

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

NEXEO SOLUTIONS, LLC

and

**TRUCK DRIVERS, OIL DRIVERS,
FILLING STATION AND PLATFORM
WORKERS' UNION, LOCAL NO. 705, AN
AFFILIATE OF THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

**CASES 13-CA-46694
13-CA-62072
20-CA-35519**

and

**BROTHERHOOD OF TEAMSTERS AND
AUTO TRUCK DRIVERS, LOCAL NO. 70
OF ALAMEDA COUNTY, AFFILIATED
WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S REQUEST FOR
SPECIAL PERMISSION TO FILE INTERIM APPEAL AND INTERIM APPEAL
OF RULINGS OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.26 of the Board's Rules and Regulations, Series 8, as amended, Counsel for the Acting General Counsel ("GC") moves for special permission to file an interim appeal of certain of the Administrative Law Judge's rulings. In short, the rulings at issue have precluded (and will continue to preclude) the GC from presenting evidence in support of its supplemental theory regarding statements and conduct the GC will argue are attributable to a purported "perfectly clear" successor. While the evidence adduced at hearing clearly support the merits of the GC's primary theory, the Judge's rulings have come despite written and oral argument demonstrating the legal viability of the GC's supplemental argument, and will seriously prejudice the GC in arguing the merits of the case under its alternative theory. Without immediate relief, the GC will be forced

continually to present evidence in the form of offers of proof and may have to seek relief via exceptions—a result that will further delay vindication of the important rights at issue.

I. PROCEDURAL BACKGROUND

On October 17, 2011, Complaint issued, in Case 13-CA-62072, alleging a violation by Respondent of Section 8(a)(5) of the Act by its delay in providing relevant, requested information to the Charging Party Union, Teamsters Local 705. That case was later consolidated with Case 13-CA-46694 by an Order Consolidating Cases and Consolidated Amended Complaint, dated November 30, 2011. The Consolidated Amended Complaint alleged, in addition, that Respondent violated Section 8(a)(5) of the Act by unilaterally implementing certain changes to unit employees' terms and conditions of employment upon its take-over of the Willow Springs, Illinois facility from predecessor employer Ashland Distribution Co.¹

On November 30, 2011, based on a charge filed by Charging Party Union Teamsters Local 70, Complaint issued in Case 20-CA-35519. In it, the GC alleged that Respondent violated Section 8(a)(5) of the Act by unilaterally implementing certain changes to unit employees' terms and conditions of employment upon its take-over of the Fairfield, California facility from predecessor employer Ashland Distribution Co.²

By an Order Further Consolidating Cases and Rescheduling Hearings, dated February 3, 2012, the three cases were formally consolidated for hearing. The hearing was

¹ On February 1, 2012, a majority of the Board authorized Section 10(j) injunction proceedings in Case 13-CA-46694. Those proceedings are currently pending in District Court.

² As asserted in both complaints, Respondent's take-over of the facilities at issue occurred as a result of a Purchase and Sale Agreement between it and Ashland. That P&S Agreement was consummated in early-November 2010. Respondent's physical assumption of Ashland's facilities, including those in Illinois and California, occurred on April 1, 2011.

scheduled to begin in Chicago, Illinois on April 2, and then continue in San Francisco, California on April 30.³

On March 26, 2012, all parties to the consolidated cases participated in a pre-trial conference call. As was made clear during the call, the GC will be arguing two theories in the alternative in relation to the “perfectly clear” successor allegations: (1) that the terms of the P&S Agreement by themselves served to render Respondent a “perfectly clear” successor to Ashland; and (2) that statements attributable to Respondent (largely oral in Illinois, largely written in California) likewise served to convey a perfectly clear message to the unit employees that all of them would be retained under essentially the same terms and conditions of employment.

During the conference call, the presiding administrative law judge, the Honorable William G. Kocol, asked a series of questions of the GC going to the second theory and, in particular, the issue of agency. Specifically, Judge Kocol questioned whether and to what degree Respondent may be held liable for the statements or acts of persons who, at the time of those statements or acts, were managers of predecessor employer Ashland. Apparently not satisfied with the answers given in the conference call, Judge Kocol suggested that certain witness testimony might be barred or limited until sufficient evidence on the issue of agency was brought out on the record.

In an effort to allay Judge Kocol’s concerns, the GC filed a Pre-Trial Brief on Agency-Related Issues. See Exhibit A. The Brief detailed agency-related facts then-known to the GC and intended to be presented at trial. The Brief also included a lengthy discussion of pertinent case law. Thereafter, Respondent filed its own Pre-Trial Brief on

³ By Order dated March 27, the San Francisco portion of the hearing was rescheduled to begin on May 7.

Agency-Related Issues. See Exhibit B. Coming into the April 2 hearing, however, Judge Kocol had issued no final rulings on the subject.

II. THE RULINGS AT ISSUE

After dealing with some preliminary matters on the record, Judge Kocol turned to the agency-related issues raised by the parties in their pre-trial briefs. See Exhibit C, being pertinent portions of the official transcript from the Chicago proceedings held April 2-4, 2012 (p. 1-3, 39-42, 54-65, 75, 85, 87-88, 90-93, 112-13, 291-94, 295-96, 298-99, 302-03, 309-12, 363, 368-69). At that time, Judge Kocol ruled that he would not allow witnesses to testify regarding statements made by purported agents of Respondent that occurred prior February 20, 2011.⁴ *Id.* at 41, lines 4-10. Judge Kocol suggested that he would need some further demonstration of agency status to consider reversing himself to allow in such testimony. *Id.*, lines 11-15. He then seemed to rest his conclusion on his determination that the GC's case would "rise and fall on what the purchase agreement says and whether Respondent complied with it . . ." *Id.*, lines 18-19. When pressed, Judge Kocol suggested that the GC make offers of proof to preserve the record. *Id.* at 42, lines 18-19. Later in the hearing, Judge Kocol suggested that he may allow said evidence into the record if it occurred after December 13, 2010. *Id.* at 292, lines 13-21. Nevertheless, Judge Kocol thereafter continued to appear wedded to the February 20, 2011 cut-off date. See *Id.* at 312, lines 21-24 (allowing evidence of a February 11 conversation into the record because "it's close enough," but questioning the weight the testimony would be given). Indeed, evidence of post-December 13 conversations was excluded. See *Id.* at 303, lines 3-9.

⁴ Judge Kocol's choice of the February 20, 2011, date appears to have rested on Respondent's counsel's earlier representations that offer letters to Ashland supervisory and managerial employees were mailed on February 17, and that most accepted their offers on or around that date.

Throughout all three days of hearing in Chicago, the GC's presentation of evidence in support of its alternative theory was severely hamstrung. Several exhibits were rejected, even though they were introduced specifically for the purpose of assuaging Judge Kocol's concerns so as to allow GC's witnesses to testify regarding the various conversations. See *Id.* at 54, lines 2-6; at 56, lines 21-23; at 63, lines 9-11; at 64, lines 14-15. And, in all but two instances, the GC's witnesses were precluded from testifying concerning conversations with purported agents occurring prior to February 20. In particular, Judge Kocol allowed some testimony from Union Representative Neil Messino regarding a December 13, 2010 conversation he had with Ashland HR Senior Representative Paul Fusco. This un rebutted testimony established that Fusco confided in Messino on that day that he had already been hired by Respondent Nexeo. See *Id.* at 112-13. Fusco also revealed to Messino during their conversation that Ashland Logistics Manager Pat Cassidy had been hired onto Respondent's "transition team," and that an offer to Ashland Willow Springs Plant Manager Tony Kuk was forthcoming. *Id.* at 112, lines 12-17; at 113, lines 12-17. Later in the hearing, Union Stewards Mike Jordan and George Sterba were allowed to testify regarding a February 11, 2011, conversation they had with Plant Manager Kuk. In that discussion, Kuk informed the stewards that he (and Logistics Manager Cassidy) were employees of Respondent and went on to provide assurances that all of the unit employees would be hired and their terms and conditions would remain the same. *Id.* at 311-12, 368-69, 372.

All other evidence of pre-February 20 conversations regarding Respondent's intent to retain all the unit employees and maintain their terms and conditions of employment had to come in by way of offers of proof. See *Id.* at 75, 85, 87-88, 92-93, 291-94, 295-96, 298-

99, 302-03.⁵ For example, an offer of proof was made as to testimony regarding a November 17, 2010, bargaining session at which HR Senior Representative Fusco represented that he may have authority to bargain on behalf of Respondent, once the sale closed; that Respondent intended on “keeping the business the way it is;” and that Respondent’s business plan included the unit employees. *Id.* at 87, lines 9-11; at 88, lines 1-2, 4-6. There would have likewise been testimony that, in a December 3, 2010, telephone conversation, Fusco informed Messino that Respondent intended to offer all unit employees employment; that employees would not have to reapply; and that Respondent “will maintain terms and conditions of employment.” *Id.* at 92, lines 14-21; at 93, lines 8-9. There would have been further testimony that, in a November 11, 2010, “town hall” meeting with unit employees, Logistics Manager Cassidy and Plant Manager Kuk gave assurances to employees that everyone would be retained and “there won’t be any changes except the name on the paychecks and the sign on the trucks.” See *Id.* at 293, lines 13-14. In addition, testimony would have been introduced that both Ashland managers aligned themselves with Respondent as evidenced by Cassidy’s statement that he assumed both of them would be retained as well. *Id.*, lines 14-18. In response to an employee question, Kuk went even farther by stressing that “there actually is not a new company, they don’t have a management team or drivers or warehouse employees. We are the new company.” *Id.* at 293 lines 14-18 to 294 lines 2. (emphasis supplied). In the same offer of proof, the GC described how, immediately after the town hall meeting, Cassidy and Kuk maintained this consistent message to the employees by informing a union steward that “the new

⁵ Pursuant to Judge Kocol’s repeated rulings on April 2 and 3, the GC agreed to forego iterating offers of proof on the record on April 4. See *Id.* at 363, lines 5-10. It was clear, however, that the GC was doing so without waiving its position on the agency questions. *Id.*

company is going to keep everything the same.” *Id.* at 294, lines 9-10. The additional offers of proof contain similar testimony.

The Chicago portion of the hearing adjourned on April 4 and the hearing is now scheduled to resume in San Francisco on May 7.

III. ARGUMENT

Respectfully, the GC is of the view that Judge Kocol’s ruling precluding witnesses from testifying in support of the GC’s alternate theory regarding pre-February 20, 2011, conversations with purported agents of Respondent is erroneous and prejudicial. While the GC believes that it will prevail on its primary theory that Respondent was a “perfectly clear” successor based on the terms of the P&S Agreement itself, the ruling has precluded the GC from pursuing its alternative theory for establishing Respondent as a “perfectly clear” successor. The GC should not have to await a full Board decision and possible remand to be allowed to put on evidence going to both of its legal theories. Thus, immediate relief requiring the admission of said evidence is required in order to avoid prejudicial delay and expense.

As demonstrated by the GC’s Pre-Trial Brief, Board law supports the notion that an entity may be held liable for the acts or statements of an unaffiliated other. See Exhibit A at 3-5, 8, and cases cited and discussed therein. The GC demonstrated that facts to be testified to by the GC’s Chicago-based witnesses fit well into the framework of caselaw presented. See *Id.* at 5-7.⁶ The GC went further, expounding upon the facts demonstrating a messaging stream common to Ashland and Respondent, *Id.* at 10-12, and citing caselaw

⁶ The numerous offers of proof made by the GC throughout the three days of testimony showed that the GC’s witnesses would have testified in a manner generally consistent with the facts set forth in the Pre-Trial Brief.

supporting the notion that a knowing beneficiary of another's acts may be held liable for those acts. *Id.* at 9-10, 12-14.

