PANAMA CANAL COMMISSION, REPUBLIC OF PANAMA Respondent	
and INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, PANAMA CANAL PILOTS BRANCH, AFL-CIO Charging Party	Case No. DA-CA-30994

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **APRIL 10, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: March 10, 1995

Washington, DC

MEMORANDUM DATE: March 10, 1995

TO: The Federal Labor Relations Authority

FROM: SALVATORE J. ARRIGO
Administrative Law Judge

SUBJECT: PANAMA CANAL COMMISSION,
REPUBLIC OF PANAMA

Respondent

and Case No. DA-CA-30994

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS,
PANAMA CANAL PILOTS BRANCH,
AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

PANAMA CANAL COMMISSION, REPUBLIC OF PANAMA Respondent	
and INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, PANAMA CANAL PILOTS BRANCH, AFL-CIO Charging Party	Case No. DA-CA-30994

Jay Sieleman, Esq. and
Clarita Smith
For the Respondent

Jack F. Harry
For the Charging Party

Joseph T. Merli, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Dallas Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by failing and refusing to negotiate in good faith with the Union during the course of negotiations over a new collective bargaining agreement.

A hearing on the Complaint was conducted in Balboa, Republic of Panama, at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally.[1] Briefs were filed by Respondent, the Union and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the Union has been the exclusive collective bargaining representative of all Panama Canal pilots employed by the Panama Canal Commission. In January 1992 Henry Ceely became the Union's Branch Agent and attempted to initiate bargaining with Respondent in an effort to raise pilots' wages. Management took the position that negotiations would be premature since the parties' collective bargaining agreement was not due to expire until July 31, 1993. On various occasions thereafter Ceely suggested to management that if the parties could just "sit down and talk," they could negotiate the terms of a new agreement without the necessity of engaging in "formal" negotiation. Management resisted entering discussion so far in advance of the agreement's expiration.

In a letter dated April 16, 1993, Branch Agent Ceely sent management written notice, as prescribed by the terms of the parties' negotiated agreement, of the Union's desire to engage in negotiations. The letter, inter alia, indicated the Union wished to finalize a time, date and site for a "ground rules" meeting. Around this time Capt. John Kaufman, a management representative, telephoned Ceely and asked him if he would be interested in meeting "off-the-table" with him and the Assistant to the Marine Director, William Cofer and possibly arriving at an agreement which would alleviate the necessity of "formal" negotiations. Kaufman told Ceely that he had a pay proposal and was "guardedly optimistic" that the Union would be pleased with management's offer. In the past, the Agency consistently maintained the position in negotiations that the basic rates of pay for pilots was not a negotiable matter under the Statute. Thus the parties' collective bargaining agreement contains no provision addressing basic rates of pay. After conferring with Union consultant Jack Harry and several other advisors, Ceely called Kaufman and informed him he

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[1] Counsel for the General Counsel's unopposed Motion to Correct the Transcript is hereby granted.

would meet if he could be accompanied by two advisors and if he received a letter from the Administrator, presumably confirming the arrangements.[2] Kaufman indicated that a letter from the Administrator would not be forthcoming and he rejected Ceely having a second advisor at the discussion since he wanted it to be a very "frank meeting" and didn't want a lot of people involved. Ceely agreed and a meeting between the parties was set for April 21, 1993.[3]

On April 20, 1993 Respondent sent the Union a letter which acknowledged receipt of Branch Agent Ceely's April 16 negotiations demand under the parties agreement and notified the Union that it would commence negotiations with the Union on May 26, 1993.[4]

In any event, on April 21, 1993, Union representatives Ceely and Harry met with management representatives Kaufman and Cofer in Orlando, Florida.[5] At this meeting Harry questioned the concept of "informal discussions" and whether the meeting was "informal." After Harry talked to Ceely it was acknowledged that the discussion would proceed on an "informal" basis. Thereafter, the day was spent on ground rules for the meetings. The Union asked and management refused to have the sessions taped. The Union proposed "prepared" ground rules which Harry described as "normally used for Government agencies." Although it at first opposed having any ground rules, management ultimately proposed and the Union agreed to the following:

> The Panama Canal Commission and the Panama Canal Pilots Branch of the International Organization of Masters, Mates and Pilots (ILA) (AFL-CIO) recognize and agree that:
>
> (1) Any informal agreement reached in the meeting commencing on April 21, 1993 is expressly

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2
Harry had indicated to Ceely that he didn't like the idea of pursuing "informal talks", but agreed to attend the meeting.

