

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WP(C) No.6606/2010**

% **Date of Decision: 16.09.2011**

Union of India Petitioner

Through Mr. V.S.R.Krishna, Advocate

Versus

Sh. S.K. Gangal & Ors. Respondents

Through Mr.M.S.Saini, Advocate.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

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|----|---|-----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

ANIL KUMAR, J.

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1. The petitioner, Union of India, through the Chief Personnel Officer, West Central Railway, has impugned the order dated 12th May, 2010 passed by the Central Administrative Tribunal, Principal Bench passed in OA No. 3522/2009 in MA No. 660/2010 titled as 'Sh. S.K. Gangal Vs. UOI and Ors.' allowing the original application of respondent no.1 and directing the petitioner to give proforma officiating promotion under the NBR (Next Below Rule) from 20th August, 2004 when the officer immediately junior to respondent no.1 was granted *ad hoc* promotion to senior scale. As a consequence of this, the Tribunal also

directed the petitioner to re-fix the pay of respondent no.1 as well as to re-calculate his post retirement benefits and to pay the amounts due to respondent No.1 with 6% simple interest per annum.

2. The relevant facts to comprehend the disputes between the parties are that respondent no.1 was appointed as an Apprentice Mechanic (DH Electronics) through the Railway Recruitment Board, Mumbai and he joined the Railways on 22nd December, 1984. He was posted at the Itarsi Diesel Shed on the Central Railway. Later on he was placed on the panel of Group 'B' Officers (Class II) on qualifying the Limited Departmental Competitive Examination on 5th February, 1997 and thereafter he was promoted and posted as Assistant Electrical Engineer (TRO), Bhopal.

3. On 30th November, 2000, respondent no.1 was sent on deputation to DMRC and was posted as Divisional Electrical Engineer in the grade of 10,000-15,200/- on usual deputation terms in the DMRC at New Delhi.

4. On account of re-organization of the Indian Railways, the existing Zonal Railways were bifurcated and additional new zones were formed. Consequently, on re-organization, respondent no.1 was allotted the newly formed West Central Zone and his lien was transferred from the erstwhile Central Railway to West Central Railway w.e.f. 1st April, 2003.

5. When respondent no.1 was away on deputation with DMRC, a DPC was held by the West Central Railway for promotion of Group 'B' Officers of the Electrical Department to officiate in Group 'A' Senior Scale, and on the basis of the recommendations of the DPC, Group 'B' Officers of the Electrical Department were promoted to officiate in the Senior Scale.

6. Sh. S.K. Aggarwal, who was next junior to respondent no.1 in the seniority list, was placed in the panel and promoted to the Senior Scale w.e.f. 20th August, 2004 and posted as the Divisional Electrical Engineer/TRS, Narkatiaganj against a regular vacancy. The Chief Personnel Officer, West Central Railway, by his letter dated 18th July, 2006, also stated that one post of Senior Scale had been kept vacant for respondent no.1.

7. According to the respondent no.1, when he came to know that the *ad hoc* promotion had been given to the officer who is junior to him, he made a representation to the General Manager, West Central Railways on 31st January, 2005 seeking proforma/*ad hoc* promotion to the Senior Scale in the parent cadre. However, the representation made by respondent no.1 was ignored by the petitioner. Thereafter, respondent no.1 made other representations as well, however, they were also not replied to.

8. Subsequently respondent no.1 completed his deputation and thereafter he was repatriated to his parent cadre, the West Central Railway, on 28th August, 2005. However, on repatriation he was not posted to the Senior Scale, but instead he was posted in Group 'B' as Assistant Electrical Engineer, Headquarters whereas his juniors continued to officiate as Divisional Electrical Engineer in the Senior Scale since 20th August, 2004.

9. In the meantime, respondent no.1 had also submitted his request for voluntary retirement from the Railway Services on 18th August, 2005 on account of domestic reasons, contending that he is not in a position to continue the services with the Railways and therefore, he gave a three months' notice for voluntary retirement as contemplated under the relevant rules of the Voluntary Retirement Scheme.

10. The request of the respondent no.1 for voluntary retirement was accepted by the Competent Authority on 6th February, 2006 without imposing any conditions and without rejecting any of his claims for seeking proforma/*ad hoc* promotion on account of NBR. Consequently, Respondent no.1 relinquished the charge of the post of AEE/Headquarters in the afternoon on 6th February, 2006.

11. Since the request of respondent no.1 to give proforma/*ad hoc* promotion from 20th August, 2004 was disregarded by the petitioner, he filed an original application, being OA 2445/2006, before the Tribunal. In the said original application, the petitioner did not appear nor did they file a reply, entailing the passing of the order dated 27th September, 2007 by the Tribunal directing the petitioner to treat the original application and the grounds raised therein as supplementary representation of the respondent no.1 and to decide the same by a speaking order within three months. The Tribunal also directed that the respondent no.1 be heard in person before final orders are passed.

