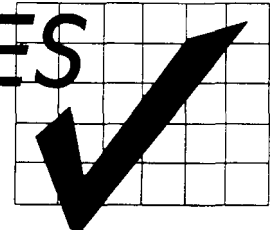

SELF-EXECUTING RULES



There are a few rules in almost every agreement which provide that when a given circumstance occurs, certain specific results must automatically follow. Most such rules simply state that unless a party (either an employe or carrier) satisfactorily fulfills a certain rule requirement, the forfeiture of a particular right will result. These rules are said to be **self-executing** or **self-invoking**.

The most common types of self-executing rules are those governing leave of absence, recall from furlough, exercise of seniority and absence without authorization. An illustration of the language which sets these rules apart from other rules--thus making them self-executing--would be the inclusion of the statement that if an employe fails to return from furlough within 10 days following recall notification, he or she will forfeit seniority and be removed from service. Another example is language providing that an employe's failure to file name and address with carrier within so many days of becoming furloughed will result in loss of seniority and removal from service. Note that both examples involve forfeiture of seniority and employment. Other self-executing rules may involve the forfeiture or revocation of a different right such as loss of an exercise of seniority.

There is a well-settled, basic assumption in contract construction with respect to the meaning given to the words *will* or *shall*, as compared to the words *may* or *can*. Simply stated, the words *will* or *shall* are said to be comoulsory or mandatory, while the words *can* or *may* are permissive or optional. Thus, when the words *will* or *shall* are used in an agreement, the terms of the rule are mandatory and must be invoked. The self-executing clauses "will forfeit" and "will result" compel the mandatory forfeiture or loss spelled out in the rule and absent any extenuating circumstances! neither carrier nor organization has the option of disregarding the rule's requirements.

The distinction between permissive and mandatory contract language was critical to the decision reached by a Board of Arbitration convened in 1992 to adjudicate the dismissal of a Carmen Division Local Chairman who was charged with failure to protect his assignment, even though he had requested leave for union business. In sustaining the claim, the arbitrator stated:

"The language of Rule 23, as the Union correctly argues, is not permissive. It does not say 'may'; it says that the '...company will not discriminate against any committeemen. . . and will grant them leave of absence. . .'"

Self-executing rules are common in many collective bargaining agreements. And, like all the rules in a contract, self-executing rules

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are negotiated to serve a particular purpose. The primary purpose of the wording in the examples cited above is to provide for the speedy removal from service of those furloughed employees who have been deemed to have abandoned their jobs, based on the criteria spelled out in the rule. In so doing, carriers are allowed to drop such employees from employment rolls and promptly hire replacement employees if necessary; at the same time, agreement-covered employees are assured that an employee who fails to return to service in accordance with the agreement will immediately forfeit seniority, rather than reappearing at a later date, demanding to return to service and exercise displacement rights.

Perhaps the most significant attribute of self-executing rules is that the prescribed result--revocation or forfeiture--in most cases takes place with very little or no warning. Frequently, loss of seniority and dismissal occurs without even a hearing. For example, a furloughed employee when recalled will usually receive a letter requiring return to service within 10 days. Failing to do so, the next letter received usually announces that loss of seniority and automatic dismissal have occurred. However, most "reporting from leave of absence" rules (and other self-executing rules) recognize that serious mitigating circumstances which may prevent the employee from reporting by the deadline must be taken into account. Thus, a claim under the normal grievance procedures of the agreement can be instituted if seniority was forfeited without consideration of serious mitigating factors which kept the employee from performing as required by the rule.

The consequences of self-executing rules can be severe and permanent, so it is essential for TCU representatives to be familiar with such provisions in the agreements they police. Needless to say, whenever you are contacted by a member whose circumstances may be governed by a self-executing rule, it should be ascertained that the employee fully understands the particular rule, including its purpose and what steps the member must take to avoid forfeiture or other adverse result.

