

(1976) 08 CAL CK 0024

In the Calcutta High Court

Case No : F.M.A. No. 37 of 1968 and F.M.A. No. 243 of 1971

General Manager, Eastern Railway and Others

APPELLANT

Vs

Bibhuti Bhusan Roy
 Sachindra Nath Maity and
Another Vs Union of India and Others

RESPONDENT

Date of Decision : 08-08-1976

Acts Referred:

Constitution of India, 1950 — Article 311, 311(2)

Citation : 81 CWN 587

Hon'ble Judges : M.N. Roy, J;A.K. Sen, J

Bench : Division Bench

Advocate : Ajoy Kumar Basu and S.K. Roychowdhury in F.M.A. No. 37 of 1968 and Puspamoy Dasgupta in F.M.A. No. 243 of 1971, for the Appellant; Arun Kumar Dutta and Amar Nath Dhole in F.M.A. No. 37 of 1968 and S.K. Roychowdhury in F.M.A. No. 243 of 1971, for the Respondent

Judgement

M.N. Roy, J.—F.M.A. No. 37 of 1968 is an appeal under clause 15 of the Letters Patent against the judgment and order dated August 18, 1967, making absolute Civil Rule No. 927 (W) of 1963 by D. Basu, J. and F.M.A. No. 243 of 1971 is also an appeal under the said clause 15 against the judgment and order dated March 18, 1971, by P. K. Banerjee, J., discharging thereby Civil Rule No. 3160 (W) of 1966. Since the points involved in the two appeals viz., the scope, effect and interpretation of the 18 months Rule of the Railway were the same, by consent of Parties they were heard together and they would thus be disposed by one judgment. In F.M.A. No. 37 of 1968, the employee concerned viz., the respondent petitioner (hereinafter referred to as the said employee), who at the material time was holding the post of Chargeman, Grade "A", was appointed to officiate as Assistant Foreman Grade "B" since 1956 and as a Head Planner which is equivalent to the post of an Assistant Foreman "B" since January 31, 1961. Thereafter, on or about June 22, 1962, there was an announcement by the Deputy Chief Mechanical Engineer to the effect that a selection would be held by a Selection Board for the formation of a panel for appointment as Assistant

Foreman "B" and other posts and it is an admitted fact that the said employee was invited to appear in the said selection as an eligible candidate, but he failed in the selection test. He was allowed to appear in a fresh written test for the formation of panel of Assistant Foreman "B" and other posts, by order dated 18th/19th February, 1963. The said employee, instead of appearing in the said test, challenged the validity of the said order contending inter alia amongst others that since he was officiating in the post of Assistant Foreman "B" from 1956 i.e., for a period of more than 18 months, he cannot be asked to appear in any selection test for being empanelled as a candidate eligible for promotion to the post of Assistant Foreman "B" and furthermore he cannot be reverted from the said post without duly following the procedure as prescribed in the Discipline and Appeal Rules. Such contentions were raised in view, of the Railway Board's letter of May 21, 1956, which is to the following effect: --

"Copy of Board's confidential D.O. Letter No. E55--R.G. 6/26, dated 21.5.56 from Sri N. Kamalakara Rao, Rly. Board, New Delhi to Sri S. Sarangapani, General Manager, Eastern Railway, Calcutta.

You will remember that the Rly. Board in their letter No. E 44 PM 12 PT, dated 22.11.50 intimated that reversion of an employee from an officiating appointment to his substantive post or to a lower officiating appointment did not constitute a penalty. It was further clarified in para 3(b) of Board's Secret letter No. E 52 RG 6/12 dated 16.12.54 that such reversion on grounds of unsuitability will not attract the provision of Article 311 of the Constitution. Reversion in such circumstances would not constitute a penalty and would not necessitate the application of the procedure required by law and statutory rules.

The Railway Board have further thought to the matter. With the existence of a large number of temporary posts, continuing over long periods, cases are not unusual of persons having to officiate in higher grades for several years without being confirmed.

Normally the additional posts created would be permanent and the officiating employees would, if their service had been considered to be satisfactory, be confirmed very much earlier. Such persons could not therefore have been reverted to lower grades without following the procedure prescribed for reduction in rank. The Board consider that existence in the higher grades of an appreciable proportion of temporary posts, should not deprive Railway Servants of the protection that they would otherwise have obtained. On the other hand, it is necessary that every Railway servant must understand that his continued retention in a higher grade is dependent on satisfactory performance of his duties.

The Board, therefore, desire that with immediate effect the performance of every Railway servant officiating in a higher grade should be adjudged by the competent officer before the expiry of 12 months of total officiating service, and if the performance is not satisfactory either the Railway servant may be reverted

on the ground of unsuitability or he may be warned that his work is not quite satisfactory, but that he is being permitted to draw his increment in the expectation that his performance will improve during the next six months for which he will continue to be under observation. At the end of the extended period of six months i.e. of a total officiating service of 18 months either the person should be declared suitable for retention in the grade or should be reverted because he is unsuitable. Any person who is permitted to continue to officiate beyond 18 months cannot in future be reverted for unsatisfactory work without following the procedure prescribed in the Discipline and Appeal Rules.

The final assessment of the performance of each Railway servant officiating in higher grades at present, for a total period of over 12 months should be made without the next six months and action taken as indicated in the previous para, in respect of Railway servants officiating in higher grades for 18 months."

2. The present appellants contested the said Rule and they in their affidavit-in-opposition contended that the post of Assistant Foreman "B" and Head Planner, although of equal rank, were selection posts promotions to such posts could only be made by positive acts of selection viz., tests to be held by duly constituted Selection Boards in the manner prescribed by Rules. They also contended that the officiating promotions in the case of the said employee were nothing taut temporary arrangements or accommodations which could not in any event give him any right to the post held by him nor entitle him to claim that it is not necessary for him to pass the selection test. It has also been stated by the said respondents that because of the said employee's refusal or failure to appear before the Selection Board, he had been duly reverted back to his substantive post of Chargeman Grade "A" by the order dated March 19, 1964. Since this order was not known to the said employee, he did not challenge the same initially but on the disclosure as aforesaid, he got his petition amended by incorporation new grounds.

3. Thus the point on which the case was contested was the true scope and effect of the circular dated May 21, 1956, as quoted hereinbefore. Against the said circular, the respondents in the connected Rule relied upon the Rules in Chapter II of the Railway Establishment Manual, which govern promotions of subordinate staff and in particular to Rule 6(a) thereof. It was further urged by the respondents that the circular of 1956 being a confidential one, the court should not take any cognizance thereof and furthermore the post of Assistant Foreman "B" being a selection one (vide Appendix V of the Manual), no promotion could be made in contravention of Rule 6 as aforesaid. It was in fact contended that the circular could not override the Rules incorporated in Chapter II. It was further submitted that the promotion in the instant case, was a stop gap one and such promotion conferred no right to the promotional post as it was not a regular one nor was it made on eligibility. The respondents also contended that even if Rule 6 (a) of Chapter II had its origin in a circular, still there is no reason why the 1953 and 1956 circulars cannot stand together and they should not be

interpreted in an harmonised manner.

4. On the pleadings as aforesaid, the learned Judge in the trial court has held that Rule 6 (a) in Chapter II of the Manual has got no independent statutory origin. Such findings have been arrived at on a reference to the provisions in Appendix 10 of the Manual. It has also been found that the said Rule 6(a) is based on another Railway Board's letter Being No. E 48|R.C|1|18|3 dated November 21, 1953, which is to the following effect: --

"Serial No. 2343, Circular No. AE 2460|S.P.Pt I dt. the 14th December, 1953.

