

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

INTERNAL REVENUE SERVICE NORTH FLORIDA DISTRICT, TAMPA FIELD BRANCH, TAMPA, FLORIDA Respondent and NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 87 Charging Party	Case No. AT-CA-70357

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. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before MARCH 30, 1998, and addressed to:

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

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: February 25, 1998
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: February 25, 1998

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: INTERNAL REVENUE SERVICE
NORTH FLORIDA DISTRICT,
TAMPA FIELD BRANCH,
TAMPA, FLORIDA

Respondent

and Case No. AT-
CA-70357
NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 87

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(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

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

INTERNAL REVENUE SERVICE NORTH FLORIDA DISTRICT, TAMPA FIELD BRANCH, TAMPA, FLORIDA Respondent and NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 87 Charging Party	Case No. AT-CA-70357

Sheri Layne Smith, Esquire
Harry Mason, Esquire
For the Respondent

Steven Flig, Esquire
For the Charging Party

Sherrod Patterson, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. 1, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent, ". . . refused to sign or implement . . . ," a Memorandum Of Understanding ("MOU")

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For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116 (a) (5) will be referred to, simply, as, "\$ 16(a) (5)".

and/or, ". . . refused to comply with, and has repudiated, the MOU." (Complaint, G.C. Exh.1(e), Pars. 14 and 15). For reasons fully set forth hereinafter, I conclude that the parties never reached an agreement, Respondent did not fail or refuse to bargain in good faith and that the Complaint be dismissed.

This case was initiated by a charge, filed on February 27, 1997, alleging violation of §§ 16(a)(1) and (5) of the Statute (G.C. Exh. 1(a)); and by a First Amended charge, filed on June 30, 1997, also alleging violation of §§ 16(a)(1) and (5) of the Statute (G.C. Exh. 1(c)). The Complaint and Notice of Hearing issued on June 30, 1997, (G.C. Exh. 1(e)); alleged violations of § 14(b)(5), and §§ 16(a)(1), (5) and (8) of the Statute; and set the hearing for September 11, 1997, pursuant to which a hearing was duly held on September 11, 1997, in Tampa, Florida, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, and to introduce evidence bearing on the issues involved. At the conclusion of General Counsel's case, Respondent moved to dismiss the Complaint and I reserved ruling on the motion. The parties were afforded the opportunity to present oral argument which the Charging Party, in particular, exercised (Tr. 46-48; 69-91). Respondent called no witnesses and, at the conclusion of the hearing, October 14, 1997, was fixed as the date for mailing post-hearing briefs. General Counsel timely mailed a Brief, received on October 21, 1997, and Respondent timely mailed a "Closing Statement", received on October 17, 1997, which have been carefully considered. On the basis of the entire record, I make the following findings and conclusions:

FINDINGS

1. The National Treasury Employees Union ("NTEU") is the exclusive representative of a nation-wide unit of employees of the Internal Revenue Service and the Internal Revenue Service and NTEU have a National Agreement (Jt. Exh. 13 - NORD IV) which covers, of course, employees at Internal Revenue Service's North Florida District, Tampa Field Branch ("Respondent").

2. National Treasury Employees Union, Chapter 87 ("Union"), is the agent of NTEU for the representation of bargaining unit employees of Respondent. This case involves only Revenue Officers assigned to Respondent's Tampa and St. Petersburg posts of duty.

3. In August, 1995, Respondent and the Union entered into a Memorandum of Understanding ("MOU") covering eligible Collection employees (i.e., Revenue Officers) which set

forth procedures for supervisory review of case files of Revenue Officers. In October, 1995, the parties executed an Addendum to the MOU. The original MOU and the Addendum, collectively, are, hereinafter, referred to as the "1995 MOU" (Jt. Exh. 1). The 1995 MOU was for a period of one year and specifically provided, in relevant part, that, ". . . Should either party deem it necessary to withdraw this arrangement, it may do so unilaterally, upon providing a thirty (30) day notice." (Jt. Exh. 1).

4. By letter dated August 19, 1996, Respondent gave the Union notice that it was withdrawing from the 1995 MOU, ". . . effective September 30, 1996. . . ." (Jt. Exh. 2).