12. Pursuant to the direction of the Tribunal, the representation of respondent no.1 seeking grant of proforma/*ad hoc* promotion under the Next Below Rule from 20th August, 2004 was rejected by the petitioner by letter dated 2nd January, 2008 without giving the opportunity of personal hearing to respondent no.1, in compliance with order dated 27th September, 2007 passed in OA 2445/2006. Therefore, the respondent no.1, filed an appeal in July, 2008 to the General Manager, West Central Railway for grant of the opportunity of personal hearing. However, no response to the appeal was received by respondent no.1. Respondent no.1, therefore, filed another original application, being OA 2245/2008, before the Tribunal, which was disposed of by order dated 20th October, 2008 directing the Appellate Authority to deal with and dispose of the appeal of respondent no.1 in accordance with law. The

petitioner and respondent No. 3 thereafter rejected the claim of respondent No. 1 by order dated 18th March, 2009 on the ground that the benefit of fixation of pay under Rule 1316(1) (FR 22C) can be given under NBR to the seniors with reference to that of juniors only in cases where the promotion of seniors and juniors are on a regular basis. It was asserted that since the junior to respondent No. 1 had been given *ad hoc* promotion, therefore, respondent No. 1 is not entitled for proforma promotion and thus, claim of respondent no.1 for pay fixation under NBR viz-a-viz his junior, who was promoted to Senior Scale on *ad hoc* basis, was declined, entailing the filing of another original application, being OA No. 3522/2009, titled as 'Sh. S.K. Gangal Vs. UOI & Ors.', which was disposed of by order dated 12th May, 2010.

13. Respondent no.1 assailed the order of the petitioner dated 18th March, 2009 before the Tribunal on the ground that it was arbitrary, unreasonable, and discriminatory and in complete contravention of Article 14 and 16 of the Constitution of India. Respondent no.1 also contended that the concept of 'Next Below Rule' is intended to protect the interest of a Government servant who is working on deputation under the Government outside his regular line of service, which has been wrongly interpreted by the petitioner. It was also submitted that as per rules, Group 'B' Officers are promoted to officiate in the Senior Scale on *ad hoc* basis against regular vacancies and that this is not a stop gap arrangement and with regard to this he also placed reliance on Rule

214 of the Indian Railway Establishment Code Vol.1. Respondent no. 1 further cited instances wherein the petitioner had given the benefit of proforma promotion under NBR for certain persons in similar circumstances. He referred to the cases of Sh. R.L. Dogra, Accounts Officer, and Sh. Praveen Kumar, a Group 'B' Officer, who were on deputation and were granted proforma promotion under the NBR by the petitioner.

14. Before the Tribunal, the claim of respondent no. 1 was contested by the petitioner on the ground that when the DPC was held in West Central Railway on 20th August, 2004 for promotion of Group 'B' Officers to Senior Scale on *ad hoc* basis for Electrical Department, one post of Senior Scale was kept vacant for respondent no.1 who was likely to come back to West Central Railway from deputation, while his junior, Sh. S.K. Agarwal, was considered for promotion and placed on the panel. On completion of deputation in DMRC, respondent no.1 was repatriated to the West Central Railway and posted as Assistant Electrical Engineer/Headquarters on 28th October, 2005. However, respondent No. 1, before joining the West Central Railway (hereinafter referred to as WCR) sought voluntary retirement which was granted, and consequently, respondent No.1 had voluntarily retired on 6th February, 2005, therefore he is not entitled for proforma/*ad hoc* promotion. Relying on Rule 25 and 26 of the Master Circular No. 56, it was asserted that it is applicable only in cases where an officer has

been given officiating promotion and therefore, the respondent No. 1 is not entitled to receive proforma promotion to Senior Scale under NBR. It was categorically contended that respondent No.1 had worked in WCR for very few days and if he would have stayed, he might have been considered for *ad hoc* promotion to Senior Scale with prospective effect subject to suitability adjudged by the DPC. Relying on Recruitment Rules governing appointment to Senior Scale post in organized services, it was asserted that only Group 'A' Junior Scale officers, who have rendered the prescribed years of service in Group 'A', are eligible for such promotions and in terms of the rules, a Group 'B' officer has the avenue of promotion to Group 'A' service at the Junior Scale level on the basis of selection and not directly to Senior Scale. A Group 'B' officer, according to the petitioner, has no right under the rules for promotion to senior scale without first having eligibility.

15. The Tribunal, after carefully taking into consideration the pleas of both parties, ultimately allowed the original application of respondent no.1 by relying on the note dated 3rd October, 1962 of the Ministry of Finance and Rule 214 of the Indian Railways Establishment Code (IREC) Vol.1 which specifically provides for *ad hoc* promotion to Senior Scale.

16. The Tribunal also relied on a decision of a coordinate bench in TA 108/1986 dated 29th September, 1987 titled as 'Suraj Bhan Sharma Vs.

