

CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

O.A.No.260/472/2013

Date of Reserve:03.04.2019
Date of Order:06.08.2019

CORAM:

HON'BLE MR.GOKUL CHANDRA PATI, MEMBER(A)
HON'BLE MR.SWARUP KUMAR MISHRA, MEMBER(J)

Biswajit Swain, aged about 41 years, S/o.Duryodhan Swain – at present working as Asst.Loco Pilot, Loco-Titlagarh, At/PO/PS-Titlagarh, Dist-Bolangir, At-Tilakpur, PO/Via/PS-Derabis, Dist-Mendrapara.

...Applicant

By the Advocate(s)-M/s.K.Ray
R.K.Kar
S.K.Patri

-VERSUS-

Union of India represented through:

1. The General Manager, East Coast Railway, At-Rail Sadan, Chandrasekharpur, Bhubaneswar, Dist-Khurda.
2. Chief Operation Manager-cum-Revisionary Authority, East Coast Railway, At/PO/PS-Bhubaneswar, Dist-Khurda.
3. Addl.Divisional Railway Manager-cum-Appellate Authority, Office of the Divisional Railway Manager, East Coast Railway, At/PO/PS/Dist-Sambalpur.
4. Sr.Divisional Mechanical Engineer, East Coast Railway, At/PO/PS/Dist-Sambalpur.
5. Sr.Loco Inspector-cum-Enquiry Officer, At/PO/PS-Titlagarh, Dist-Bolangir.

...Respondents

By the Advocate(s)-Mr.M.B.K.Rao
Mr.R.K.Pattnaik

ORDER

PER SWARUP KUMAR MISHRA, MEMBER(J):

While working as Loco Pilot-II(Goods), Titlagarh under the East Coast Railways, applicant was issued with a Memorandum of Charge under Rule – 9 of Railway Servants (Discipline & Appeal) Rules, 1968, under the following Articles of Charges:

Article-I

That Shri Biswajit Swain, while functioning as Loco Pilot – II(Goods)/TIG during the period on 18.09.07 as incharge of 235 passenger locomotive absconded from duty on arrival at KSNG and did not perform shunting duty of placement of empty rake of 235 passenger.

Article-II

That the said Shri Biswajit Swain while functioning as Loco Pilot-II(Goods)/TIG period during on 21.09.07 gave false statement before the Inquiry Committee which investigated into the derailment of 235 passenger empty rake at KSNG on 18.09.07. Thus, he tried to suppress the facts and mislead the inquiry committee.

2. On receipt of the above Memorandum of Charge, the applicant submitted a representation to Respondent No.4 for providing some documents appended to the charge-sheet as well as other relevant documents in order to submit his explanation. In response to this, the Respondent No.4 while providing some documents, refused to supply the other documents asked for by the applicant on the ground that those documents are not relevant. However, the applicant submitted his explanation on 17.11.2008 denying the allegations made against him with a request to consider his case favourably. Thereafter, the Disciplinary Authority (Respondent No.4) vide order dated 28.11.2008 appointed Respondent No.5 as the Inquiring Officer to enquire into the charges. On conclusion of the inquiry, the I.O. submitted his report to the Disciplinary Authority on 31.3.2009. Respondent No.4 after going through the said report, remanded the case to the IO with an instruction to examine an additional prosecution witness, Sri J.Behera and to confront one document purported to be written by one R.Ravi, Asst.Loco Pilot to ADRM, Sambalpur on 03.06.2008. On examination of the additional prosecution witness Shri J.Behera and re-examination of Prosecution Witness No.5, the I.O. submitted his report to the Disciplinary Authority on 14.5.2009. The

Disciplinary Authority vide his letter dated 15.05.2009 directed the applicant to submit the written statement of defence to the report of the I.O. The applicant submitted his written statement of defence on 04.06.2009 and the Disciplinary Authority without applying his mind, passed order dated 27.08.2009 (A/13) removing the applicant from service. Being dissatisfied, the applicant preferred an appeal to Respondent No.3 and the Appellate Authority vide order dated 16.07.2010(A/15) directed reinstatement of the applicant in service in the lower post of Asst. Loco Pilot in the lower pay with bottom seniority. Thereafter, the applicant submitted a petition to the Revisionary Authority on 4.9.2010 and the latter sat over the matter for about 2 years and on receipt of a reminder, the revision petition was disposed of vide order dated 31.05.2012 upholding the order as passed by the Appellate Authority.

