

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

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DEPARTMENT OF HEALTH AND .  
HUMAN SERVICES, SOCIAL .  
SECURITY ADMINISTRATION, .  
AND SOCIAL SECURITY .  
ADMINISTRATION, FIELD .  
OPERATIONS, REGION II .  
Respondent .  
and . Case Nos. 2-CA-80121  
2-CA-80159  
AMERICAN FEDERATION OF .  
GOVERNMENT EMPLOYEES, .  
AFL-CIO .  
Charging Party .  
. . . . .

Richard A. Matthews, Esq.  
For the Respondent  
Barbara S. Liggett, Esq.  
For the General Counsel of FLRA  
Before: SAMUEL A. CHAITOVITZ  
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-  
Management Relations Statute, as amended, 5 U.S.C. 7101  
et seq., hereinafter called the Statute, and the Rules and  
Regulations of the Federal Labor Relations Authority (FLRA),  
5 C.F.R. Chapter XIV, § 2410 et seq.

The charges were filed and amended by American  
Federation of Government Employees, AFL-CIO, hereinafter  
called AFGE, in Case No. 2-CA-80121 and Case No. 2-CA-80159,  
against Department of Health and Human Services, Social  
Security Administration and Social Security Administration,  
Field Operations, Region II, hereinafter called SSA and  
Respondent.

The General Counsel of the FLRA, by the Regional Director of Region II of the FLRA, issued a Complaint and Notice of Hearing alleging that Respondent violated Section 7116(a)(1), (5) and (6) of the Statute when it allegedly failed and refused to cooperate in impasse procedures by unilaterally instituting the Field Office Request for Medical Evidence, Pilot Program, hereinafter referred to as FORME, while impact and implementation negotiations over FORME were pending before the Federal Service Impasses Panel, hereinafter called FSIP. Respondent filed an Answer denying it had violated the Statute.<sup>1/</sup>

A hearing was held before the undersigned in San Juan, Puerto Rico. Respondent and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs were filed and have been fully considered.

Based upon the entire record in this matter,<sup>2/</sup> my observation of the witnesses and their demeanor, and my evaluation of the evidence I make the following:

#### Findings of Fact

AFGE is the exclusive representative of a consolidated nationwide unit of certain employees of Respondent, including all employees employed in the District and Branch Offices of the Social Security Administration in the Commonwealth of Puerto Rico, with certain exclusions. AFGE has delegated to the National Council of Social Security Administration Field Operations Locals (Council) authority to act as its representative for the purposes of collective bargaining for certain of SSA employees, including employees of SSA's Puerto Rico District and Branch Offices, and the Council's delegation has been recognized by Respondent.

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<sup>1/</sup> Respondent filed a Motion to Admit Respondent's Answer Into Evidence. No opposition was filed and Respondent's Motion is hereby GRANTED. Accordingly, the Answer is made a part of the record herein and is attached hereto as "Attachment A."

<sup>2/</sup> General Counsel of the FLRA filed a Motion to Correct Transcript. No opposition has been received. Accordingly the Motion is hereby GRANTED and attached hereto as "Attachment B."

The AFGE, Local 2608 has acted as agent for the Council for the purposes of collective bargaining for SSA's employees in Puerto Rico and the Virgin Islands, and has been recognized in this capacity by SSA.

The FORME Pilot Program is a program which affects the processing of Social Security Administration disability benefit claims. Under FORME, employees in SSA's field offices initiate requests for medical evidence from treating sources such as doctors and hospitals. Prior to FORME this work was done by the Disability Determination Services, a state agency which is responsible for making the medical determination about whether an applicant is disabled. The FORME program affects SSA's Claims Representatives and Development Clerks. Under FORME Claims Representatives complete a set of four forms for each source of medical evidence, in addition to completing the documents which were previously used for processing a disability claim. This additional responsibility increases the length of time spent conducting each interview with a disability benefit applicant from an average of approximately an hour and a half under the previous system, to an average of approximately two and a half to three hours under FORME. A Development Clerk then reviews the folder created by the Claims Representative and photocopies the FORME forms, separates and files snap-out forms, and mails the FORME documents, forms, and questionnaires to the different doctors and hospitals.