Many cases involving self-executing rules have been adjudicated over the years. Historically, arbitrators of the National Railroad Adjustment Board (NRAB) and Public Law Boards (PLBs) have been unsympathetic to employees who have violated self-executing rules. If the rule is clear and the circumstances do not strongly favor the employee, the chance of an arbitrator restoring the status quo is remote.

For example, in Third Division Award No. 24225, the Claimant failed to respond to recall within the time specified and was dismissed without a hearing. Claimant countered with the argument that Carrier had failed to properly maintain the staffing level of the Guaranteed Extra Board at another location, thereby denying her a more desirable position which she wanted. The Board held that even if Claimant's argument were correct, it did not overcome the fact that

Claimant was recalled to a position and she failed to report. The Board held in pertinent part:

" . . . as it is undisputed that Claimant did not timely comply with the Carrier's recall order to protect work at Santa Rosa, and Rule 41(f) is self-executing as it concerns the forfeiture of seniority and an employment relationship with the Carrier, this Board is compelled to deny the claim."

In Third Division Award No. 27925, the Claimant was dismissed without a hearing when he failed to return at the expiration of a leave of absence. The Board upheld the Carrier's decision, stating as follows:

"The record is clear that Claimant did not report for duty at the expiration of his leave of absence on June 14, 1986, nor did he request an extension to his leave prior to its expiration. Under Rule 21(c) it was proper for Carrier to consider Claimant out of service. Rule 21(c) is self-executing and where it is applicable, hearing is not required under the discipline rule of the applicable Agreement. The claim will be denied."

In a case involving recall from furlough, the grievant in Second Division Award No. 7027 refused to sign for the certified letter which notified him of his recall and failed to report within the 10 days specified by the Agreement. The Board held as follows:

"We find that the Carrier did not violate Rules 27 and 28 of the Agreement in not holding a hearing on the matter. . . . As stated in Rule 24 above, removal from the roster is 'automatic' and no hearing or investigation is required. Rule 24 is a self-executing rule providing for the automatic severing of relations with the company.

Rule 28, dealing with investigations of suspensions or discharge is inapplicable to the present situation. Rule 28 is a discipline rule and the Claimant was not disciplined but automatically removed from the Carrier's roster under Rule 24."

Second Division Award Nos. 8296 and 11904 also adjudicated cases involving self-executing rules.

Sometimes even strong mitigating factors are not given much weight. In the dispute resolved by Third Division Award No. 24606, the rule provided that an employee who was absent for five or more days "without proper authority shall be considered as voluntarily

forfeiting their seniority rights and employment relationship.” The Grievant was absent without authority from August 24 until September 1 and was dismissed without hearing, even though the union requested a hearing so that the employe could explain why he was absent. The Board held:

“We agree with the Carrier that the rule is self-executing and that a hearing of any kind is not required when it [the rule] is applicable.”

The arbitrator did consider Claimant’s excuse---that he was in jail---and the fact that a friend had notified his Foreman of his predicament. Unfortunately for Claimant the arbitrator held that incarceration is no excuse for failure to protect one’s assignment and that Claimant’s notice to Carrier through his friend “could not be construed as ‘proper authority’ as referred to in Rule 41(k).”

A final example dealing with forfeiture of seniority due to failure to return from furlough is Third Division Award No. 287 16. In that case, Claimant was sent a recall notice while he was away on vacation. When he finally did receive the notice, the evidence suggests that there may have been a misunderstanding with respect to the date he was required to report. Significantly, there the Board did consider the mitigating circumstances and reinstated Claimant with back pay, holding as follows:

“Any interpretation of the time limits in Rule 41 must be made in light of reasonable expectations for compliance. Under all the circumstances present here, we must conclude that there are grounds for sustaining the claim ”

There are other types of self-executing rules which TCU representatives may encounter.

Time limit rules are also considered self-executing because most such rules contain language such as the following, taken from the August 21, 1954 National Agreement:

“Should any claim or grievance be disallowed, the Carrier shall notify within 60 days of the date same is filed, whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented.. .” (Underlining added.)