3
The following account of meetings between representatives of Respondent and the Union is a synthesis of relevant portions of testimony based upon my credibility resolutions necessitated by the presentation of sometimes divergent versions of what transpired during these meetings.

4
The collective bargaining agreement allows a party to take up to 40 days for preparation after receipt of a notice of intention to amend the agreement before commencing negotiations.

5
The meeting continued over a three day period.

conditioned on the right of the Administrators review and approval and the PCPB ratification vote. Any final agreement will be subject to Agency Head Review under 5 USC 7114(c).

(2) The right is reserved to assert nonnegotiability with respect to any matter discussed off-the-table should such discussions be abandoned and formal negotiations commence; and

(3) If formal negotiations commence later there is no obligation to begin (build upon) where the off-the-table ended.

On the following day management presented its pay proposal to the Union. The proposal essentially raised the top base pay rate for senior pilots from $73,000 a year to $89,000. Lower rated pilots' pay would increase proportionately. After looking over the proposal Ceely stated Respondent's proposal was unacceptable and the Union had a counter proposal. Management replied that they were not there to take proposals, but to give the Union their proposal and that was all they were going to discuss. Cofer stated he wasn't there to negotiate but only to offer a proposal which the Union could take or leave. Ceely gave the Union's pay proposal to Kaufman but, apparently without looking at the proposal, Kaufman threw it back across the table at Ceely and remarked, "this is shit." Management subsequently caucused and reviewed the Union's proposal which sought a pay level increase for senior pilots to $179,000 and included such items as 401(k) plans for retirement; IRA's; and a 15 percent pay differential for Panamanian pilots. For the remainder of that day and the following day the parties' discussion, sometimes "heated" and "nasty", centered on Respondent's pay proposal and related matters, including bonuses and pay progression considerations. During these discussions management presented four variations of its pay package. Further, Respondent told the Union words to the effect that the Union had better accept their informal contract offer because if no wage agreement was reached during informal wage discussions, Respondent would "stonewall" the pay issue in formal negotiations by maintain-ing their position that pilots' basic wages was not a negotiable matter and when a rumored pay freeze took effect, pilots would not get "a goddamn thing."[6] Although no agreement on pay was reached, the parties did agree that a further meeting might be productive.

6
The parties' were aware of a rumor that later in the year a pay freeze applicable to all Government employees would be imposed by the President.

The parties next met in mid-May 1993 in the Tampa, Florida, area.[7] During the meetings, which spanned five days, the parties discussed various proposed changes in working conditions, including pay. The Union submitted numerous arguments and data to support its positions and management, while proffering various arguments furthering its positions, nevertheless maintained that the wage increase offered in Orlando was the maximum dollar amount of pay benefit it would agree to and any additional benefits would have to be "cost neutral." Management also indicated that it was agreeable to dividing the money package in benefits other than a straight salary increase if the Union wished. The Agency rejected various Union pay proposals, indicating that the Union was "burying them in paper" and, although they reviewed the Union's proposals, continually conveyed that while they were voluntarily discussing pay issues, basic pay rates for pilots was not negotiable. Management was adamant that the pay offer it presented was its only and last best offer and was not willing to discuss any proposal which would increase the cost of the package beyond their proposal. The management representatives, seeking to persuade the Union to accept their offer, again mentioned that if management's pay offer was not accepted, the scenario that would follow in formal negotiations would be that of management "stonewalling" the Union with its position of nonnegotiability of pilots' pay and, if a Government-wide pay freeze went into effect, pilots would receive no pay increase.