The following is published for information and guidance.

Copy of Railway Board's letter No. E 48 Rcl|18|3, dated 21st November, 1953, to General Managers, All India Railways etc.

Procedure for promotion to "selection",

"Non selection" posts-Non-gazetted.

The existing rules governing the promotion of subordinate staff are contained in Appendix II-A of Indian Railway Establishment Code, Vol. I. The Railway Board have had under consideration the need for amending these rules in order to define more precisely than at present.

(a) the grades upto which promotion will be made principally on seniority i.e. "non-selection" posts and

(b) the process of making selections.

After taking into account the various representations received on the subject including the views of the National Federation of Indian Railway it has been decided to modify the extent rules in Appendix IIA. R.I. to the extent indicated below.

(1) There will be only two categories of post "non-selection posts" and "selection posts".

(2) Non-section posts will be filled by promotion of the senior most suitable employees, the suitability being determined, by the authority competent to fill the posts on the basis of the records.

(3) Selection posts will be filled by a positive act of selection made with the help of selection Boards from among the staff eligible for selection, selection will be made on the basis,--of merit as assessed by the selection Board after examining the service records end interviewing the eligible staff.

(4) For the guidance of the selection Boards, the weightage to be given to the various factors influencing selection should be as follows:

a) Record of service 20 percent.

b) Seniority 30 percent.

c) Professional ability and capacity to do the particular job 20 percent.

d) Personality, address and leadership 30 percent

(5) The names of the selected candidates will be placed on the panel in the order of merit. The approval list should be treated as confidential as hitherto.

(6) All posts in grades or Rs. 200-300 and above should be treated as selection posts, certain specific categories which involve supervision and a degree of personal responsibilities in the grade Rs. 150-225 may also be included in the list of selection posts with the prior approval of the Railway Board. Reference in connection with such categories should be sent to the Board immediately, so that this will not hold up promotions.

In the case of running staff running allowances as represented by 50 percent of basic pay should be added to the pay scale for classifying posts as "selection".

(7) For posts filled on all Hallway basis, the selection Boards should consist of officers of not lower than junior Administrative rank. For other posts the selection Boards should consist of officers not below the Senior scale.

(8) If the competent authority does not accept the recommendations of the Selection Board, the case should be referred to the General Manager for instructions, why may constitute a fresh Selection Board at a higher level".

5. The learned Judge in the trial court has also found on a consideration of the letters as mentioned hereinbefore, that thus there is no reason why the latter Circular of 1956 should not prevail so far as it goes, both having the same origin. He has further held that in the Circular of 1956 as quoted hereinbefore, no exception has been made with respect to selection posts and on the other hand, the purport of the said Circular is to protect those who had been serving for a good number of years in an officiating capacity in a higher post and perhaps that too in view of the fact of their having acquired the experience of the higher post even though they might not have been promoted after any formal selection or competitive test. The learned Judge in the trial court has further over ruled the contention as mentioned hereinbefore, since in the case of a non-selection post there is no question of selecting from amongst the eligible candidates by application of any competitive test. On an interpretation of Rule 6 (a) of the Manual he has further held that the said Rule makes it clear that non-selection posts would be filled up by promotion according to seniority and it is only when a selection post is concerned, that seniority may lose its priority and in case, the senior most person fails in the test, he may have to go down, even though he might have officiated in the higher post for a long time and that is what is sought to be prevented by the 1956 Circular, apparently, in consideration of the hardship that might be caused to a person, who had been officiating in a higher post for a long time and also in view of the fact that he must have acquired working experience of the higher officer by reason of his officiation therein for a good

number of years. The learned Judge in the trial court has of course over ruled the contention of the respondents about the lack of statutory force and nature of the Circulars of 1953 and 1956 and has held that both the said Circulars have statutory force or a binding effect, when the Circulars in question have been issued by the Railway Board and the General Managers, they have acquired legal force even though they are not couched in the form of statutory instruments such as rules or regulations. Thus it has been held by the learned Judge in the trial Court that if, therefore, the conditions of service of Railway servants are sought to be governed by Circulars issued by the Railway Board and addressed to the General Managers and the other appropriate authorities, who control the employees and are bound to act according to those Circulars, they would be capable of being enforced by an aggrieved employee and the fact that such Circulars are marked "confidential" would not take away such right of the employees. In view of the above, the learned Judge in the trial Court made the Rule absolute holding further that the attempt of the respondents to enforce the said employee to appear in the selection test after having served in the higher Post for 7 years and thereafter to take disciplinary action against him for his failure to appear before the selection post, was contrary to Board's Circular of 1956, which at the material time was in force.

6. In Appeal No. 243 of 1971, the employees concerned, who are appellant petitioners (hereinafter referred to as the said appellants) were working as Tracers in the Office of the District Engineer, Bridge Special, Howrah under the Chief Engineer, Eastern Railway, Fairlie Place, Calcutta. They were appointed on diverse dates in 1940 and 1944 in the office of the said Chief Engineer, first as Peons and then as Daftaries. They had in fact served as such for 18 years and thereafter promoted as Tracers in the scale of Rs. 110-200/- after a qualifying test held on July 18, 1959 by a specially constituted Board. They have alleged that thereafter, they were posted as Tracers at the open line in or about August 1959, by orders issued by the Chief Engineer, Eastern Railway. The said appellants have alleged that such appointments of theirs as Tracers were made pursuant to applications made by them in response to an advertisement for such post. On such appointment as Tracers, after being successful in the test, the said appellant No. 2 was posted at Asansol but the said appellant No. 1 could not go to the place of posting at Asansol because of his illness. It appears from the records in this proceeding that subsequently the said appellant No. 2 made an application to the Chief Engineer, Eastern Railway, to the effect that he may be absorbed in the said post of a Tracer in the open line and it was also stated by him that he was ready to undergo any suitability test for the purpose, if required. He was appointed as Tracer as a stop gap measure and such fact would be apparent and clear from the concerned letter of appointment. It is also an admitted fact that the said appellants accepted such offer and were asked to appear in the examination for formation of panel of Tracers in the open line among the Class IV staff of the Chief Engineer's Office. Against such direction, they preferred an appeal to, the Chief Personnel Officer and by order dated July

16, 1966, it was directed that as the said appellants were not selected by a duly constituted Selection Board for the open line, their names were included in the list to appear before the Selection Board and as such they were asked to appear in the connected examination. Still then, the said appellants made representations stating that in view of the fact that they had already been working on officiating posts for more than 18 months and as such they should be deemed to have been confirmed and cannot be called upon to appear again in the examination. Because the said appellants failed and neglected to appear in the examination for the necessary selection for formation of panel, they were reverted to their substantive posts. Against such order of reversion, the said appellants obtained the connected Civil Rule No. 3160 (W) of 1966. In their affidavit-in-opposition to the said Rule, the respondents therein have contended that the said appellants' selection, if any, were made on the Construction Department and they were working in the Chief Engineer's office in the open line in the post of Tracers as stop gap arrangement and that would not give them any immunity to have any benefit or exceptions as have been claimed and the more so when such appointment in the post of tracers were made on stop gap basis and more particularly when in the appointment orders it had also been made clear that they would have no claim for future promotions. It has also been contended by the said respondents that the said appellant No. 2, when applying for appointment as aforesaid stated that he was ready to undergo any suitability test. They have further contended that the selection of the said appellants in the Construction Branch was not recognised in open line as in that case the other persons in the cadre on the said open line would be prejudiced. In view of the above, it has been contended that it was necessary for the said appellants, who were working on stop gap basis as Tracers in the open line, to appear in the selection test.