5. When the 1995 MOU was terminated, the parties agreed to begin negotiations for something to replace it (Tr. 31). The Union negotiating committee consisted of: Mr. Steve Vanater, Executive Vice President of the Union (Tr. 18), Chief Spokesman, and Messrs.: Larry Keith, John King, Tom Rateau and Ray Zacek (Tr. 32); and Respondent's negotiating committee consisted of: Mr. Terry Wood, Chief, Tampa Field Branch, Chief Spokesman, and Ms. Melaney Partner, Group Manager, St. Petersburg, and Mr. Bob Budde, Group Manager, Tampa (Tr. 21, 32).

6. The parties met on September 12, 1996 (Tr. 33, 34) and again on September 26, 1996 (Tr. 39) and the Union's first draft of a new MOU, prepared by Mr. Vanater, Joint Exhibit 11, was discussed (Tr. 35-36, 39, 40). Mr. Vanater said there were two sections of that draft, Items 2 and 5, on which they could not reach agreement (Tr. 39-40).

7. On October 15, 1996, Mr. Vanater transmitted a second draft, also prepared by Mr. Vanater (Jt. Exh. 3), in which he made changes in items (paragraphs) 2, 5 and 8.

The Tampa Field Branch includes Tampa and St. Petersburg, which are represented by NTEU Chapter 87, and Lakeland, which is represented by Chapter 84 (Tr. 18). Chapter 84 represents, essentially, the Orlando Branch (Tr. 20) and the Jacksonville Branch, represented by Chapter 16, rounds out the North Florida District (formerly, the Jacksonville District (Tr. 19)) which covers the State of Florida from Sarasota County across to the Vero Beach area on the east coast all the way north (Tr. 20). Mr. Wood, Chief of the Tampa Field Branch, is also Chief of the Orlando Branch (Tr. 26) and his office is in Orlando (Tr. 41).

The first two drafts submitted by Mr. Vanater (Jt. Exhs. 11 and 3) provided for signature by Chapter 84; but

Chapter 84 did not take part in negotiations (Tr. 37) and the parties agreed to negotiate only for Tampa and St. Petersburg (Tr. 36-37) and if Lakeland employees, ". . . chose to buy into it . . . that would be up to them. . . ." (Tr. 36-37)².

8. Also on October 15, 1996, Mr. Vanater confirmed arrangements for the next bargaining session on October 31, 1996 (Jt. Exh. 4).

9. On October 23, 1996, Mr. Wood transmitted a draft (Jt. Exh. 5) which reflected his, ". . . input toward the MOU of reviews . . ." (Cover sheet, Jt. Exh. 5) and attached "Evaluation Roll Up Data" (Jt. Exh. 5, Attachment).

The Union on its first two drafts had listed, without place for signature, the names of the "Negotiations Committee Members" (Jt. Exh. 11 and 3); and Mr. Wood on his draft of October 23, 1996, similarly listed them, without place for signature; however, he called them: "Recommending committee members" (Jt. Exh. 5). Further, the Division Chief, Charles Schaefer, was to sign as approving official for Respondent and the President of Chapter 87, Martin Grier, was to sign as approving official for the Union (id.).

10. The parties met on October 31, 1996, and, Mr. Vanater testified, ". . . I believed we had an agreement." (Tr. 50); ". . . we discussed the draft . . . It would be J-5. . . . And we reached agreement on all the points on that, on that draft. And there was an agreement, I believe, that some of the language would be changed some. But, we reached agreement and the Branch Chief agreed to prepare the final draft. And he agreed to change the signature block back to himself and change the recommending committee from the individuals listed as the recommending committee, change that back to negotiating members with a right of signature . . . we wanted to be able to sign the agreement, that the individuals for the Union that were negotiating. And he agreed to that." (Tr. 49).

Mr. Vanater stated that Mr. Wood said,

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Actually, Local 84 already had a similar agreement with the Orlando Branch (Tr. 26). As a matter of fact, when Local 87 received a copy of the Orlando agreement. ". . . we wanted such an agreement in our branch. . . . what was used as sort of a guide. . . ." (Tr. 27).

". . . I'll change the signature blocks back to mine, but, I don't think the Division Chief will let me sign it. . . . (Tr. 49).

11. On November 4, 1996, Mr. Wood, as he had agreed on October 31, submitted a revised draft (Jt. Exh. 6), on which changes were made, including, for example, acceptance in Paragraph 5 of the use of open cases for review and a ratio of closed (60%) to open (40%) cases; deletion of "disqualified" in Paragraph 7 and the addition of a provision for return to this review process when a removed employee becomes fully successful; and provided for signature by the, "Recommending committee members". This draft, as had Joint Exhibit 5, provided for approval by Mr. Schaefer, for Respondent, and by Mr. Grier, for the Union. Paragraph 8, as had the substantially similar Paragraph 8 of Joint Exhibit 5, provided that, "This memorandum of understanding is subject to review and approval . . . and becomes effective upon signature of both parties [Division Chief and Chapter 87 President]."