Notwithstanding management's contention that it would not improve the pay of pilots beyond the total dollar amount that it proposed, management agreed to accept a Union proposal to establish an Equal Time Plan study, and, in turn, the Union agreed to accept, conditionally, management's pay offer. The Equal Time proposal would give pilots an equal number of weeks on duty and off duty, e.g. six weeks on duty and six weeks off duty as contrasted with the then current six weeks on duty and four weeks off duty schedule. Thus, if accepted, wages of pilots would be improved indirectly since time off would be identical to work time. The parties also discussed various other conditions of employment during these meetings and the parties executed the following Memorandum of Understanding:

> 1. Notwithstanding Article 3, section 2 of the collective bargaining agreement, the Panama Canal Commission and the International Organization of Masters, Mates, and Pilots, Panama Canal Pilots

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[7] Each party had an additional representative present during these meetings.

Branch, hereby agree to extend until July 21, 1993 the May 26, 1993 deadline for commencing formal negotiations.

2. The base pay and availability bonus plan (copy attached) presented by the Commission on 19 May 1993 are informally agreed upon.

3. The purpose of the extension is to permit the parties additional time to continue the informal discussions which began on April 21, 1993.

4. The Commission and the PCPB agree to participate in a study of a progression plan and work rule procedures which will lead to the implementation of an even time plan designed in such a manner as not to significantly increase costs. Nothing shall be implemented until a Memorandum of Understanding amending the present agreement is approved.

5. If no agreement is reached during informal discussions, formal negotiations will be pursued.

The parties met again on July 10, 1993 in Panama. Meetings were held over six consecutive days, however the parties met jointly for only approximately one hour each day. During the first session management told the Union that the Equal Time Plan study had been stopped, apparently because the Union and management could not agree on operational changes which would be necessary to effectuate an Equal Time program on a non-cost basis. Management continued to take the position that their pay proposal was the maximum monetary offer they would consider and continued to maintain it was not obligated to bargain over pilots' basic pay. Management also proposed that any collective bargaining agreement agreed to would have a December 31, 1999 expiration date. The Union proposed to accept Respondent's pay offer if the agreement would be for a one year period. Both parties rejected the other's proposal. Although numerous other matters were discussed, including progressive promotion schedules, pilot representation at investigations of accidents, pay for pilots while taking physical examinations and pilots taking family members on canal transits, and indeed agreement was reached on various working conditions, no agreement was reached on salaries during the "off-the-table" discussions.

On July 21 and 22, 1993 the parties met to negotiate ground rules for the formal negotiations to replace the parties' contract due to expire on July 30, 1993. During those sessions management took the position that it would

not negotiate on the Union's proposal to increase pilots' base pay during formal negotiations. The record reveals that the wage proposal the Union submitted during these negotiations in the form of a provision in the parties' collective bargaining agreement was as follows:

> Effective . . . the Panama Canal base pay rate for grade 04-08 will be adjusted to $179,000.00 with the other pilot grades pay adjusted based on this rate according to the percentages in the current step system.

The transcript of the August 18, 1993 negotiations received in evidence reveals that Respondent continually refused to bargain over this proposal, expressing the belief that the proposal was not negotiable and therefore there was no duty to bargain on that proposal. Thus, the transcript reveals the following excerpts of colloquy between Michael Stephenson for Respondent and Jack Harry for the Union:

> **MR. STEPHENSON:** Now, what we can do is we can take the wages, and I can tell you on the basis of the proposal, we really believe that we don't have a duty to bargain on those. That's the position we are going to take.
>
> **MR. HARRY:** That is going to take us right to impasse and will mean calling in the authorities.
>
> **MR. STEPHENSON:** Well, I realize it is a bullet that has to be bitten at some point, so we may as well do it right now.
>
> The problem we have is -- I mean, we can all read the Panama Canal Act, and we all know what it says in terms of compensation and basic wages, and we can all read your proposal. But, in our view, considering the authorities that the agency has under the Panama Canal Act, it is our view that it wasn't mean to be negotiated. It wasn't meant to be subjected to the bargaining process. Obviously, you guys think otherwise, or you wouldn't have given us this proposal . . . .
>
> **MR. HARRY:** I want to get one thing clear before we go farther, and that is you are refusing to negotiate wages.
>
> **MR. STEPHENSON:** No. No.

(At transcript pages 29-30).