7. In the Rule, it was contended on behalf of the said appellants that since they were appointed as officiating Tracers for more than 18 months, the 18th months' Rule as contained in the Circular of May 21, 1956 would apply and they could not be reverted without following the procedure as laid down therein. The learned Judge in the trial court, after relying on the unreported decision of Anil Kumar Sen J. dated July 28, 1970, in the case of D. N. Modak vs. Union of India & Ors. (Civil Rule No. 56 (W) of 1965), held that the said appellants, not having any right to the post of a Tracer their reversion on the ground as noted hereinbefore, would not come within the provisions of the 18 months Circular. The learned Judge in the trial Court has further observed that the appellants, who did not appear in the open line selection test, were not entitled to be retained in the said post because of their refusal to appear in the examination and when admittedly, others who appear in the same, were successful. It has further been observed by the learned Judge in the trial court that the said appellant No. 2 in his letter in question specifically agreed to appear in the suitability test and after he was appointed, it would not line in his mouth to say that he was not going to appear in the test because he made a statement under a mistaken belief. On the

findings as aforesaid, the said Rule was discharged.

8. The principal point which has been agitated before us in these two appeals is as to whether the Respondent in the first appeal and the appellants in the second, are entitled to the benefits of the 18 months Rule as laid down by the Railway Board in its Circular dated May 21, 1956.

9. Apart from the Circular dated May 21, 1956 set out hereinbefore, the Circulars on which the learned Advocates placed reliance are quoted hereunder in seriatim as they would be relevant and material for the present purpose and for appreciating the arguments as advanced, on the construction and interpretation of the said 18 months Rule :--

GOVERNMENT OF INDIA MINISTRY OF RAILWAYS (RAILWAY BOARD)

No. E(D & A) 56.RG-6-A17

The General Managers, All Indian Rlys, & GLW & Ors.

1. No. E 51 RG 6-6 dt. 16.12.54

2. No. E 52 RG 6-12 dt. 1.12.54

3. No. E 55 RG 6-26 dt. 21.5.56

2. Article 311 (2) provides protection Rly. servants among others, in respect of dismissal or removal from service or reduction in rank. In affording such protection Art, 311 does not, in terms, say that the protection extends only to persons who are permanent members of the service or who hold permanent civil posts. To limit the operation of the protective provisions of this Article to these classes of persons will be to add qualifying words to the Article which is not warranted. The protection of this is thus available to both permanent and temporary railway servants without distinction.

Dated 31.7.58, New Delhi .

Sub: Reversion from officiating appointment-- Circumstances under which it attracts the provisions of Art. 311(2) of the Constitution.

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Reference : Board's letter noted in the margin regarding the interpretation of Article 311(2) of the Constitution. Consequent on a judgment recently delivered by the Supreme Court in the case of an employee of the Northern Railway, copy enclosed, it has become necessary to clarify the implications and consequence of that Article of the Constitution.

The judgment referred to earlier makes it clear that a termination of service brought about by the exercise of a contractual right or compulsory retirement in terms of a specific rule does not amount to the infliction of a punishment and,

therefore, does not attract Article 311 (2). In determining whether a servant, permanent or temporary, is due the protection or not, it is necessary to determine whether he has a right to hold that post. In the absence of any special contract, the substantive appointment to a permanent post gives the servant to appointed a right to hold the post until, under the rules, he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years of service, or the post is abolished. Having acquired the right, his services cannot be terminated and he cannot be reduced in rank except by way of punishment for misconduct, negligence, inefficiency or any other disqualification. On the other hand, appointment to a permanent post in Govt. service, either on probation or on an officiating basis, is terminable at any time under the ordinary law of master and servant, as the servant in question does not acquire any substantive right to the post, similarly appointment to a temporary post may also be substantive or on probation or on an officiating basis. In this case also, the servant so appointed acquires no right to the post and his service may be terminated at any time, except in one case, namely, when the appointment to the temporary post is for a definite period. It follows that, in the case of a servant who has no right to a particular rank or post the termination of his service or his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment. In case of doubt as to whether the particular reduction in question is by way of punishment, it is necessary to apply two tests (1) whether the servant had a right to hold the post or the rank and (2) whether he has been visited with evil consequences. The first has been referred too earlier. The latter may be, for example, a reduction in pay to the employee, in his substantive rank or his being declared ineligible for future consideration for promotion. If the case in question satisfies either of these two tests, then it must be held that the servant has been punished and the requirements of the rules and Article 311 must be complied with.

4. While Article 311(2) may not be attracted on, reversion from an officiating post in certain circumstances as clarified above, administratively, the staff are nonetheless due some protection against such reversion. In this connection, attention is invited to the Board's d.o. letter No. E-55/ RG-6-26, dated 21.5.56 in which it was laid down that an officiating railway servant can be reverted on grounds of unsatisfactory performance and or unsuitably in the first year of his officiating or if the period is extended by another 6 months with a warning --in the first 18 months but that thereafter reversion may only be made after observance of the disciplinary procedure.

5. The position, therefore, is that in law of termination of permanent or temporary service brought about by the exercise of a contractual right and termination of the appointment to a permanent or temporary post in Government service either on an officiating basis or on probation does not attract Article 311(2); but, in respect of officiating railway servants, who have already officiated for a period of 12 to 16 months, as mentioned in the Board's d.o. (letter No. E55RG-6-26 dated 21.5.56, such reversion cannot administratively be made

without the observance of the disciplinary procedure.

6. A suitable form for use in cases of reversion from an officiating post is enclosed for information.

DA: 2 Copies of judgment and form for use.

Sd/- M. A. Qudeer,

Director, Estabbl. Rly. Board.

Copy of Rly. Board's Confd. letter No. E (D & A) 65-RG6-24 dated 9.6.65 to G.Ms. All Indian Rlys.

Sub :--Reversion on grounds of general unsuitability of staff officiating in a higher grade or post.

In Sri N. Kamalakara Rao, Director Establishment's d.o. No. E 55-RG-6-26 dated 21.5.1956, it was inter alia, stated that any person who is permitted to continue to officiate, beyond 18 months cannot in future be reverted for unsatisfactory work without following the procedure prescribed in the Discipline and Appeal Rules. These instructions were cancelled vide Board's letter Nos. E (D & A) RG-6-5 dated 1.2.60 and 14.5.1960, thus permitting the reversion of an employee officiating in a higher post, on grounds of general unsuitability, at any time and not necessarily within a period of 18 months, without following the procedure prescribed in the Discipline and Appeal Rules.

2. The Board have reconsidered the matter and feel that it would not be correct to effect such reversions after prolonged officiating periods. They have, therefore.

decided against that, in future, any person who is permitted to officiate beyond 18 months cannot be reverted for unsatisfactory work without following the procedure prescribed in the Discipline and Appeal Rules.

CALLS FOR IMMEDIATE (CONFIDENTIAL) EASTERN RAILWAY

No. E-308 Confdl. Vol. II Cat. 26th June, 1965

Br. DHM|

Sr. DHM|FA & CAO|COPS|

CME|EE|CEE|CSEE | COS: KG| CSO|CMD|C (CON)--38 Chowringhee, DS: HWH| SDAH|ASN|DHN| DRN, CAO(W) CCU: SW|KPA: DGME|HH|JMP: ALL SPOS & APOS|CCC. DES: LTE|JMP| KPA | DCCS : HLR | LIH | JMP: DEN: PD: MGS : MSW : HWR. Law Officer, 38, Chowringhee, Vigilance Officer: CCC, Enquiry Officer under CVO/CCC.