3. Aggrieved with this, the applicant had approached this Tribunal in O.A.No.1046 of 2012. Vide order dated 19.03.2013, this Tribunal granted liberty to the applicant to file a better application. Hence, by filing the present O.A., the applicant has sought for the following reliefs:

- i) Admit and allow this Original Application and thereby the orders as per Annexure-A/13, A/15 and A/17 be quashed and direct the Respondents to reinstate the applicant in the post of Loco Pilot Grade-II with all consequential benefits.
- ii) Pass such other order(s)/direction(s) as may be deemed fit and proper in the bona fide interest of justice.

4. The grounds on which the applicant has based his claim are as follows:

- i) The IO conducted the inquiry in a perfunctory manner and the findings of the IO that the charges have been established are based on no evidence.
- ii) The IO (Respondent No.5) was a lower officer than the officers who had conducted a fact finding enquiry and

therefore, his appointment as IO to enquire into the charges is not permissible as per Railway Servant (D&A) Rules.

- iii) As per Railway Servants (D&A) Rules, statement recorded in the fact finding enquiry should be recorded afresh in presence of the delinquent employee. But the IO did not do so and completed the inquiry in a slipshod manner.
- iv) Request for supply of shunting memo which was used on the date of incident, i.e., 18.09.2007 being a vital document was deliberately not supplied to the applicant even though asked for to know by whom the shunting work on that day had been done.
- v) As per the settled position of law, the IO should act independently and in an impartial manner. But, he was influenced by the higher authority, reopened the matter to fill up the lacuna and recorded his finding which is not permissible under the Railway Servants (D&A) Rules.
- vi) The letter of AARM, Shri C.M.Hembrum relied upon in the inquiry was not made available for cross-examination despite the demand made by the applicant.
- vii) As per the RS(D&A) Rules, new evidence is not permitted or called for or any witness shall be called to fill up any gap in the evidence. But, the Disciplinary Authority in order to fill up the lacuna in the inquiry intentionally remanded the matter to the IO to record the evidence of one additional witness, Shri J.Behera, whose name was not in the list of witnesses appended to the charge sheet and re-examined PW-5.
- Viii) S.R. 5.13.02 of Indian Railway (Open Lines) General Rules, 1976 provides Loco Pilot shall retain the shunting authority till shunting is completed. After shunting work was over, the applicant handed over the shunting authority to Token Porter (PW-2) who had admitted the same in his deposition. But this aspect was not considered by the IO who gave a perverse findings.
- ix) On the self same misconduct/incident, the Token Porter and the Guard were imposed minor punishment whereas the applicant was imposed a major punishment which amounts discrimination.
- x) The testimonials/evidence of additional witness should not have been taken into account because of the fact that the distance from Titlagarh to Kisinga by road is 35 kms. Therefore, it is not practically possible to cover up such a distance within 40 minutes by motor cycle during night.

- xi) The findings of the IO that the applicant had not interacted during 22.15 to 23.15 with any of his colleagues itself speak that the applicant was very much present during the shunting period and did the shunting work.
- xii) As per settled position of law parity among co-delinquents has to be maintained when punishment is being imposed, whereas the respondents within a mala fide intention have imposed major punishment on the applicant while minor punishment has been imposed on the other co-delinquents.

5. Contesting the claim of the applicant, the respondents have filed their counter. While narrating the facts, the respondents have submitted that in consideration of the report dated 31.3.2009 of the Inquiry Officer, the Disciplinary Authority remitted the matter back to the Inquiry Officer for holding further inquiry and to report by recording his reasons under Rule – 10(2) of 1968 Rules. Consequently, the IO submitted his report on 14.05.2009 reiterating its earlier report by holding that the applicant is guilty of charges beyond doubt. In consideration of his defence representation to the report of the IO, the Disciplinary Authority imposed punishment of removal from service on the applicant. On the appeal preferred, the Appellate Authority vide his order dated 16.7.2010 varied the order of punishment by reducing the applicant to the post of Assistant Loco Pilot in the lowest pay with bottom seniority. On the revision petition being submitted by the applicant, the Revisionary Authority vide order dated 31.05.2012 concurred with the view of the Appellate Authority with regard to quantum of punishment imposed.