UOI', (1988) 6 ATC 368, wherein the term "fortuitous promotion" was defined as one being officiating promotion as a local arrangement in leave or other short vacancies where it is administratively inconvenient to post the person eligible for such promotion. It was held that since the vacancy in the matter was a regular vacancy, therefore the appointment to the said post cannot be termed as fortuitous. Reliance was also placed on the order of the Full Bench in OA No. 2286/2002 titled as 'Sh. Bhagwan Dass Vs. UOI & Ors.' decided on 21st July, 2003. The Tribunal further referred to the promotion given under NBR to Sh. Praveen Kumar, a Group 'B' Officer of the Railways, who had been placed in Senior Scale (on *ad hoc basis*) w.e.f. 2nd September, 2002 under the NBR and as these facts were not refuted and were fairly conceded by the counsel for the petitioner. In view of the above mentioned reasoning, the Tribunal directed that the respondent no.1 should be given proforma promotion under the NBR from 20th August, 2004 and consequently, the pay of respondent no.1 should be re-fixed and his post retirement benefits also ought to be re-calculated and the arrears made over to respondent no.1 would be given with 6% simple interest per annum. Thereafter, the petitioner filed a Review Application against the order of the Tribunal, which was however dismissed by order dated 19th July, 2010 entailing the filing of the above mentioned writ petition before this Court.

17. The order of the Tribunal is impugned by the petitioner inter alia on the grounds that the claim of the respondent No. 1 for promotion at par with his junior has to be effected through the process of constituting a Departmental Promotion Committee, and in the case of the respondent no.1, there was no occasion to constitute the DPC as prior to his repatriation, i.e. on 18th August, 2005, he had tendered an application for seeking voluntary retirement due to domestic reasons. It was also contended that as a matter of fact, the sequence of events show that respondent no.1 had hardly spent any time on duty and was on leave for a number of days. Regarding the promotion of Sh. Praveen Kumar by letter dated 17th October, 2002 to Senior Scale on *ad hoc* basis under NBR Rule, which was relied on by the Tribunal, it was contended that the benefit given to the said officer was wrong as the same was applicable in case an officer is given an officiating promotion under Rule 25 and 26 of the Master Circular No. 56 and that it would not apply in case of *ad hoc* promotion.

18. The writ petition is contested by respondent no. 1 on the same pleas and contentions which were raised before the Tribunal by respondent no.1 in his original application and reliance has also been placed on the documents produced before the Tribunal, copies of which have already been produced before this Court. The learned counsel for the respondent No. 1 has also relied on AIR 2010 SC 1682, UOI & Anr .Vs. Hemraj Singh Chauhan & Ors. ; 1964 (7) SCR 471, State of Mysore

Vs. MH Bellary; 2005 (6) SLR 231, Tarlok Singh Vs. UOI; 1996 SCC (L&S) 573, Block Development Officer's Association Vs. State of MP and Ors.; 2002 LS (SC) 877, Tejindra Dhawan, Calcutta Vs. UOI to contend that respondent No. 1 is entitled for proforma *ad hoc* promotion on the ground that a person junior to respondent No.1 had been given *ad hoc* promotion and later on he was regularized.

19. In Tarlok Singh (Supra) decided by the Division Bench of Punjab & Haryana High Court, the employee was empanelled and a person junior to him was promoted. It was held by the High Court that having granted the empanelment, it would be wholly unjust and inequitable to deny the consequential benefits to him, by holding that the period could not be counted as service for the purpose of promotion and selection grade. In the circumstances, direction was given to release the proforma promotion together with consequential benefits and selection grade from the date the same were given to persons junior to the said employee.

20. In State of Mysore Vs. M.H. Bellary (supra), it was held that where promotions are based on seniority cum merit basis, an officer on deputation has a legal right to claim promotion to a higher post in his parent department, provided his service in the department to which he is lent is satisfactory. In the instant case, the employee was a Govt. servant in one of the departments of the Bombay Govt. and was sent on

deputation to another department for a long period during which he was given a number of promotions. Thereafter, he was reverted back to his parent department, however, he was given a lower grade while another Govt. servant who was below his rank was promoted as Assistant Secretary. In the petition filed before the High Court, it was held that the employee was entitled to invoke the jurisdiction of the Court when there is a violation of a statutory rule. Even on merits, it was held that the employee was entitled to the relief claimed, which was affirmed by the Supreme Court after High Court had granted a certificate under Article 133 of the Constitution.

21. In *UOI & Ors. Vs. Hemraj Singh Chauhan (supra)* the Supreme Court had held that the right of eligible employees to be considered for promotion is virtually a part of their fundamental right guaranteed under Article 16 of the Constitution of India.

22. In *Block Development Officers Assn. (supra)*, the Supreme Court had considered the right of the deputationist in his parent department. In the instant case, the employee was working with Panchayat and Social Welfare Department of the State of MP and was sent on deputation as BDO to the Panchayat and Rural Development Department. During the period the employee was on deputation, his juniors in the parent department had been promoted to higher cadre, however, the case of the employee was not considered. The appeal of

the employee was allowed and the State of MP was directed to consider the employee for promotion from the date his juniors, if any, were promoted.