Re: D & A Rules-reversion on grounds of general unsuitably of staff officiating in a higher grade or post.

It has now been decided by the Rly. Board that in future any per-son who, is

permitted to officiate beyond 18 months cannot be reverted for unsatisfactory work without following the procedure prescribed in discipline and Appeal Rules. Therefore, it is now very essential to assess the performance of an officiating employee immediately after a period six months officiating service and again 12 months and action taken to revert the employee if at the end of 12 months he is not considered fit. It is now, therefore, necessary that the instruction regarding periodical assessment of the performance of an officiating employee should be scrupulously carried out. In this connection attention is invited to this office confidential circular No. AEA-4101 dated 31.5.60 and d.o. No. E-308|C|Confdl. Vol. I elated 19.5.1965.

In view of this decision of the Railway Board, the instruction contained in this office d.o. letter No. E-308|C| Confdl. Vol. II dated 18.6.1964 to DSs, S, KPA and DCMs (copy docketed to others) on 15.7.64 regarding obtaining prior approval of the head office for reversion of staff officiating in higher post for more than 18 months while no longer hold good and as such may be treated as cancelled.

A copy of the Board's letter No. E (D & A) 65-RG-6-24 dated 9.6.1965 is enclosed for information and guidance. Board's. d.o. letter No. E-55-RG-6-26 dated 21.5.1956 and their letters No. E (D & A) 6 ORG-6-5 dated 1.2.1960 and 14.5.60 were circulated under this office letter No. AE|4001 dated 21.5.1956, 3.3.60 and 25.6.60 respectively (copies enclosed for ready reference).

Sd/- Illegible. for Chief Personnel Officer.

Copy of Rly. Board's Confidential letter No E|(D & A) 65RG-6-24 dated 15.1.66 addressed to G. Ms. All Indian Rlys. & others.

Sub: Reversion on grounds of general unsuitability of staff officiating in a higher grade or post.

Reference Board's letter of even number dated 9.6.65 wherein it has, inter alia, been stated that, in future, any person who is permitted to officiate beyond 18 months cannot be reverted for unsatisfactory work without following the procedure prescribed in the discipline & Appeal Rules. A question has been raised whether this safeguard applies to persons who are officiating on promotion as a stop gap measure and not after empanelment (in the case of selection posts) and after passing the suitability test (in the case of non-selection posts.). It is clarified that the safeguard applies to only those employees who have acquired a prescriptive right to the officiating posts by virtue of their empanelment or having been declared suitable by the competent authorities. It does not apply to those officiating on promotion as a stop gap measure and also to those cases where an employee duly selected, has to be reverted after a lapse of 18 months because of cancellation of selection Board proceedings or due to a change in the panel position consequent to rectification of mistakes in seniority etc.

(This disposes of Dy. C.P.O|S.E. Rly's d.o. No. P|R|Con|II|Pt.V. dated 30.9.1965).

Sub : Reversion on grounds of general unsuitability of staff officiating in a higher grade or post.

Reference Board's letter of even number dated 9.6.65 on the above subject laying down that any person who is permitted to officiate beyond 18 months cannot be reverted for unsatisfactory work without following the procedure prescribed in the D & A Rules. The Board have considered the matter further and decided that while there should be no departure from the procedure laid in the letter referred to above, General Managers may in very special circumstances revert an officiating employee in relaxation of the time limit of 18 months, in exercise of their personal judgment.

Railway Board's No. E(NG) 1-69 CN 5|31 dt. 5.2.72 addressed to the General Managers All Indian Railways and Ors.

Sub : Confirmation of staff officiating in higher grades.

In continuation of the instructions contained in letter of even number dated 12.8.71 the Board desire that the cases of staff who have been promoted on a regular basis should be reviewed after completion of one year's continuous officiating service, even if a permanent vacancy does not exist; with a view to determining their suitability for retention in the grade. The review should be completed early and a decision to continue the employee in the officiating post or revert him, taken and implemented within a period of 18 months of officiating service. Having followed this procedure there should be no question of denying the benefits of confirmation to an employee on completion of two years officiating service in a clear-permanent vacancy for the reason that he is not fit for confirmation.

10. It has been submitted on behalf of the employees concerned in both the appeals that in view of the fact they have officiated and/or held and/or served in their respective posts from which they have been directed to be reverted, for more than 18 months, they have acquired a status or a right to those posts on proper appreciation and application of the said 18 months Rules or in interpretation and application thereof and as such they cannot be reverted, even, to their substantive posts, without following and except in accordance with the discipline Rules. In fact it was submitted that such reversion was not only illegal and irregular but the same was against all principles of natural justice and bad because such reversion was in fact and effect taken against them as a measure of punishment. It was further argued that the fact that the employees concerned were employed for a long time in their respective posts, negated the plea of stop gap arrangement in the matter of such appointment and as contended on behalf of the Railway administration. In fact relying on the Circulars as quoted

hereinbefore and their evolution, it was argued that they in fact classified and explained the safeguards available to the Railway employees and furthermore extended them to a class of employees, having given a prescriptive right to them. In fact relying on the case of Parshotam Lal Dhingra Vs. Union of India (UOI), , wherein it has been observed that the conditions of service of a Government servant appointed to a post, permanent or temporary, are regulated by the terms of the contract of employment, express or implied, and subject thereto, by the rules applicable to the members of the particular service, it was argued that since the said 18 months Rule governs or determines the terms of service and conditions of employment of the employees concerned, they would be entitled to the benefits of the same irrespective of the nature of employment, be it temporary or permanent. It was also submitted relying on the decision of Anil Kumar Sen J. in the case of Madhukar Raghunath Nafday Vs. Union of India and Others, , that the Railway Board having framed the 18 months Rule and having applied the" same in respect of the Railway employees, cannot deny its benefits to the employees concerned, as, such denial would lead to or result in unreasonable discrimination.

11. The said 18 months" Rule came up for consideration in various judgments of this Court and the interpretation"s as made are not uniform. The first of such determination was made by D. Basu J., in the unreported decision dated February 1, 1969, in Civil Rule No. 519 (W) of 1967, (Chandi Charan Dhar Vs. General Manager Eastern Railway & Ors.). In that case the petitioner was initially appointed as a Passenger Supervisor, Class II in 1948 and was confirmed in the said post in 1957. Thereafter, on March 5, 1969, he was appointed Investigating Inspector in the Vigilance Branch of the Railway Board and in 1967 he was reverted back to his substantive rank as Ticket Collector, Grade "A". In the above Rule, he challenged the said order of reversion and contended that the order in the instant case was really an order of reduction made in violation of Article 311(2) of the Constitution of India and principles of natural justice, apart from being malafide. It was also argued that such reversion from the Vigilance Organisation to the substantive post after the petitioner had officiated in the former post for more than 18 months contravened the Railway Board"s notifications dated July 31, 1958 and June 27, 1965 and particularly when the employee concerned had acquired a right to hold the post from which he had been removed or reverted and he has been visited with penal consequences. Such argument was sought to be based on the basis of the determination of the Supreme Court in the case of Parshottam Lal Dhingra Vs. Union of India (supra). It was further argued on the basis of the Rules in question and more particularly the protection as envisaged therein, that when an employee has officiated in a post for more than 18 months, he could not be reverted on the ground of unsatisfactory performance or unsuitability except after due observance of the disciplinary procedure. It was further urged that the reasonable interpretation of the connected Rule should be that since the disciplinary procedure must be complied with in case of reversion after 18 month of officiating service on the

