

(7)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW BOMBAY BENCH, NEW BOMBAY.

O.A.No. 279 198
T.A.No. 198

DATE OF DECISION 19.6.1987

Shri M.S.Subramanian, Applicant/s.

Shri T.R.Talpade Advocate for the Applicant/s.

Versus

Union of India & Ors. Respondent/s.

Shri J.D.Desai. Advocate for the Respondent(s).

CORAM:

The Hon'ble Member(A), Shri S.P.Mukerjee,
The Hon'ble Member(J), Shri M.B.Mujumdar.

1. Whether Reporters of local newspapers may be allowed Y to see the Judgment?
2. To be referred to the Reporter or not ? N
3. Whether to be circulated to all Benches? N

S. S.
19.6.87

R

8

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW BOMBAY BENCH, NEW BOMBAY.

Original Application No.279/86.

Shri M.S.Subramanian,
C/o.Mr.T.R.Talpade,
Advocate for the applicant,
Narottam Niwas, Gr. Floor,
308, Jawaji Dadaji Rd,
Nana Chowk,
Bombay.400 007.

... Applicant

V/s.

1. Union of India,
2. Railway Board,
3. General Manager,
Western Railway,
4. R.P.Oberoi,
5. P.S.Khuntia,
6. Harish Kumar,
7. Abhay Mishra,

(Notice to be served on
Central Government Advocate
at Bombay, Branch Secretariat,
Ministry of Law, Ayakar Bhawan,
Annexe, Bombay.400 020).

... Respondents.

Coram: Hon'ble Member(A), Shri S.P.Mukerjee,
Hon'ble Member(J), Shri M.B.Mujumdar.

JUDGMENT:-

(Per S.P.Mukerjee, Member(A)) Dated: 19.6.1987.

The applicant in this case Mr.M.S.Subramanian who is a retired Class II, Assistant Accounts Officer in the office of the Financial Adviser Western Railway has moved this application under section 19 of the Administrative Tribunals Act praying that the Respondents 1 to 4 be directed to promote him to the Senior scale of the Indian Railways Accounts Service w.e.f. 1st August, 1984 or 1st of March, 1985 with all consequential benefits. He has also challenged the Constitutionality of the Railway Board's instructions dated 19/31.12.1985 and prayed for its annulment. The material facts of the case lie within a narrow compass and be summarised as follows. (In this judgment 'Class.I' and 'Class.II' wherever mentioned mean Group 'A' and Group 'B').

2. The Indian Railway Accounts Service consisted of Junior Scale Class.I posts in the scale of Rs.700-1300 and Senior Scale posts in the pay scale of Rs.1100-1600,

The senior scale posts are filled up 60% by promotion (Group A) from the junior scale class.I Officers who are directly recruited and 40% of the senior scale posts are filled (Group B) up by promotion of class.II Officers in the scale of Rs.340-1200. Only those class.II Officers who have completed 3 years of non-fortuitous service in ^{are eligible} class.II for promotion to senior scale class.I post. In respect of junior scale class.I, direct recruits only those who have completed 5 years of service in the junior scale including 2 years of probation are eligible. This period of 5 years was reduced to 4 years by the order of 29.12.1978 (Exhibit 'D' to the Petition). ^{and} By a further order of the Railway Board dated 24.4.1981 (Exhibit 'E') the General Managers were authorised to promote junior scale Class.I Officers with even less than 4 years of service but with a minimum of 3 years ^{in such cases} of service to senior scale posts, but they were entitled to their junior scale pay plus a special pay of Rs.150/- instead of the regular senior scale. It was laid down in that order that such promotion would be permitted only if no suitable and eligible class.II Officer was (Exhibit M) available. By another order dated 19/31.12.1985 the Railway Board instructed that in making the ad hoc promotions to the senior scale, junior scale Class.I Officers with a minimum of 3 years of service should be considered for promotion to the senior scale "on preference to Group 'B' Officers, even if the Group 'B' Officers have rendered over 3 years of service in Group 'B'".

3. The ^{continuation} grievance of the petitioner is that he was the only one candidate promoted to Class.II grade on 15.1.1980 out of 150 candidates who appeared in the limited departmental examination. This fact was ⁱⁿ admitted by the Respondents and evident from the promotion order dt. 15th January, 1980 at (Exhibit 'A' ^{to} the petition). The petitioner became eligible

for promotion to class.I senior scale on 15.1.1983 having completed 3 years of service in class.II. His grievance is that till his retirement on 1.1.1987 he was not considered for promotion to class.I senior scale even though his junior in Class.II grade Shri Ramamurthy ~~who~~ got such promotion on 2.7.1985 in the Railways Electrification Division and a number of junior class.I Officers got promotion to senior scale one after another between 16.10.1985 and ~~undate~~ ^{16/12/1985} petitioner's retirement. Such promotions of large number of junior scale class.I Officers even though some of them ~~had~~ not completed 4 years of service was given as a result of the impugned order of 16/19.12.1985 which gave unwarranted preference to such Officers.

