included in the letter dated 15.6.79 and their category was different, whatever benefits were given to the drivers mentioned in that letter can not be extended to the motormen. It was not disputed that the motormen also belonged to the category of running staff. Para 507 in Chapter 5 of the Indian Railway Establishment Code Vol. I defines running allowance as allowance ordinarily granted to running staff for the performance of duty directly connected with the charge of moving trains and includes 'mileage allowance' or 'allowance in lieu of mileage' but excludes special compensatory allowance. The term running staff in this section (i.e., II) shall refer to railway servants of classes mentioned therein which includes (i) drivers including motormen and rail motor drivers, but excluding shunters. There cannot, therefore, be any doubt about the ^{position} decision that motormen are included in the category of drivers which

28

term is included in the category of running staff.

8. In Western Railway ~~Rules~~ for payment of running allowance the running staff, the term motormen refers to the driver of a mobile unit drawn on the electrified section. It is difficult to regard this category as entirely different from the category of drivers mentioned in the Railway Board's letter, Exhibit B, dated 15.6.79.

9. In the Railway Board letter dated 30.9.86 which has also been quoted at page 174 of Railway Establishment Rules and Labour Laws of B S Maine, 17th edition, 1988, the new designation is Passenger Drivers/Motormen (all other passenger train and EMUs) the revised designation and pay scale of running staff under the head Loco Running staff includes Driver A special for superfast, mail/express and passenger trains (revised designation Mail Driver superfast, Mail and express only) about 250 kms and motormen. (at page 194 of the same book). There cannot be any dispute therefore, that the fact that motormen along with drivers come within the category 'running staff' and are eligible for running allowance. The last sentence of Exhibit B which we have extracted above ~~is~~ shows that the grades which have been shown for the purpose of equivalence after including 30% of the allowance are merely illustrative while the substantive benefit is conferred by the second sentence in the said circular which speaks of the disadvantage being removed by adding to the pay scales of the running staff roughly 30% of the same. The benefit, therefore, was intended to give to the running staff and not merely to the categories listed at the

(29)

end, the letter being merely illustrative.

10. The contention on behalf of the applicants was that the illustrations given were exhaustive, but it is difficult to accept this contention. While considering the position with regard to the illustration A in Sec. 101 of the Evidence Act, and Illustration B in Sec. 106 of Evidence Act the Hon. Supreme Court observed in SHAMBHU NATH V. STATE OF AJMER, AIR 1956, pp.404, that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused the facts cannot be said to be "especially" within the knowledge of the accused. It is also held that the section cannot be used to undermine the well established rule of law that, save in the very exceptional class of case, the burden is on the prosecution and never shifts.

11. This is also the view taken in DR. M.K. SALPEKAR V. SUNIL KUMAR SHAMSUNDER CHAUDHARI & ORS., (1988) 4 Supreme Court Cases 21, where it was held by considering the provisions of Berar Letting of Houses and Rent Control Order, 1949, clause 13(3)(v) that the explanation cannot be construed to narrow down the scope of the first categories of cases where tenant secured alternative accommodation.

12. It is difficult, therefore, to accept the submission that since the category of motormen was not included in the list in Exhibit B, the benefit which was intended to be conferred on the running staff would become unavailable to the motormen.

13. The next submission was that by its very nature running allowance could not have been treated as pay and it was like any other allowance and therefore including 30% of running allowance for the purpose of comparison was arbitrary.

13. Para 913 of the Indian Railway Establishment Manual contemplates treatment of running allowance as pay for certain purposes in case of running staff drawing pay in the authorised scales of pay viz., pay for the purpose of passes and PTOs being 60% of pay; pay for purposes of leave salary, medical attendance and treatment, educational assistance, retirement benefits, etc., to a maximum of 75%; pay for the purpose of fixation of pay in stationary posts, compensatory (city) allowance, house rent allowance, rent for railway quarters, income tax etc., to the extent of 40% and pay for the purpose of contribution to the State Railway Provident Fund, to the extent of 70%. It was not that the running allowance came to be considered only for the purpose of equivalence/comparison in the matter of promotion as in the present case.