12. Mr. Vanater stated that, ". . . we were in agreement with the substance of the agreement [i.e. Jt. Exh. 6]. The only area that we had a problem with was the signature block area" (Tr. 51).

Indeed, Mr. Vanater was asked and testified as follows:

"Q Mr. Vanater, did the agreement, the substantive parts of the agreement, Paragraphs 1 through 8, [Jt. Exh. 6], did this essentially memorialize what was agreed upon on October 31st?

"A Yes. We were in agreement with that." (Tr. 52).

13. Nevertheless, Mr. Vanater on his draft of November 6, 1996 (Jt. Exh. 7), made changes in Paragraph 2 of Joint Exhibit 6, he stated, to conform to changes to NORD 4.5, October 4, 1996 (Jt. Exh. 13; Tr. 53); to Paragraph 5, which he described as rewording and, ". . . there was no substantive change to Item [Paragraph] Number 5 . . . (Tr. 54); in Paragraph 7, strangely, Mr. Vanater re-introduced the word "disqualified" to which he had objected in Joint Exhibit 5 and which Mr. Wood had removed in Joint Exhibit 6. Mr. Vanater added a new Paragraph 8 which provided, "None of the terms and condition of this agreement shall supersede any provision of NORD IV (Rev 7-94 and 10-96)." (Jt. Exh. 7). Finally, Mr. Vanater, renumbered Paragraph 8 of Joint Exhibit 6 and his new Paragraph 9 provided,

"This Memorandum of Understanding is subject to review and approval of Branch Chief Terry Wood and NTEU Chapter 87 President Martin Grier, and becomes effective upon signature of both parties." (Jt. Exh. 7, Par. 9).

Signature lines for "Approving Officials", Terry Wood and Martin Grier, were provided as well as signature lines for each member of the negotiating committee, including Mr. Wood (Jt. Exh. 7).

14. On November 7, 1996, Mr. Wood in his "Weekly Notes" stated, in part, that, "We completed the negotiation of the review process for the Tampa and St. Pete PODs. . . ." (Jt. Exh. 8; Tr. 54).

Mr. Vanater stated that when he saw Joint Exhibit 8, he,

". . . was a little perplexed by it . . . the problem is that the agreement had not been signed. So I guess we kind of interpreted it as premature to say they [negotiations] were completed without having signed the agreement. . . ." (Tr. 55).

15. Mr. Vanater talked to Mr. Wood, probably on November 8 (Tr. 56) and, ". . . expressed some concern . . . that he was, he was representing that the agreement was done. . . . And the problem with, the only problem with that is that it had not been signed yet." (Tr. 56; see also, Tr. 57).

16. On November 14, 1996, Mr. Wood submitted a further draft (Jt. Exh. 9) which adopted Mr. Vanater's proposed Paragraph 2 (Jt. Exhs. 7, 9); but rejected the wording of Paragraph 5 as Mr. Vanater had proposed in Joint Exhibit 7 (Jt. Exh. 9, Par. 5). Mr. Wood, in Paragraph 7 eliminated "disqualified" which Mr. Vanater had included; Mr. Wood eliminated the new paragraph 8 which Mr. Vanater had inserted on his November 6 draft (Jt. Exh. 7) and the concluding Paragraph 8 of Mr. Wood's draft rejected Mr. Vanater's proposed Paragraph 9 (Jt. Exh. 7) and again proposed that,

"This memorandum of understanding is subject to review and approval of Division Chief Charles Schaefer and NTEU Chapter 87 President Martin Grier and becomes effective upon signature of both parties" (Jt. Exh. 9, Par. 8).

Signature lines were provided for each member of the "Recommending committee", and for the "Approving Officials", i.e., Mr. Schaefer, Division Chief, and Mr. Grier, NTEU Joint Council Chairman (Jt. Exh. 9).

