

Date of order: 11-8-99

OA No.292/99

Purshottam Das S/o Shri Mata Prasad, now-a-days working as Driver, Loco Shed, Phulera.

OA No. 291/99

Suraj Mal S/o Shri Ganga Sahai, now-a-days working as Driver, Loco Shed, Bandikui.

OA No.293/99

Babu Lal Meena S/o Shri Ram Chand, now a-days working as Goods Driver, Loco Shed, Bandikui.

OA No.294/99

Shiv Ram S/o Shri Moji Lal, now-a-days working as Driver, Loco Shed, Phulera.

OA No.295/99

Rajendra Prasad S/o Shri Kanhaiya Lal, now-a-days working as Goods Driver, Loco Shed, Phulera.

OA No.296/99

Shambhu Dayal S/o Shri Mool Chand, now-a-days working as Driver, Loco Shed, Phulera

OA No. 308/99

Suresh Chand S/o Shri Hari Ram Balai, now-a-days working on the post of Goods Driver, Loco Shed, Phulera.

Moti Lal S/o Shri Kishan Lal Bairwa, now-a-days working as Goods Driver, Loco Shed, Phulera.

Bachu Singh S/o Shri Ram Jat, now-a-days working as Goods Driver, Loco Shed, Phulera.

Laxman Singh S/o Shri Sukh Dev Gurjar, now-a-days- working as Goods Driver, Loco Shed, Phulera.

Girdhar Gopal S/o Shri Bhura Dhankya, now-a-days working as Goods Driver, Loco Shed, Phulera.

.. Applicants

Versus

1. Union of India through the General Manager, Western Railway, Churchgate, Mumbai.
2. Divisional Railway Manager (E), Western Railway, Jaipur Division, Jaipur.
3. Additional Divisional Railway Manager, Western Railway, Jaipur Division, Jaipur.

.. Respondents

Mr. S.K.Jain, counsel for the applicants

Mr. Manish Bhandari, counsel for the respondents

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CORAM:

Hon'ble Mr. Gopal Krishna, Vice Chairman

Hon'ble Mr. N.P.Nawani, Administrative Member

ORDER

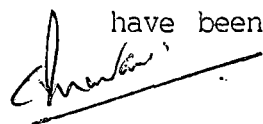
Per Hon'ble Mr. N.P.Nawani, Administrative Member

In view of the similar facts and circumstances as also the relief sought, it is proposed to dispose of the above mentioned OAs by a common order.

2. In these applications under Section 19 of the Administrative Tribunals Act, 1985, the applicants have prayed that:

- i) the respondents should interpolate their names in the panel dated 25.2.1999 (Ann.A1) and they should be regularly promoted on the posts of Goods Driver in the Grade of Rs. 5000-8000 from the date of their appointment/promotion and the impugned order dated 15.6.1999 (Ann.A/1a) be quashed, deeming the applicants to be continuing on the posts of Goods Driver w.e.f. their date of joining.
- ii) the respondents be directed not to revert the applicants to the lower post till a legal selection is held by calling them for the viva-voce test/interview.
- iii) that the applicants should be granted all the ancilliary benefits regarding seniority, further promotion etc.
- iv) in the alternative, the interview held by the illegal Selection Board be quashed and the respondents be directed to reconstitute the Selection Board and hold the interview again as per law.

3. The facts of the case, as stated by the applicants, are that they have been working as Senior Diesel Assistants on regular basis in the Jaipur Division of the Western Railway. They were promoted on ad hoc basis on the post of Goods Driver in the Grade of Rs. 5000-8000 from various dates ranging from 24.6.1995 to 18.8.1998 and they have been working continuously on the said post since then. The respondents had published a total of 144 posts of Goods Driver and a written examination was conducted in the month of August-September, 1998 for which 244 candidates were called. The applicants appeared in the said examination and passed, as it is apparent from the notification dated 12.11.1998. The applicants were, however, not selected in the interview as is evident from the provisional panel notified vide letter dated 25.2.1999 (Ann.A1) and 135 candidates were selected against 144 available posts. Since the names of the applicants do not find a place in the panel, it seems that the applicants have been declared unsuccessful in the interview. As contended by the



applicants they have been ³ working on the post of Goods Driver satisfactorily and could not have been declared unsuccessful in view of the Railway Board's circular No. EP/1025/38 dated 7.2.1976, para 2.2 on which is reproduced as under:

"2.2 : Panels should be formed for selection post in time to avoid ad hoc promotions. Care should be taken to see while forming panels that employees who have been working in the posts on ad hoc basis quite satisfactorily are not declared unsuitable in the interview. In particular any employee reaching the field of consideration should be saved from harrassment."

It has also been stated by the applicants that a matter similar to that being agitated in these applications had come up before the Jaipur Bench of the CAT in TA No. 558/1986 and vide order dated 21.1.1994, it was held that "the applicant is entitled for the benefit of this circular and his reversion order Ex. 10 dated 18.8.1983 is quashed qua the applicant and the applicant should be allowed to continue on the post which he was holding on ad hoc basis." Further, the above order was, inter alia, relied upon in a number of other cases, which have been mentioned in para 4(xiii) of the OA. The settled position now, according to the applicants, is that all the employees who had been successful in the written test and were officiating on the higher post, on which the selection has to be done, cannot be declared unsuccessful in the interview and on that basis they cannot be reverted. The applicants are, therefore, entitled to a declaration that they should be deemed to be the selected employees on regular basis and could not be reverted to the lower post.

In the alternative, it has also been averred by the applicants that the constitution of the Selection Board for holding the interview was not as prescribed in para 218 of the Indian Railway Establishment Manual (for short, IREM) and, therefor, it was wholly illegal and did not confer any right to the respondents to declare any result of the interview. They were not debarred or estopped from raising the objection against the constitution of the Selection Board in spite of the fact that the applicants appeared before the said Board as they got to know the names of the members of the Selection Board much later. It is, therefore, contended on behalf of the applicants, except Shri Girdhar Gopal, applicant in OA No.308/1999, that their names should be interpolated in the panel and they should not be reverted to the lower post. It has also been mentioned that in a similar matter in OA No.281/99, Rajendra and Ors. Vs. Union of India and Ors., this Tribunal had granted a stay on 18.6.1999 and it has been prayed that in their cases also a similar stay should be granted. The applicants have also filed an affidavit on 29.6.1999 stating that they had represented to the General Manager, Western Railway, Mumbai against the

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formation of the panel in addition to the representations made on their behalf by the Union .

4. The respondents in their reply have strongly opposed the contentions of the applicants. Their preliminary objection was that the applicants have challenged the order of reversion without first availing statutory remedy available to them in the Railway Servants (Discipline and Appeal) Rules (for short, the Rules). It has been stated on behalf of the respondents that it was clearly mentioned in the notification dated 12.11.1998 (Ann.A4), containing the names of candidates being called for interview (Viva voce), that their names will be shown in the panel only on their passing the interview and such candidates had appeared in the interview on such conditions without any protest or objection and are therefore, estopped from raising any grievances subsequently. Since the post of Goods Driver is a selection post and falling in the safety category, a candidate is required to obtain 60% aggregate marks in the professional ability and again 60% in aggregate in the selection in which marks of seniority are also included, apart from the marks which are allocated on different counts as have been specified in the rules as well as in the circular dated 16.4.1991. Therefore, if a candidate fails to obtain 60% marks in professional ability or 60% marks in aggregate in selection, he cannot be taken on the panel and since the applicants have failed to obtain 60% marks, they were not taken on the panel. The averments made that the applicants were working as Goods Driver satisfactorily, has not been substantiated by any proof and cannot be accepted. The contention of the applicants that they could not have been declared unsuccessful in the interview is not acceptable since they could not be empanelled on account of their failure to secure 60% marks. As regards the plea that the Selection Board was not constituted as per rules, the respondents have stated that the Selection Board under para 218 is for pay scale Rs. 1600-2600 and above, whereas the pay scale of a Goods Driver is only Rs. 1250-2200 and, in any case, having appeared before the Selection Board without any protest and having subsequently been declared failed therein, the applicant cannot question the constitution of the Selection Board, when the panel was declared, which was a good six months later. In any case, all the members of the Selection Board were nominated in accordance with the rules and circulars. With regard to the contention of the applicants that in view of the Railway Board's circular No. EP/1025/38 dated 7.2.76, they could not have been declared unsuitable in the interview, the respondents have mentioned that there exists no such circular. There is only a "Record Note" of the correspondence. The fact of the matter is that the applicants could not find place in the panel on account of not obtaining 60% aggregate marks and their plea of being