ground of unsatisfactory work, the performance of each, officiating employee must be periodically assessed at the end of 6 and 12 months, so that the need for such reversion after 18 months officiating service may seldom arise. The respondents in that case contended that the said 18 months' Rule has no application since the petitioner's appointment to the Vigilance Organisation was a case of deputation for a tenure and he was released from the said tenure post after completion of the period of tenure and he voluntarily accepted the transfer back to his parent department. On the pleadings of the parties, the post of Vigilance Inspector was held to be tenure post and the petitioner was sent on deputation. The learned Judge, on the construction of the said 18 months' Rule held that (a) the periodical assessment would take place in respect of tenure posts also, so that the inefficient may be weeded out even before the completion of 18 months, (b) resort to the disciplinary action must be held if the holder of a tenure post is sought to be sent back after his completion of 18 months but before he completed the tenure and (c) no formality would be required for transferring such officer back to his parent department after he completes his tenure whether there is any allegation of inefficiency or not. The learned Judge accordingly discharged the Rule holding further that as the post held by the petitioner in the Vigilance Organisation was on deputation for a tenure and that he was reverted at the end of such tenure, there was no violation of the provisions of Article 311 (2).

12. The said 18 months' Rule thereafter came for consideration in Civil Rule No. 1358 (W) of 1967 (Nageswar Singh vs. General Manager, Eastern Railway & Ors.), The petitioner in that case was appointed as a Guard Grade "C" in the pay scale of Rs. 80-170/- in July 1953. Thereafter, on December 1, 1961 he was appointed to officiate as Vigilance Sub-Inspector in the grade of Rs. 205-280/- and then by an order dated December 18, 1962, he was appointed to officiate as Vigilance Inspector in the scale of Rs. 250-380/-. Thereafter, by an order, dated November 19, 1965, the petitioner was transferred from the Vigilance Organisation to the department under the Divisional Superintendent, Danapur and then by another order dated November 24, 1965, issued by the said Divisional Superintendent, he was posted as a Guard Grade "C". In the connected Rule the petitioner impeached the said order on various grounds. On the basis of the Circular of the Railway Board dated July 21, 1958. which presented the Rule to be followed in the case of reversion of Railway employees from officiating higher appointments to their substantive posts, it was contended that the petitioner who held the officiating post of Vigilance Inspector for more than 18 months could not be reverted to his substantive post, without following the disciplinary procedure and in every case of reversion after 18 months, whatever might be the reason or ground of such reversion, the disciplinary procedure as laid down in the Railway Establishment Code must be followed. It was also contended that even in a case where the reversion order was made after 18 months, not on the ground of unsatisfactory service or unsuitability, the disciplinary procedure would have to be followed, failing which the reversion

order should be held to be unlawful and contrary to the Rules prescribed by the Railway Board.

13. B. C. Mitra, J. discharged the said Rule on September 10, 1969. On a consideration of the said Circular dated July 21, 1958 and also the earlier one dated May 21, 1956, it has been held by the learned Judge that the disciplinary procedure in case of reversion after a period of 18 months is required to be adopted and followed only in those cases where the reversion order is made on the ground of unsuitability or unsatisfactory performance and there is nothing in either of the Circulars to warrant a proposition that disciplinary procedure should be followed even in a case where the reversion order is made after 18 months on administrative grounds other than unsatisfactory service or unsuitability. It has further been held that there is nothing in the connected Circular which requires that even in a case where reversion order is made on the ground that the post held by the employee was a tenure one, with a fixed term and the reversion order has been made on the ground that the tenure has expired, that the disciplinary procedure will have to be followed. Nor is there anything in the Circular requiring that the disciplinary procedure should be followed in a case where the reversion order has been made because the post is abolished or in a case where the officiating higher post was being held in a leave vacancy and the employee on leave has reported back for duty. The Railway employees on the basis of the Circular in question would not be entitled to claim that the disciplinary procedure should be followed even in cases where the reversion order has been made on the ground other than unsuitability or unsatisfactory performance. The Circulars clearly prescribe that where an employee, who was appointed to a higher post, has been found to be unsuitable or where his performance in the higher post has been found to be unsatisfactory, an order of reversion should not be made, if the employee has held the higher appointment for 18 months or more, without following the procedure prescribed for disciplinary action, as such reversion on the ground of unsuitability or unsatisfactory service, would have the effect of attaching a stigma to the service records of an employee and furthermore such a reversion, according to the Circulars, cannot be made without following the procedure prescribed in the disciplinary action.

14. Thereafter, the interpretation of the connected Rule came up for consideration in the case of D. N. Modak vs. Union of India (Supra) in connection with a reversion order dated December 5, 1964, passed by the Railway Administration in respect of the petitioner, who was appointed temporarily as a Tracer on a scale of Rs. 60-150|- since revised into Rs. 110-200|- in July 21, 1958. The petitioner in that Rule, while holding the post of Tracer, was promoted fortuitously on December 14, 1960 to the post of Draftsman in the revised scale of Rs. 205-280|- There was an intermediate post of Assistant Draftsman on the revised scale of Rs. 150-240|- and it was specifically mentioned in the said fortuitous order of promotion to the petitioner to a post two ranks above the one he was holding, that such promotion was purely a temporary local arrangement

made in the exigency of the work and that would not give him any right or claim for promotion in future. The petitioner was confirmed as a Tracer in 1963 and in 1964 he appeared in a suitability test for empanelment of candidates eligible for promotion from the substantive rank of Tracers to Assistant Draftsman. He failed in the test and the Railway Administration by order dated December 5, 1964, reverted him to his substantive rank of Tracer in the scale of Rs. 110-200|-. In the Rule, the petitioner impeached the said order to be illegal and irregular, contending that he having officiated in the promotional post of a Draftsman continuously for a period of about four years from December 14, 1960, could not be reverted to the substantive rank except by way of penalty imposed in a proper disciplinary proceedings and the order in question not only reverted him to a lower post but made him junior to a number of co-employees, who were always junior to him as Tracers. The respondents contended that the petitioner did not hold any appointment which could confer any right on him to the post of a Draftsman so that his reversion from the officiating post of Draftsman becomes unauthorised in law. It was also contended that the petitioner was holding such post only in the exigencies of the administration and purely as local arrangement when he failed to qualify himself in the suitability test which could render him eligible even for promotion to an intermediate rank of an Assistant Draftsman and as such he had been rightly reverted from the officiating post of Draftsman. It was also contended that the petitioner was never made junior to others recruited after him in the cadre of Tracers and in fact there was no infringement in the rule of seniority. The question on the point at issue emanating from the Railway Board's Circular dated May 21, 1956 containing the said 18. months" Rule, which provides that when an employee has officiated in a higher grade, his work should be adjudged preferably within a period of 12 months and in any event within 18 months in order to decide whether he should be retained in the said higher grade or not and if such evaluation is not made within 18 months, the employee concerned viz., who has been allowed to officiate for more than 18 months cannot in future be reverted for unsatisfactory work without following the procedure prescribed in the Discipline and Appeal Rules, was considered by the learned Judge and on the facts of that case, agreeing with the determination made by B. C. Mitra, J. in the unreported decision dated September 10, 1969 in Civil Rule No. 1358 (W) of 1973 aforesaid, discharged the Rule. The decision now under consideration in this appeal was also cited before the learned Judge and on facts, the said decision was found to be distinguishable. The learned Judge also expressed his doubts as to the correctness of the decision in view of the said determination in Nageswar Singh's case (Supra) and expressed his inclination to refer the matter to a Division Bench., if the facts were not distinguishable. The learned Judge discharged the Rule as he found that the petitioner was fortuitously promoted to two ranks above, the rank of Tracer then being held by him. He was not even confirmed as a Tracer when he was promoted as a Draftsman. He had not qualified himself either for the post of an Assistant Draftsman or that of a Draftsman and as he was called upon to officiate as Draftsman in the exigencies of the administration. The learned Judge of course

followed the determination in the said case of Nageswar Singh to the effect that an employee having no right to the post, his reversion would not come within the mischief of 18 months Rule.