17. On December 3, 1996, Mr. Vanater submitted what he termed, "This our final draft. . . ." (Jt. Exh. 10, Cover sheet). In his "final draft", Mr. Vanater accepted Mr. Wood's wording of Paragraph 5 (Jt. Exhs. 9, 10); but, in Paragraph 7 re-inserted "disqualification" and "disqualified" (Jt. Exh. 10); re-inserted, from his November 6, 1996, draft (Jt. Exh. 7), Paragraph 8, which Mr. Wood had rejected in his November 14, 1996, draft (Jt. Exh. 9)³; re-inserted his Paragraph 9 from Joint Exhibit 7, except that the President of Chapter 87 was then Ms. Cindy Rush (Jt. Exh. 10). Thus, the MOU was to be subject to review and approval of Branch Chief Terry Wood and NTEU Chapter 87 President Cindy Rush; signature lines were provided for "Approving Officials", namely Mr. Wood and Ms. Rush, and signature lines were provided for each member of the "Negotiations Committee" (Jt. Exh. 10).

Mr. Vanater stated that,

"Paragraph 9 is the point that we were stuck on . . . which is in regards to the approving authorities." (Tr. 62) (Emphasis supplied).

18. On, or about, January 21, 1997, at a partnership meeting, Mr. Wood, ". . . advised us that he was not authorized to sign it." (Tr. 66).⁴

CONCLUSIONS

1. The Parties never reached agreement

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Mr. Vanater stated that this, ". . . was never discussed . . ." (Tr. 62), which the record shows was correct; but his further statement that it was, ". . . never disagreed" (Tr. 62) is contrary to the record. Mr. Wood pointedly removed it when he submitted his November 14, 1996, draft.

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From the record as a whole, including Mr. Vanater's statement that they were ". . . stuck . . . in regards to the approving authorities" (Tr. 62), it is clear, and I so find, that Mr. Vanater meant that Mr. Wood said he did not have authority to sign as the approving official. At no time did Mr. Wood ever refuse to sign the agreement as a member of the Committee, whether designated "Recommending" or "Negotiations".

The record shows that the parties never reached full agreement. Mr. Vanater, Chief Spokesman for the Union, said that on October 31, 1996, the parties reached agreement; that Mr. Wood, Respondent's Chief Spokesman, agreed to prepare ". . . the final draft" (Tr. 49) and that he, Wood, would change the signature block back to himself and for each member of the negotiating committee to sign. On November 4, 1996, Mr. Wood, as he had agreed, submitted a revised draft (Jt. Exh. 6). Mr. Vanater said, ". . . we were in agreement with the substance of the agreement [i.e., Jt. Exh. 6]. The only area that we had a problem with was the signature block area . . ." (Tr. 51). Indeed, Mr. Vanater said that, as to Paragraphs 1 through 8 of Joint Exhibit 6, "We were in agreement with that." (Tr. 52).⁵ Nevertheless, Mr. Vanater in his draft of November 6, 1996, Joint Exhibit 7, not only made changes in Paragraph 2 to conform to changes in NTEU's National Agreement, NORD 4.5, October 4, 1996, Joint Exhibit 13, but changed Paragraphs 5 and 7; added a new Paragraph 8; re-wrote what Mr. Wood had written as Paragraph 8 (Jt. Exhs. 5 and 6), which he, Mr. Vanater, described as, "Number [Paragraph] 9 is a major change. . . ." (Jt. Exh. 7, attachment). Of course, Mr. Vanater's November 6 draft made Mr. Wood the approving official.

On November 7, 1996, Mr. Wood stated in his "Weekly Notes" that, "We completed the negotiation of the review process for the Tampa and St. Pete PODs . . ." (Jt. Exh. 8) and Mr. Vanater called Mr. Wood, on November 8, 1996, to protest his premature representation because he, Wood, ". . . was representing that the agreement was done. . . . And the problem . . . with that is that it had not been signed yet." (Tr. 56).

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From the record as a whole, Mr. Vanater plainly did not intend to say that the Union agreed with Paragraph 8, for the reason that Paragraph 8 stated, inter alia, that the MOU is subject to review and approval of Division Chief Charles Schaefer and approval by Respondent's District Director is at the heart of the Union's position.

I am also aware that Mr. Wood consistently used the word "Recommending" (Jt. Exhs. 5, 6, 9) while Mr. Vanater consistently used the word "Negotiations" (Jt. Exhs. 11, 3, 7, 10) in describing the Committee members. While this was an item of disagreement, nothing in the record indicates, or suggests, that this played any part in the failure of the parties to reach agreement. To the contrary, the Union's disagreement was its refusal to accept approval by Respondent's District Director.

On November 14, 1996, Mr. Wood submitted a further draft, Joint Exhibit 9, in which he accepted Mr. Vanater's proposed Paragraph 2, but rejected Mr. Vanater's wording of Paragraph 7; eliminated "disqualified", which Mr. Vanater had inserted in Paragraph 7; eliminated Mr. Vanater's new Paragraph 8; rejected Mr. Vanater's proposed Paragraph 9; and, again, provided for approval by Respondent's Division Chief.