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continued on the higher post despite having failed to obtain the prescribed marks is not tenable. The respondents in their reply also stated that the applicants did not represent the matter to the competent authority. As the grievance of the applicants is that they have been unfairly reverted, they had an alternative, efficacious and mandatory remedy under Rule 18(v)(b) of the Rules. As regards the plea that the orders of reversion may be stayed, it has been stated that on their not having been selected, as many as 73 employees have been reverted and this number is even higher than the number of posts against which promotions have been given to the candidates other than the ad hoc promotees and, therefore, staying the reversion is not only untenable in law but such a course of action will be impracticable.

5. We have heard the learned counsel for the parties at great length and have also perused the records carefully.

6. The learned counsel for the applicants strongly pleaded that the applicants, who were working on the post of Goods Driver on ad hoc basis satisfactorily and who had all passed in the written test, could not have been declared unsuccessful in the interview/viva voce in view of the Railway Board's circular No.EP/1025/38 dated 7.2.1976. He relied on a number of decisions of this Tribunal, including that of this Bench and also on the judgement of Hon'ble the Supreme Court dated 3.11.95 in R.C.Srivastava v. Union of India and Another. He emphasised that the case before the Hon'ble Supreme Court was of similar nature where the petitioner was not selected since he had not secured the required 30 marks for Professional Ability but had secured 33 marks out of 50 marks in the Personality etc. In Professional ability, he had secured 24.15 marks out of 35 marks for the written test and 5 marks out of 15 marks in the viva voce, and thus, had secured a total of 29.15 marks and had he been given 6 marks instead of 5 in the viva-voce, he would have passed. The Hon'ble Apex Court accepted the pleas of the petitioner in that case about his satisfactory service in the higher post for which his selection was made and ruled that the circular dated March 19, 1976 does not run contrary to any statutory rule and only gives guidance in the matter of exercise of the power by the Selection Committee and held that "a person who has been working on the post for which selection is being made on ad hoc basis and whose work is quite satisfactory should not be declared unsuitable in the interview. The learned counsel for the respondents has not been able to show that this direction is inconsistent with any statutory rule. We are, therefore, unable to hold that the said direction in the circular dated March 19, 1976 is inconsistent with any statutory rule". It was, therefore, held by the Hon'ble Apex Court that the applicant was

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entitled to the benefit of the direction contained in the circular dated March 19, 1976 and applying the said circular, it was concluded that the applicant was wrongly denied the selection on the basis of the marks given to him in the viva-vice test.