15. Then came the two determinations of Sabyasachi Mukherji, J. in the unreported decisions in the case of (1) Bhabatosh Roy vs. Union of India & Ors., (Civil Rule No. 2907 (W) of 1966), dated November 17, 1970. The learned Judge, agreed with the determinations in the cases of Nageswar Singh vs. General Manager, Eastern Railway & Ors., (Supra) and D. N. Moddk vs. Union of India (supra).

While making the said determination, the learned Judge also made references to the determination of D. Basu J. as referred to hereinbefore and also to the decision of Assam High Court in the case of Amar Nath Sur vs. General Manager, North East Frontier Railway (Civil Rule, Rule No. 300 of 1968) since reported in AIR 1969, Assam 112, where it has been observed that even in a case where an order of reversion was innocuous, if it could be gathered that such order was passed because of the unsatisfactory nature of work of a person then the Circular would have application. On the facts of the case, the learned Judge, on a consideration and construction of the said 18 months" Rule has held that the purpose of the Circular is, firstly, to ensure that the individual who has been asked to officiate in a position in respect of which there is no impediment of his holding that position, should not be asked to go back from that position because of any unsatisfactory nature of his work beyond a certain point of time, otherwise it might seriously affect his other avenue of work and promotion and the other purpose is that an Administration, if it is to revert a person for unsatisfactory nature of work of a person, must be able to find out within 18 months and cannot be allowed to prolong the matter, otherwise it might lead to favouritism and arbitrary attitude in the administrative superiors. It has further been observed that it is to fulfill the aforesaid purposes that the 18 months" Rule was introduced and it has further to be considered in harmony of the Rules requiring appointments and the procedure for filling up vacancies.

16. Thereafter, such consideration of the said 18 months" Rule came up again before Sabyasachi Mukharji, J. in the case of (2) Kanti Gupta vs. Union of India & Ors., (Civil Rule No. 875 (W) of 1966) and by the unreported decision dated February 2, 1972, the Rule was discharged. In that case the petitioner was first appointed on September 27, 1947 as a Watchman in the Watch and Ward Department, East Indian Railway at Dhanbad which has thereafter been renamed as Railway Protection Force. The petitioner was confirmed on December 16, 1950 and then promoted to the post of Havildar on January 15, 1953 and subsequently confirmed as such with effect from May 3, 1956 by an order dated September 21, 1956 in the pay scale of Rs. 40 to 60|-. Thereafter, on the initiation of a Vigilance Organisation, the petitioner along with others were transferred to the same by an order dated May 14, 1956. In 1957 the said Vigilance Organisation was transferred from the administrative control of the

Chief Security Officer to that of the Senior Deputy General Manager and he continued in the said services till the issue of the impugned order dated May 2, 1956, whereby he was transferred from the Vigilance Organisation to the Railway Protection Force. Apart from other grounds, it was submitted in the Rule that as the petitioner had held the rank of officiating Watcher in the Vigilance Organisation for more than 18 months, in view of the Railway Board's Circulars, which prevented reversion back on the ground of inefficiency after a period of 18 months, he could not be reverted back in the manner as it was done. The submissions on the said 18 months Rule were negatived by the learned Judge, holding in the facts of the case that there was no violation of the 18 months Rule and the said Circular would not be applicable unless the reversion was on the ground of inefficiency and the more so when there was no reversion in the case.

17. After this the said 18 months Rule came up for consideration before Chittatosh Mookerjee J. in the cases of P. Satya Prasad Patnaik & Ors., vs. Deputy Chief Mechanical Engineer (Loco), South Eastern Railway & Ors., (Civil Rule Nos. 316-317 (W) of 1967 and in the case of Purnendu Chandra Pal & Ors., vs. Union of India & Ors., (Civil Rule No. 7232 (W) of 1968). In the first Rule, the petitioners were appointed as Cleaners in the, scale of Rs. 70-80|- in South Eastern Railway. Initially, their appointments were as Diesel Cleaners and in July 1963 they were temporarily promoted as Diesel Drivers' Assistants in the scale of Rs. 100-130|-. They continued to work as such till November 26, 1966, when an order was issued by the Divisional Personnel Officer, South Eastern Railway, whereby their seniority was interpolated with that of the Cleaners on the Steam side. Consequent to that order, the petitioners along with others were directed to be reverted to the grade of Second Fireman. Amongst other challenges, it was contended that such reversion of the petitioners, who were promoted to officiate as Diesel Drivers' Assistants beyond 18 months, was in violation of the 18 months Rule as incorporated by Railway Board's letter dated June 9, 1965. It was found by the learned Judge that the petitioners were not reverted on the ground of their unsuitability or unsatisfactory work but their reversion was for administrative reasons and as a consequence of interpolation of the seniority of Diesel Cleaners officiating as Diesel Assistants with that of the cleaners on the Steam side and as such the Railway authorities were not required to follow the procedure prescribed in the Discipline and Appeal Rules before such reversion, since the petitioners did not acquire any right to hold the said higher post. In making such determination, the learned Judge referred to and followed the determinations in the cases of Nageswar Singh vs. General Manager, Eastern Railway (Supra), Bhabatosh Roy vs. Union of India (Supra) D. N. Modak vs. Union of India & Ors. (Supra) and further noticed that the learned Judges in their determinations in the cases of Bhabatosh Roy vs. Union of India (Supra) and D. N. Modak vs. Union of India (Supra), considered the determination of D. Basu J. in the unreported decision now under consideration in this appeal but had followed the determination in the case of Nageswar Singh vs. General Manager, Eastern Railway (Supra) on the question of the interpretation of the said 18

months" Rule, The effect and import of the said 18 months" Rule as stated hereinbefore again canoe up for consideration before the said learned Judge in the case of Purnendu Chandra Paul & Ors., vs. Union of India & Ors., (Supra) and in the unreported judgment dated November 26, 1973, no view contrary to those as mentioned hereinbefore, has been expressed by him.

18. In a case, where the petitioners were appointed substantively in the rank of Shunters and had been officiating in the higher post of Train Clerks from time to time on fortuitous basis, the question of interpretation and application of the said 18 months" Rule came up for consideration before Anil Kumar Sen, J. in the case of Shri H. D. Mukherjee vs. General Manager, Eastern Railway & Ors., (Civil Rule No. 2548 (W) of 1971 and by his unreported judgment dated January 3, 1974, his lordship has discharged the Rule holding that this Court has repeatedly held that 18 months" Rule is not available to appointments made on stop gap basis or under fortuitous circumstances. It has further been held that the said Rules will have to be given a harmonious construction. The said Rule was never enacted to supersede the rule which lays down that appointments to selection post can be made only on selection, so that fortuitous appointments for some time for one reason or other cannot confer any right to the post without any selection.