On December 3, 1996, Mr. Vanater submitted ". . . our final draft. . . ." (Jt. Exh. 10, cover sheet). In his "final draft", Mr. Vanater accepted Mr. Wood's wording of Paragraph 5; but in Paragraph 7 re-inserted "disqualification" and "disqualified"; re-inserted, from his November 6 draft, Paragraph 8; re-inserted his Paragraph 9 from his November 6 draft, except that the President of Chapter 87 was then Ms. Cindy Rush; and, of course, again, would make Branch Chief Wood the approving authority.

On, or about, January 21, 1997, Mr. Wood told Mr. Vanater, as he had told him on October 31, 1996, that he, Wood, ". . . was not authorized to sign it" (Tr. 66), by which, as I stated above, n.4, supra, Mr. Wood meant, and Mr. Vanater understood, that he was not authorized to sign as the approving official. Indeed, Mr. Vanater testified that, "Paragraph 9 is the point that we were stuck on . . . which is in regards to the approving authorities." (Tr. 62).

Obviously, the parties never reached full agreement. Internal Revenue Service, Philadelphia District Office, 22 FLRA 245 (1986). The Union refused to sign Respondent's proffered agreement and Respondent refused to sign the Union's proffered agreement. From his first proposed agreement on October 23, 1996 (Jt. Exh. 5), Mr. Wood made it clear that the MOU must be approved by Respondent's Division Chief. At no time did Mr. Wood refuse to sign the MOU; but he made it clear that it must be approved by the Division Chief. The Union, by Mr. Vanater, refused to accept approval by Respondent's Division Chief and on that implacable reef agreement foundered. General Counsel's argument that Respondent refused to sign the MOU simply is without basis in fact. As to implementation, when Mr. Wood, in his "Weekly Notes", announced that, "We completed the negotiation of the review process for the Tampa and St. Pete PODs . . .", which strongly inferred an intent to put it into effect, the Union, by Mr. Vanater, "blew the whistle" and, in effect, said no, there is no agreement because it hasn't been signed. Thereafter, as he had previously, Mr. Wood proffered a written document, fully in accord with

§ 14(b) (5) of the Statute, which Respondent's negotiators were fully prepared to execute; but the Union refused to execute the proffered agreement.

2. Respondent exercised a statutory right in insisting that MOU be approved by its Division Chief

§ 14(c) (1) of the Statute provides,

"(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency." (5 U.S.C. § 7114(c) (1)).

While § 14(c) (4) provides,

"(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement. . . ." (5 U.S.C. § 7114(c) (4)).

Article 47 of the parties' National Agreement, which includes "Section 4 Local Bargaining", in Section 1, entitled "General Provisions", specifically provides,

"K.

"Agreements negotiated pursuant to this article will be subject to agency head approval pursuant to 5 USC 7114(c). . . ." (Jt. Exh. 13, Article 47, Section 1K.).

Accordingly, by the procedures of the controlling National Agreement, local agreements, such as the MOU in question here, are subject to agency head approval, pursuant to § 14 (c) (1) of the Statute. The agency head's authority under § 14(c) (1) is delegable, National Treasury Employees Union, Chapter 52, 23 FLRA 720 (1986); American Federation of Government Employees, AFL-CIO, Local 1858, 27 FLRA 69, 70 (1987). Fort Bragg Association of Teachers, 44 FLRA 852, 855 (1992). Respondent proffered a written document fully in accord with § 14(b) (5) of the Statute which the Union refused to sign. The record shows that Mr. Wood, Branch

Chief, was fully authorized to negotiate⁶ for Respondent and that he was fully prepared to execute the proffered agreement.

Having found that Respondent did not violate § 16(a)(5) or (1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. AT-CA-70357 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: February 25, 1998
Washington, DC

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Mr. Wood's authority has not been questioned. In any event, District Director Schaefer on October 31, 1996, questioned Mr. Wood's proposed MOU (G.C. Exh. 14); but Mr. Wood adhered to his position in all of his subsequent drafts (Jt. Exhs. 6, 9), which underscores his independent authority to negotiate for Respondent.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. AT-CA-70357, were sent to the following parties in the manner indicated:

CERTIFIED MAIL, RETURN RECEIPT

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Dated: February 25, 1998
Washington, DC