The GC did not stop there. As detailed above, the GC attempted to introduce numerous exhibits supportive of its agency theory. These exhibits were rejected. See Exhibit C at 54, lines 2-6; at 56, lines 21-23; at 63, lines 9-11; at 64, lines 14-15. And, but for a smattering of testimony, GC was forced to make numerous offers of proof, nearly all of which contained statements going both to the agency statuses of the Ashland managers and the merits of the "perfectly clear" successor issue under the alternative theory. See, e.g., *Id.* at 293, lines 13-14, 17-18 (Logistics Manager Cassidy giving assurances to unit employees and telling them that he assumed he and Plant Manager Kuk would be retained). Despite the relevance of the evidence proffered, Judge Kocol continued in his refusal to allow nearly all such evidence into the record.⁷

The GC contends here, as he did to Judge Kocol, that the known facts and caselaw demonstrate that the GC can prevail on the agency issue. The GC should, therefore, be allowed to introduce into the official record witness testimony and documentary evidence pertinent to the agency issue. Allowing that evidence in now will preserve for the Judge the opportunity to fully consider the evidence in context, and will make the evidence available for immediate ruling by the Board should either party file exceptions. Judge Kocol's rulings to the contrary have severely prejudiced the GC's presentation of its

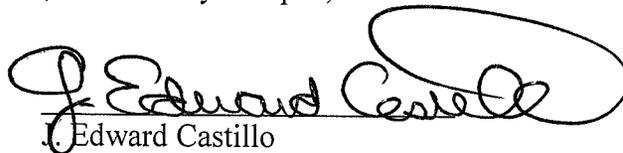
⁷ Indeed, the evidence Judge Kocol admitted into the record further demonstrates the error of the remainder of his rulings. For example, HR Senior Representative Fusco's statements on December 13 that he "was hired," Exhibit C at 112, line 17, and that Logistics Manager Cassidy "was hired," *id.*, line 20, clearly suggest that the two were hired some time *prior to* December 13. This conclusion would be consistent with other statements and acts not allowed into evidence that Cassidy and others had accepted employment with Respondent well before December 13. Nevertheless, evidence of pre- and post-December 13 conversations were excluded from evidence. See, e.g., *Id.* at 303, lines 3-9 (describing testimony that, between December 10, 2010, and mid-February 2011, Plant Manager Kuk repeatedly provided Union officials and employees with assurances regarding Respondent retaining all unit employees under the same terms and conditions of employment).

alternative theory on why Respondent is a “perfectly clear” successor and may lead to unnecessary delay and expense going forward.

III. CONCLUSION

Judge Kocol is certainly within his rights to press the GC on the agency issue to insure that it is not a fishing expedition. The offers of proof and supporting Board law though make it clear that such is not the case here. Because the GC has proffered specific facts and articulated cognizable legal theories in support of his agency argument, Judge Kocol’s exclusion of this evidence is erroneous. To allow Judge Kocol’s rulings to stand will essentially allow him to dictate how the GC will argue his case on the merits—or, as Judge Kocol put it himself, how the GC’s case will “rise and fall.” Exhibit C at 41, line 18. The ruling has prejudiced the GC in pursuing its alternative theory on the “perfectly clear” successor issue, and will continue to do so. Therefore, the GC respectfully requests that Judge Kocol’s ruling precluding witness testimony concerning pre-February 20, 2011, conversations with purported agents of Respondent be REVERSED, and that Judge Kocol be instructed to re-open the record in Chicago to allow said evidence into the record. The GC further requests that Judge Kocol be instructed to permit the GC to present evidence and litigate the agency issue in San Francisco as well.

DATED AT Chicago, Illinois, this 19th day of April, 2012.



J. Edward Castillo
R. Jason Patterson
Counsel for the Acting General Counsel
National Labor Relations Board
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Chicago, Illinois 60604

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Counsel for the Acting General Counsel's Request for Special Permission to File Interim Appeal and Interim Appeal of Rulings of the Administrative Law Judge have been served this 19th day of April 2012, in the manner indicated, upon the following parties of record.

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A handwritten signature in black ink, appearing to read "J. Edward Castillo". The signature is written in a cursive style with a large, looping flourish at the end.

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TEAMSTERS**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S MOTION FOR LEAVE
TO FILE PRE-TRIAL BRIEF ON AGENCY-RELATED ISSUES**

Pursuant to Section 102.24(a) of the Board's Rules and Regulations, Series 8, as amended, and in response to the oral rulings issued in a March 26, 2012, conference call with all parties, Counsel for the Acting General Counsel ("GC") moves for leave to file a pre-trial brief on agency-related issues. The circumstances requiring the filing of said pre-trial brief are as follows:

On March 26, 2012, all parties to the above-captioned cases participated in a pre-trial conference call. In the conference call, the residing administrative law judge, the Honorable William G. Kocol, asked a series of questions of the GC going to the issue of agency. In particular, Judge Kocol questioned whether and to what degree Respondent Nexeo Solutions may be held liable for the statements or acts of persons who, at the time of

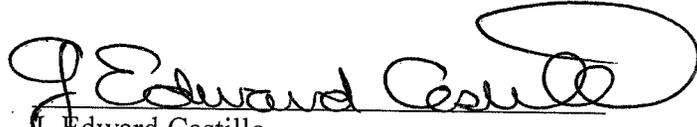
those statements or acts, were agents of predecessor employer Ashland, Inc. Apparently not satisfied with the answers given in the conference call, Judge Kocol suggested that certain witness testimony may be barred or limited until sufficient evidence on the issue of agency was brought out on the record. In addition, Judge Kocol ruled that Respondent's obligation to comply with request Paragraphs 8 and 9 of Subpoena Duces Tecum B-644109 was contingent upon the GC first putting on sufficient evidence concerning the agency issue.

The GC is of the view that the above-described rulings will hinder presentation of his case-in-chief. Said ruling, for example, may require the rearrangement of the order of witnesses. Moreover, the withholding of records responsive to Paragraphs 8 and 9 of Subpoena may preclude the GC from procuring documents relevant to agency questions at issue.

To avoid these problems, the GC seeks leave to file the attached Pre-Trial Brief on Agency-Related Issues. As the Brief will demonstrate, Board and court case law support the notion that an entity may be held liable for the acts or statements of an unaffiliated other. Moreover, facts currently known to the GC that will be presented at trial in due course fit well within the case law. The GC is of the view that the Brief will allay the tribunal's preliminary concerns regarding agency, thus allowing for a more normalized presentation of the GC's case-in-chief and resulting in an order requiring Respondent to comply with Subpoena Paragraphs 8 and 9 at the opening of the April 30 hearing.

For the reasons described, Counsel for the Acting General Counsel seeks leave to file the attached Pre-Trial Brief on Agency-Related Issues.

DATED at Chicago, Illinois, this 30th day of March 2012.



Edward Castillo

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Counsel for the Acting General Counsel's Motion for Leave to File Pre-Trial Brief on Agency-Related Issues have been served this 30th day of March 2012, in the manner indicated, upon the following parties of record.

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**COUNSEL FOR THE ACTING GENERAL COUNSEL'S PRE-TRIAL BRIEF
ON AGENCY-RELATED ISSUES**

I. PROCEDURAL BACKGROUND

On March 26, 2012, all parties to the above-captioned cases participated in a pre-trial conference call. In the conference call, the residing administrative law judge, the Honorable William G. Kocol, asked a series of questions of Counsel for the Acting General Counsel ("GC") going to the issue of agency. In particular, Judge Kocol questioned whether and to what degree Respondent Nexeo Solutions may be held liable for the statements or acts of persons who, at the time of those statements or acts, were agents of predecessor employer Ashland, Inc. Apparently not satisfied with the answers given in the conference call, Judge Kocol suggested that certain witness testimony may be barred or limited until sufficient evidence on the issue of agency was brought out on

the record. In addition, Judge Kocol ruled that Respondent's obligation to comply with request Paragraphs 8 and 9 of Subpoena Duces Tecum B-644109 was contingent upon the GC first putting on sufficient evidence concerning the agency issue.

In an effort to allay the tribunal's concerns regarding the agency-related questions, the GC hereby files this Pre-Trial Brief on Agency-Related Issues. As the Brief will demonstrate, Board and court case law support the notion that an entity may be held liable for the acts or statements of an unaffiliated other. Moreover, facts currently known to the GC that will be presented at trial in due course fit well within the case law. Given the currently known facts and the state of the law, the GC should be allowed it to proceed with the presentation of its evidence and witnesses as it chooses. Respondent should also be made to comply with Paragraphs 8 and 9 of Subpoena Duces Tecum No. B-644109 at the opening of the April 30 hearing.

II. ARGUMENT

A. Introduction

The prime issue in the matters set for hearing in Chicago is whether Respondent was a "perfectly clear" successor prohibited from altering initial terms and conditions of employment for the unit employees employed in Willow Spring, Illinois. The traditional inquiry in such cases is whether the successor employer, by its actions, statements, or silences, made "perfectly clear" its intention to retain the predecessor's employees under conditions likely to be accepted. See, e.g., *DuPont Dow Elastomers, LLC*, 332 NLRB 1071, 1073 (2000), *enfd.* 296 F.3d 495 (6th Cir. 2002); *Canteen Co.*, 317 NLRB 1052, 1053 (1995), *enfd.* 103 F.3d 1355 (7th Cir. 1997).

While the GC's primary theory will be that the terms of the Purchase and Sale Agreement ("P&S Agreement") itself served to establish Respondent as a "perfectly clear" successor, we will also argue that statements and actions of Ashland's agents are properly attributable to Respondent. Because the statements—primarily of a verbal nature in the Willow Springs, Illinois unit, and primarily of a written nature in the Fairfield, California unit—gave the impression that all unit employees would be retained under essentially the same terms and conditions of employment, Respondent was a "perfectly clear" successor to predecessor-Ashland.

The GC's agency theory is advanced in two separate but closely related arguments. First, because certain Ashland's managers were offered employment by Respondent and were otherwise acting on its behalf well before they were actually employed by Respondent, the acts of those persons may be attributed to Respondent. Second, Respondent may be held liable for a consistent messaging stream regarding the purchase and business transition which was disseminated largely by Ashland's managers. The latter argument is premised on the Purchase and Sale Agreement's Section 11.7 and the evidence we have of cooperation in messaging between the entities. I explicate each in turn.

B. Certain Ashland Agents Are Properly Considered Agents of Nexeo

Simply because a person is not employed by an entity does not mean that the person's actions or statements may not be attributed to that entity. The Board has long recognized that individuals unaffiliated with an employer may act as agents of that employer when the employer has knowledge of their activity, reaps the benefits of the activity, and fails to disavow the activity. See, e.g., See *Dean Industries*, 162 NLRB

1078, 1092-93 (1967) (even without formal authorization, non-employee townspeople found to be agents of employer because of the “cooperative effort” between it and the townspeople and because it accepted the benefits of their activities); *Cagle’s Inc.*, 234 NLRB 1148, 1148-49 (1978), *enfd. in pert. part* 588 F.2d 943 (5th Cir. 1979) (non-employee Director of local Chamber of Commerce found to have acted as employer’s agent, where Director distributed anti-union leaflets to and otherwise communicated with employees with employer’s knowledge); *Southern Pride Catfish*, 331 NLRB 618, 619 (2000) (where non-employee pastor approached employer about speaking to employees-parishioners, anti-union speeches on found attributable to employer because employer was in a “cooperative effort” to oppose the union and failed to disavow pastor’s message); see also *Henry I. Siegal Co.*, 172 NLRB 825, 839 (1968), *enfd.* 417 F.2d 1206 (6th Cir. 1969), *cert. denied*, 398 U.S. 959 (1970) (“[E]ven under technical common law rules, agency through ratification, knowledgeable acceptance or retention of the fruits of the alleged agent’s act, or through failure to disavow are firmly recognized.”); *The Maumee Stone Co.*, 259 NLRB 1168, 1169 fn.1, 1171 (1982) (non-employee of new ownership found to have acted as owner’s agent where he addressed employees with owner’s knowledge and without disavowal, was familiar to the employees in a leadership capacity, and took actions on behalf of the new owner following the take-over); *Davlan Engineering*, 283 NLRB 803, 804-05 (1987) (by way of common law principles of agency, holding that a union may be held liable to the acts or statements made by non-employee solicitors of union authorization cards).