MR. HARRY: Well, at any rate, you are not going to negotiate wages. You are saying that; right?

MR. STEPHENSON: I'm saying that we are not going to negotiate on that proposal.

MR. HARRY: Are you going to negotiate wages or not?

MR STEPHENSON: Well, what you deal with at the bargaining table are specific proposals. What we have is a specific proposal that we are not going to negotiate over because we believe there is no duty to bargain on that proposal.

MR. HARRY: You don't believe that there is a duty to bargain on wages then.

MR. STEPHENSON: Well, I don't think that's relevant. I think what is important is that we don't have a duty to bargain on this proposal, and that's all we are obliged to deal with is proposals on the table.

MR. HARRY: The proposal on the table deals with wages.

MR. STEPHENSON: Specific language is what we are taking about. We are not talking about a category here; we are talking specific language. We don't believe we have a duty to bargain on this proposal.

MR. HARRY: Well, if we gave you another proposal in relation to wages, would you be willing to bargain on it?

MR. STEPHENSON: Well, I can't say that we wouldn't bargain on it. I can't say. You have to deal with the specific proposal, and this is what we have.

(At transcript pages 42-43).

The parties failed to reach accord during subsequent negotiations and in late August 1993 the Union submitted to the Authority a petition for a negotiability determination (Case No. 0-NG-2172). The Union contended, and Respondent acknowledged, inter alia, that Respondent declared nonnegotiable various Union proposals dealing with employee compensation. In that case, Respondent essentially takes

the position that the Union's proposals dealing with Pilots' compensation are nonnegotiable, raising various arguments directed to particular proposals, including interference with the Agency's right to determine its budget; and that the proposals "concern a matter specifically provided for by law or (are) inconsistent with Federal law."[8] The case is currently before the Authority for determination.

Additional Findings, Discussion and Conclusions

The General Counsel alleges that during the meetings between the parties in April, May and July 1993 as set forth above, Respondent "failed and refused to negotiate in good faith with the Union during the course of negotiations over a new collective bargaining agreement by informing the Union that if it did not accept management's pay proposal it would stonewall negotiations until a proposed pay freeze went into effect, by offering a pay proposal on a 'take it or leave it' basis and by informing the Union that it would not negotiate over any of its pay proposals," and contending that on July 21 management told the Union it was not going to negotiate over pay.

Respondent denies the allegations and essentially takes the position that there was no duty to bargain on the Union's pay proposals since they were nonnegotiable "as inconsistent with the Panama Canal Act (for all the reasons set forth in the agency's submission in connection with the pending negotiability appeal)." Respondent further maintains that its meetings with the Union prior to July 21, 1993 were not "negotiations" within the meaning of the Statute since there existed no Statutory duty to negotiate with the Union at this time. Therefore, Respondent argues, since the meetings prior to the advent of formal negotiations were not negotiations under the Statute, Statutory constraints on the parties' conduct during these meetings is not applicable.

The allegations of the Complaint all concern the subject of pay for pilots. The record reveals, and I find, that the "pay" that the parties were discussing and over which disagreement arose was specifically basic pay rates for pilots. Respondent has consistently taken the position that basic pay rates for pilots were not negotiable. Thus, in International Organization of Masters, Mates and Pilots and Panama Canal Commission, 13 FLRA 508, 518-519 (1983), the union proposed that the base pay of pilots should be

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8 The Agency, in its statement of position in the negotiability case relies upon various provisions of the Panama Canal Treaty of 1977 and prior decided Authority and court cases.

increased by ten percent. The Authority, when ruling over this proposal, held:

> The proposal would require a 10% increase in the base pay of pilots. Section 1215 of the Panama Canal Act of 1979 (93 Stat. 465)(22 U.S.C. § 3655) . . . establishes a specific procedure for determining the basic pay of employees. That section provides that any adjustments in the basic rate of pay can only be made "in amounts not to exceed the amounts of the adjustments made from time to time by or under statute in the corresponding rates of basic pay for the same or similar work" performed in the United States or in such areas outside the United States as may be designated by regulation. There is no evidence in the record that the proposal is based upon or is intended to be applied in conformity with the statutory procedures. Accordingly, the proposal is inconsistent with Federal law and, therefore, outside the duty to bargain under section 7117(a) of the Statute.