7. On the other hand, the learned counsel for the respondents drew our attention to a copy of the Railway Board's letter No.E(NG)I-82-PMI-132 dated 9.8.82, in which it has been mentioned that an extract of the record note of a meeting held by the then Deputy Minister for Railways and the Railway Board with the Heads of the Personnel Departments of the Railway Administrations on 27.11.75 was sent to the Railways, Production Units and RDSO vide Board's letter No.E(NG)I-75/PMI-264 dated 25.1.76 stating therein that instructions should be issued to all concerned for strict compliance of the decision as contained in the extract of the minutes, referred to above, and goes on to reproduce para 2.2 of the said record note. Para 2.2 has been reproduced by the applicants in para 4(xii) of their application. This letter goes on to state that "it would appear that the referred instructions have led to the normal rules and procedure of selection as contained in the Indian Railway Establishment Manual (IREM, for short) and other cognate orders not being followed in some cases and with a view to ensure that such departures do not take place, it is hereby clarified that the intention of the instructions conveyed in the Board's letter dated 25.1.76, referred to above, was not to bypass or supercede in any manner, the normal rules of selection as contained in the IREM and other orders issued from time to time but only to serve as a broad guideline for the Departmental Promotion Committees and the authorities who are required to consider and approve employees for promotion. In any case, there was no intention to confer any right on the employees officiating on ad hoc basis in higher posts to be selected and included in the panels for these posts." We do not know whether this clarificatory letter of the Railway Board dated 9.8.82 was brought to the notice of the Hon'ble Supreme Court when it delivered the judgement in R.C.Srivastava's case on 3.11.95. What we find is that this clarificatory letter has not been mentioned anywhere in the judgement of the Hon'ble Apex Court. The learned counsel for the respondents argued that with the issuance of the clarificatory letter, the primacy of rule as contained in the IREM has been reiterated and the record note intimated through letter dated 25.1.76 is to serve only as a broad guideline to DPCs and the authorities who are required to consider and approve the employees for promotion. Therefore, no right accrues to the employees that if they are holding a higher post for which selection is being made and ^{even} if they are

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serving at such post on ad hoc basis satisfactorily, they can be declared unsuitable in the interview/viva voce. The learned counsel for the applicants, on the other hand, stated that the judgement of the Hon'ble Supreme Court is of a date much later than 9.8.82 when the clarificatory letter was issued. All we can say at this juncture is that it is for the Railway Board to apply its mind on this issue and take whatever steps are necessary to reconcile the matter keeping in view the record note extracted in their letter of 25.1.76, the clarificatory letter issued on 9.8.82 and the judgement of the Hon'ble Supreme Court dated 3.11.95.

8. It was also argued by the learned counsel for the applicants that the very constitution of the Selection Board was illegal and, therefore, the records of the viva-voce should not be made the basis for non-selection of the applicants. In this connection, he referred to para 218 (c) of the IREM and seeking support from the Railway Board's letter No.E(NG)I/89/PM II/8-A dated 10.1.92, in which Goods Driver's pay scale of Rs.1350-2200 has been equated with the pay scale of Rs.1600-2660, pressed that the Boards should have been constituted under the above para as prescribed for selection post in the scale of Rs.1600-2660. Enumerating details of the names and designations of the members of Board as contained in the pleadings, he contended that the Board was not constituted as per the provisions of this rule. The Board should have consisted of officers of the Junior Administrative rank and could have included a Personnel Officer in the next lower rank who should nevertheless be an equal member of the Selection Board and as against this, two members of the Board viz. D.O.M.(C) and A.P.O. were of grades lower than prescribed. It was also contended that fourth member was added unnecessarily for influencing the decision of the Board and, therefore, the interview and its result was wholly illegal and liable to be quashed. The respondents, on the other hand, argued that the letter dated 10.1.92, referred to by the learned counsel for the applicants was not applicable and as specifically provided in Para 218 (c), the Board was constituted 'for all other selection posts' as against for 'selection post' in the scale of Rs.1600-2660. It has been contended on behalf of the applicants that the marks for seniority have not been included while computing the total marks obtained by them. The learned counsel for the respondents, on the other hand, stated that this was not true and the marks have been allotted to the applicants on all counts as prescribed.