In September or October of 1986, the President of AFGE, Local 2608, Pedro Romero, first learned that the FORME project was going to be implemented in certain areas of SSA's Region II. In December of 1986, the Area Director for Area VIII<sup>3/</sup> informed Romero that implementation of FORME in Puerto Rico would be delayed while management sought feedback from the Disability Determination Services. On August 14, 1987, Romero received a letter dated August 10, 1987, from Jorge Dario Ortiz, Area Director for Area VIII, informing Romero that Respondent planned to implement the FORME Pilot Program in Puerto Rico on September 21, 1987, and requesting AFGE Local 2608's input by August 28, 1987.

By letter dated August 21, 1987, AFGE Local 2608 submitted preliminary bargaining proposals on ground rules for the FORME Pilot Program and advised SSA that the union's

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<sup>3/</sup> Area VIII is a part of Region II, and covers Puerto Rico and the U.S. Virgin Islands.

negotiators would be Romero and Ana Angelet. Ortiz responded by letter dated August 24, 1987, agreed to bargain, and stated SSA did not know what was meant by preliminary bargaining proposals, which in any event had been left out of the union's letter. SSA also requested any additional proposals by August 28. Beginning on September 10, 1987, the parties met and bargained on the FORME program for five days. After the fifth day, the parties had reached a deadlock on most of AFGE Local 2608's proposals. The parties had agreed on 3 of AFGE Local 2608's proposals that were still outstanding.<sup>4/</sup> On September 16, 1987, Romero informed management by letter that the union planned to seek the assistance of a mediator and insisted that no implementation take place until an agreement had been reached. The letter also said that AFGE Local 2608 may go to FSIP. Management's chief negotiator, Miriam Alvarez, responded by letter dated September 18, 1987, inviting AFGE Local 2608 to reconsider management's last offer and end the deadlock.

On October 22, 1987, the parties met with, Erwin Gerard of the Federal Mediation and Conciliation Service. With the assistance of the mediator, the parties were able to reach agreement on five proposals, leaving seven proposals outstanding. At the point in the mediation when the parties were unable to agree on the outstanding 7 proposals, the mediator requested that the parties explain their positions with respect to the remaining 7 proposals, which the parties did. The mediator indicated the parties were deadlocked and unable to reach agreement and asked SSA to provide to AFGE Local 2608 SSA's position with respect to each of the remaining 7 union proposals that had not been agreed to. SSA complied and the mediator then advised AFGE Local 2608 of the various options then available to it. AFGE Local 2608 requested SSA to provide the union with a written statement explaining management's position with respect to each of these 7 proposals, including a declaration of non-negotiability on any proposal being determined by SSA to be non-negotiable.

The above version of this meeting is an amalgam of the version of the various witnesses. In this regard, I find no witness more credible than any other, but rather each saw and heard the proceedings from his or her own perspective.

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<sup>4/</sup> AFGE Local 2608 had originally submitted 21 proposals.

Thus, although the SSA witness felt management had clearly expressed its position on each proposal, AFGE Local 2608 witnesses expressed confusion as to which proposals were being declared non-negotiable and which were not.<sup>5/</sup> Both parties recognized they were deadlocked. Management did not, at this point, indicate any specific date when FORME would be implemented.<sup>6/</sup> SSA did agree to send the union the written position of SSA as to the outstanding proposals.

Following the October 22, 1987 meeting, Romero spoke with Alvarez several times during November and December 1987 about the status of the promised letter. During some of these occasions, Alvarez told Romero that the letter was being prepared and would be forthcoming.