In a footnote the Authority stated that in view of this disposition it was unnecessary to address the Agency's other contentions of nonnegotiability.

During the meetings of April, May and July 1993 Respondent maintained its position that it was not required to bargain over pay, although it agreed to talk about pay.[9] That position was carried over into formal negotiations and resulted in the request for a negotiability determination presently before the Authority for decision.

In Decision on Petition for Amendment of Rules, 23 FLRA 405, 407 (1986), affirmed sub nom. National Labor Relations Board Union v. FLRA, 834 F.2d 191 (D.C. Cir. 1987), the Authority held:

> Sections 2423.5 and 2424.5 of the Authority's Rules and Regulations provide, in pertinent part, that where a labor organization files an unfair labor practice charge which involves a negotiability issue and also files a petition for review of the same negotiability issue, it is required to choose which procedure to pursue first. Cases which involve only an agency's allegation that the duty to bargain in good faith

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[9] See for example the testimony of Union representative Harry at transcript pages 69-70 and 81-82 and Union Representative Ceely at page 113.

> does not extend to the matter proposed to be bargained, and which do not involve alleged unilateral changes in conditions of employment, must be processed exclusively under the negotiability procedures in part 2424 of the Authority's Rules and Regulations. In our view, these regulations are consistent with the language of sections 7117 and 7118 of the Statute, which specify separate procedures for resolving negotiability and unfair labor practice cases, respectively. They are also consistent with the legislative history of the Statute, which indicates that Congress considered but rejected a provision which would have required all negotiability disputes to be resolved in unfair labor practice proceedings.
>
> Unfair labor practice remedies are available in appropriate refusal to bargain situations, such as (1) where the refusal to negotiate is accompanied by unilateral changes in conditions of employment; and (2) where an Agency refuses to bargain over a proposal substantially identical to one which the Authority has previously determined to be negotiable under the Statute.

(Footnote and citations omitted.)

In the case herein there is no allegation that a unilateral change was made in the base rates of pay of pilots. However, counsel for the General Counsel contends that the negotiability of pay for pilots is governed by Ft. Stewart Schools v. FLRA, 495 U.S. 641, 110 S. Ct. 2042 (1990) (Ft. Stewart), and the Authority's application of the doctrine of that case in American Federation of Government Employees, AFL-CIO, Local 3732 and U.S. Department of Transportation, United States Merchant Marine Academy, Kings Point, New York, 39 FLRA 187 (1991) (Merchant Marine Academy). Respondent disagrees that Ft. Stewart or Merchant Marine Academy controls the situation herein.

Whatever effect the holding in Ft. Stewart has upon the negotiability of pilots' basic pay, the case herein will be determined by the Authority in the negotiability case presently before it. However, neither, Ft. Stewart nor Merchant Marine Academy dealt with the Panama Canal Act, the statute which Respondent relies upon to support its claim of nonnegotiability of pilots' basic pay. Nor do I find the matters at issue herein are "substantially identical" to those the Authority previously determined to be negotiable under the Statute, within the meaning of its Decision on Petition for Amendment of Rules, above. Although Ft.

Stewart essentially holds that matters relating to pay are not excluded from consideration as a condition of employment unless specifically provided for by statute, Respondent nevertheless contends that the Panama Canal Act contains an explicit statutory procedure for establishing and adjusting pay of employees and is therefore distinguishable from Ft. Stewart. That issue has not yet been resolved.

The negotiability of the matter giving rise to the proceeding herein was in question at the time this case was litigated. Such a determination is a prerequisite to determining whether an unfair labor practice has occurred. Accordingly, in all the circumstances herein I conclude that it is procedurally inappropriate to make the necessary negotiability determination in this proceeding and also resolve the unfair labor practice charge that Respondent failed to bargain in good faith with the Union concerning basic rates of pay for Panama Canal pilots. See Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 23 FLRA 738 (1986). Since the subject matter of the controversy herein is not appropriately before me, I also conclude that the statements allegedly made by Respondent when dealing with the Union are likewise not appropriately before me for determination as to whether they would independently constitute a violation of section 7116(a)(1) of the Statute. Cf. U.S. Department of Veterans Affairs, Washington, D.C. and U.S. Department of Veterans Affairs, Medical and Regional Office Center, Fargo, North Dakota, 34 FLRA 182 (1990), aff'd in part and rev'd in part as to other matters, 930 F.2d 1315 (8th Cir. 1991).