In fact, in the context of business succession, the Board has on numerous occasions found acts and statements by the predecessor’s management attributable to the

successor where the managers in question were offered employment by the successor and otherwise acted in the successor's interests. See *Lemay Caring Center*, 280 NLRB 60, 65-67 (1986), affd. mem. 815 F.2d 711 (8th Cir. 1986) (statements of predecessor's manager were attributable to the successor because, before the statements were made, manager was offered employment by successor and contacted employees on its behalf); *Weco Cleaning Specialists, Inc.*, 308 NLRB 310, 310 fn.2, 315 (1992) (predecessor project manager who, at the time of the acts in question, had tentatively agreed on employment with the successor, acted as successor's agent with regard to his hiring activities); *Horizons Hotel Corp.*, 312 NLRB 1212, 1215-16, 1221 (1993) (where bankruptcy trustee operated predecessor business, was offered on-going employment with the successor, and performed tasks to the successor's benefit, trustee was found to constitute successor's agent).

With particular regard to the Willow Springs unit, the GC will put on the following evidence:

- Of the persons named as agents of Respondent in the Amended Complaint (i.e., John Hollinshead, Brian Brockson, Paul Fusco, Tony Kuk, Pat Cassidy, and Kevin Myers), Respondent admits that Brockson, Fusco, Kuk, and Cassidy were formerly employed by Ashland, were thereafter employed by Respondent, and have since been agents and/or supervisors of Respondent.
- Between approximately November 8, 2010, and mid-December 2010, Ashland Senior HR Representative Paul Fusco made a number of statements to Teamsters Local 705 regarding the sale of Ashland,

including: (1) that it was his understanding that the buyer would retain all the employees; (2) that Respondent had reviewed the various collective bargaining agreements that Ashland was a party to and did not wish to significantly alter any of their terms; and (3) that Respondent would keep the unit employees' current terms in place until a new collective bargaining agreement was reached, because the P&S Agreement obliged them to do so.

- On November 10 and 11, 2010, Ashland's Regional Logistics Manager Pat Cassidy and its Willow Springs Plant Manager Tony Kuk held a series of town hall meetings for employees to facilitate discussion of Respondent's purchase of Ashland. At these town hall meetings:
 - Plant Manager Kuk informed the employees that Respondent was going to retain all of them. He further stated that aside from a new name on the employees' paychecks and new signs on the trucks, things would remain the same.
 - Logistics Manager Cassidy concurred that that the new company planned to retain all employees and nothing should change with respect to their employment.
- On December 10, 2010, Ashland Senior HR Representative Paul Fusco provided the Union with a copy of the P&S Agreement. Amongst other things, the P&S Agreement obligates Respondent to "make offers of at-will . . . employment to the Employees . . . at least thirty (30) days prior to the Closing Date (or such longer period required by applicable Law or the

terms of any Union Contract), with such employment to be effective as of the Closing . . . Any such offer of employment shall be for a position that is comparable to the type of position held by such Employee immediately prior to the Closing Date.” See P&S Agreement § 7.5(c). In addition, the P&S Agreement obligates Respondent for at least the first 18 months following the purchase closing, to “provide to each [unit employee] (i) a base salary or wages no less favorable than those provided immediately prior to the Closing Date and (ii) other employee benefits, variable pay, incentive or bonus opportunities under plans, programs and arrangements that are substantially comparable in the aggregate to those provided by Ashland...as expected to be in effect on January 1, 2011....” See P&S Agreement § 7.5(d). The evidence will show that the Union shared the pertinent terms of the P&S Agreement with employees at subsequent union meetings.

- In about mid-December, Ashland’s Senior HR Representative Paul Fusco informed the Union that Respondent had hired him and that Respondent had also hired Logistics Manager Cassidy and Plant Manager Kuk onto its transition team.
- Throughout December 2010 and until February 15, 2011, in a series of meetings and conversations with Local 705, Ashland’s managers reiterated the assurances made in the November 10 and 11 town hall meetings.

First, the types of assurances described above are precisely those that have been found by the Board to indicate a successor's "perfectly clear" intention to hire the predecessor's employees under terms likely to be accepted. See, e.g., *Elf Atochem North America, Inc.*, 339 NLRB at 796, 808 (2003) (employer informed employees that they would be offered employment, that their seniority would be recognized, and that they would receive equivalent salaries and comparable benefits).

Second, the evidence strongly suggests that the verbal assurances of Fusco, Cassidy, and Kuk, and the written assurances included in the P&S Agreement insofar as Fusco forwarded it to Local 705, can be attributed to Respondent. In this regard, the evidence currently available to the GC suggests that all three managers were hired prospectively by Respondent sometime prior to mid-December. Throughout the same period, all three managers discussed the successor intentions of Respondent at length with Local 705 and with the employees. Given the facts known now to the GC, the GC asserts that there is at least a *prima facie* showing that Fusco, Cassidy, and Kuk are properly treated as agents of Respondent, and that their pertinent statements and actions may therefore be attributed to Respondent. See *Lemay Caring Center*, 280 NLRB at 65-67 (1986); *Weco Cleaning Specialists, Inc.*, 308 NLRB at 310 fn.2, 315. The GC suspects that certain evidence subpoenaed from Respondent—such as the documents requested in Paragraphs 4, 8, 9, 13, and 14 of Subpoena Duces Tecum B-644109—will serve to document and strengthen this aspect of our case.

C. More Broadly, the Messaging Stream Regarding the Business Transition Disseminated Largely by Ashland Agents Should be Attributed to Respondent

It is the view of the GC that, even assuming that the pertinent Ashland managers did not receive employment offers until later in the transition process, Respondent is properly held liable for predecessor-Ashland's dissemination of a consistent messaging stream regarding the nature of the business transition and the likely impact on unit employees.

As already explained, "even under technical common law rules, agency through ratification, knowledgeable acceptance or retention of the fruits of the alleged agent's act, or through failure to disavow are firmly recognized." *Henry I. Siegal Co.*, 172 NLRB at 839. Thus, a person wholly unaffiliated with an entity may be viewed as that entity's agent if the person performs acts or issues statements benefitting the entity and the entity knows of it and otherwise fails to disavow. See *Dean Industries*, 162 NLRB at 1092-93 (even without formal authorization, non-employee townspeople found to be agents of employer because of the "cooperative effort" between it and the townspeople and because it accepted the benefits of their activities); *Cagle's Inc.*, 234 NLRB at 1148-49 (non-employee Director of local Chamber of Commerce found to have acted as employer's agent, where Director distributed anti-union leaflets to and otherwise communicated with employees with employer's knowledge); *The Maumee Stone Co.*, 259 NLRB at 1169 fn.1, 1171 (non-employee of new ownership found to have acted as owner's agent where he addressed employees with owner's knowledge and without disavowal, was familiar to the employees in a leadership capacity, and took actions on behalf of the new owner following the take-over); *Southern Pride Catfish*, 331 NLRB at 619 (where non-employee pastor approached employer about speaking to employees-parishioners, anti-union speeches on found attributable to employer because employer was in a

“cooperative effort” to oppose the union and failed to disavow pastor’s message); see also, e.g., *Dentech Corp.*, 294 NLRB 924, 925-26 (1989) (finding that the employer’s cooperation with, and failure to repudiate, employee’s solicitation of support for petition renouncing support for the union constituted ratification of employee’s actions); *Capitol EMI*, 311 NLRB 997, 999-1000 (1993) (in the joint employer context, holding one employer liable for the other’s discriminatory conduct so long as they are found to be joint employers, one has engaged in discriminatory conduct, and the non-acting employer cannot show that it neither knew nor should have known of the reason for act or was otherwise powerless to prevent it).

Here, in addition to the statements and acts of Senior HR Representative Paul Fusco, Regional Logistics Manager Pat Cassidy, and Willow Springs Plant Manager Tony Kuk already described, the P&S Agreement and other written documents currently available to the GC tend to show Respondent’s “knowledgeable acceptance [and] retention of the fruits” of Ashland’s acts. The pertinent facts can be summarized as follows:

- In pertinent part, Section 11.7 (“Public Disclosure”) of the P&S Agreement reads: “No communication, release or announcement to the public or to employees or others not directly involved in the negotiation or approval of this Agreement . . . shall be issued or made by any party without the prior consent of the other party (which consent shall not be unreasonably withheld, conditioned or delayed) . . . provided, however, that each of the parties may make internal announcements to their respective employees that are consistent with the parties’ prior public

disclosures regarding the Contemplated Transactions after reasonable prior notice to and consultation with the other parties.”

- On November 8, 2010, Ashland President Bob Craycraft sent a letter to Ashland customers stating, in part, “Our goal is to ensure a seamless transition to Ashland Distribution operating as an independent distribution business. The same great people will provide the same great service.” The letter was attached to a November 8 letter from Senior HR Representative Paul Fusco and addressed to Fairfield, California unit representative Local 70. The letters were received by Local 70 on November 10.
- On or about November 8, 2010, Ashland circulated to the Fairfield, California employees a document entitled “Questions and answers for employees.” This document addressed a variety of anticipated concerns regarding staffing and the related business transition, including confirmation that:
 - Ashland’s current management team would remain with the business.
 - The successor employer’s intent was to “retain Ashland employees.”
 - “Ashland Distribution people and various support partners will continue to work from their current locations and perform similar roles and functions.”

- “Under the terms of the agreement, for at least the 18 months following closing, the [successor employer] is required to provide, to each transferred employee, base salary and wages that are no less favorable than those provided prior to closing; and other employee benefits that are substantially comparable in the aggregate to compensation and benefits as of January 1, 2011.”
- On or about November 12, 2010, Ashland provided the Fairfield unit employees with a document entitled “Talking Points for Ashland Distribution Customers.” The document specified that “[a]ll current [Ashland] employees are staying with the business.”
- In about late-November or early-December, a document entitled “Update to Ashland Distribution Transaction Employee Q&A,” Ashland advised the Fairfield unit employees that “[o]ver 2,000 employees have already been notified that they will transfer to the new company on the day after the sale closes,” and that “managers are aware and continue to be part of the mutually agreed upon process to determine the methodology for transferring employees to the new distribution company.”

According to Section 11.7 of the P&S Agreement, the communications described immediately above should have been reviewed and approved by both Ashland and Respondent prior to their dissemination. That the written communications to the Fairfield, California unit employees were so close in substance to the verbal communications to the Willow Springs, Illinois unit employees indicates an internally consistent message regarding the transition. The inference to be drawn is that Ashland

and Respondent abided by Section 11.7 of the P&S Agreement and, therefore, that Respondent knew and approved of the communication stream disseminated by Ashland.¹ The GC thinks it likely that certain documents subpoenaed from Respondent—particularly those requested in Paragraphs 4, 7, 8 and 9 of Subpoena Duces Tecum B-644109—will further document this “cooperative effort.” *Dean Industries*, 162 NLRB at 1092; *Southern Pride Catfish*, 331 NLRB at 619. For now, the GC avers that the evidence is sufficient to allow one to infer a cooperative messaging effort between Ashland and Respondent. Compare *Dean Industries*, 162 NLRB at 1092-93 (1967) (noting cooperation with and acceptance of benefits of the other’s activities) with *Raytheon Co.*, 179 NLRB 678 (1968) (radio station not agent of employer where, despite employer’s failure to disavow, where no evidence of employer cooperation or participation).