6. Respondents have pointed out that not only rules of natural justice but also statutory rules/procedures have duly been followed while conducting departmental inquiry against the applicant. Besides, the orders passed by the Disciplinary Authority, Appellate Authority and the Revisionary Authority are based on evidence justifying the conclusion arrived at. According to respondents, the incident of derailment was preliminarily investigated into by

a Fact Finding Committee which gave its report against the applicant, Assistant Loco Pilot as well as the Guard for dereliction of duties on 18.9.2007. The report of the Committee was one of the relied upon documents to prove the charge of misconduct, copy of which had been provided to the applicant. It is stated that the inquiry was conducted in a fair and unbiased manner. Respondents have stated that the allegation of the applicant regarding non-supply of shunting memo dated 18.09.2007 is not correct inasmuch as the said document did not form part of the relied upon document for proving the charges levelled against the applicant nor the said document has been utilized against the applicant during inquiry. Further, it has been submitted that examination of additional prosecution witness is permissible under Rule-9(18) of 1968 and such a course could be adopted strictly in tune with the procedure laid down in that provision. As regards the reliance placed on the letter of AARM, Sri C.M.Hembrum, it has been submitted that copy of the same was duly provided to the applicant on demand. Respondents have denied the allegation of the applicant regarding non-consideration of evidence of PW 2 and PW 3 by the IO. It has been stated that the token porter and guard were also imposed punishment taking the entire gamut of the evidence against them, degree and gravity of offence committed. The applicant is stopped to compare his case with them in view of the fact that as Loco Pilot of the locomotive, it was his prime responsibility to ensure safe shunting work with utmost devotion and sincerity without any lapse. The gravity of offence committed by the applicant was found to be very high and therefore, the punishment as imposed on him is commensurate with the degree of his offence which cannot be said to be disproportionate or discriminatory.

7. Applicant has filed a rejoinder to the counter to which respondents have also filed a reply.

8. In the written notes of submission, the applicant has submitted that there being enough evidence available on record to establish the presence of the applicant and that the shunting work had been performed by him on 18.09.2007, the same was not taken into consideration by the I.O. It has been pointed out that at the relevant point of time, the applicant had talked with the Divisional Mechanical Engineer who ascertained about the development of the situation.

9. We have heard the learned counsels for both the sides and perused the records. We have also gone through the written notes of submission filed by the applicant along with the decisions cited by him.

10. The allegations in the charge memo are dereliction of duty on 18.09.07 since the applicant did not perform shunting duty of placement of empty rake of 235 passenger and he tried to suppress the facts and misled the Inquiry Committee.

11. It is the case of the applicant that the IO (Respondent No.5) was a lower officer than the officers who had conducted a fact finding enquiry and therefore, his appointment as IO to enquire into the charges is not permissible as per Railway Servant (D&A) Rules. In this connection, he has relied on Rule-9/A of the Rules, 1968, the relevant part of which reads as follows:

"Except in cases arising out of fact-finding inquiries like accident inquiries, inquiries consequent to audit reports, inquiries made by Vigilance Organisation and on reports from S.P.E., departmental inquiries for disciplinary action should not be entrusted to an officer lower in status than that of the officer, who conducted the fact-finding inquiry (Re: R.B.'s No.E(D&A) 70RG6-31 of 15.6.70, SL No.ER 7499/SE 169/NR 5051).

12. It is not in dispute that the IO who conducted the inquiry is lower than in rank than the officer(s) who had conducted the fact-finding inquiry. Secondly, it is the specific case of the applicant that his request for supply of shunting memo which was used on the date of incident, i.e., 18.09.2007 which is a vital document to know by whom shunting work on that day had been done was not supplied to him. This point has been countered by the respondents by stating that since this document was not one of relied upon documents nor utilized against the applicant and therefore, there was no deviation of any rules in not supplying the said document.

13. It is the case of the applicant that as per the RS(D&A) Rules, new evidence is not permitted or called for But, the Disciplinary Authority in order to fill up the lacuna in the inquiry intentionally remanded the matter to the IO to record the evidence of one additional witness, Shri J.Behera, whose name was not in the list of witnesses appended to the charge sheet and re-examined PW-5. Replying to this, the respondents have stated that this course of action is permissible under Rule-9(18) of the Rules, 1968 as well as further inquiry is permissible under Rule10(2) of the Rules, 1968. However, we have gone through the orders passed by the Disciplinary Authority, Appellate Authority and the Revisionary Authority. In Paragraph-2 in the appeal, the applicant had pointed out as under:

“2. Sir, the inducement of additional PW J.Behera is not a valid procedure as per Rule-9(18) of RS (D&A) Rules, 1968. Which was objected in detail by a letter dated 05.07.08 addressed to Inquiry Officer by defence assistant. But I.O. had not properly evaluated the protest and continued the inquiry”.

14. In Paragraph-4(ii), the applicant had stated as follows:

“(ii)Prosecution witness Sri A.Nag LM/KSNG.