19. Thus excepting the judgment under appeal and the decision in the case of M. R. Nafday Vs. Union of India & Ors. (supra), the determination of this court on the interpretation of the said 18 months" Rule are more or less uniform and the determinations do not accept the wide interpretation of the 18 months Rule as given in the judgment under appeal by D. Basu J. The case of M. R. Nafday Vs. Union of India (supra) is, however, wholly distinguishable as there the reversion was on the ground of unsatisfactory work contrary to the provisions of the Rule and not on any other administrative ground or for any other cogent reason justifying such reversion.

20. We have discussed the various decisions of the Calcutta High Court on the point of the interpretation of the concerned Rule and before we come to our conclusions, we think we should refer to and discuss the other cases on the point as were cited at the Bar.

21. In the case of Pasupati Narayan Singha Vs. Union of India, AIR 1971 Patna 18, it was contended that the impugned order not only reduced the petitioner in rank within the meaning of Article 311(2) without complying with the necessary formalities but an officer junior to him has been promoted, affecting thereby his further prospect of promotion. The respondents not only challenged the said averments as baseless but also contended that the petitioner was merely holding the concerned, post temporarily, on a stop gap basis and that he had no other claim to hold the post by virtue of the impugned order as issued, in 1967. It was also submitted that the petitioner had been temporarily "put to officiate" in a grade carrying on a higher scale of pay, only as a matter of local measure, on a clear understanding that the promotion would not confer on him any claim in future over seniors and empanelled- him and that his promotion, if any, was a

local arrangement and as it might have continued for over three months, the general manager's specific sanction had been obtained according to the rules. It was found in that case that the petitioner was not admittedly empanelled. In the said determination after quoting the relevant circulars it has been held that since the petitioner was temporarily put to officiate in higher grade as a stop gap measure, no right could be conferred on him to claim preference in future over the seniors and for higher grades unless he was duly selected. It has further been held that since the order or reversion was made to the substantive scale without any stigma, the same would not amount to reduction in rank by way of punishment and as such and also because of the fact that no statutory right was conferred, it was held that Article 311 (2), had no application.

22. The next case on which reliance was placed is the case of *Brajnath Rai Vs. Union of India and Anr.* AIR 1976 S.L.R. 295 In this case, the petitioner, who was found to hold substantive rank of Assistant Loco Foreman, was temporarily promoted to officiate as a Junior Fuel Inspector and then similarly was further promoted to officiate. Loco Inspector Safety. Later, he was reverted by an order dated April 12, 1973, to the post of Assistant Loco Foreman, which he challenged on various grounds including the ground that such an order violated the 18 months Rule.

23. In support of his contentions, the petitioner not only referred to the various relevant circulars on the point but also relied on the determination of this court in the case of *Madhukar Raghunath Nafdey vs. Union of India (Supra)*. Reference was also made to the case of *Amar Nath Sur vs. General Manager, N. F. Railway & Ors (Supra)*. The respondents on the other hand contended that the determinations in the cases as mentioned above were distinguishable on facts and in fact they have no application at all. It was also contended that the petitioner was officiating only as a tentative measure and furthermore his promotion, if any, was purely on ad hoc and temporary basis, which would not confer any claim of seniority over those who were seniors to him. As such also it was contended that those cases as mentioned above were not applicable. A reference was also made to the Bench decision of the Patna High Court in the case of *Pasupati Narain Singha vs. Union of India (Supra)*, where dealing with the provisions of Article 311 and, the different Railway Circulars, which fell for consideration in the case of *Madhukar Raghunath Nafdey vs. Union of India (Supra)* and the Assam case reported in AIR 1969 Assam 112, the petitioner therein had filed an application for an order that the order impeached and in so far as the same affected him should be quashed as he was reduced in rank within the meaning of Article 311 (2) without complying with the provisions as required thereunder. In that case the authorities contended that since the employee was merely holding the post temporarily and on a stop gap basis he had no claim to the post. Such contentions of the respondents were accepted and it was held that no legally enforceable right was created in favour of the petitioner and all the more so when there was no stigma attracted against him in the connected orders. This determination was made following the Judgment of the Supreme

Court in the case of Parshottam Lal Dhingra vs. Union of India (Supra). Following the determinations in the above cases and also another unreported decision of the Patna High Court dated December 14, 1971, in the case of Sashi Purna Barua vs. Union of India (C.W.J.C. No. 1275 of 1969), the contentions of the respondents were accepted and it was held that the reversion was not in violation of Article 311 and the petitioner failed to establish that the impugned order was by way of punishment.

24. As mentioned hereinbefore, the consideration of the 18 months Rule came up before the Assam & Nagaland High Court in the case of Amar Nath Sen vs. General Manager, N. F. Railway & Ors., (Supra). The petitioner in the case joined Railway service as an Assistant Engineer on February 16, 1942. Thereafter, he was confirmed in the post with effect from March 1, 1943 and then as District Engineer in the senior scale on January 15, 1968. After that, on April 7, 1942 he was appointed to officiate as Deputy Engineer on North-East Frontier Railway and he joined the said post on May 22, 1962. While holding the said post, the petitioner also held the tenure post of the Deputy General Manager of that Railway from September 16, 1964 to January 10, 1967. On August 3, 1968, the petitioner received a memo signed by the Chief Personnel Officer on behalf of the General Manager with the approval of the Railway Board reverting him to the post of senior scale District Engineer. Considering the different circulars of the Railway Board on the 18 months' Rule, the impugned order was set aside as violative of the Rule incorporated in such circulars. It was observed that the Railway Board in their circulars definitely laid down that officers promoted to officiate beyond 18 months should not be reverted for unsatisfactory work without following the procedure laid down in the Discipline and Appeal Rules and this very salutary principle had not been laid down by the Railway Board only for the guidance of the General Managers and other officers below them but also for the Railway Board itself. Moreover, the Board has the power to promote and demote and, therefore, the Board has the power to lay down the policy and the rules to exercise all those powers.

25. On a construction of the several relevant Circulars in respect of the said 18 months Rule as quoted hereinbefore and on consideration of the determinations as mentioned above, we are of the view that in case of reversion after a point of 18 months, the disciplinary procedure is required to be adopted and followed when the basis of the said order is unsuitability or unsatisfactory performance. Such disciplinary procedure is not required to be followed when the order of reversion after 18 months officiation is made on other administrative grounds which justify such action. There may be circumstances in which an employee, who though has officiated for more than 18 months, cannot be retained in his officiating appointment, e.g., where the tenure has lapsed, where the post is abolished or where the casual vacancy in which he had been officiating ceased to exist either on the employee on leave, coming back or an employee suspended or removed, is restored to service. It would be impossible to retain the employee who had been officiating even if he had done so for more than 18 months and it