On November 9, 1987, Alvarez sent AFGE Local 2608 a letter in which SSA provided its position as to all remaining 7 proposals, including 2 which SSA contended were non-negotiable. This letter did not specifically state SSA intended to implement FORME or a date when FORME would be implemented. AFGE Local 2608 did not receive this letter at this time. On December 21, 1987, a letter from Ortiz was hand delivered to Romero which informed Romero that FORME would be implemented on December 29, 1987, because "more than reasonable time has elapsed from the time the impasse was declared to present" and there had been "no further formal contact concerning the issue of FORME." Upon review of this letter, Romero telephoned Maria Maldonado, the Area Administrative Assistant, and asked her why management was implementing when the union had never been given the letter promised by Respondent. Maldonado told Romero that she understood a letter had been sent. Romero then called Alvarez and asked about the letter. Alvarez told Romero that she had sent him a letter on November 9, 1987, and agreed to send Romero another copy when he told her that he had never received any such letter. On December 22, 1982,

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<sup>5/</sup> This difference as to each proposal determined whether AFGE Local 2608 could proceed to FSIP with a particular proposal or utilize a negotiability proceeding.

<sup>6/</sup> SSA indicated during the morning meeting that it intended to implement FORME. No date was mentioned and there was no such representation after the parties were deadlocked.

Alvarez gave a copy of the letter to another union official, Mr. Rodriguez, and asked him to give it to Romero.

On December 22, 1987, Ortiz issued a letter to all District and Branch Managers in the area confirming a December 21, 1987 telephone conversation in which he announced the December 29, 1987 implementation of FORME. On December 24, 1987, Romero hand delivered a letter to Ortiz in which he stated that the written position of management's negotiators had never been received by the union, and stated that implementation of FORME while the negotiators were at impasse would result in the filing of a charge with the FLRA. The same day, Romero filed a request for assistance with the FSIP and hand delivered a copy of this request to Respondent's Area Office. Ortiz responded to Romero's December 24, 1987 letter by letter dated December 28, 1987. Ortiz attached a copy of the November 9, 1987 letter from Alvarez, and asserted that even if the letter had not been received by AFGE Local 2608, the union should have invoked FSIP assistance at an earlier date because the parties had reached impasse on October 22. Ortiz stated that SSA had fulfilled its bargaining obligations and implementation would proceed as scheduled on December 29, 1987.

On December 29, 1987, a FORME training session was conducted by management which was attended by certain managers and bargaining unit employees. Actual cases began to be processed under FORME procedures on January 15, 1988.

On January 19, 1988, management responded in writing to AFGE Local 2608's December 24, 1987 FSIP submission; SSA's letter dealt with 5 of the 7 remaining proposals.<sup>7/</sup> The union provided a written rebuttal to management's January 19, position by letter dated January 28, 1988. By letter dated February 11, 1988, FSIP informed the parties that it was declining to assert jurisdiction because it was unclear that an impasse existed "within the meaning of section 2470.2(e) of the Panel's regulations." FSIP's letter stated that the employer had raised questions concerning its obligation to bargain, that AFGE Local 2608 contended the employer's claims were without merit, and that "such questions concerning the obligation to bargain must be resolved in an appropriate forum before a determination can be made as

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<sup>7/</sup> AFGE Local 2608 had submitted 5 proposals to FSIP. The 2 that had been declared non-negotiable by SSA in its November 9 letter were not submitted to FSIP.

to whether the parties have, in fact, reached a negotiation impasse." The letter further stated that the determination to decline to assert jurisdiction was made "without prejudice to the right of either party to file another request for assistance at such time as the aforementioned threshold questions have been resolved and an impasse has been reached on the substantive issues."

