

(2023) 09 CAT CK 0025

In the Central Administrative Tribunal

Case No : Original Application No. 905 Of 2019

Sukhvinder & Ors

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 26-09-2023

Acts Referred:

Railways Servants (Hours Of Work And Periods Of Rest) Rules, 2005 — Rule 3, 4, 7(3),
8 (3), 8(4)(a)(i), 8(4)(a)(ii)10
Constitution Of India, 1950 — Article 141, 323A

Citation : (2023) 09 CAT CK 0025

Hon'ble Judges : Dr. Chhabilendra Roul, Member (A)

Bench : Single Bench

Advocate : U. Srivastava, Ranjan Tyagi

Final Decision : Disposed Of

Judgement

Dr. Chhabilendra Roul, Member (A)

1. The present Original Application has been filed by the Applicants against order dated 28.08.2017 by Respondent No.2 declining the request of the applicants for granting the over time allowance for the working period beyond 8 hours per day.

2. The factual matrix of the case is as follows:

2.1 The applicants are working as Gateman/ Track Maintainer on different Road side as Gates under SSE/P-Way/ GHNA at Rohtak Railway Division. The respondents treated the applicants as performing "Essentially Intermittent" duties under Rule 7(3) of the Railways Servants (Hours of Work and periods of Rest) Rules, 2005 and stipulated their duty hours accordingly. The applicants are agitating since 2011 that their duty can not be termed as "Essentially Intermittent". The Applicants submitted a legal notice to the respondents on 27.7.2011 in this regard. As the respondents did not respond to the legal notice, some of the Gatemen-applicants filed OA No.3378/2011 before the Principal Bench, CAT. This Tribunal vide order dated 16.9.2011 directed the respondents to

pass reasoned and speaking order treating the said OA as representation and in light of the Order dated 21.1.2011 in OA no. 107/2009 titled Om Prakash and Anr Vs Union of India & Ors by this Tribunal.

2.2 In pursuance of the order 16.09.2011, the respondents passed speaking order dated 1.12.2011 declining the request of the applicants therein. Being aggrieved, another OA no. 3054 of 2012 was filed by some Gatemen. The Principal Bench of CAT, vide order dated 27.08.2013 passed the following order:

"3. After hearing both the counsel it appears that the matter is covered by an earlier order of this Court in O.A. 1097/2009 dated 21.02.2011. It is also to be noted that the same case was taken to Hon'ble High Court of Delhi in WPC No.7164/2011 and was heard along with other matters of similar nature and it was found that Tribunal has reached on the correct conclusion and directed the respondents therein, who are the applicants earlier, were entitled to overtime wages. Therefore, the same is the case also here. Judicial propriety demands that we follow the dictum. Therefore, the OA is allowed to the same extent. No order as to costs."

2.3 The present applicants submitted representation dated 22.09.2016 and 19.02.2017 requesting the respondents to grant similar benefit as it has been granted to the applicants in OA no. 2509/2008, vide order dated 21.01.2011 which was upheld by the High Court of Delhi vide their order dated 18.02.2013. Aggrieved by alleged inaction by the respondents, the applicants filed OA 1824 of 2017 before this Tribunal, which vide order dated 25.05.2017, directed the respondents to consider the legal notice and pass appropriate reasoned and speaking order with 90 days. As no action was carried out by the respondents within the stipulated period, the applicants filed CP No. 728/2017. In compliance of the order dated 25.05.2017, the respondents issued order dated 28.08.2017 (impugned order) rejecting the claim of the applicants. Being aggrieved, they have come in the present OA seeking the following relief:

"(a) Directing the respondents to place the relevant records pertaining to the present O.A. before their Lordships for the proper adjudication in the matter in the interest of justice.

(b) Quash and set aside the impugned order dt. 28.08.17 issued by the respondents after declaring the same is as illegal, unjust, arbitrary, against the rules and contrary to the law laid down by the Hon'ble Tribunal, Principal Bench, New Delhi in OA No. 107/09 decided on 21.01.11 upheld by the Hon'ble High Court of Delhi in WP (C) 7164/11, OA No.3054/12 decided on 27.08.13 and OA No.3594/15 decided on 19.08.16 and thereafter.

(c) Directing the respondents to consider and finalize the case of the applicants for granting the overtime allowance for the working period of the applicants beyond 8 years per day as the respondents prepared the 12 hours duty roster of the applicants from the date of their posting/ entitlement accordingly with all other consequential benefits i.e. the arrears of differences and interest etc.