would be irrational to think or hold that even in such cases the 18 months Rule would be a bar to reverting the employee concerned. Similarly the 18 months Rule presupposes, an employee who is entitled to claim benefits of this Rule was promoted to officiate in a regular manner and in accordance with Rules so that there is no other impediment to his confirmation except unsuitability or unsatisfactory character of his performance. The Rule imposes a time limit within which an employee promoted against a substantive vacancy in a regular manner can be reverted on the ground of unsuitability and not beyond that. It is like a rule which limits the period of probation and prescribes that on expiry thereof the employee becomes automatically confirmed. Necessarily, therefore, employees who have not the eligibility or who have not undergone the test or selection under the Rules for such promotion but have fortuitously been promoted, cannot come within the purview of these circulars firstly because their promotion being fortuitous may come to end at any moment and secondly because these circulars cannot be so construed as to override other rules prescribing eligibility or requirements of a valid promotion. Ordinarily the employees cannot claim that disciplinary procedure will have to be followed in cases where the reversion order from an officiating post has been made on the ground of unsuitability or unsatisfactory performance. When an employee, who has been appointed to a higher post has been found to be unsuitable or when or where his performance in the said post has been found to be unsatisfactory, an order of reversion cannot be made, if he has held the said post for more than 18 months or more, without following the procedure meant for disciplinary action because of the above Rule and such reversion on the ground of unsuitability or unsatisfactory services would have the effect of attaching a stigma to his service record and further more such a reversion cannot be made without following the procedure prescribed for disciplinary action as enjoined by the Rules incorporated in the circulars. When an employee has no right to the post, his reversion would not come within the provisions of 18 months Rule. We are also of the view that the relevant) circulars must not only be construed within their own ambit but they must be considered and construed in harmony of the Rules requiring appointments and the procedure for filling up vacancies. The circulars should not be construed to mean that reversion in any event cannot be made or take place. Reversion can certainly be made subject to the exceptions as mentioned hereinbefore or for administrative exigencies justifying the reversion. The object and purpose of the concerned Rule has been found in the case of *Bhabatosh Roy vs. Union of India & Ors.*, (Supra), to be to ensure that the individual who has been asked to officiate in a position in respect of which there is no impediment to his holding that position, should not be asked to go back from that position because of any unsatisfactory nature of his work beyond a certain point of time, otherwise it might seriously affect his other avenue of work and promotion and also for the other purpose that if the administration wants to revert an employee for unsatisfactory nature of work, they must be able to find out within 18 months and should not be allowed to prolong the matter, otherwise the same may lead to favouritism and arbitrariness in the administration. But there is no doubt that the

said 18 months Rule has no application to appointments made on stop gap basis or in fortuitous circumstances. Fortuitous appointments some time for one reason or other will not confer any right to the post. That this is the true import and intention behind the circular dated May 21, 1956, and the circulars reaffirming that circular is (sic) out by the subsequent circular dated January 15, 1966 referred to hereinbefore. The latter circular clarifies the former circulars but does not amend them so that what was made clear by the clarification was also inherent in the Rule as originally made.

26. It was argued relying on the determination of the Supreme Court that public orders, publicly made, in exercise of statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do and furthermore public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself in the case of *Commissioner of Police, Bombay vs. Gordhandas Bhanji*, AIR 1952 S.C. 18, that the impugned Rule should be interpreted not with reference to the circular of 1966. We find no merit in this contention. It is not a case of interpolation of an unambiguous order in the light of subsequent explanation. Here what we find to be the true import and implication of a Rule is well supported by a subsequent clarification of the Rule itself.

27. The decision of the Supreme Court in the case of *G.S. Ramaswamy and Others Vs. Inspector-general of Police, Mysore*, , where the provisions of Rules 401 and 486 of the Hyderabad District Police Manual came up for consideration well supports the conclusions we have arrived at as it has been held in that case that the mere fact that a Sub-Inspector's name was put on the eligibility list does not give him any indefeasible right to promotion. Further, the fact that he is actually promoted, temporarily or officiating basis does not give him any right to continuance even during the two years' promotion and he is liable to be reverted at any time even during those two years if his work is found unsatisfactory. In that case the contention of the petitioners that they had right under the eligibility test for promotion or that after they had actually been promoted, they had a right to continue in the post in question, was negatived, and it was held that the fact that the petitioners worked for more than two years in the connected post did not automatically confirm them to those posts. The aforesaid determination of the Supreme Court, according to us is more akin to the determination to be made in the facts of the present case and as such we would prefer to follow the same. The fact that a Government Servant has no legal right to be promoted to a higher post although he had a right to increments in a time scale applicable to the post that he held on the date of transfer on deputation on which he had a lien, is supported from the determination of the Supreme Court in the case of *State of Mysore Vs. M.H. Bellary*, . We feel that the determinations which we are making is also supported by the observations of the Supreme Court made in the

above cases. It may be true, as observed by the Supreme Court in the cases of Divisional Personnel Officer, Southern Railway Vs. S. Raghavendrachar, and Parshottam Lal Dhingra vs. Union of India (Supra), that even an officiating Government servant may be reverted to his original rank by way of punishment attracting Article 311 (2) of the Constitution in such cases. Therefore, in given cases, the procedure as prescribed under the Railway Discipline and Appeal Rules may have to be followed, if the reversion amounts to punishment under the provisions of the 18 months rule. But such is not the case here. Though much reliance was placed by the learned advocate for the appellant on the observations of the Supreme Court in the case of C. Channabasavaiah Vs. State of Mysore and Others, and particularly to the following effect:--

"It is very unfortunate that these persons should be uprooted after they had been appointed but if equality and equal protection before the law have any meaning and if our public institutions are to inspire that confidence which is expected of them we would be failing in our duty if we do not, even at the cost of considerable inconvenience to Government on the selected candidates do the right thing. If any blame for the inconvenience is to be placed it certainly cannot be placed upon the petitioning candidates, the candidates whom this order displaces of this Court."

We think that these observations have no application to the facts of this case.

28. Thus applying the tests as we have indicated above, we are of the view that the learned Judge in the trial court was in error in holding that the order of reversion in the case of Bibhuti Bhusan Roy was illegal being violative of the 18 months Rule incorporated in the Circular dated May 21, 1956, and as such, we allow the connected appeal being F.M.A. No. 37 of 1968 and set aside the determination as made by D. Basu, J. Consequently the said Civil Rule No. 927 (W) of 1963 is discharged. So far the other appeal being F.M.A. No. 243 of 1971 is concerned, we think no interference is called for on the admitted facts of the case. The appellants there were lying claim to a selection posts they were holding without being selected therefor under the 18 months Rule which they are not entitled to in law. Moreover, the petitioner No. 2 in the connected Rule admittedly made an application for appointment wherein he of his own stated that he was ready and willing to undergo any suitability test to sustain his appointment to the selection post and he cannot now even round to claim otherwise. The petitioners, who were working as Tracers on stop gap basis in the open line without being selected for the same, were required to appear in the selection test. We hold that the learned Judge in the trial Court was right and justified in holding, following the determination in a similar case in D. N. Modak vs. Union of India (Supra) and the other case of Nageswar Singh vs. General Manager, Eastern Railway (Supra) that the petitioners having no right to the post of Tracer's their reversion would not come within the mischief of the connected rule. We are not in a position to accept the contention of the appellants that their qualifying in the test for the construction should be treated as qualifying in a

selection test in the open line and as such they must be deemed to have been promoted in a regular manner. That was not a selection test as enjoined by the rules. Moreover, obviously that was a limited test for appointments in the Construction which the eligible candidates in the open line may not have opted not being a part of the regular avenue of promotion and all of them may not have been even called for either. We are, therefore, of the view that the petitioners not having appeared in the open line selection test, were not entitled to be retained in their promotional posts superseding the claim of selected candidates. In the above view of the matter, F.M.A. 243 of 1971 should also be dismissed and the determination made by the learned Judge in the trial court in Civil Rule No. 3160 (W) of 1968 should be affirmed.

Thus on the findings as above, F.M.A. 37/1968 is allowed and F.M.A. 243 of 1971 is dismissed.

There will however be no order for costs in either of the appeals.

Stay of operation of the order in F.M.A. 243 of 1971, as prayed for, is refused.

Anil Kr. Sen, J.

I agree.