23. In *Tejendra Dhawan, Calcutta (supra)*, it was held that a person on deputation has a right to get benefit accruing in the parent cadre. In the instant case, when the employee was on deputation, Govt. constituted new cadre by framing Central Labour Service Rules, 1987 under which the juniors to the appellant had been given higher benefits. The employee had sought similar benefits on the ground that employees junior to him had been granted higher benefits, which was contested by the Govt. on the ground that benefit accruing to the parent cadre cannot be made applicable to a deputationist as he had opted to go out of the cadre on deputation. The plea was repelled by the Supreme Court holding that the deputationist would also be allowed to the benefit which had accrued in the parent cadre.

24. The learned counsel for the petitioner has not been able to refute the note dated 3rd October, 1962 which contemplates that the benefit of officiating promotion can be given under the next below rule for the periods during which the NBR rule is satisfied. The note dated 3rd October, 1962 does not contemplate that it is to be given only in respect of promotions given to juniors on a regular basis under Rule 1316(1) (FR 22-C), as had been contended.

25. If that be so, the plea of the learned counsel for the petitioner that the benefit of fixation of pay under Rule 1316(1)(FR 22-C) can be given in the case of promotions under the NBR only in cases where promotion of seniors and juniors are on a regular basis is not sustainable. The learned counsel for the petitioner is also unable to show any rule or policy that the promotion under the next higher rule can be given only in case of officiating promotions and not in case of *ad hoc* promotion. Rather, before the Tribunal it was conceded that the promotion had been given to Sh.Pravin Kumar, a group B officer, who had been on deputation and who had been placed in senior scale on *ad hoc* basis.

26. Not only was in the case of Sh.Praveen Kumar the Next Below Rule applied, though his junior had been given *ad hoc* promotion, but even in the case of Sh.R.L.Dogra, an Accounts Officer, who was on deputation, promotion had been to Senior Scale on *ad hoc* basis under the 'NBR' rule by order dated 20th May, 2004. Before the Tribunal, the plea of the petitioner as well as respondent Nos.2 and 3 was that applicability of Rule 25 and 26 of the Master Circular No.56 is only in cases where an officer has been given officiating promotion. The claim of respondent No.1 for promotion under the NBR rule was also contested on the ground that he had worked in the Western Central Railway for only a few days and that if he would have stayed, then he could have been considered for *ad hoc* promotion to the Senior Scale from the prospective effect subject to suitability adjudged by the DPC.

In para 4.17 of the counter reply dated 24th February, 2010 filed on behalf of the petitioner and respondent Nos.2 & 3 before the Tribunal, it was contented as under:.

“On 28.10.05	Reported WCR and posted as AEE in CEE Office.
From 31.10.05 to 15.11.05	Availed leave refixing/suffixing holidays
On 16.11.05	Attended Office
On 17.11.05	Availed leave
On 18.11.05	Attended Office
From 21.11.05 to 04.02.06	Availed leave office prefixing/suffixing holidays.
On 06.02.06	Attended office and relinquish the charge on voluntary retirement in terms of this office letter No.17/2006 dated 01.02.06.

From the above table, it is clear that applicant has worked in WCR for very few days. **If he would have stayed he might have been considered for Ad-hoc promotion to Sr.Scale from the prospective effect subject to suitability adjudged by the DPC.”**

From the above it is clear that the plea of the petitioner and respondent nos. 2 & 3 was not that *ad hoc* promotion under ‘NBR’ could not be given as it is contrary to any rule. But it was not given to the respondent no.1 as he had not stayed in his parent department.

27. Even though respondent no.1 categorically contended that *ad hoc* promotion had been given applying the NBR rule in the cases of

Sh. Praveen Kumar and Sh. R.L.Dogra, however, in the counter reply filed before the Tribunal, it was not contended that they were wrongly given the promotion. The Tribunal also relied on the fact that the counsel for the petitioner and respondent nos.2 and 3 had conceded to the point while appearing before it. In the writ petition filed before this Court, however, it has been contended that the benefit of *ad hoc* promotion which had been given to Sh.Praveen Kumar is wrong and that it was brought to the notice of the Tribunal by showing the annexures in the counter reply as alleged in ground 5 of the writ petition. The annexures which were annexed to the counter reply filed before the Tribunal were the letter dated 2nd January, 2008 from the Chief Personnel Officer to respondent no.1 stipulating that as per the rule, NBR is given only if the promotion of the junior is on regular basis and not on *ad hoc* basis. It was not contended that the promotion under NBR can be given if the promotion of the junior is on regular basis and not on *ad hoc* basis. The relevant extract of letter dated 2nd January, 2008 is as under:-

“As per rule, NBR is given to the seniors who are deputation etc. and not on roll of the cadre and their juniors are promoted. But the promotion of junior should have been on regular basis and not on *ad hoc* basis. Since, Group ‘B’ officers are promoted to Senior Scale on *ad hoc* basis, your claim for NBR vis-a-vis his junior promoted to Senior Scale is not tenable. Therefore NBR may not be given in your case.