That Respondent reaped benefits from the communication stream cannot be in doubt. First, Ashland’s communications benefitted Respondent by allaying customer concerns that the change would negatively impact the services they had come to expect. One would expect such actions to decrease customer flight from the operation. Second, the communications facilitated the stated goal of creating a seamless transition in operations. The message repeatedly communicated from about November 8, 2010, through mid-February 2011 was that Respondent would retain the Ashland employees

¹ Indeed, it is worth noting that the verbal and written communications described herein are consistent with various obligations imposed on Respondent in the P&S Agreement. See, e.g., P&S Agreement § 7.5(d) (requiring “wages no less favorable than those” paid by Ashland, and the provision of benefits “comparable in the aggregate to those provided by Ashland”); *id.* at §§ 7.5(b)(i), (c) (obligating Respondent to offer employment to all Ashland employees and to maintain substantially identical terms and conditions of employment).

under terms essentially identical to those they had enjoyed before. Hearing such messaging repeatedly, one would expect most employees to remain tethered to their current jobs, thus supporting a seamless transition. The benefits Respondent reaped from the communication stream were significant.

Finally, the evidence shows that no Ashland or Respondent agent disavowed or repudiated any portion of the communication stream until February 15, 2011—over three months after Ashland began communicating the Respondent’s intentions. The Respondent’s failure to timely repudiate the communication stream effectively ratified and authorized them such that they can be viewed as Respondent’s “perfectly clear” pronouncements. See, e.g., *Canteen Co.*, 317 NLRB at 1052-53 (successor employer’s initial pronouncements to union representative defined it as a “perfectly clear” successor despite its dissemination of a different message to employees a mere day or days later).

III. CONCLUSION

As a preliminary matter, the GC has been asked to prove up the agency status of several named individuals and to otherwise demonstrate how Respondent may be held liable for acts and statements of Ashland agents. Respondent’s obligation to comply with Paragraphs 8 and 9 of Subpoena Duces Tecum No. B-644109 was made contingent on this showing, and it was suggested in the March 26 conference call that certain witness testimony may be treated likewise. The GC asserts that the facts and arguments proffered herein are sufficient to allay the tribunal’s initial concerns over this topic. Therefore, the GC should be allowed to proceed with the presentation of its evidence and witnesses as it chooses. Respondent should also be made to comply with Paragraphs 8 and 9 of Subpoena Duces Tecum No. B-644109 at the opening of the April 30 hearing.

DATED AT Chicago, Illinois, this 30th day of March, 2012.

A handwritten signature in black ink, appearing to read "J. Edward Castillo". The signature is written in a cursive style with a large, prominent loop at the end.

J. Edward Castillo

R. Jason Patterson

Counsel for the Acting General Counsel

National Labor Relations Board

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Chicago, Illinois 60604

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Counsel for the Acting General Counsel's Pre-Trial Brief on Agency-Related Issues have been served this 30th day of March 2012, in the manner indicated, upon the following parties of record.

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A handwritten signature in black ink, appearing to read "J. Edward Castillo". The signature is written in a cursive style with a large, looping flourish at the end.

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

NEXEO SOLUTIONS, LLC,	:	
	:	
Respondent,	:	
	:	Cases 13-CA-46694
and	:	13-CA-62017
	:	
TRUCK DRIVERS, OIL DRIVERS, FILLING	:	
STATION AND PLATFORM WORKERS'	:	
UNION, LOCAL NO. 705, AN AFFILIATE OF	:	
THE INTERNATIONAL BROTHERHOOD OF	:	
TEAMSTERS,	:	
	:	
Charging Party.	:	

RESPONDENT NEXEO SOLUTIONS, LLC'S MOTION FOR LEAVE TO FILE PRE-TRIAL BRIEF ON AGENCY-RELATED ISSUES

In light of the motion filed by Counsel for the General Counsel ("GC") on March 30, 2012, for leave to file a pre-trial brief on agency-related issues, Respondent Nexeo Solutions, LLC hereby similarly requests leave to file the attached pre-trial brief on those issues.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April 2012, I served the foregoing upon the following parties of record via email and via personal service at the hearing scheduled to take place on April 2, 2012 in Chicago, Illinois:

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David A. Kadela

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
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THE INTERNATIONAL BROTHERHOOD OF	:	
TEAMSTERS,	:	
	:	
Charging Party.	:	

**RESPONDENT NEXEO SOLUTIONS, LLC'S
PRETRIAL BRIEF ON AGENCY-RELATED ISSUES**

I. BACKGROUND

On November 5, 2010, Nexeo Solutions, LLC (“Nexeo” or the “Company”), whose name at the time was TPG Accolade, LLC, entered into an agreement (the “APA”) with Ashland, Inc. (“Ashland”) to purchase the assets of Ashland Distribution Company, an international distribution business with facilities throughout the United States and in a number of other countries. The transaction closed on March 31, 2011, and Nexeo commenced operations the next day, April 1, 2011. One of the places where it began operations was Willow Springs, Illinois.

The Willow Springs facility (the “Facility”), like others the Company acquired, has warehousing and trucking operations. The warehouse employees at the Facility have long been represented by Teamsters Local 781 and the drivers by Teamsters Local 705. Ashland had six other facilities across the country whose employees had union representation: Fairfield,

California; Louisville, Kentucky; Saint Louis, Missouri; Carteret, New Jersey; Twinsburg, Ohio; and Morrisville, Pennsylvania.

In the APA, Nexeo agreed to offer Ashland Distribution employees employment (a) effective upon closing, (b) in a position comparable to the position they held prior to closing, (c) at a base rate of pay no less favorable than they were paid prior to closing, and (d) with employee benefits substantially comparable in the aggregate to those sponsored by Ashland. Nexeo expressly disclaimed in the APA that it was assuming any Ashland collective bargaining agreements, and otherwise gave itself freedom to establish terms of employment different from those of Ashland. Nexeo, thus, did not obligate itself to adopt any employment-related policies and procedures of Ashland, or any terms of any collective bargaining agreements to which Ashland was or had been a party.

In January 2011, Nexeo retained John Hollinshead as a consultant, assigning him responsibility for labor relations matters, including responsibility for overseeing the preparation of offers of employment to union-represented employees of Ashland Distribution and communicating with the unions that represented those employees. He had no predecessor. In early February 2011, the offer letters were finalized and meetings set up with the eight unions that represented Ashland employees.

The offer letter prepared for Willow Springs union-represented employees (the same letter was used for Local-705 represented and Local 781-represented employees) began by outlining the terms that the Company agreed to offer employees in the APA, as described above.

It then added that:

- Ashland employment policies would terminate upon the closure of the sale;
- Nexeo policies would, to the extent reasonably possible under the Company's structure, generally mirror Ashland's policies, but the Company was not adopting any practices that were inconsistent with the express terms of its policies;

- Nexeo had not agreed to assume any of Ashland's collective bargaining agreements and had not chosen to adopt, as initial terms of employment, any of the provisions contained in any current or expired Ashland collective bargaining agreement; and
- Accepting the offer meant, among other things, that the employee, upon becoming a Nexeo employee, would participate in the Company's 401k and group health plans, not the multi-employer pension and health & welfare plans in which the employee participated as an Ashland employee.

The meeting with Local 705 was held on February 15, 2011. Nexeo was represented at the meeting by Mr. Hollinshead and Brian Brockson, an Ashland executive whom Nexeo had determined to offer employment as its Vice President of Operations. The Union was represented by Neil Messino, the Local 705 contract administrator assigned to the Ashland Distribution drivers' unit, Rick Rowe, a Local 705 business agent, and Tom Allison, outside counsel for the Union. At the meeting, Mr. Hollinshead:

- Addressed the nature and status of the transaction, noting that it was an asset, not a stock sale, and that it was on track to close on March 31, 2011, with Nexeo commencing operations on April 1, 2011.
- Indicated that Nexeo planned to mail offers of employment to the Local 705-represented employees of Ashland on February 17, 2011, and that the employees would have 10 days to mail back their response.
- Provided the Union team with a copy of the offer letter, and reviewed its terms, explaining that:
 - Nexeo was adopting its own policies and procedures, and was not adopting any existing practices that were inconsistent with its policies; and
 - Nexeo was not adopting any of the provisions contained in Local 705's expired collective bargaining agreement with Ashland, including, in particular, the benefit provisions under which the employees participated in the Local 705 pension and health plans.
- Provided the Union team with a summary of the benefit plans Nexeo had determined to adopt, and reviewed the summary's contents, focusing on the 401k and health-related plans and explaining why the Company had decided not to offer coverage under the multi-employer plans in which the employees participated as Ashland employees.
- Indicated that, assuming a majority of employees accepted the Company's offer, allowing Nexeo to conclude that a majority of its drivers would be former Ashland employees, the

Company would conditionally recognize the Union prior to closing and agree to engage in contingent bargaining.

The Company mailed offer letters to the Local 705-represented Ashland employees on February 17, 2011. In responding to the offer, many of the employees struck out or added language to the letter reflecting that they did not agree to the Company's covering them under its benefit plans instead of the Local 705 plans. In doing so, they effectively rejected the Company's offer. Mr. Hollinshead communicated that fact to Mr. Messino. That prompted Mr. Messino to request that the Company provide clean copies of the offer letter to the employees. He told Mr. Hollinshead that, upon being given a second chance, the employees would only add the words "under protest" below their signature. Mr. Hollinshead agreed to the request. During their discussion, Mr. Messino also asked if Mr. Hollinshead would provide him with all of the "edited" letters the employees had returned, expressing a concern that the Company might somehow use those letters against the Union in the future. Mr. Hollinshead agreed to that request as well, and later provided the original copies of all of the letters to Mr. Messino. After being provided with new copies of the offer letter, the Local 705-represented employees signed and returned the letter to the Company.

Shortly after receiving responses to its offer letters from the employees of the eight Ashland Distribution bargaining units, Nexeo extended conditional recognition – conditional upon the closing – to the employees' union representatives. The Company also agreed, as had been communicated to the unions at the initial meetings, to engage in pre-close, contingent collective bargaining negotiations. Prior to the closing, the Company reached a complete collective bargaining agreement with six of the unions. The two unions with which the Company did not reach agreement were Local 705 and Teamsters Local 70, which represents the Fairfield, California employees.

The six agreements that the Company reached contain provisions under which the employees participate in the Nexeo 401k plan. Five of the agreements also contain provisions covering the employees under Nexeo's other benefit plans, including its group health plan. The agreement with Local 781 is the only exception. In negotiating that agreement, the Company agreed to allow the employees to participate in the Local 781 health & welfare plan.

The Company had two pre-close, face-to-face negotiating sessions with Local 705, one on March 23, 2011, and one on March 31, 2011. Between those sessions, on March 28, 2011, the Company's negotiating team also had a conference call with Mr. Messino during which the parties' proposals were discussed. The main obstacle that prevented the parties from reaching an agreement was retirement benefits – the Company maintained that it would only agree to cover the employees under its plan, while the Union insisted that it would only agree to a contract that provided for the employees' participation in the Local 705 pension plan. At each of the bargaining sessions, Mr. Hollinshead, who headed the Company's negotiating team, reminded the Union's negotiating team that the failure to reach an agreement prior to closing would mean that the terms outlined in the Company's offer letter would go into effect upon the Company's commencing operations. And that is what happened. On April 1, 2011, the Local 705-represented employees began their employment with the Company under the terms outlined in the offer letter.

II. AGENCY-RELATED ISSUES

What happened between February 15, 2011, and the closing on March 31, 2011, puts into context and explains why the GC is so focused on the agency-related issues that pre-date that time period. The GC advances two theories in support of his agency argument. First, the GC claims that, as agents of Nexeo, three former managers of Ashland made certain statements to

unit employees and the Union which establish Nexeo's status as a perfectly clear successor. Second, the GC argues that statements in various written communications distributed to employees of Ashland in California should be attributed to Nexeo's actions in Illinois, because Nexeo ratified them. The GC's arguments are without merit. Nexeo lawfully exercised its right to establish initial terms and conditions of employment for its Local 705-represented employees.