(a) During inquiry PW A.Nag LM/KSNG has stated that he has given shunting authority to me but not particular while withdrawing it. (Q. No.2 of CE and Q. No.5 & 6 of I.O). It should be noted that neither Asst.Loco Pilot nor Guard handed over shunting memo to PW A.Nag. The remaining one is Loco Pilot, who handed over shunting authority to TP.

(b) As PW A.Nag was not particular about physical presence of any of the crew, the handing over of shunting authority delivers a point which ascertains my presence at that time of derailment.

These points from 4(ii) (a) to 4(ii)(b) diminishes Disciplinary Authority's conclusion by taking said P.W. statements towards whereabouts of Loco Pilot. Moreover, PS A.Nag's statement during exam & cross exam is an asset in terms of my presence at derailment site".

15. The plea of non-supply of any document including the shunting document in question was not at all raised by the applicant before the Appellate Authority or the Revisionary Authority as seen from the appeal dated 7.10.2009 (A/14) and Revision Petition dated 4.9.2019 (A/16). The evidence adduced before the Inquiry Officer has been discussed in detail in this regard by the order passed by the Appellate Authority dated 16.07.2010(/15) as well as the order passed by the Revisionary Authority dated 31.5.2012 (A/17). The applicant had stated in his statement dated 20.9.2007 that soon after seeing the danger signal from the Guard, he while going towards the "Dead End", saw that the Guard was passing on the opposite side of the rake. He then asked the Guard that "what happened", but the Guard could not listen his voice due to noise of through passing train at that time.

16. The authorities have also considered the grounds taken by the applicant in his explanation dated 17.11.2008 regarding his inability to make communication with anyone. It has been found by the concerned authority

that the applicant had taken a false plea regarding the reason for which he could not make any communication with his colleagues or any staff of the Railway Department regarding the accident in question. In the show cause, he had mentioned that he had got down from locomotive for natural requirement and refreshment for a short period with a certain orientation to embark back to the loco. The applicant had also taken the plea that he could not call anybody over telephone as there was no charge of battery in his telephone. On the other hand, the authorities found from the telephone call details in question that the applicant had in fact some telephonic conversation during the relevant period. After discussing the evidence on record, it was found by the concerned authorities that during the relevant time, the applicant had left the spot by a motor cycle with one of his colleagues. In view of the said detailed discussion of evidence showing that the applicant was not physically present at the time of the accident and in view of the discussions already made, this Tribunal finds that the plea of non-supply of documents in question has not in any caused prejudiced to him.

17. We do not accept the submission of the learned counsel for the applicant that as per Rule-9/A of the Rules, 1968 officer junior to the officer who had conducted the fact finding inquiry could not be the Inquiry Officer to enquire into the charges levelled against the applicant since this Tribunal is of the opinion that the said circular is applicable only for the enquiry in cases other than the fact finding inquiry like accident inquiries, inquiries consequent to audit reports, inquiries made by Vigilance Organisation and on reports from S.P.E. The statement dated 21.09.2007 of the applicant before the Fact Finding Inquiry Committee which has also been filed at Annexure-

R/7 containing the Question Nos. 1 & 2 along with answers thereof are as follows:

Q.1 – Please state with whom you interacted at the site immediately after the derailment ?

Ans. I have not interacted with any staff till approx. 45 mins. after the derailment.,

Q.No.Why ? Was it not necessary on your part to intimate details of the derailment to Dy.SS on duty or on duty Station Manager ?

Ans. I went for nature call and light dinner and returned to the engine within 20 mins., after derailment and I came to station after 15 mins. thereafter. At the station Sri Bag, SMR, Sri Mishra, Dy.SS and on duty TP and guard were available.

18. As regards the claim of the applicant that shunting memo was not cited as the Relied Upon Document to the charge memo, the respondents have pointed out that the request of the applicant for supply of other documents was found to be non-relevant and as such, his request was not acceded to by the competent authority vide its order under A/6. We would at this stage note that the detailed evidence produced during departmental inquiry has been discussed by the I.O. and by the D.A. This Tribunal will not go into the detailed discussion of the evidence and weigh the same either in favour of the applicant or the respondents as after going through the records, this Tribunal is of the opinion that this is not a case of no evidence. In view of this, we do not find any justifiable reason to interfere with the matter.

19. In the result, the O.A. being devoid of merit is dismissed with no order as to costs.

(SWARUP KUMAR MISHRA)
MEMBER(J)

(GOKUL CHANDR PATI)
MEMBER(A)

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