Please acknowledge the same.”

28. Another annexure filed by the petitioner and respondent nos.2 and 3 was a letter dated 13th March, 2009 from the Under Secretary Railway Board to the General Manager, Western Central Railway, that Rule 25 and 26 of Master Circular No.56 shows that it is applicable where an officer has been given officiating promotion. Since the junior of respondent no.1 had been given *ad hoc* promotion, therefore, he cannot claim this benefit under the said rules. The plea in this communication is contrary to the plea taken in letter dated 2nd January, 2008 that promotion under 'NBR' can be given only if the junior has been promoted on regular basis. The said communication does not deal with the specific plea taken by respondent no.1 in his appeal against the rejection of his representation for grant of proforma promotion and fixation to Senior Scale under the NBR that Master Circular No.56 and the rules there under do not disentitle the respondent no.1 for the *ad hoc* promotion. Respondent no.1 had categorically stated that as per Master Circular No.56 issued by the Ministry of Railways, the benefit of officiating promotion under the rule should be allowed and it applies if all the officers senior to the officer who is away on deputation are promoted. The other relevant conditions under para 25 dealing with 'NBR' are that (ii) the officer immediately junior to him should have been given officiating promotion; (iii) the benefit should be given to only one officer against one vacancy; (iv) the benefit of officiating promotion should be allowed only against promotions in a cadre, in vacancies of more than 90 days duration. In

case of respondent no.1, all these conditions were fulfilled. The learned counsel for the petitioner has not explained as to how these conditions under para 25 of the Master Circular No.56 are not fulfilled in the case of respondent no.1 and he is not entitled for promotion under the NBR rule. Respondent no.1, in his appeal filed before the General Manager, Western Central Railway, had also categorically averred that para (ii) of Rule 26 had been misinterpreted deliberately in his case by some interested persons in the administration as the condition the said sub para deals with does not apply to the case of the respondent no.1, which condition is only in relation to cases where vacancies caused in the cadre is not filled up by making promotion on *ad hoc* basis. According to him, this condition is applied only in cases where no officer junior to such officer eligible for promotion within the cadre is available and as in his case his next junior, Sh.S.K.Aggarwal, was available in the cadre and was duly promoted, therefore, the said condition is not applicable. The ground taken by respondent no.1 in para 9 of his appeal dated July, 2008 filed before the General Manager is as under:-

“.....The misinterpretation of the rule is caused deliberately by some interested person in the administration who is wrongly applying irrelevant condition no. (ii) under Para 25 which is not applicable in the case of the applicant. This condition ‘the vacancy caused in the cadre is not filled up by making promotion on *ad hoc* basis.....’ Applied only in cases where no officer junior to such officer eligible for promotion within the cadre is available. Here in my case, my next junior Sh. S.K. Agarwal was very much available in the cadre and was duly promoted. The interpretation thus being given by the administration that ‘the promotion of

junior should have been on regular basis and not on *ad hoc* basis' is therefore wrong, arbitrary and unreasonable and quite in violation of the spirit of the NBR rules."

The learned counsel for the petitioner has not been able to refute this plea nor has been able to substantiate the plea taken in the writ petition that Rule 25 and 26 of the Master Circular No.56 do not entitle respondent No.1 for *ad hoc* promotion under the NBR rule.

29. Along with the counter reply filed before the Tribunal, the petitioner and respondent Nos.2 and 3 had also filed a Railway Board's letter No.E(O)(iii)/SPL/2006/39 dated 31st December, 1985 which was regarding promotion of group 'D' officer to senior scale on *ad hoc* basis as annexure R (iii). Annexure R (iv) which was filed before the Tribunal with the counter reply by the petitioner and respondent nos. 2 & 3 was a copy of general conditions of service. Learned counsel for the petitioner has not been able to show as to how the letter dated 31st December, 1985 regarding promotion of group 'D' officer to Senior Scale on *ad hoc* basis and the general conditions of service would disentitle the respondent no.1 for promotion under the NBR rule.

30. The guiding principles for the working of the Next Below Rule is as under:-

"(4) Guiding principle for the working of the next below rule-The Government has sanctioned the adoption of the

following guiding principle in regard to the working in future of the next below rule.

The intention of the so called rule was apparently that an officer out of his regular line should not suffer by forfeiting acting promotion which he would otherwise have received had he remained in his regular line. From that it follows that the fortuitous acting promotion of someone junior to an officer who is out of the regular line does not in itself, give rise to a claim under the “next below” rule. Before such a claim is established, it should be necessary that all the officers senior to the officer who is out of the regular case the acting promotion is not given because of inefficiency, unsuitability or leave. In the event of one of these three being applicable to the officer immediately below the officer outside his regular line, then some other officer, even more junior, should have received acting promotion and the officer, if any, in between should have been passed over for one of these reasons.