III. LAW AND ARGUMENT

A. The Union Cannot Establish That Nexeo Was A Perfectly Clear Successor Based On Alleged Statements Made By Former Ashland Managers

1. *Applicable Board Law Governing Agency Status*

The burden of proving agency status is on the party asserting that agency status exists. *D.G. Real Estate, Inc.*, 312 NLRB 999 (Sept. 30, 1993). The test for determining whether an employee is the agent of the employer is whether, under all of the circumstances, "the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Omnix International Corp.*, 286 NLRB 425, 426-427 (1987). In *Local 9431, Communications Workers of America, AFL-CIO*, 304 NLRB 446, 448 (1991), the Board stated that agency status may be actual or apparent. An agent acts with actual authority when "the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." Restatement 3d, Agency § 2.01; *see also Local 9431*, 286 NLRB at 446, n.4 (quoting the Restatement of Agency). Apparent authority, on the other hand, "is created through a manifestation by a principal to a third party that supplies a reasonable basis for the latter to believe the principal has authorized the alleged agent to do the acts in question." *D.G. Real Estate, Inc.*, 312 NLRB 999 (1993). Two conditions must be satisfied before apparent authority may be found: (1) there must be some manifestation

by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. *Id.*

2. ***Kuk, Cassidy & Fusco Were Not Agents Of Nexeo When The Alleged Statements Were Made And Their Alleged Conduct Is Not Attributable To Nexeo***

In his brief, the GC contends that former Ashland managers, Paul Fusco, Tony Kuk, and Pat Cassidy, made certain statements in their capacity as agents for Nexeo from the period of November 8, 2010 through February 15, 2011, and that these alleged statements establish Nexeo's status as a perfectly clear successor. Preliminarily, this argument fails because these individuals did not make the statements alleged by the GC, or any other statements which support a perfectly clear successor finding under current Board law. But saying that puts the cart before the horse.

The GC's position is without merit because he has no factual or legal basis for attributing any alleged statements on the part of these individuals to Nexeo. In particular, he cannot establish that Nexeo gave Kuk, Cassidy, or Fusco any direction or authorization to act on its behalf in connection with the job prospects of Ashland employees prior to February 17, 2011. Furthermore, and contrary to GC's assertions, Nexeo did not extend offers of employment to Kuk, Cassidy or Fusco prior to February 17, 2011. Accordingly, even assuming Kuk, Cassidy, and/or Fusco made the alleged statements, which they did not, they were not vested with actual or apparent authority to speak for Nexeo. *See Pan-Oston Co.*, 336 NLRB 305, 306 (2001) (no agency status on the part of a supervisor where there was no evidence that the Respondent communicated to employees that he was acting on its behalf at the time he engaged in the acts in question); *D&K Frozen Foods, Inc.*, 293 N.L.R.B. 859, 872 (1989) (manager of a predecessor was not acting as agent for the respondent because respondent did not offer him employment or utilize him for assignments in connection with the transition when the alleged statements were

made); *Omnix International Corp.*, 286 NLRB 425, 426-427 (1987) (agency status not found because no evidence was adduced at the time of the alleged statements that Respondent held the individual out as being privy to management decisions or as speaking with management's voice about the matters at issue); *The Zack Company*, 278 NLRB 958, 959 (1986) (no agency status where the foreman had no responsibility or authority for the employment decisions at issue).

The GC relies on a series of cases that purportedly establish that acts and statements by a predecessor's management personnel can be attributed to the successor. (*See* GC Brief at p. 5). None of these cases provide support for the GC's position because the individuals at issue in these cases were either already offered employment at the time the statements were made, or were expressly recruited by the successor to assist with the hiring process and thus had actual authority to make the statements at issue. None of those factors is present here. Furthermore, the actions of Kuk, Cassidy, and/or Fusco in providing alleged "assurances" to unit employees, standing alone, cannot establish their agency status. *See Sea Mar Community Health Centers*, 345 N.L.R.B. 947, 950 (2005) (holding that the alleged agent's "conduct alone cannot establish apparent authority"). To the contrary, as the Board squarely held in *Bekins Moving & Storage Co.*, 330 NLRB 761 (2000), if a representative of the predecessor is not authorized to act on behalf of the successor, his or her actions are not binding and cannot form the basis for a perfectly clear successor finding.

In *Bekins*, the Board evaluated whether the respondent, as a successor employer, violated Sections 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of its employees' employment prior to bargaining with the union for a new contract. Before the respondent assumed operations of the predecessor's facility, managers of the predecessor—who were later hired as managers of the respondent—told unit employees that the respondent planned

to hire them. Prior to the date the unit employees were hired, however, Respondent notified them that they would be hired under new and different terms and conditions of employment, including pension plan changes. The unit employees were also advised that their employment would be “at will” and that if they desired to work for the Respondent they would have to accept the new terms and conditions of employment.

The General Counsel in *Bekins* argued that the Respondent was a perfectly clear successor based on the statements made to the unit employees by the managers, who were allegedly acting as agents for the Respondent. The Board rejected this argument, reasoning that the predecessor’s managers were “simply responding to the employees’ concerns in order to provide them with current information as plans were being developed regarding the takeover of the operation by the Respondent.” *Id.* at 763. Because the respondent (1) told the unit employees prior to their hire date what their new terms and conditions of employment would be; and (2) told the unit employees that they would not be hired unless they accepted the new terms and conditions, it had no duty to bargain with the union prior to setting initial terms and conditions of employment. *Id.*

Identical to the facts in *Bekins*, it is undisputed that Nexeo notified all unit employees before they were hired that the terms and conditions of employment at Nexeo would be different, and that they would not be hired unless they agreed to the new terms and conditions. Beyond this, Nexeo communicated to the union from the outset that it was not adopting any of the terms contained in any current or expired Ashland collective bargaining agreement. Thus, pursuant to *Bekins*, Nexeo cannot be deemed to have submitted to those terms by operation of law and properly set the initial terms and conditions of employment before bargaining with the union.

B. Messages Distributed By Ashland Do Not Support That Nexeo Was A Clear Successor

The GC next relies on a ratification theory to support his argument that Nexeo was bound by certain communications allegedly distributed by Ashland managers to customers and to unit employees in California. (See GC Brief at pp. 9-14). This argument fails because, as discussed, Nexeo informed the union and the Ashland employees they represented in its first communication with them—the informational meetings with the union and the offer letters to the employees—that it was establishing new terms of employment, ones different in a number of material respects from those under which the employees worked for Ashland. Under *Bekins*, as well as the Board’s decision in *Spruce Up Corp.*, 209 NLRB 194, (1974), Nexeo’s actions in this regard were more than sufficient to disavow any contrary statements on the part of employees of Ashland.

In arguing otherwise, the GC cites to *Canteen Co.*, 317 NLRB 1052 (1995), for the proposition that a successor employer may not disavow initial pronouncements to the union which defined it as a “perfectly clear” successor. (See GC Brief at p. 14). The Board’s decision in *Canteen* is of no assistance to the GC because it is readily distinguishable. In *Canteen*, the successor itself—not a third party—met with the union and announced its intent to hire all of the predecessor employees, but made no mention of any changes in the terms or conditions of employment. The Board held that the successor’s actions in this regard, despite later clarifications to predecessor employees, established its status as a perfectly clear successor. *Id.* at 1053. Unlike the facts in *Canteen*, here Nexeo immediately notified the union regarding the changes that were forthcoming. It then provided the unit employees with the same notice. Nexeo therefore took the actions required under current Board law to avoid perfectly clear successor status.

Moreover, by its terms, application of perfectly clear successor test adopted in *Spruce Up* turns upon a successor's pre-hire communications with the predecessor's employees or their unions. In every case in which the test has been applied, the outcome has been dictated by the nature and timing of such communications. *See, e.g., Bekins*, 330 NLRB at 763; *Monterey Newspapers, Inc.*, 334 NLRB 1019 (2001); *Ridgewell's, Inc.*, 334 NLRB 37 (2001), *enforced*, 38 Fed. Appx. 29 (D.C. Cir. 2002); *Resco Products, Inc.*, 331 NLRB 1546 (2000); *Bekins Moving & Storage*, 330 NLRB 761 (2000); *Pioneer Concrete of Arkansas, Inc.*, 327 NLRB 333 (1998); *Planned Building Services, Inc.*, 318 NLRB 1049 (1995); *Banknote Corp. of America*, 315 NLRB 1041 (1994), *enforced*, 84 F.3d 637 (2d Cir. 1996); *Boeing Co.*, 214 NLRB 541 (1974), *enforced*, 595 F.2d 664 (D.C. Cir. 1978); *Henry M. Hald High School Assn.*, 213 NLRB 415 (1974); and *Jerry's Finer Foods*, 210 NLRB 52 (1974).

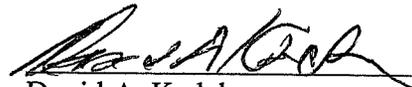
Despite this firmly-established principle of Board law, the GC cites exclusively to communications sent by Ashland employees to customers and to unit employees in California in support of his argument. (*See* GC Brief at pp. 10-12). However, based on the precedent cited above, the CG cannot rely on these communications without first laying a foundation that they were disseminated to, and received by bargaining unit employees at the Willow Springs location. Stated differently, communications sent to customers and California employees that were never disseminated to or received by bargaining unit employees in Illinois cannot be used to buttress a claim that Nexeo is a perfectly clear successor in this case.

IV. CONCLUSION

The GC cannot meet his burden of establishing the agency status of the individuals alleged in the Amended Complaint or that Nexeo was a perfectly clear successor of Ashland. While the GC would prefer that agency status in this case be assumed, the foregoing authority establishes that the administrative law judge properly ruled that the GC must introduce

foundational evidence in support of his agency theory before he may introduce testimony regarding alleged communications he intends to attribute to Nexeo. The GC also must adduce evidence in support of his agency theory before Respondent is ordered to comply with Paragraphs 8 and 9 of Subpoena Duces Tecum No. B-644109.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April 2012, I served the foregoing upon the following parties of record via email and via personal service at the hearing scheduled to take place on April 2, 2012 in Chicago, Illinois:

Administrative Law Judge
William J. Kocol
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Attorney for Charging Party


David A. Kadela

Firmwide:110153419.1 067415.1001

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

REGION 13

In the Matter of:	:	
	:	
NEXEO SOLUTIONS, LLC	:	
	:	
and	:	Case No. 13-CA-046694
	:	13-CA-062070
TRUCK DRIVERS, OIL DRIVERS, FILLING	:	20-CA-035519
STATION AND PLATFORM WORKERS' UNION,	:	
LOCAL NO. 705, AN AFFILIATE OF THE	:	
INTERNATIONAL BROTHERHOOD OF	:	
TEAMSTERS	:	
	:	
and	:	
	:	
BROTHERHOOD OF TEAMSTERS AND AUTO	:	
TRUCK DRIVERS, LOCAL NO. 70 OF	:	
ALAMEDA COUNTY, AFFILIATED WITH THE	:	
INTERNATIONAL BROTHERHOOD OF	:	
TEAMSTERS	:	

The above entitled matter came on for hearing pursuant to notice, before **WILLIAM G. KOCOL**, Administrative Law Judge, at the NLRB Regional Office, 209 South LaSalle Street, Room 910, Chicago, Illinois, on Monday, April 2, 2012, at 11:00 a.m.

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A P P E A R A N C E S

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1 pointed out in the conference call, all three of these
2 cases have been consolidated. I'm not hearing them
3 separately, I'm hearing them in a consolidated way.

4 MR. CASTILLO: And so, there would just be one decision
5 that you will be issuing?

6 ADMIN. LAW JUDGE KOCOL: One decision.

7 MR. ALLISON: And we're on the record?

8 ADMIN. LAW JUDGE KOCOL: We're on the record.

9 MR. CASTILLO: So, then it will not be necessary for me
10 to introduce them because they will come in in the
11 California case.