(d) Allowing the O.A. of the applicants with all other consequential benefits and costs.”

3. Notices were issued to the respondents and they have filed their counter reply, to which the applicants have also filed rejoinder.

4. The Applicants in their OA as well as through their learned counsel during arguments have tendered the following grounds seeking the aforementioned relief:

4.1 As per the Railways Servants (Hours of Work and periods of Rest) Rules, 2005, the applicants are not in the category of “Essentially Intermittent”. Rather they are covered under the category of continuous work/duty and accordingly, their duty roster should be 8 hours duty, rather than 12 hours roster issued by the respondents. If their roster is taken as 8 hours continuous duty, they are entitled for over time as per Rule 10 of the said Rules as well as the instructions issued by Ministry of Finance and DOPT from time to time.

4.2 The Railways Servants (Hours of Work and periods of Rest) Rules, 2005 have contradictory provisions. Because, under Rule 8 (3) for the Essentially Intermittent category also the working hours are fixed as 48 hours a week, but as per rule 8(4)(a)(i)&(ii) only 24 additional hours of working have been prescribed only for those who are fulfilled the conditions of (i) i.e. Gateman ‘C’ and (ii) those provide residential quarter with 0.5 Kms. from their place of duty and both the conditions are not applicable on the applicants and other Essentially Intermittent employees, are required only 12 additional hours per week i.e. 10 hours daily.

4.3 The Delhi Division of Railways prescribed 8 hours duty roster for the Gatemen way back in 1999. The gatemen in the Delhi Division are enjoying an 8 hours duty roster and are being paid over time if they work beyond the stipulated 8 hours. The applicants are gatemen in Rohtak Division but are not getting similar benefits.

4.4 The applicants are equally placed as the applicants in Rohtas & Ors Vs Union of India, OA No. 2509/2008 and Om Prakash & Anr Vs Union of India & Ors, OA No. 107/2009. The Delhi High Court in WP (C) No. 7164/2011 and WP (C) No. 7172 /2011 decided on 18.02.2013 overturned the identical decision of the Tribunal in the aforementioned OAs, which reads as under:

“On reference to above subject it is brought to our kind notice that factual job analysis have also been carried out where it is examined that the action period on an average basis come in 10-17 minutes per day (i.e. out of 24 hrs) which is less than 50 statutory limit i.e. 12 hrs per day. Hence, it does not warrant to change in present classification as such status quo is to be maintained.”

4.5 The learned counsel for the applicants relied on the orders of this Tribunal in Sarwan Kumar & Ors Vs Union of India & Ors dated 7.10.2022 in OA No.4095/2018 in a similar case of Gatemen and Trackmen. The operative portion

of the said order speaks as follows:

"4. It is observed that this Tribunal has already discussed the issue pertaining to the present Original Application in O.A No. 107/2009 which reads as under:-

"Therefore, the OA is allowed. It is hereby declared that the 'A' class Gateman are bound to work 8 hours duty and in case of additional working hours, they are to be paid the overtime allowance, as stipulated under the rules. It is pointed out that Rule 10 of the Rules *ibid* prescribes the method of calculating the overtime allowance. It shall be taken note of by the respondents as a methodology. It is made clear that within the three months next, the respondents shall calculate the overtime allowance payable to the applicants from the date of institution of the OA and make it available to the applicant. No costs."

It is also stated therein that earlier this Tribunal has also decided the similar issue in *Paley Ram & others v. Union of India & others* vide O.A. No. 3285001 decided on 26.03.2004.

5. In view of the above, I am of the view that the applicants in the present OA are entitled for overtime allowance, if they have performed more than 8 hours of duty in a day and the respondents are hereby directed that the said allowance shall be paid to the applicants within a period of 90 days from the date of receipt of a copy of this order. A copy of the Order shall be given to the applicants. With this observation, the O.A. is allowed."

4.6 The learned counsel for the applicant further relied on the order dated 24.12.2022 in *Nand Kishore and ors Vs Union of India & Ors* in OA No.3531 of 2022. The said order relies on the order of this Tribunal in *Sarwan Kumar* (*supra*) judgement and held that :

"8. In view of the above stated portion, the issue is no longer *res integra*, this Tribunal is bound by the finding arrived at by the Hon'ble High Court. The present OA is allowed and the applicants are entitled of overtime allowance if they have performed more than eight hours of duty in a day and the respondents are hereby directed that the said allowances as per rules shall be paid to the applicants within a period of two months from the date of receipt of certified copy of this order."