9. A preliminary objection has been raised on behalf of the respondents that these applications are premature and not maintainable since the

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applicants have not exhausted the alternative remedy of appeal provided under Rule 18 of the Rules. It was argued on behalf of the applicants that the grievances of the applicants are (i) not being empanelled and (ii) being reverted from the post of Goods Driver and whereas there is no provision for filing an appeal for not being empanelled, Rule 18 (v)(b) of the Rules does not apply as the applicants were reverted from a post in which they were working on 'ad hoc' basis and not 'officiating' as provided in sub rule (b) of Rule 18(v) of the Rules. The learned counsel for the respondents, however, stressed on the fact that if a railway servant has any grievance, an appeal/representation is mandatory before approaching the Tribunal and the present grievance can certainly be dealt with by the appellate authority under Rule 18(v)(b), which deals with reversion or under Rule 18(iv)(a) of the Rules, which provides for appeal against an order which denies or varies to his disadvantage, his pay, allowances, pension, Provident Fund Benefits, service gratuity or other conditions of service as regulated by rules or by agreement. It was also mentioned that the applicants having been ordered to be reverted from a higher post to a lower post, an appeal certainly lies since officiating does not occupy a higher level than working on ad hoc basis, as contended by the learned counsel for the applicants.

10. The learned counsel for the applicants, however, argued that in view of the incorrect procedure adopted in declaring the applicants failed in the interview/viva-voce in disregard to decisions of the various Benches of the Tribunal and also the judgement of the Hon'ble Apex Court as also on account of illegal constitution of the Selection Board, the requirement of exhausting the alternative remedy of appeal before approaching the Tribunal should be dispensed with. In this regard, reliance has been placed on WLC (Raj.) 1998 (3) 484 - Smt. Ruby Joyce Charles v. Air Force School & Ors., (1998) 8 SCC 1 - Whirlpool Corporation v. Registrar of Trade Marks, Mumbai & Ors., (1996) 33 ATC 747 - U.P. Forest Service Assn. & Ors. v. Union of India & Ors., 1996 (2) WLN (Full Bench) 35 - R. Dayal & Ors. v. State of Rajasthan & Ors., (1993) 23 ATC 910 - Alfred D'Souza v. Collector of Customs & Anr., (1988) 8 ATC 741 - Rajkishore Das v. Union of India & Ors., (1988) 8 ATC 911 - Thakur Prasad Pandey v. Union of India and others, (1988) 8 ATC 808 - Smt. D.R. Shah and Others v. Union of India and others and 1986 ATC 307 - Charan Singh v. Union of India and Others.

11. Section 20 of the Administrative Tribunals Act, 1985 specifically provides that the Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant has availed of all the remedies available to him under the relevant rules as to redressal of his grievances. The use

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of the word 'ordinarily' is deliberate. It signifies that in ordinary course, an applicant has to avail of all the remedies provided under the relevant service rules before approaching the Tribunal for redressal of his grievances. It is only in exceptional and extra-ordinary circumstances that the Tribunal can entertain an application dispensing with the requirements of making an appeal or representation, as the case may be, provided under the relevant rules.

12. However, in these cases, while it was mentioned in the Original Applications that the applicants and others represented this matter to the Union and the Union filed the representation to the General Manager, some of them have, subsequently, through their affidavits intimated that they have made representations to the General Manager. It is borne out from the records that some of them have not made any such individual representation. In any case, we find that the applications are premature and the applicants should have waited for six months after making representations before approaching this Tribunal.

13. Keeping in view the facts and circumstances of these cases and the contentions made by the opposite parties, we deem it just and proper to pass the following order :-

- i) All the applicants may file their appeals as envisaged under Rule 18 of the Railway Servants (Discipline & Appeal) Rules, 1968 to the General Manager within 15 days of this order and the appellate authority shall consider these appeals and decide the same through detailed speaking orders on merits meeting all the points raised by the applicants within a period of two months from the date of its receipt. Let copies of the OAs and the annexes thereto be sent to respondent No.1 alongwith a copy of this order.
- ii) These applications are held to be premature and these are disposed of accordingly with no order as to costs.



(N.P. NAWANI)

ADM. MEMBER



(GOPAL KRISHNA)

VICE CHAIRMAN