12 ADMIN. LAW JUDGE KOCOL: Yes. All right. Any other
13 preliminary matters? Because the only thing I have left
14 that you've raised is my suggestion to you that I would not
15 want to hear any, I'm going to use this date kind of
16 arbitrary, any statements made by Ashland to employees
17 concerning their terms and conditions prior to February
18 20th, 2011 until you first establish agency or some
19 tolerable showing of agency prior to that time.

20 MR. CASTILLO: Your Honor, that's going to be very
21 difficult for us to do because the facts and the evidence
22 we're going to rely on to show agency status and apparent
23 authority are the communications. So, for example --

24 ADMIN. LAW JUDGE KOCOL: That, go ahead, explain that
25 to me. I don't get that, that's what I'm having trouble

1 with.

2 MR. CASTILLO: So, for example, in mid December when
3 Mr. Fusco who was still an Ashland HR employee tells Neil
4 Messino I've been retained by Nexeo Solutions, I've been
5 hired by them, you know, that shows agency status. You
6 know, he's basically informing the union that he has the
7 authority to act on Nexeo's behalf.

8 ADMIN. LAW JUDGE KOCOL: Now, how would, okay, let's
9 stay with that bit. How would Nexeo know that he made that
10 representation and, therefore, adopted it?

11 MR. CASTILLO: 11.7 of the purchase agreement
12 required --

13 ADMIN. LAW JUDGE KOCOL: Well, I'm going to get you
14 those documents, you'll get those documents. Any documents
15 exchanged.

16 MR. ALLISON: No, but 11.7 required them to clear these
17 statements through each other, so it's not a question of
18 whether there's a paper trail or not. That was the
19 requirement under the --

20 ADMIN. LAW JUDGE KOCOL: But Ashland breached that,
21 let's say these breached it, then what?

22 MR. ALLISON: Well, I think under the doctrine of
23 apparent authority, if these folks are out there saying I'm
24 hired by Nexeo and here is what's going to happen, you're
25 all going to get hired, we're not going to change anything,

1 that they have cloaked themselves with apparent authority.

2 ADMIN. LAW JUDGE KOCOL: No, but see, that's the
3 problem. They can't cloak themselves. It's Respondent who
4 has to cloak them. So, I'm not persuaded by that. So, I'm
5 still, Mr. Castillo, I'm still going to ask that you
6 present your case as best you can in line with what I have
7 suggested. And that is present your entire case as you see
8 it with regard to what you need to prove without the
9 statements made by Ashland supervisors to the unit
10 employees prior to February 20th.

11 And then if you still need, if you think you still need
12 to prove up those statements, then I'll need some showing
13 of agency other than what you've said to me today or in
14 your various filings with me before us getting to all that
15 litigation of what was said and putting on people, no, I
16 didn't quite say this, and trying to resolve it through
17 that, because I think the guts of your case is going to
18 rise and fall on what the purchase agreement says and
19 whether Respondent complied with it and whether the
20 purchase agreement as agreed to makes the Respondent a
21 perfectly clear successor who has to bargain with the union
22 to establish what substantially comparable in the aggregate
23 is.

24 MR. CASTILLO: Well, that's certainly one theory, that
25 the purchase agreement made Nexeo Solutions --

1 ADMIN. LAW JUDGE KOCOL: I understand you have a
2 different theory, but that second theory, I'm not going to
3 go through a long litigation of people coming in and saying
4 this is what the Ashland people said to me when at the end
5 of the day it's all going to be hearsay.

6 MR. ALLISON: There's not going to be that much
7 testimony, your Honor, and I think that you're not going to
8 have the record you need to determine whether agency
9 existed and whether these people have the authority to do
10 it or the apparent authority to do it and whether the
11 people relied on these statements that were made to them,
12 all of which are elements of a perfectly clear case, and
13 you're excluding all of that from the record. I think it's
14 not that much and the real risk, you're not giving yourself
15 and the Board the opportunity to see the context in which
16 the statements were made to make a reasoned decision with
17 respect to authority.

18 ADMIN. LAW JUDGE KOCOL: Now, there's always offers of
19 proof that will preserve the record I think. That's where
20 I'm leaning now, so that takes care of preliminary matters
21 from you.

22 I know, Mr. Allison, you have a petition to revoke and
23 I haven't had a chance to look at it. I'll look at it when
24 we break and I'll get back to that. But any other
25 preliminary matters from you?

1 ADMIN. LAW JUDGE KOCOL: Mr. Castillo?

2 MR. CASTILLO: Yes, your Honor. To address your
3 concerns about the agency issue, we do have some documents
4 that were provided by Ashland in this case pursuant to our
5 subpoena. I'd like to provide a copy of these relevant
6 documents to each of the parties as well as yourself.

7 ADMIN. LAW JUDGE KOCOL: Yes. How many documents do
8 you have?

9 MR. CASTILLO: There will be about five.

10 ADMIN. LAW JUDGE KOCOL: Five, okay.

11 MR. CASTILLO: They're all short.

12 So, we have GC 39 through 42, your Honor. And if I may
13 just kind of briefly touch on what we think are the
14 relevant portions of each of these documents?

15 With respect to GC 39, this is a letter that Ashland's
16 president, Robert Craycraft, sent to Ashland's customers on
17 November 8th in 2010, the same day that the sale was
18 announced. And if you look at the fourth paragraph, it
19 states, "Our goal is to ensure a seamless transition to
20 Ashland Distribution operating as an independent
21 distribution business. The same great people will provide
22 the same great service." So, here you've got statements
23 from Ashland's president to all of its customers reassuring
24 them that it's going to be business as usual, it's going to
25 be a seamless transition, they are not going to suffer any

1 adverse effects in terms of services being provided by
2 Ashland/Nexeo because of the sale. And more importantly,
3 it also indicates that it's going to be the same employees
4 that are going to continue to provide the same service that
5 the customers are accustomed to.

6 GC 40 --

7 (Whereupon General Counsel's Exhibit Numbers 39 through 42
8 were marked for identification.)

9 ADMIN. LAW JUDGE KOCOL: All right, any objection to GC
10 39?

11 MR. KADELA: Yes, your Honor.

12 ADMIN. LAW JUDGE KOCOL: What's the objection?

13 MR. KADELA: It's irrelevant.

14 MR. CASTILLO: As to agency.

15 MR. KADELA: I'm not quite sure how it would go to
16 agency. Who would be the agent? Under what circumstances?
17 And certainly with respect to the perfectly clear successor
18 standard, I'm not aware of any case, and I'm certain there
19 is none, where a communication to a customer was held to
20 bind a successor to abide by the predecessor's terms and
21 conditions of employment pending negotiation --

22 ADMIN. LAW JUDGE KOCOL: Yes, but even assuming that,
23 Mr. Castillo, which you haven't shown, but even assuming
24 that this communication was, that Nexeo knew about this
25 communication, did not object to it, how does this support

1 the fact that it's, what statements made by supervisors
2 that contradict the sales agreement rendered those
3 supervisors agents of Nexeo, that's what I don't
4 understand.

5 MR. CASTILLO: I don't think I followed your question,
6 your Honor, I'm sorry.

7 MR. ALLISON: I don't think there is any contradiction
8 between the statements of the supervisors and the purchase
9 agreement. We think they're consistent.

10 ADMIN. LAW JUDGE KOCOL: Well, but the purchase
11 agreement as I understand it, the way you've represented it
12 is that the benefits would not be identical, they would be
13 comparable in the aggregate.

14 MR. ALLISON: Substantially comparable.

15 ADMIN. LAW JUDGE KOCOL: Yes, thank you, whatever that
16 phraseology means. So, you don't --

17 MR. ALLISON: I don't see that as an inconsistency.
18 The terms that were implemented were so grossly deficient
19 to what there was, and so it's a distinction without a
20 difference between the same and substantially comparable.

21 ADMIN. LAW JUDGE KOCOL: All right. So, I'm going to
22 reject GC Exhibit 39 but it may go in the rejected exhibit
23 file. I assume you want it there, right?

24 MR. CASTILLO: Yes.

25 ADMIN. LAW JUDGE KOCOL: So, Ms. Reporter let's create

1 a rejected exhibit file and let's put this GC 39 in that.

2 All right, let's go to 40.

3 (Whereupon General Counsel's Exhibit Number 39 was rejected
4 and put in the rejected exhibit file.)

5 MR. CASTILLO: GC 40, if you look at question number,
6 and this is a document that was posted on November 8, 2010
7 on Ashland's corporate web page, "Questions and Answers for
8 Employees." Number 4, "Will Ashland Distribution's current
9 management team remain with the business? Yes. The
10 current management team will transfer with the business."

11 So, there you've got, again coming from Ashland's
12 corporate office, you know, statements indicating that the
13 current Ashland managers are going to be moving over to
14 Nexeo Solutions. And so, this was a document prepared for
15 the employees who were certain to have questions about, you
16 know, the impending sale and what it would mean for
17 everyone including their managers. This, I don't know how
18 much more clear you can be than the fact that from the very
19 first day, November 8th, Ashland, with the approval of
20 Nexeo, indicated that the current management team would be
21 going over with the business.

22 ADMIN. LAW JUDGE KOCOL: Do you stipulate that? Was
23 that part of the purchase agreement?

24 MR. KADELA: With respect to this document, I would
25 submit that it probably, it is what it purports to be, a

1 document posted by Ashland that contains --

2 ADMIN. LAW JUDGE KOCOL: I think that there is no
3 objection just to authenticity, so let's --

4 MR. KADELA: Absolutely. There is no foundation to
5 support an agency relevance, nor is there any foundation to
6 support a relevance towards Nexeo as being deemed to be a
7 perfectly clear successor which of course would require
8 some kind of agency. The fact that it says that the
9 managers are going to transfer with the business would
10 dovetail with our agreement that the managers became agents
11 and supervisors of Nexeo effective April 1 when the company
12 commenced operations, not effective November 8.

13 ADMIN. LAW JUDGE KOCOL: All right.

14 MR. CASTILLO: The other thing, your Honor, if I may?

15 ADMIN. LAW JUDGE KOCOL: Yes.

16 MR. CASTILLO: Question number 20 which is in the
17 bottom right corner of page 1, "Does the newly independent
18 company anticipate any changes to compensation and/or
19 benefits? Under the terms of the agreement for at least
20 the 18 months following closing, the newly independent
21 company," and it continues on the upper right-hand corner,
22 "is required to provide to each transferred employee base
23 salary and wages that are no less favorable than those
24 provided prior to closing, and other employee benefits that
25 are substantially comparable in the aggregate to

1 compensation of benefits as of January 1st, 2011." That's
2 taken directly from the purchase agreement.

3 ADMIN. LAW JUDGE KOCOL: Yes. Well, do you still want
4 to object to this one? I think it's --

5 MR. KADELA: Yes, exactly, your Honor. I think that
6 this would prove that employees were notified on day one
7 that the terms and conditions of employment would change.

8 ADMIN. LAW JUDGE KOCOL: Properly notified by I assume
9 as to what the deal would be.

10 MR. KADELA: Yes.

11 ADMIN. LAW JUDGE KOCOL: So, are you still objecting to
12 this one?

13 MR. KADELA: Again, I don't object to its authenticity
14 that it's a document posted by Ashland. But to the extent
15 it's offered to prove that Ashland was acting as Nexeo's
16 agent, I have a hard time doing that.

17 ADMIN. LAW JUDGE KOCOL: Let's see if this, but I'm
18 going to receive into evidence General Counsel's 40 because
19 I think this is akin to an admission against your interest,
20 that to the extent that the supervisors are going to,
21 you're going to present supervisors who will say something
22 different than this --

23 (Whereupon General Counsel's Exhibit Number 40 was received
24 into evidence.)

25 MR. CASTILLO: No. They're going to inform the

1 employees that they would all be retained including the
2 managers and that the benefits were going to be the same in
3 fact.