(32) The ‘Next Below Rule’ and its exact scope- Doubts have frequently been expressed regarding the exact scope of the various rulings issued in connection with the operation of the ‘Next Below rule’. For avoidance of doubt, the extant decisions on this subject have been summarized below-

2. The working rule subjoined to this paragraph may be taken to express the convention which is commonly known as the ‘Next Below Rule’ as originally approved, and its provisos, the modifications made from time to time. **The intention underlying the “rule” is that, an officer out of his regular line should not suffer by forfeiting the officiating promotion which he would otherwise have received had he remained in the original line.** The so-called “rule” is not a rule of any independent application. It sets out only the guiding principles for applications in any case in which it is proposed to regulate officiating pay by special orders under the second proviso to FR 30(1). The conditions precedent to the application of the ‘Next Below Rule’ must, therefore, be fulfilled in each individual case before action may be taken under this proviso. It also follows that the benefit of officiating promotion is to be given only in respect of the period or periods during which the conditions of the ‘next below rule’ are satisfied.

“Rule- When an officer in a post (whether within the cadre of his service or not) is for any reason prevented from

officiating in his turn in a post on higher scale or grade borne on the cadre of the service to which he belongs, he may be authorized by special order of the appropriate authority pro forma officiating promotion into such scale or grade and thereupon be granted the pay of that scale or grade, if that be more advantageous to him, on each occasion on which the officer immediately junior to him in the cadre of his service (or if that officer has been passed over by reason of inefficiency or unsuitability or because he is on leave or serving outside the ordinary line or forgoes officiating promotion of his own volition to that scale or grade, then the officer next junior to him not so passed over) draws officiating pay in that scale of grade;

Provided that all officers senior to the officer to who the benefit under the substantive part of this rule is to be allowed are also drawing, unless they have been passed over for one or other of the reasons aforesaid, officiating pay in the said or some higher scale or grade within the cadre.

Provided further that, except in cases covered by any special orders, not more than one officer (either the senior most fit officer in a series of adjacent officers outside the ordinary line, or if such an officer either forgoes the benefit of his own volition or does not require the benefit in virtue of his holding a post outside the ordinary line which secures him at least equivalent benefits in respect of pay and pension that the next below in the series) may be authorized to draw the pay of the higher scale or grade in respect of any one officiating vacancy within the cadre filled by his junior under this rule."

3. The 'Next Below Rule' set out in the preceding paragraph, should be applied with due regard to the rulings or decisions mentioned hereunder-

(i) *A purely **fortuitous** officiating promotion given to an officer who is junior to an officer outside the regular line does not in itself give rise to a claim under the 'Next Below Rule'.*

(ii) The expression "outside the ordinary line" occurring in Fundamental Rule 30 (1) is not intended to be rigidly interpreted as necessarily involving a post either "outside the cadre of a service" or "outside the ordinary time-scale".

(iii) If Government have approved in any department a list of officers in order of merit for promotion to

administrative rank or a Selection Grade, then that order will prevail as the order of seniority of the officers in the ordinary gradation list of their cadre.

4. It has been held that holders of a special (e.g. tenure) posts such as Secretary ships to a Governor or a State Government should be ready to accept loss of officiating promotion for short periods to posts on a higher scale or grade in the ordinary line in consequence of their incumbency and that, when the stage is reached at which their retention involves loss of substantive or lengthy officiating promotion, the proper course is to make arrangements to release them from the special posts rather than to compensate them for the loss of officiating promotion under the 'Next Below Rule'. 'Short periods' should be interpreted as meaning periods not exceeding three months.

If in such a case the conditions of the 'Next Below Rule' are not satisfied and an officer is deprived of officiating promotion owing to its being impracticable for the time being to release him from the special post, he may be granted such compensation for loss of officiating promotion as would have been admissible under the 'Next Below Rule' for the period in excess of first of his retention in the posts in the public interest. No specification or declaration in terms of the second proviso to Fundamental Rule 30 (1) will be necessary in these cases and it will suffice if those authorities issue the requisite orders granting the officers concerned the compensation on that basis. As in the case of the 'Next Below Rule' the periods for which compensation equivalent to the 'Next Below Rule' benefit is allowed will count for increment in the higher scale or grade in which the officer would satisfied, the officer concerned may be granted under the second proviso to Fundamental Rule 30(1) the concession admissible under the 'Next Below Rule', but save in exceptional circumstances, such an officer should not be retained in the special post, if the pay attached thereto is lower than that admissible to him under the 'Next Below Rule' for more than six months beyond the date from which the 'Next Below Rule' begins to operate.

(G.I.F.D No.F.2(25)-Estt.III/46, dated the 2nd April, 1947 and G.I., M.F., (C.Da).U.O No.5635-PT-1/62, dated the 3rd October, 1962.)