By letter dated January 7, 1988, Maria B. Storkson, Operations Supervisor at SSA's Carolina Branch Office, informed Romero that FORME would be implemented on January 15, 1988 in the Carolina Branch Office. The notice was sent to Romero because there was no local on-site AFGE Local 2608 representative in the Carolina Branch Office at that time. Romero met with Storkson on January 13, 1988 to discuss the proposed changes in the Carolina Branch Office prompted by FORME. Romero and Storkson were unable to reach agreement on any issues, so following the meeting, Romero prepared and delivered to Storkson written ground rules and substantive bargaining proposals. Among the proposals submitted by the AFGE Local 2608 were the following: "The parties agree that the implementation of FORME was made illegally as the negotiations at the Area Level were still at impasse," and "The parties agree that the implementation of FORME will conform to the agreed upon articles of the failed Area-wide negotiations." A cover letter dated January 14, 1988, which Romero had prepared to accompany the proposals, was mailed later. By letter dated January 19, 1988, Storkson responded to Romero's bargaining proposals. In the letter, Storkson stated that AFGE Local 2608's proposals had already been negotiated at the Area level, and were either agreed upon or were at impasse. Storkson stated that these matters were out of her jurisdiction. By letter dated January 20, 1988, Storkson responded to Romero's January 14, 1988 letter, and denied that management had failed to bargain in good faith. Romero and Storkson had no further contact regarding FORME.

The implementation of FORME in Puerto Rico, with the attendant increase in the length of time necessary to conduct a disability interview, would reasonably and foreseeably result in employees' having less time to perform their other duties. Also it could reasonably be foreseen to affect the quality of employees' performance and be reflected in lowered performance appraisals. Both quality and quantity of work are considered in rating employees' performance.

The purpose of the FORME Pilot Program was to try to reduce the length of time required to process disability benefit claims. The program was implemented as a pilot program.

### Discussion and Conclusions of Law

General Counsel of the FLRA contends that SSA violated Section 7116(a)(1), (5) and (6) of the Statute by failing and refusing to cooperate in impasse procedures with AFGE Local 2608 regarding the implementation of the FORME Pilot Program in Puerto Rico when SSA unilaterally implemented FORME in Puerto Rico while implementation negotiations were pending before FSIP.<sup>8/</sup>

There is no dispute that during September and on October 22, 1987 the parties engaged in meaningful and good faith negotiations concerning the impact and implementation of the FORME Pilot Program in Puerto Rico. There is no dispute that an implementation of FORME was a change in conditions of employment which obligated SSA to bargain about the impact and implementation of the FORME Pilot Program.<sup>9/</sup>

At the October 22, 1987 meeting SSA and AFGE Local 2608, with the aid of a mediator, continued their impact and implementation bargaining involving FORME. The parties reached agreement on 5 proposals but were unable to reach agreement on 7 remaining union proposals. At this point, at the urging of the mediator, SSA explained its position as to each of the 7 remaining proposals. It apparently became clear to AFGE Local 2608 that SSA contended that 2 of the remaining proposals were non-negotiable.<sup>10/</sup> As to the other 5, although both parties recognized they were deadlocked,

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<sup>8/</sup> SSA contends an issue also presented herein is whether it generally violated Section 7116(a)(1) and (5) of the Statute by bargaining in bad faith concerning the impact and implementation of FORME. No such allegation is contained in the complaint herein nor is it urged by the General Counsel of the FLRA. Accordingly, I need not and do not deal with such allegation herein.

<sup>9/</sup> There is no allegation or contention that SSA was obligated to bargain about the substance of FORME, presumably because SSA was privileged to institute such a change pursuant to Section 7106(a) and (b) of the Statute. The obligation to bargain about the procedures to be observed in implementing such a change and arrangements for employees adversely affected is found in Section 7106(b)(2) and (3) of the Statute and is referred to herein as "impact and implementation" bargaining.

<sup>10/</sup> After subsequent research Romero agreed they were non-negotiable.



there was some confusion on AFGE Local 2608's part as to each of the remaining 5 proposals whether SSA was contending it was non-negotiable or the parties were at impasse.<sup>11/</sup> SSA agreed to write such a letter setting forth its position as to the negotiability of each remaining proposal. In light of the foregoing, because of the confusion on the part of AFGE Local 2608 as to whether SSA was declaring particular proposals non-negotiable or at impasse, I conclude that on October 22, AFGE Local 2608, although recognizing the parties were deadlocked, did not know which particular proposals it could take to FSIP and which it had to pursue through the negotiability procedures. Thus the matter was not ripe for presentation to FSIP.