4.7 The learned counsel for the applicants further averred that the impugned order by the respondents is a non-speaking one as it has no reasons to reject the claims by the applicants. He cited the order dated 13.02.1991 of this Tribunal in OA Nos. 184, 273, 851 and 135 of 1990 in *Ganga Ram and Ors Vs Union of India and Ors* wherein it was held that :

"16. It will thus be seen that it is not a speaking order at all. It does not give any reason nor makes any declaration of law. Consequently, it is not a binding order under Article 141 of the Constitution. It will only have an effect in the case of *Shri Rasila Ram and Three* [SLPs (Civil) Nos.9345 to 9348 of 1989 – OA Nos.89/88, 1667/87, 1497/88 and 1802/88]. Until the decision of the Full Bench

is set aside, reversed or modified by the Supreme Court, the Full Bench decision of the Tribunal in the case of Rasila Ram (*supra*) remains effective.”

4.8 In conclusion, the learned counsel for the applicants averred that in view of the rule position and the dicta of judgments and orders mentioned above, the OA needs to be allowed.

5. Per contra, the learned counsel for the respondents relied on the counter affidavit filed by the respondents. He argued that the present OA is not maintainable as the subject matter has not been dealt as per the statutory provision contained in the Railways Servants (Hours of Work and Period of Rest) Rules, 2005. As per Rule (4) of the said Rules, if any Railway employee is aggrieved by categorization of any duty and roster thereof, he/she should have moved to the Regional Labour Commissioner. There is further scope for Appeal to the Secretary, Ministry of Labour if the employee is not satisfied by the order by the Regional Labour Commissioner. Particularly, Rule 4 of the said Rules reads as follows:

“4. Appeals against classification :-

(1) Any railway servant aggrieved by the declaration of classification made under rule 3 may, within ninety days from the date of such declaration, prefer an appeal to the Regional Labour Commissioner, who, after scrutiny of relevant documents or if considered necessary, after a fresh job analysis, may order for a change in the classification.

(2) Any railway servant or Railway Administration aggrieved by a decision of the Regional Labour Commissioner may, before the expiry of ninety days from the date on which the decision of the Regional Labour Commissioner is communicated to him, prefer an appeal to the Secretary to the Government of India in the Ministry of Labour who will dispose it off after hearing the parties concerned.”

In the instant case, the learned counsel for the respondents averred that the applicants have not approached the appropriate authorities as per Rule 4 of the said Rules. Hence, the OA is not maintainable on grounds of jurisdiction.

5.1 The prayer of the applicants that their duty should be termed continuous amounts to prayer for change of classification. The authority to declare the employment of railway servants as “Intensive” or “Essentially intermittent” within the meaning of section 130 vests with the Head of Railway Administration or any authority to which such power is delegated . The applicants have not approached the concerned railway authorities for change of categorization and working hours per week for them at the places of duty as per Rules.

6. I have gone through the records of the case thoroughly and heard the arguments by both counsels carefully.

Here the basic issues are twofold: (i) Whether this Tribunal lacks jurisdiction to

adjudicate issues like daily and/or weekly working hours at a place of duty and also categorization of the working at such places "Intensive" or "essentially intermittent". I agree with the contention of the learned counsel for the respondents that there are specific statutory provisions to declare a level crossing as "C" or any other category as well as the duty at such gates "intensive" or "Essentially Intermittent". For clarity, we may refer to Rules 3 and 4 of the Railways Servants (Hours of Work and Period of Rest) Rules, 2005, which reads as follows:

"3. Prescribed authority to classify the employment of railway servant –

(1) The power to declare the employment of railway servants as 'intensive of essentially intermittent' within the meaning of section 130 shall vest in the Head of the Railway Administration :

Provided that the Head of the Railway Administration may, in his discretion, delegate the power vested in the competent authority can be exercised by an officer not below the rank of senior scale.

(2) A copy of every declaration made by the prescribed authority under sub-rule (1) shall, as soon as may be, sent to the Regional Labour Commissioner concerned and, in case the declaration is made by an officer other than the Head of the Railway Administration, to the Head of the Railway Administration or the Chief Personnel Officer, as the case may be."