(33) One for one Principle under 'Next Below Rule'.- It has been noticed that in some instances claims have been supported for the protection of more than one officer in respect of a single officiating appointment in cases where a consecutive series of two or more officers in a cadre are on deputation to posts outside the regular line, and the officer next below them is promoted to officiate in a higher post in the cadre. In order to eliminate any doubt in the matter, it has been decided that one officer and one officer only, namely, the most senior fit officer who is not debarred by the conditions prescribed for the application of the rule should be allowed the benefit under the 'Next Below Rule'.

It may happen that the senior most officer serving outside the regular line does not require to be protected under the 'Next Below Rule' by his belongings to one or other of the types indicated below:-

(i) An officer serving outside the ordinary line holds a post carrying a scale of pay identical with that of an administrative post in the ordinary line, and is, by virtue of a declaration in terms of the Exception below FR 22, eligible for the pay and incremental benefit of the higher post in the ordinary line and also for the benefit of the additional pension by virtue of a declaration under Article 475-A of the Civil Service Regulations.

(ii) An officer outside the regular line holds a post (generally temporary carrying better pay than the 'identical' scale, and qualifying per se or by special declaration, for special additional pensions as for the higher post in ordinary line.

In such cases, it has been decided that the promotion under the 'Next Below Rule' in respect of any one vacancy occurring in the regular line may go to the next senior most fit officer serving outside the cadre who is not independently protected in respect of pay, increment or pension by belonging to one or other of these types.

(G.I.M.F.O.M No.F.2(2)-Ests.III/46, dated the 9th May, 1949)"

31. From the above, it has not been explained satisfactorily as to how respondent no.1 is not entitled for promotion on account of promotion granted to his junior from 20th August, 2004. This is not disputed and cannot be disputed that the promotion to the junior of the respondent no.1 was not fortuitous.

32. The next plea raised on behalf of the petitioner to deny promotion to the respondent no.1 under 'NBR' is that he had applied for voluntary retirement on 18th May, 2005 before he was repatriated to the Western Central Railway and posted as AEE in the CEE office on 28th October, 2005 and that he had worked for only a few days. Thereafter, respondent no.1 was granted voluntary retirement w.e.f. 6th February, 2006. Before the Tribunal, it was contended that if he would have stayed he might have been considered for *ad hoc* promotion to Senior Scale from the prospective effect. From the rules relating to Next Below Rule, the learned counsel for the petitioner is unable to explain as to how the same will not be applicable in case an employee has sought voluntary retirement. This is not disputed that if the respondent no.1 was entitled for promotion under the Next Below Rule, it was prior to him seeking voluntary retirement and before he was granted voluntary retirement on 6th February, 2006. The case of respondent no.1 is that his junior, Sh.S.K.Agarwal, was placed in the panel for promotion to Senior Scale w.e.f. 20th August, 2004 and that his immediate junior was posted as Divisional Electrical Engineer while

one post of Senior Scale was kept vacant for respondent no.1, which fact has been admitted to by the petitioner in its orders dated 2nd January, 2008 and 18th March, 2009. If that be so, then the entitlement of respondent no.1 for promotion under the NBR rule shall be from 20th August, 2004 when his immediate junior was promoted, if found eligible by the DPC. Subsequently, if the voluntary retirement was sought by respondent no.1 which was granted unconditionally w.e.f. 6th February, 2006, then it would not affect the right of respondent no.1 for promotion under the `NBR'. The Tribunal has also considered that *ad hoc* promotion to group A was not fortuitous promotion. Rule 214 of Indian Railway Establishment Code (IREC) Vol.-I specifically provides for *ad hoc* promotion to Senior Scale. The relevant para of the rule reads as under:-

214. Powers of General Managers in making officiating promotions-The General Manager may appoint-

...

(b) a Group B officer to officiate in Group A, Senior Scale on *ad hoc* basis for a continuous period not exceeding one year on each occasion where circumstances warrant such course except to the posts of Security Officer, Law Officer, Hindi Officer, Chemist and Metallurgist, Public Relations Officer and Superintendent (Printing & Stationery);

Railway Minister's Decision-"Group 'B' Officers will be considered for *ad hoc* promotion to Senior Scale when Group 'A' (Junior Scale) Officers with three years of service in Junior Scale are not available."

33. In the present case, the *ad hoc* promotion which was given on 20th August, 2004 was not a stop gap arrangement as it is clearly evident from the notification dated 17th April, 1990 bearing no. Rly Bd's No. E (GP) 89/1/8 relied on by the respondent no.1, which is reflective of the intention of the petitioner by stipulating that once the Group B officers are promoted to Senior Scale on *ad hoc* basis there should be no reasonable chance to have them reverted to their earlier grade and therefore necessary precautions to prevent the same had been taken. The notification dated 17th April, 1990 is as follows:

"Rly.Bd's No.E(GP)89/1/8
Delhi, Dt. 17.4.90

New

Sub: Promotion of Group 'A' Officers to Senior Scale on *ad hoc* basis.