SSA on November 9, 1987 did write and mail a letter to AFGE Local 2608, advising the union of SSA's position on each of the 7 remaining proposals, including both the 2 that were declared non-negotiable and the other 5 which were not so declared. AFGE Local 2608 did not receive this letter and, apparently after the November 9 date, never asked where the letter was that SSA had promised to send.<sup>12/</sup> Instead AFGE Local 2608 waited until December 21 when it received notice of the actual date of FORME implementation, before the union inquired as to where was SSA's promised letter of position as to the 7 proposals. At this point AFGE Local 2608 invoked the assistance of FSIP.

Section 7119(b)(1) of the Statute provides that if the parties cannot "resolve a negotiation impasse" either party may request FSIP to consider the matter. The FLRA has held that impasse resolution procedures are an aspect of the collective bargaining process and by failing to maintain the status quo while matters are pending before FSIP an agency acts in derogation of its bargaining obligation and violates Section 7116(a)(1) and (5) of the Statute and also violates Section 7116(a)(6) of the Statute because such conduct by an agency constitutes a failure to cooperate with impasse procedures. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 18 FLRA 466 (1985), hereinafter called the BATF Case. In this case the FLRA noted that an agency is required to maintain the status quo after impasse has been reached "and the services of the Panel have been invoked in a timely manner . . ." BATF, supra, at 469.

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<sup>11/</sup> There is no dispute herein and all parties agree that all 5 of the remaining proposals were and are negotiable.

<sup>12/</sup> There were some such inquiries apparently prior to November 9, but not after.

The General Counsel of the FLRA contends that SSA violated the Statute because it implemented the FORME Pilot Program after AFGE Local 2608 had requested FSIP assistance. In this regard General Counsel of the FLRA contends that AFGE Local 2608 sought assistance from FSIP in a timely manner, because it is contended the reference point on determining "timely manner" is when the union learned SSA specifically intended to implement FORME and that time commenced to run December 21 when SSA advised AFGE Local 2608 that FORME would be implemented on December 29. General Counsel of the FLRA argues, accordingly, that AFGE Local 2608 acted timely when it submitted its request for assistance to FSIP on December 24, 1987. In U.S. Customs Service, 16 FLRA 198 (1984), the FLRA affirmed the Administrative Law Judge who stated that after impasse changes can unilaterally be implemented only if the agency provides the union with sufficient notice management intended to implement the changes, so that the union is afforded a reasonable opportunity to invoke the processes of FSIP. The Administrative Law Judge went on to state that notice of intent to implement must be given after impasse to permit lawful unilateral implementation. U.S. Customs Service, supra, at 210. The Administrative Law Judge stated "Obviously, neither the fact that an impasse in negotiations has been reached nor the passage of time after impasse permits a lawful unilateral implementation of the change, on which impasse has been reached, in the absence of notice 'of when the intended change was to be put into effect' in order to provide the Union, after notice of intended implementation of the changes, 'an opportunity to invoke the services of the Panel.'" U.S. Customs Service, supra, at 211. In the U.S. Customs Case, supra, the FLRA stated that the Union had a reasonable opportunity to invoke the services FSIP after impasse had been reached and after receiving notice of intent to implement the last proposal as soon as possible.

The FLRA in determining whether a union had a reasonable opportunity to invoke the services of FSIP relies upon the circumstances in each case. See Department of the Navy, United States Naval Supply Center, San Diego, California 31 FLRA 1088 (1988), hereinafter called Naval Supply Center.