6.1 We also refer to Rule 4 of the said Rules as quoted in the averment by the counsel for the Respondents, according to which there are statutory provisions for the Railway servant to redress the grievance in respect of the categorization of gates as Category "C" or otherwise, category of work at any railway level crossing as "intensive" or "Essentially Intermittent" and the per day and per week working hours. This has been basically challenged by the applicants in the present OA. I agree with the averment by the learned counsel for the respondents that the applicants have not exhausted all the statutory avenues available to them before coming to this Tribunal.

6.2 The ratio of the judgment of the Delhi High Court in Rohtas (supra) and Om Prakash (supra) cases and the orders of this Tribunal in Nand Kishore (supra) and Ganga Ram (supra) are not applicable to the present OA as the issue of jurisdiction was not agitated in those writ petitions and OAs, and no findings were given thereof in that respect. It is not only the facts and circumstances of the cases alone, but the issues framed and adjudication thereof which determine the applicability of ratio of a judgement to subsequent cases.

6.3 The Central Government has determined the payment of Overtime to its employees as per the decision taken by the Ministry of Finance and DOPT on the recommendations of the 7ThPy commission. The 7th Pay Commission has recommended continuation of some Overtime payments and abolished other specific extra work allowances. The Ministry of Finance constituted a Committee

to recommend specific action in respect of the Recommendations of the 7th Pay Commission in respect of various allowances. The Committee has the following recommendation in respect of Overtime allowances:

S No

Name of the Allowances

Recommendations of 7th CPC

Recommendations/ Modifications proposed by the Committee

125

Overtime Allowance (OTA)

Abolished

Accepted with the modification that rates of OTA may not be revised upwards and it will be linked to biometric attendance

The Ministry of Finance considered the report of the Committee headed by Finance Secretary and notified the following in respect of Over Time allowances:

(1)

(2)

(3)

(4)

125

Overtime Allowance (OTA)

Abolished except for operational staff and industrial employees governed by statutory provisions

Ministries/ Departments to prepare a list of those staff coming under the category of 'operational staff'. Rates of Overtime Allowance not to be revised upwards

Following this notification the DOPT has vide OM No. A-27016/03/2017-Estt(AL) dated 19.06.2018 has stated that :

"2. Further it has been clarified by the Dept. of Expenditure that the Government has decided that given the rise in the pay over the years, the recommendations of the 7th CPC for discontinue OTA for categories other than Operational Staff and industrial employees who are governed by statutory provisions may be accepted.

3. Accordingly, it has been decided to implement the aforesaid decision of the Government on Overtime Allowance across all the Ministries/Departments and

attached and subordinate office of the Government of India. The following definition shall be used to define Operational Staff.

"All non-ministerial non-gazetted Central Government servants directly involved in smooth operation of the office including those tasked with operation of some electrical mechanical equipment."

4. The concerned Administration Wing of the Ministries/Departments will prepare a list of operational Staff with full justification based on the above parameters for inclusion of a particular category of staff in the list of operational staff with the approval of JS (Admn.) and Financial Adviser of the concerned Ministry/Department."

6.4 From all the above policy decisions, it is clear that payment of over time to "operational" and "industrial" employees shall be governed by the concerned statutory provisions. Individual Ministries/ departments have been given the liberty to identify and declare such staff. The Railways have their statutory Rules namely the Railway Servants (Hours of Work and Period of Rest) Rules, 2005, defining categorization of work places and categorization of duty as intensive or essentially intermittent. Hence, the railway servants have a statutory remedy in case of improper categorization of work place and specific duties as intensive or essentially intermittent.

6.5 The Central Administrative Tribunal Act 1985 has empowered the Tribunal to adjudicate all matters between the government servant and the government in matters of recruitment and service conditions, Working hours and performing duties in any situation of the government servant is part of the service condition. To be specific, the preamble of the Act states as follows:

"An Act to provide for the adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation or society owned or controlled by the Government in pursuance of article 323A of the Constitution and for matters connected therewith or incidental thereto."

In view of this, I do not agree with the assertion of the learned counsel for the respondents that this Tribunal does not have any jurisdiction to adjudicate the matters concerning categorization of level crossings and categorization of service as "intensive" or "essentially intermittent". However, I do agree with the contention of the learned counsel for the respondents that the applicants have not exhausted the statutory remedy already available under the Railway Servants (Hours of Work and Period of Rest) Rules, 2005.

6.6 In view of this, the present OA is premature. The applicants are directed to first avail and exhaust all the statutory remedies available to them under the said Rules. They are at liberty to approach this Tribunal, if they do not get remedy

from the concerned authorities as per statutory provisions.

6.7 The OA is disposed of in the above manner. No order as to costs.