In terms of Board's letter No.E(GP)85/1/48 dated 31.12.85 Group A Junior Scale officers with more than 3 years of service, but less than 4 years are eligible to be considered for looking after the duties in Senior Scale, on payment of special Pay of Rs.150/- PM in addition to their pay in Junior Scale and it is only in the absence of group A officers who have completed the probation successfully that Group B officers who have rendered not less than 3 years service in Group B and have been adjudged suitable by a Committee of HODs for appointment against Senior Scale vacancies, are to be considered for *ad hoc* promotion to Senior Scale. This is based on the fact that all Senior Scale posts are in Group A and as such Group B officers, irrespective of their length of service, can have no claim for promotion to Senior Scale, even on *ad hoc* basis.

2. While the above position basically remains unchanged, it has now been decided by the Board, as temporary measure in the overall administrative interest, that in cases where a Group A junior scale officer who is eligible for regular promotion to Senior Scale officer who is eligible for regular promotion to Senior Scale having completed 4 years service, is not available, Group B and

have been adjudged suitable by a Committee of HODs for appointment against Senior Scale vacancies may be considered for *ad hoc* promotion to Senior Scale. In case no such Group B Officer is available, the provisions contained in sub paras 3.1(ii) and (iii) of Boards's letter dated 31.12.85 quoted above, shall continue to be followed.

3. While empanelling Group B officers for *ad hoc* promotion to senior scale, it shall henceforth be ensured that the criteria followed are such that there may be no reasonable likelihood of such officers not getting empanelled for regular promotion to Group A at a later date. Further when promoting Group B officers with 6 years service to senior scale, on *ad hoc* basis, it shall be ensured that adequate number of vacancies in senior scale would be available for Group A junior scale officers who would be completing 4 years of service within the next one year, so that there may be no reasonable chance of Group B officers having to be reverted, once they are promoted to senior scale even on *ad hoc* basis."

35. Reliance can also be placed on the judgments, Narayan Yeshwant Gora vs. UOI, (1995) 4 SCC 470 and Gurjit Singh Sahota vs State of Punjab, (1975) 4 SCC 687. In Narayan (supra) the appellant was on deputation in Census Department, while his juniors had been promoted as *ad hoc* in his Parent Department. The Supreme Court held that the appellant, regardless of being on deputation, since his post in Census Department and in the parent Department was *ad hoc* post and the Department itself considered that his continuance in the Census Department did not affect him, could not be prejudiced by not offering him the post of Assistant Director in the parent Department. Therefore, the benefit of the *ad hoc* promotion was given to the appellant and he too was deemed to have been working as Assistant

Director on *ad hoc* basis in the Parent Department from the date his junior was confirmed. In Gurjit Singh (supra) the appellant was appointed as Assistant Soil Conservation Officer (Class II) on 14-9-1962. When the appellant was working as Class II officer, the Government confirmed 5 Class II officers on 16-9-1968. The appellant was not one among them. But the order of confirmation stated that one post was reserved for the appellant for his being confirmed when found suitable. One Mehtab Singh who was a junior to the appellant in the post of Assistant Soil Conservation Officer was confirmed with effect from 10-6-1968. Subsequently, the appellant too was confirmed in Class I, however, later on he was reverted back to his earlier post in Class II. The Supreme Court, in view of the fact, held that if on the basis of the subsequent record of his service, the appellant was entitled to be promoted to Class I post in preference to any one of his four juniors, there was no justification for the order reverting him to Class II service, and, therefore, directed the Public Service Commission to consider the record of service of the appellant in Class I post on the basis of his *ad hoc* promotion to that post and to see whether he was eligible for promotion to that class of post in preference to any one of his four juniors who have been promoted to Class I posts.

36. For the foregoing reasons, this court is not inclined to interfere, in exercise of its jurisdiction under Article 226 of the Constitution of India, with the order dated 12th May, 2010 in OA No. 3522/2009 and the writ

petition is dismissed except to the extent that the petitioner shall hold the review DPC in respect of respondent no.1 for consideration of his *ad hoc*/proforma promotion to Senior Scale in terms of the relevant rules and regulations and from the relevant date.

37. In case the DPC recommends *ad hoc*/proforma promotion of respondent no.1, as a consequence, the pay of the respondent no.1 would be re-fixed and his post retirement benefits only would be re-calculated and arrears will be paid to the respondent no.1 with 6% simple interest per annum. Needful be done by the petitioner and respondent nos. 2 & 3 within 12 weeks. Interim order dated 28th September, 2010 is vacated and all the pending applications are also disposed of. The parties are, however, left to bear their own costs.

ANIL KUMAR, J.

SUDERSHAN KUMAR MISRA, J.

SEPTEMBER 16, 2011.

‘rs/vk’