This language is intended to automatically settle any claim to which a carrier fails to timely respond. In this rule, the obligation

rests with the carrier rather than the employe. and the right subject to forfeiture is the carrier's right to further deny the claim.

Unfortunately, when a carrier violates the time limit provisions of an agreement. it does not always lead to the automatic allowance provided for in the rule. Rather than allow the grievance, carriers will sometimes argue that the grievance was never received or was itself untimely filed; indeed. it is even possible for a carrier to back date a denial so that it appears to be timely. The representatives' course of action is to continue handling the claim through the normal grievance procedure, but to also argue that it must be allowed pursuant to the time limit rule.

In discipline cases, a carrier's adherence to time limit rules is critical to the employe's due process rights. Employes must be timely charged, the hearing must be timely held, and notice of discipline must be timely issued. When carrier violates one of these time limits, the charges should immediately be dropped and the accused should be automatically reinstated and made whole for lost wages and benefits. Unfortunately, there are a few arbitrators who do not always believe that a carrier's failure to comply with a disciplinary rule time limit is fatal to its case; instead, these arbitrators require the accused to prove substantial harm because of the delay. According to them, if there is no harm, there is no foul. TCU is aware of this small minority of arbitrators and recommends that they not be used.

Another kind of self-executing agreement language is found in many reinstatement agreements. Such agreements are usually offered in connection with leniency reinstatements to employes who have been dismissed for operating rule violations. Frequently, the employe has either already been given a disciplinary hearing and has been found guilty or the employe has waived the right to a hearing and accepted dismissal; in either case, the employe is returned to service on a leniency basis subject to the terms and conditions of a reinstatement agreement.

The most common form of reinstatement agreement is found in connection with Rule G dismissals and usually contains the requirements that an employe will remain drug or alcohol free for a specified period, will be subject to unannounced testing, and will satisfactorily complete a rehabilitation program.

Although drug and alcohol testing is a relatively recent practice in the transportation industry, numerous awards have been issued where employes have been dismissed for violation of leniency reinstatement agreements. Referees have consistently held that an employe's failure to live up to any part of the terms of a reinstatement agreement may call for automatic dismissal without a hearing. This could mean that an employe who misses just one meeting of a rehabilitation group can be found to have violated the agreement and dismissal is automatic. Here, as with other self-executing rules, the most disturbing aspect is that the employe isn't afforded a hearing to explain

what happened and to introduce evidence in his behalf. Again, the avenue of protest is to timely file a claim in the hope that an arbitrator will ultimately consider the employee's explanation.

Thus, even if a rule self-executes without a hearing, a claim may still be instituted in accordance with the grievance procedures on your property. The key to winning a grievance involving a self-executing rule is to prove that the employee was unable to meet the rule's requirements due to factors over which he or she had no control. Such factors must be relevant and substantial. For instance, as shown in this article, being in jail has been found to be no excuse for failure to return to service; nor is the often-made argument that the claimant was simply not aware of the rule's requirement or was not warned by carrier of the consequences.

As a TCU representative, if you have not yet dealt with a self-executing rule, you will almost certainly encounter one sooner or later. What you must always keep in mind is that the very nature of the rule dictates that once the rule comes into play, the outcome is automatic. It should also be understood that although violations of self-executing rules often result in an employee's removal from service, unless the rule calls for a hearing, it is not deemed a disciplinary action in which carrier bears the burden of proof (see Second Division Award No. 7027, above). Rather, the claim is based on a rule violation, which means that the Union is the moving party and bears the burden of proof.

The best defense against the consequences of a self-executing rule is to ensure in advance that all the requirements of the rule are clearly understood and complied with by those it affects. Simply put, forewarned is forearmed. Most importantly, members should be aware of the automatic consequences should they fail to satisfy the requirements of a self-executing rule.



Unions and working families-partners in the fight for child care, family leave, health care, and other policies that mean a better life for parents and their children.