4 ADMIN. LAW JUDGE KOCOL: Okay. That they told the
5 employees specifically what you just read? Then you have
6 yourself covered here, then you have your case covered
7 because you can, your entire case, if that's what they were
8 going to tell employees, you have your case covered here if
9 this is what they told employees.

10 MR. CASTILLO: Well, it wasn't in those terms, it was
11 in terms that the employees could understand. And
12 there's --

13 ADMIN. LAW JUDGE KOCOL: Well, then, now here comes the
14 problem. This is what I raised with Mr. Allison a minute
15 ago. And we're going to be moving on here because I've
16 made my point, to the extent that you put on testimony that
17 these Ashland employees put a gloss on this, then it's
18 inconsistent with the purchase agreement and they're not
19 going to be agents from that. They're not going to have
20 the authority to do that. I'm not going to find that.

21 MR. CASTILLO: Well, it's a distinction --

22 ADMIN. LAW JUDGE KOCOL: I mean so far. So far.

23 MR. CASTILLO: It's a distinction without a difference.

24 ADMIN. LAW JUDGE KOCOL: Okay. Well, then if it is
25 without a difference, then you're covered here. I've

1 received this into evidence and you now have evidence that
2 Ashland itself quite apart from what these individual
3 supervisors have said, but Ashland itself told the
4 employees about this, they'd be hired and their wages would
5 be the same for 18 months and that the benefits would be
6 comparable in the aggregate. So, you're covered, there is
7 your case.

8 MR. KADELA: And I wouldn't necessarily disagree, your
9 Honor, because if the principal claim in this case is that
10 the purchase agreement obligated Nexeo as the perfectly
11 clear successor based upon this language, then let's brief
12 it.

13 ADMIN. LAW JUDGE KOCOL: Now, that's what I think we're
14 getting down to. But let's continue, this is your case.
15 So, I've received GC 40. And I think that helps resolve a
16 lot of the issues here, but you can go on.

17 MR. CASTILLO: Just so I understand, I'm not arguing
18 with you, just so I understand, you believe then that GC 40
19 establishes our case that Ashland managers were making
20 these representations to the employees?

21 ADMIN. LAW JUDGE KOCOL: Ashland itself, I don't know
22 about Ashland managers. But this certainly establishes
23 that Ashland told the employees what you say it told the
24 employees in terms of what you just read, those two
25 paragraphs. There's no question about it. So, if that's

1 what you are seeking to prove, I think you've established
2 through this, my acceptance of this as an authentic
3 document issued by Ashland to its employees and Ashland
4 told them just what it says here.

5 MR. CASTILLO: There are Board cases, your Honor, that
6 indicate --

7 ADMIN. LAW JUDGE KOCOL: Now, the result of that is,
8 you know, a different story.

9 MR. CASTILLO: Okay. Because there are Board cases
10 saying that simply telling employees that they would
11 receive comparable benefits does not put them on notice
12 that terms and conditions of employment would be changing.

13 There are Board cases on that.

14 ADMIN. LAW JUDGE KOCOL: All right. Now, we're getting
15 into a whole different line of cases. At the next break,
16 supply me with that lead case, not a lot of cases but the
17 lead case on that. Because I asked earlier whether the
18 parties were aware of any case in point, everyone said no.

19 Now you say there was a case in point.

20 MR. CASTILLO: Let me go off the record for just a
21 minute. I may have it right here.

22 ADMIN. LAW JUDGE KOCOL: Okay, off the record.

23 (Off the record.)

24 MR. CASTILLO: Yes, and I'm turning to GC 41, question
25 number 6. "Will the management team have any say on the

1 employees that are slated to go with the new distribution
2 company? Yes. The managers are aware and continue to be
3 part of the mutually agreed upon process to determine the
4 methodology for transferring employees to the new
5 distribution company." The managers are aware, this was a
6 December 6, 2010 document.

7 ADMIN. LAW JUDGE KOCOL: All right. Any objection?

8 MR. KADELA: Yes, same objections.

9 ADMIN. LAW JUDGE KOCOL: And this one is rejected and
10 it goes in the rejected exhibit file. Please continue, Mr.
11 Castillo.

12 (Whereupon General Counsel Exhibit Number 41 was rejected
13 and put in the rejected exhibit file.)

14 MR. CASTILLO: What's the basis for the rejection?

15 ADMIN. LAW JUDGE KOCOL: It's rejected, I've already
16 explained that in the first document.

17 MR. ALLISON: Without being argumentative, your Honor,
18 doesn't this document from Ashland say that its managers
19 are aware of the process? Isn't that Ashland telling
20 employees that Ashland managers are able to speak with
21 respect to this process out of the purchase agreement?

22 ADMIN. LAW JUDGE KOCOL: You can't pick and choose the
23 words out. You have to read the entire sentence to
24 determine the methodology for transferring employees. It
25 doesn't say determine the terms and conditions that would

1 be set for the new employees. So, let's move on. I'm sort
2 of running up to, unless you have something again, needless
3 to say on some of these, it's time to, in other words, as
4 we're going through these documents, at least in my own
5 mind, I'm becoming convinced I'm ruling correctly here on
6 the agency issue.

7 MR. CASTILLO: Then turning to GC 42, on page 3, "Who
8 is on the separation team?" It relates to the transition
9 from the way I understand it. If you look at the bottom
10 right-hand corner, there is Pat Cassidy's name under supply
11 chain.

12 ADMIN. LAW JUDGE KOCOL: All right. You're objecting?

13 MR. KADELA: Yes, your Honor.

14 ADMIN. LAW JUDGE KOCOL: Same ruling, it's rejected and
15 it may go in the rejected exhibit file.

16 (Whereupon General Counsel's Exhibit Number 42 was rejected
17 and put in the rejected exhibit file.)

18 MR. ALLISON: May I also, without being argumentative,
19 point out that this is a transition update document. It's
20 a joint document from Ashland and Nexeo about statements
21 from the Nexeo president and from the Ashland president.
22 So, they're on the same page in this presentation.

23 ADMIN. LAW JUDGE KOCOL: Okay, thank you for pointing
24 that out. All right, so we're back to you, Mr. Castillo.

25 MR. CASTILLO: At this point, General Counsel would

1 call Neil Messino as its first witness.

2 ADMIN. LAW JUDGE KOCOL: Mr. Messino, step up here. Be
3 careful, there are some cords here. Raise your right hand.
4 Whereupon,

5 NEIL MESSINO,
6 called as a witness herein, after having been first duly
7 sworn, was examined and testified as follows:

8 ADMIN. LAW JUDGE KOCOL: Have a seat, make yourself
9 comfortable. Now, if you don't mind, give us your full
10 name and spell your last name so we get that right.

11 THE WITNESS: Name is Neil Messino, last name is
12 spelled (M-e-s-s-i-n-o), first name (N-e-i-l).

13 ADMIN. LAW JUDGE KOCOL: All right, thank you, Mr.
14 Messino.

15 DIRECT EXAMINATION

16 Q. BY MR. CASTILLO: Neil, are you currently employed?

17 A. Yes.

18 Q. By whom are you employed?

19 A. Teamsters Local 705.

20 Q. What is your current position?

21 A. Contract administrator.

22 Q. Can you briefly describe your job duties?

23 A. I oversee a little bit over a hundred contracts. I
24 negotiate contracts, I'm usually the lead spokesperson. I
25 hold ratification meetings. I sit on, chair panels for

1 ruling is, were not followed. I'm not sure if I'm making
2 myself clear on that.

3 ADMIN. LAW JUDGE KOCOL: Yes. Let's go off the record
4 a moment.

5 (Off the record.)

6 ADMIN. LAW JUDGE KOCOL: Mr. Kadela, you've persuaded
7 me. I won't allow this because I'm putting you in a
8 dilemma here. You either cross examine and then you've
9 litigated the issue, or you do nothing and if there is a
10 reversal we all come back. So, I'm leaving you hanging too
11 much, I don't think I'm being fair to Respondent on this
12 one. So, the objection is sustained as to what Ashland
13 said to this witness concerning the terms and conditions of
14 employment.

15 MR. CASTILLO: I'd like to make an offer of proof then.

16 ADMIN. LAW JUDGE KOCOL: Yes.

17 MR. CASTILLO: If permitted to testify, Neil Messino
18 would testify that he asked Paul Fusco during this
19 conversation what is going to happen to the employees.
20 Paul Fusco responded my understanding is that the buyer is
21 going to retain all the employees.

22 ADMIN. LAW JUDGE KOCOL: The offer of proof is noted
23 and rejected. So, please continue.

24 Q. BY MR. CASTILLO: What did you do after you hung up the
25 phone with the Mr. Fusco?

1 describing an agreement that Ashland is a party to. So, he
2 has some direct standing in this in terms of his authority
3 to describe what the understanding is between the parties.

4 ADMIN. LAW JUDGE KOCOL: If Ashland was a party to this
5 proceeding, you're absolutely right. If they were somehow
6 a Respondent, what they said about this would be perceived
7 as an admission of a party opponent. But they're not, so
8 my ruling stands.

9 MR. CASTILLO: Well, I would like to make an offer of
10 proof then.

11 ADMIN. LAW JUDGE KOCOL: All right.

12 MR. CASTILLO: If permitted to testify, Neil Messino
13 would testify that during the November 17th, 2010
14 bargaining session, he asked Paul Fusco, do you have the
15 authority to bargain on behalf of TPG? Paul Fusco
16 responded, I am bargaining on behalf of Ashland for now,
17 and if the sale closes, I or someone else will bargain the
18 agreement between the union and TPG. Thereafter, Paul
19 Fusco --

20 ADMIN. LAW JUDGE KOCOL: Hold on until I accept it now.
21 Do you want to reconsider your objection to that portion?

22 MR. KADELA: You know --

23 ADMIN. LAW JUDGE KOCOL: Or not. I'm just asking you.

24 MR. KADELA: I think to the extent that Mr. Messino is
25 going to testify that Mr. Fusco said that he was there

1 inappropriate to proceed.

2 ADMIN. LAW JUDGE KOCOL: Make your entire offer of
3 proof then. I think you're right. Let's hear your entire
4 offer of proof and see where it gets us.

5 MR. CASTILLO: I'll start over. If permitted to
6 testify, Neil Messino would testify that during the
7 bargaining session on November 17th, 2010, he asked Paul
8 Fusco, do you have the authority to bargain on behalf of
9 TPG? Paul Fusco responded, I am bargaining on behalf of
10 Ashland for now, and if the sale closes, I or someone else
11 will bargain the agreement between the union and TPG. Paul
12 Fusco also asked Mr. Messino, do you want to change the
13 union's initial proposal? At that point, the union called
14 a caucus.

15 Mr. Messino would testify that when the parties
16 reconvened, he stated I don't know if I want to change my
17 proposal. Mr. Fusco then clarified, I understand TPG
18 reviewed all of the union contracts across the country and
19 doesn't want too much of a change which is why I asked you.
20 Mr. Messino would further testify that during this
21 bargaining session he asked Mr. Fusco for a copy of the
22 purchase agreement. Mr. Fusco agreed to provide the
23 purchase agreement to Mr. Messino.

24 Thereafter, during this bargaining session, Mr. Messino
25 asked what is TPG's business plan? Paul Fusco responded, I

1 understand TPG is planning on keeping the business the way
2 it is and not gutting the operation.

3 ADMIN. LAW JUDGE KOCOL: All right. So --

4 MR. CASTILLO: And then Mr. Messino asked, does TPG's
5 business plan include unit employees? Paul Fusco
6 responded, that's the plan. The meeting then ended with
7 Mr. Messino stating I'm willing to meet with TPG and
8 Ashland representatives to make it part of the purchase
9 agreement that they honor our negotiated contract. Fusco
10 responded, I will get that information for you. And that
11 completes my offer of proof.