I further find that the April, May and July meetings which occurred prior to the onset of formal negotiations between the parties, were recognized by the parties as being outside the concept of negotiations within the meaning of the Statute. Thus, the sessions the Union was invited to participate in were variously described as "off-the-table" meetings and "informal" discussions. While the record does not indicate that the concept of "informal meetings" was fully explained, it is clear that these meetings would be something less than "negotiations." Indeed Union representative Harry expressed his concern regarding participating in "informal talks" both before the first meeting and at the first meeting, but the Union decided to proceed nonetheless, obviously in hopes of obtaining an agreement on basic pay for pilots since Kaufman previously told Ceely that he had an offer to make and Respondent had never previously negotiated basic pay with the Union.

Management felt these off-the-table discussions were completely free of Statutory constraints. Thus, its representatives were of the view that while discussing

matters which, in their opinion, were not negotiable as such, these meetings could not result in impasse, negotiability appeals or unfair labor practice charges. Respondent's conduct during discussions with the Union on the basic pay rates for pilots reflected this belief. A day before the first informal meeting occurred on April 21, 1993, Respondent replied to the Union's request for negotiations under the terms of the collective bargaining agreement by acknowledging receipt of the request and setting May 26 as the date when formal negotiations would commence, and subsequently such date was postponed to July 21, 1993. The Union had to be aware that these meetings were considered by management as not negotiations in the Statutory sense and the Union nevertheless freely proceeded with the discussions on that basis. The rejection of the Union's "prepared" ground rules and agreement to the terms of the ground rules proposed by management further supports this finding.

Respondent did not illegally coerce the Union into participating in these meetings. The Union freely agreed to enter into discussions on basic pay for pilots, a matter Respondent had consistently maintained was not negotiable, with full knowledge of management's position on negotiability of the subject, and full knowledge that discussions on this matter at this time would not be Statutory "negotiations". The Union obviously decided that proceeding in this manner was to its advantage. Proposals on basic pay for pilots were exchanged. Discussion on a matter claimed to be nonnegotiable ensued. However, the very term negotiation was avoided by management when discussing these sessions with the Union and the distinction between negotiation and discussion was maintained even when the parties signed procedural agreements in April and May, 1993, supra.

It is clear from the record herein that the meetings between the parties at issue were never intended to be considered, and indeed were not considered to be, negotiations within the meaning of the Statute. Rather, they were understood to be an approach to resolve a pay issue which, if it came up in Statutory negotiations, the Agency would, as it eventually did, declare the matter nonnegotiable. In these sessions the Agency conveyed its position that while it had no obligation to negotiate on basic wage rates for pilots, it had an offer to make and strongly attempted to convince the Union to accept the offer, which offer and acceptance process would not take place in a Statutory negotiating process. The Union knowingly and freely accepted the opportunity to discuss pilots' wages on this basis. In the circumstances herein I

conclude the Union's Statutory bargaining rights were not violated.

This is not to say that any conduct occurring during this process would be free from the proscriptions of the Statute. For example, if during such discussions a party attempted to coerce the other party to obtain agreement to a condition of employment by threatening that if negotiations under the Statute take place, the party would engage in conduct prohibited by the Statute (refusing to bargain on a clearly negotiable matter), in my view such conduct would constitute a violation of section 7116(a)(1) of the Statute. The conduct would also be evidence of bad faith to be considered if the party was accused of violating its Statutory obligation to bargain in good faith during later negotiations which were encompassed by the Statute.