14. In the First Pay Commission report it was mentioned that running allowance seemed to recognise that, though called an allowance, the running allowance is to a large extent, part of the pay of the staff. The Second Pay Commission in its report observed that a substantial portion of the total emoluments of running staff is in the form of running allowance, a factor which has to be borne in mind when determining their pay scales. It is paid as an incentive for the safe and punctual movement of trains; and a small portion of it is intended to cover travelling allowance. The Miabhoy Committee in its report at page 201 pointed out that the running allowance represents a substantial portion of basic pay and that if running allowance did not contain the element of pay, most probably it would never have been considered as pay for the above purpose.

15. In view of this position, we see nothing arbitrary in the inclusion of 30% running allowance for the purpose of pay for establishing equivalence of the running staff in the matter of upgradation as well as equivalence for promotion. On the other hand there was sound reason and logic for adopting this measure. If, by virtue of the subsequent letter dated 30.9.1981, Exhibit "D" two pay scales of the motormen, Rs.425-640 and Rs. 455-700 came to be upgraded to revised scale of Rs. 550-700 with effect from 1.6.81, the natural corolary would be that by virtue of the letter dated 15.6.79, Exhibit B motormen who belonged to the running staff category became entitled to the removal of disadvantage because

of low pay scales by adding 30% of the running allowance. The obvious result would be that by including the 30% running allowance for the grade Rs.550-700 the motormen would be entitled to the placement in the scale of Rs.700-900.

16. With regard to the submission of Shri Masand, learned counsel for the applicants, that the chances of promotion of the applicants receded because of the double benefit so conferred on the Respondents nos. 4 to 58, factually we see no merit in this submission because in the seniority list filed by the applicants, sr.nos. 1 to 63 were drawn from the category to which the applicants belong by virtue of their seniority and the names of the motormen appear from Sr.No. 64 onwards. This is how it should be because the ad hoc service of the applicant could not have been counted for the seniority as they were regularised from the year 1982, while the eligibility of Respondent nos. 4 to 58 had to be considered on the basis of exhibits B, C & D to which we had adverted earlier.

17. Under para 157 of the Indian Railway Establishment Code the Railway Board has full powers to make rules for non-gazetted servants. In B.S. VADERA V. UNION OF INDIA, AIR 1969 SC 118 it was observed that the Railway Establishment Code, ^{W.e.f} issued by the President in exercise of his powers under Proviso to Article 309. Under Rule 157, the President has directed the Railway Board, to make rules of general application to non-gazetted railway servants, under their control.

The rules, which are embodied in the Schemes, framed by the Board, are within the powers, conferred under Rule 157, and in the absence of any Act, having been passed by the 'appropriate' Legislature, on the said matter, the rules, framed by the Railway Board, will have full effect and, if so indicated, retrospectively also. Such indication, about retrospective effect, is clearly there, in the provisions. Exhibits B, C & D, therefore, cannot be ignored merely as administrative instructions ^{only} because they have the effect of reducing the applicant's chances of promotion.

In DIRCTOR, LIFT IRRIGATION CORPORATION LTD.

& ANOTHER V. PRAVATKIRAN MOHANTY & ORS., 1991 SCC(L&S) 472 it was laid down that there is no fundamental right to promotion, but only right to be considered for promotion and reduction in chances of promotion does not affect any right. A policy decision taken on administrative exigencies is not open to judicial review unless mala fide, arbitrary or without discernible principle. When the right to be considered for promotion is not affected and only chances of promotion recede there is no violation of Articles 14 and 16 of the Constitution.

18. In INDIAN RAILWAY SERVICE OF MECHANICAL ENGINEERS ASSOCIATION & ORS. & INDIAN RAILWAY TRAFFIC SERVICES ASSOCIATION & ANOTHER V. UNION OF IIT, I.I.T., SC 1993 the Hon. Supreme Court held that the Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their Constitutional or statutory