4. We have heard the arguments of the learned Counsel for both the parties and gone through the documents carefully. During the course of the arguments the learned Counsel for the Respondents accepted the admission in their counter affidavit that the last panel of class.II Officers for promotion to the senior scale was prepared in September, 1983 which was exhausted by the promotion of the last Officer in the panel on 11.10.1984 and that the applicant was the senior most class.II Officer outside the panel. During the course of the arguments the learned Counsel for the Respondents produced photostat copies of the Confidential ^(that is the position) Report entries of the applicant to say that the applicant had earned a number of adverse entries, as a result of which he could not be included in the panel. The learned Counsel however, fairly ^{for the Respondents} ^{conceded} ~~considered~~ that the adverse reports had never been communicated to the

applicant. We went through the photostat copies of the C.R. entries for the years ending between 31.3.1981 and 31.3.1986 and found that for the years ending on 31.3.1981, 31.3.1982 and 31.3.1983 the applicant has been earning 'outstanding' and 'very good' reports, but for the years ending on 31.3.1984 onwards his superior Officers entered adverse reports against him. ^{These} indicated that he was not fit for promotion that he was an average Officer; that he could not execute his theoretical knowledge; that ^{he has a round} about method of dealing with even elementary issues; that his application of rules was not at all judicious; that he was not time conscious etc. It was also conceded by the Respondents that between 1983 and 1987 a number of vacancies in the senior scale had occurred which were filled up entirely by the promotion of junior scale class.I Officers. Though during the oral arguments the learned Counsel for the Respondents indicated that the applicant was considered for promotion in 1986, but because of the adverse entries he could not be promoted, the counter affidavit indicated that the last panel was prepared in 1983. Be that as it may, it was transparently clear that there ^{were} ⁱⁿ vacancies ~~of~~ ⁱⁿ class.I ~~senior scale posts~~, ^{posts}, that the applicant was eligible for ad hoc promotion to ~~these~~ posts but he was not considered for such promotion or even if considered was rejected because of the uncommunicated adverse entries. It has been held by the Supreme Court in Gurdial Singh Fiji v. State of Punjab and others 1973(3) S.C.R. 513 and Amar Kant Choudhary v. State of Bihar, 1984 (2) S.C.R. 297 that unless an adverse report is communicated and representation, if any, made by the employee is considered, it

cannot be acted upon to deny promotion. We feel that noncommunication of the adverse entries in the instant case where the applicant was in an ~~unbreakable~~ ^{unenviable} ~~raising objections in~~ ^{was} position of clearing bills of payment and thus ~~was~~ ^{had} faced with the professional hazard of incurring the displeasure of his superior Executive Officers in the construction Units of the Railways, it was not only desirable, but absolutely necessary to communicate the adverse entries and enable the applicant to represent against those entries. Since this was not done, we feel that the case of the applicant for promotion has gone not only ^{to} suffered grievously ^{to} by default, but through malice in law.

5. The Respondents have conceded that there were vacancies in the senior scale between 1983 and 1987, but all these vacancies had been filled up by promotion of junior scale class I Officers, This was done in pursuance of the impugned instructions of the Railway Board dt. 19/31.12.1985 in accordance with which a blanket preference to ad hoc class.I junior scale Officers, even though they had not completed 4 years of service has to be given, even though there are eligible class.II Officers like the applicant who have completed 3 years of service. We feel that such blanket preference to class.I junior scale Officers ^{pay in the} who are not even eligible for getting regular senior scale, ^{to the exclusion of} ~~no preference to~~ those class.II Officers who are qualified for regular promotion having completed 3 years of service in class.II scale, is not only discriminatory, but violative of Articles 14 and 16 of the Constitution of India. Our reasons are as follows:

a) The then pay scale of the junior scale class.I ^{that is class I} post was Rs.700-1300, whereas the pay scale of group 'B' post is Rs.840-1200 which is higher than the class. I junior scale. There is no reason to denigrate Group 'B'

Officers for ad hoc promotion.

b) Before 29.12.1978 the minimum qualifying service in the junior scale for promotion to senior scale was 5 years including 2 years of probation. As against this the minimum qualifying service in class.II has been 3 years. Thus till 29.12.1978 the qualifying service both in the junior scale and the class.II scale was 3 years excluding probation. On 29.12.1978 the working experience in the junior scale was reduced to 2 years instead of 3 years and the total qualifying service for promotion including 2 years of probation was fixed at 4 years. By order of 24.3.1981 (Exhibit 'E') the qualifying service (excluding probation) of 2 years in the junior scale was reduced further to one year (total service including probation ^{the} ~~of~~ ^{as} ~~3~~ ⁵ years). However, in that order it was made clear that promotion of junior scale officers with more than 3 ^{total} years of ^{total} service in the junior scale would be permissible only when no suitable eligible class.II Officer was available. In the instructions of the Railway Board dated 18.5.1981 (Exhibit 'G') it was made clear that there should be no delay in drawing ^{up} the panels of group 'B' Officers for ad hoc promotion to the senior scale and the panel should be published. In a much earlier circular of 17.9.1961 (Exhibit 'F') it was clarified by the Railway Board that it is not necessary to revert a class.II Officer who had been promoted to hold senior scale post after completing 3 years of service in class.II, in order to accommodate junior scale class.I officer, as soon as he completes 4 years of service and that such a class.I junior

scale officer will have to wait till another vacancy in the senior scale arises. The underlying principle throughout has been that junior scale class.I officers and class.II officers after they become eligible for promotion to senior scale on completion of the prescribed length of qualifying service in their respective grades should be treated at par. This concept seems to have been given a go bye through the ^{impugned of 19/12.1985 (Ex.M)} following instructions ⁱⁿ para 3.1 thereof which reads as follows:

"After a careful consideration, taking into account the fact that a Group 'B' Officer posted to work in Senior Scale on ad hoc basis has not yet been appointed to Group 'A' service, the Board have decided as follows:

- i) Vacancies arising in Senior Scale should be filled with Group 'A'/Junior Scale Officers who are eligible for appointment to Sr. Scale;
- ii) If eligible Group 'A'/Junior Scale Officers are not available but Junior Scale Officers with a minimum of three years of service in Junior Scale who have completed the probation successfully are available, they should be considered for looking after duties in Senior Scale on payment of a special pay of Rs.150/- p.m. in addition to pay in Junior Scale, subject to the condition that pay plus, special pay does not exceed the pay admissible on regular promotion to Senior Scale on completion of the years of service prescribed in Jr. Scale. This consideration will be on preference to Group 'B' Officers, even if the Group 'B' Officers have rendered over three years of service in Group 'B' ;
- iii) Failing (i) and (ii) above, Group 'B' Officers who have rendered not less than three years of service in Group 'B' and have been adjudged suitable by a Committee of HODs for appointment against Senior Scale vacancies should be considered for ad hoc appointment.
- iv) While ordering reversion, the inverse order of the priority indicated above should be followed."

6. We have serious reservations about the justification and legal validity of the aforesaid provisions. Considering that 60% of the senior scale posts has to be filled by junior scale class.I Officers and 40% by the Class.II Officers, it is a revolting to the judicious mind that there should be 100% reservation for junior scale class.I Officers for filling up senior scale posts on an ad hoc basis and that too when no junior scale officers even with two years working experience (plus 2 years of probation) is available but group 'B' Officers with 3 years working experience are still waiting to be promoted. To add insult to injury the instructions ordains that for reversions/^{of} a class.II Officer with more than 3 years working experience should be reverted first while junior scale class.I Officers with only one years' of working experience (and not entitled to regular senior scale pay) should be retained. Since both these categories of Officers are eligible for regular promotion to the senior scale in the ratio of 60:40, law and equity demand that the differentiation recognised for regular promotion should be maintained as far as possible for making ad hoc promotions also and any prohibitory and mandatory instructions depriving class.II eligible Officers from being considered for promotion in case class.I junior scale officers who are not qualified to draw regular senior scale are available, would be unconstitutional and illegal because of the element of hostile discrimination against the class.II officers. Accordingly, we have no hesitation in striking down the Railway Board's impugned letter No.E(GP)85/1/48 dated 19/31-12-1985 as void.

7. In the facts and circumstances discussed above, we allow the application with the following directions.

a) All adverse reports given to the applicant /the between/years 1983-84 till his date of retirement should be

communicated to him by Respondents Nos.1,2 and 3 within a period of one month from the date of communication of this judgment and the representations of the applicant received within a month of such communication should be disposed of ^{by another} not below the level of the General Manager within a period of one month from the receipt of the representation, and the communicated adverse remarks expunged, modified or maintained in accordance with the decision on the representation.

b) The aforesaid impugned instructions of the Railway Board dated 19/31/12/1985 is set aside with the directions that for ad hoc promotions to the senior scale posts the eligible junior scale class.I Officers and class.II Officers should be considered by allocating vacancies as far as possible in the ratio of 60% and 40%, that is every 4th and 5th vacancy should go to the eligible class.II Officers, even for ad hoc appointments.

c) The meeting of the selection committee which had met last in September, 1983 should be convened notionally in the years 1984, 1985 and 1986 to fill up 40% of ad hoc vacancies in the senior scale through the promotion of eligible class.II officers and the case of the applicant should be considered by that committee for each of the years in accordance with the Department of Personnel and Administrative Reforms O.M. No.22011/3/76-Estt-D of 24th December, 1980 read with the O.M. of even number dt. 20.5. 1981 . The selection committee should meet immediately after final decisions on the adverse remarks have been taken and those remarks expunged, modified or maintained as the case may be. The selection committee should not have any member who had been associated in the recording, reviewing or ^{accepting} ~~exhibiting~~ the adverse remarks.

d) If the applicant is selected for ad hoc promotion by the selection committee for any of the years mentioned above, he should be

given notional promotion to the senior scale w.e.f. the date of occurrence of the vacancy with all consequential benefits of revised pay, arrears and revised pension and other retirement benefits.

e) Action on the above lines should be completed within 6 months of the communication of this order. There will be no order as to costs.

S.P.M.
(S.P.MUKERJEE)
MEMBER (A)

M.B.
(M.B. MUJUMDAR)
MEMBER (J).