Nor would I find, if required to do so, that Respondent's conduct or statements independently violated the Statute. As to the specific allegations regarding Respondent's conduct at the meetings in question, I find Respondent sought to and conveyed to the Union that since it would not negotiate an increase in basic pay beyond the offer it made on basic wages for pilots, the Union had better accept management's current pay offer because if a pay increase was not timely effectu-ated, a suspected Presidential pay freeze would leave pilots without a basic pay increase. Whether the term "stonewalling" was specifically used is not significant. However, it is clear Respondent sought to impress upon the Union that it would not agree to any wage increase in excess of the one it proposed the Union accept, "stonewalling" if you will, and the effect of the Union not agreeing to Respondent's proposal would leave the pilots in a position of receiving no pay increase.[10] Respondent did not abandon its position

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[10] Indeed such a position was in keeping with the Agency's approach to these meetings with the Union. For example, when Kaufman was asked about a conversation wherein Respondent allegedly told the Union that Respondent would essentially say a matter was legal or illegal when it best suited its purpose, Kaufman indicated Respondent did convey this sentiment, testifying:

> To me that's all part of the process of give and take in an informal setting; you say a lot of things to each other [that] are said . . . for effect. I mean, you want to create an atmosphere that you think is conducive to you gaining the upper hand in this kind of thing, so you say things that might not necessarily be true, but you say them for effect.

regarding the Statutory nonnegotiability of basic wage rates for pilots throughout the informal discussions and into the formal negotiations and made the point to the Union that if a pay freeze occurred, the increase in basic wage rates pilots would have received if they accepted Respondent's voluntary proposal would be lost and pilots would end up with no increase in basic pay rates for that period. I do not conclude that maintaining the position of nonnegotiability and explaining its possible consequences to the Union constituted bad faith bargaining under the Statute.

I also find and conclude that Respondent offered its pay proposal on a "take it or leave it" basis. The above findings and the record fully supports this conclusion. However, assuming the discussions at issue constituted negotiations within the meaning of the Statute, in my view Respondent's rejection of the Union's pay proposals and maintaining a "hard and fast" position on its own salary package, while open to negotiation for the distribution of money in a variety of ways, does not amount to bad faith bargaining. Section 7103(a)(12) of the Statute when setting out the Statutory meaning and obligations of "collective bargaining," specifically states that "the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession." Further, the Authority has held that the mere fact a party is not persuaded to change its position during negotiations does not constitute a showing of bad faith. Bureau of Prisons, Lewisburg Penitentiary, Lewisburg, Pennsylvania, 11 FLRA 639 (1983).

Turning now to the allegation that Respondent informed the Union it would not negotiate with the Union over "any" of its pay proposals, I find the record does not establish that this occurred. While management clearly rejected the Union's proposal to increase pilots' base pay to $179,000 a year, it took the position that it would not accept any pay proposal costing more than its own offer, a position which I have found it was permitted to take under the Statute.

Similarly, I also reject counsel for the General Counsel's allegation that on July 21, 1993 management informed the Union it would not negotiate pilots' pay. Union representatives Harry and Ceely testified that management representative Stephenson made this remark to them at the July 21 negotiations over ground rules for formal negotiations. Stephenson admits bringing up the subject of basic pay for pilots but testified he told the Union representatives words to the effect that it was "unlikely (they would) submit a . . . pay proposal or basic pay proposal . . . about which (Respondent would) negotiate

over." Stephenson testified he came to this conclusion from the aspirations expressed by the Union during informal discussions on basic pay and his conviction that such a demand would be inconsistent with provisions of the Panama Canal Act. I credit Stephenson's version of the comments made at this meeting. His version is consistent with the positions of the parties during informal discussions, described above, and during formal negotiations as reflected in the transcript of the negotiating session of August 18, 1993, supra.

Accordingly, in view of the entire foregoing and the record herein I conclude it has not been established that Respondent violated section 7116(a)(1) and (5) of the Statute as alleged and I recommend the Authority issue the following:

ORDER

It is hereby ordered that the Complaint in Case No. DA-CA-30994 be, and hereby is, dismissed.

Issued, Washington, DC, March 10, 1995

SALVATORE J. ARRIGO
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by SALVATORE J. ARRIGO, Administrative Law Judge, in Case No. DA-CA-30994, were sent to the following parties in the manner indicated:

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