In the subject case the record establishes that the entire series of negotiations and meetings occurred in the context that SSA intended to implement FORME. During the October 22 meeting SSA advised AFGE Local 2608 that SSA intended to implement FORME. The whole purpose of the letter requested by AFGE Local 2608 was so that the union could determine which precise proposals should be submitted to FSIP, again in the context that SSA intended to implement FORME. This was clear to the parties and set the context of the bargaining. After SSA wrote the November 9 letter, which

letter mentioned that the union indicated it intended to take the issues to FSIP, AFGE Local 2608 did not inquire about when it would receive the promised letter, but was satisfied to delay and sit and wait for the letter.

In such circumstances, recognizing that the parties contemplated SSA's implementation of the FORME Pilot Program, AFGE Local 2608 had reasonable time to seek FSIP's assistance prior to SSA's December 21 notification that it would implement FORME on December 29.

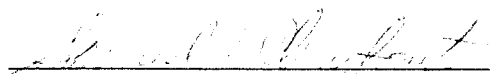
To insist upon a mechanical approach that requires additional notice of intent to implement, after impasse is reached, when the record makes it clear that participating parties were both operating in the context that SSA intended to implement FORME, would not encourage more effective bargaining and use of the FSIP procedures. On the contrary it would encourage delay and reliance upon form over substance. Accordingly, I reject this mechanical approach and agree with FLRA that each case must be decided upon its own circumstances. Naval Supply Center, supra. Thus AFGE Local 2608 had substantial and reasonable time to submit the issues to FSIP between November 9 and December 21. The union did not submit the issues to FSIP in a timely manner and SSA no longer had to maintain the status quo.

In light of the foregoing, therefore, I conclude that SSA did not fail and/or refuse to cooperate in the impasse procedures when it implemented FORME.<sup>13/</sup> Accordingly, I conclude SSA did not violate Section 7116(a)(1), (5) and (6) of the Statute when it implemented FORME and it is recommended that the Authority issue the following:

ORDER

It is hereby Ordered that the Complaint in this case is dismissed.

Issued, Washington, D.C., August 24, 1989

  
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SAMUEL A. CHAITOVITZ  
Administrative Law Judge

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<sup>13/</sup> In view of this decision I do not find it necessary to address the other issues raised by the parties in this case.

ATTACHMENT A

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY  
REGION II

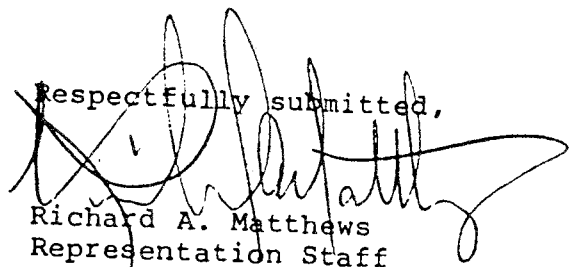
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Department of Health and Human Services :  
Social Security Administration and :  
Social Security Administration, :  
Field Operations, Region II :  
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RESPONDENT :  
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and :Case No. 2-CA-80121  
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American Federation of Government :  
Employees, AFL-CIO :  
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CHARGING PARTY :  
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Department of Health and Human Services :  
Social Security Administration and :  
Social Security Administration, :  
Field Operations, Region II :  
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RESPONDENT :  
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and :Case No. 2-CA-80159  
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American Federation of Government :  
Employees, AFL-CIO :  
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CHARGING PARTY :  
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ANSWER TO CONSOLIDATED COMPLAINT

Respondent Social Security Administration, in accordance with  
Section 2423.13 of the Federal Labor Relations Authority Rules  
and Regulations, herewith files its Answer to the Consolidated  
Complaint issued in the above-captioned cases.

1. (a) Admit.  
(b) Admit.
2. (a) Admit.  
(b) Admit.
3. Admit.
4. (a) Admit.  
(b) Admit.
5. Admit.
6. Admit.
7. (a) Admit.  
(b) Admit.  
(c) Admit.
8. (a) Deny.  
(b) Deny.  
(c) Deny.
9. Deny.
10. Deny.
11. Deny.

June 20, 1988  
Date

Respectfully submitted,  
  
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