12 MR. KADELA: I'll abide by my objection there.

13 ADMIN. LAW JUDGE KOCOL: And the objection is
14 sustained. The offer of proof is noted and rejected.

15 Q. BY MR. CASTILLO: When was the next bargaining session
16 scheduled to be held? The next bargaining sessions?

17 A. After November 17th, we had December 6th and 7th
18 scheduled I believe.

19 Q. Prior to those next bargaining sessions, did you make
20 any further efforts to obtain a copy of the purchase
21 agreement?

22 A. Yes.

23 Q. Let me show you what's been marked as General Counsel
24 Exhibit 4.

25 Do you recognize this document?

1 that TPG would honor any agreements that we came to.

2 MR. CASTILLO: Move for admission of General Counsel
3 Exhibit 4.

4 ADMIN. LAW JUDGE KOCOL: Hearing no objection, General
5 Counsel's 4 is received.

6 (Whereupon General Counsel's Exhibit Number 4 was received
7 into evidence.)

8 Q. BY MR. CASTILLO: Did Mr. Fusco respond to your e-mail
9 of December 3rd?

10 A. Yes.

11 Q. And how did he respond?

12 A. On December 3rd, a little bit later in the afternoon,
13 he called me on the phone.

14 Q. Did anyone else participate in that phone conversation?

15 A. Yes, in that day Gary Russell was in my office on
16 another related matter that he was just on the call. He
17 was in the room.

18 Q. And what was said between you and Mr. Fusco?

19 MR. CASTILLO: And this is not going towards the agency
20 issue but rather the attempts with trying to obtain the
21 purchase agreement.

22 THE WITNESS: I asked Paul, he told me that the legal
23 department was still looking at the purchase agreement,
24 that he hadn't gotten it yet but the legal department had
25 it. He did not tell me which legal department, if it was

1 Ashland or TPG. He said that they were working on getting
2 it for me, he was working on getting it for me and that he
3 didn't have it yet.

4 Q. BY MR. CASTILLO: Did you have any further conversation
5 with Mr. Fusco later that day?

6 MR. KADELA: Excuse me, your Honor, I will object. I
7 mean I think that it can be stipulated that the union
8 obtained a copy of the purchase agreement from, Mr. Messino
9 received a copy from Mr. Fusco.

10 MR. CASTILLO: And we are going to be introducing that
11 exhibit, but there is another conversation that was held
12 later that day. And that I will be introducing --

13 ADMIN. LAW JUDGE KOCOL: Well, let's get to that other
14 conversation, let's get to the foundation and then I'll
15 hear your objection.

16 Q. BY MR. CASTILLO: Did you and Mr. Fusco speak later
17 that same day?

18 A. At the end of this phone call during the midday, I told
19 him that I needed to see the purchase agreement by the end
20 of the day so we could possibly still meet on Monday. And
21 later that evening, I never got the agreement, he never e-
22 mailed it to me. So, I called him on the phone later in
23 the evening at about 6:30-7:00 o'clock at night.

24 Q. Did anyone else participate in that phone conversation?

25 A. No.

1 Q. And what was said between Mr. Fusco and yourself?

2 MR. KADELA: Objection. Because it could call for
3 inadmissible evidence, and so my objection would be if we
4 could target a particular conversation and subject matter
5 in the question, that would probably save some objections.

6 ADMIN. LAW JUDGE KOCOL: Yes, what's the relevance?

7 MR. CASTILLO: During this conversation, Mr. Fusco
8 indicated that all the unit employees would be retained by
9 the new company.

10 ADMIN. LAW JUDGE KOCOL: And your objection was
11 hearsay?

12 MR. KADELA: Yes.

13 ADMIN. LAW JUDGE KOCOL: Objection sustained.

14 MR. CASTILLO: I'd like to make an offer of proof then.

15 If permitted to testify, Mr. Messino would testify that
16 that evening he had a phone conversation with Mr. Fusco
17 during which time Mr. Fusco indicated that the intent is
18 for TPG to offer all current Ashland Distribution employees
19 new employment. Mr. Messino asked whether the employees
20 would have to reapply. Mr. Fusco responded employees are
21 not going to have to reapply. Mr. Messino then asked when
22 will the employees receive offer of employment from TPG?
23 Mr. Fusco responded probably before the sale.

24 During this phone conversation, Mr. Messino also
25 inquired about the purchase agreement. Mr. Fusco responded

1 that he was still working on it. And Mr. Messino then
2 indicated that he needed language in the purchase agreement
3 that states TPG will assume the labor contract or Ashland
4 Distribution's liability. Paul Fusco responded that TPG is
5 reluctant to put that type of language in the purchase
6 agreement but he understood from his legal department that
7 the agreement has the language Messino is looking for and
8 it states TPG will maintain terms and conditions of
9 employment.

10 And one more thing. And Mr. Fusco also stated before
11 any of this phone conversation that either he or someone
12 else would be negotiating the initial contract for what he
13 called "new co" which is what Ashland managers started to
14 refer to the new company as because it still did not have a
15 final name which would ultimately be settled on Nexeo
16 Solutions.

17 ADMIN. LAW JUDGE KOCOL: All right. The offer of proof
18 is rejected except for that portion of what Mr., Fusco is
19 it?

20 MR. CASTILLO: Fusco, yes.

21 ADMIN. LAW JUDGE KOCOL: Fusco said. What did Mr.
22 Fusco tell you, Mr. Messino, concerning who would be
23 negotiating on behalf of --

24 MR. CASTILLO: On behalf of TPG.

25 THE WITNESS: He said that if we continued on, it would

1 indicated are not properly admissible. I would just
2 request that if he could say did you have a conversation
3 with Mr. Fusco and during the conversation did you discuss
4 this, what did he say regarding that.

5 ADMIN. LAW JUDGE KOCOL: Well, no, I think that's too
6 restrictive on him. But we're still waiting to, what is
7 this conversation --

8 MR. CASTILLO: This will go to the agency issue, so I'm
9 prepared to make an offer of proof if --

10 MR. ALLISON: I think the Judge may allow this without
11 the necessity of an offer of proof --

12 ADMIN. LAW JUDGE KOCOL: All right. So, ask the
13 question and you make the objection.

14 Q. BY MR. CASTILLO: And do you recall if anything else
15 was discussed during this meeting with Mr. Fusco on
16 December 13th?

17 A. Yes, in this meeting he informed me that he was hired
18 by the new co and that's what he referred to the new
19 company, and that the announcement would be coming later in
20 the month, and that Pat Cassidy was hired on in the
21 transition team and he believed Kuk would get the same
22 offer but at that time he didn't have it yet for Kuk.

23 ADMIN. LAW JUDGE KOCOL: What was the date of this
24 conversation?

25 THE WITNESS: December 13th.

1 ADMIN. LAW JUDGE KOCOL: Go ahead. I'm waiting for a
2 new objection, Mr. Kadela. If there isn't any --

3 MR. KADELA: Yes. Yes, yes, your Honor. I mean it's
4 -- but I will object to relevance anyway, hired when?
5 There's no evidence as to when, hired as of that moment, he
6 was going to be offered employment?

7 MR. CASTILLO: Well, he just testified that --

8 ADMIN. LAW JUDGE KOCOL: Let's --

9 MR. CASTILLO: The evidence is the testimony.

10 ADMIN. LAW JUDGE KOCOL: Tell me again, Mr. Messino,
11 what did Mr. Fusco say?

12 THE WITNESS: He said that he was hired by the new
13 company, that it wasn't public yet, and he even knew that
14 the announcement would be coming at the end of the month,
15 near the end of the month, and that Mr. Cassidy was hired
16 on the transition team, and Kuk he believed would be hired
17 on the transition team.

18 ADMIN. LAW JUDGE KOCOL: I'll receive that into
19 evidence. I'm not sure what weight it will have at the end
20 of the day but I'll receive that into evidence.

21 Q. BY MR. CASTILLO: Now, if you look at General Counsel
22 Exhibit 5 again, in the e-mail on top of page 1, December
23 10th at 3:21 p.m., that's where you asked for the schedules
24 and annexes. Did Mr. Fusco ever respond to your request
25 for these schedules?

1 MR. CASTILLO: With the town hall meetings.

2 ADMIN. LAW JUDGE KOCOL: All right, objection
3 sustained.

4 MR. CASTILLO: I'd like to make an offer of proof
5 then --

6 ADMIN. LAW JUDGE KOCOL: Yes.

7 MR. CASTILLO: -- because this is our alternative
8 theory. Now, if permitted to testify Michael Jordan will
9 be testifying that on November 8th, 2010 he reported to
10 work. After returning from his shift that afternoon he saw
11 a article that was posted in the break room about the time
12 clock. And I'd like to introduce that as General Counsel
13 Exhibit 34. I move for the admission. Well, may I ask him
14 questions, or do you --

15 (Whereupon General Counsel's Exhibit Number 34 was marked
16 for identification.)

17 ADMIN. LAW JUDGE KOCOL: No, please continue with your
18 offer of proof.

19 MR. CASTILLO: Mr. Jordan, if permitted to testify,
20 would state that he observed what's been marked as General
21 Counsel 34 close to the bulletin board in the drivers break
22 room, above the time clock. And that's why I would, would
23 be the offer of proof with respect to November 8th.

24 ADMIN. LAW JUDGE KOCOL: All right, and the offer is
25 noted, and rejected, and GC will go into the rejected

1 exhibit file. It's rejected.

2 MR. CASTILLO: I would like to at this point amend the
3 offer of proof, to simply change the date from November 8th
4 to November 9th is when he saw the GC 34 posted in the
5 break room.

6 ADMIN. LAW JUDGE KOCOL: Very well.

7 MR. CASTILLO: I'm sorry, I'm going to keep it November
8 8th. Strike that amendment, I apologize Your Honor, I'm
9 trying to move on down. I'd like to next, Your Honor, have
10 Mr. Jordan testify about a separate notice that he observed
11 posted on November 9th in the break room, regarding the
12 town hall meetings.

13 ADMIN. LAW JUDGE KOCOL: All right, I going to rule,
14 just so you're clear and everyone else, I'm not going to
15 allow any testimony concerning what Ashland said to it's
16 employees about the terms and conditions at Nexeo. At
17 least nothing prior to 12/13/10, and as I recall that's
18 when, there was some testimony -- Kuk and maybe Cassidy of
19 being hired by, by Nexeo. So, I'm not going to allow
20 anything before that for sure. And anything after that
21 I'll have to see where we're at.

22 MR. CASTILLO: I understand, so I will just make a
23 second offer of proof and then move on.

24 ADMIN. LAW JUDGE KOCOL: All right.

25 MR. CASTILLO: My offer of proof is that, if permitted

1 to testify, Michael Jordan, Mike Jordan would have
2 testified that on November 9th when he arrived to work he
3 saw a notice posted on the bulletin board in the break room
4 above the time clock, which announced that there would be
5 town hall meetings held on November 10th and 11th at 8 a.m.
6 and 3 p.m. on each day. Mike Jordan would further testify,
7 if permitted to do so, that he attended the town hall
8 meeting at 8 o'clock on November 11th, which was held in
9 the large conference room, that managers Tony Kuk and Pat
10 Cassidy were present, along with 20 to 25 employees, and
11 that during this town hall meeting Tony Kuk stated it's
12 going to be business as usual, everyone is going to be
13 retained and there won't be any changes except the name on
14 the paychecks and the sign on the trucks. During this same
15 town hall meeting Pat Cassidy stated, this is a great
16 opportunity for us to grow, nothing should change regarding
17 your employment, and I assume Tony Kuk and I will be
18 retained as well. Following preliminary statements by Mr.
19 Kuk and Mr. Cassidy there was a question and answer
20 session, and one of the dock men, also known as a
21 warehousemen, asked the managers if the new company going
22 to hire all of us. Pat Cassidy replied, the new company
23 intends on keeping everyone, it's going to keep everything
24 status quo. Tony Kuk followed up those comments by
25 stating, there actually isn't a new company, they don't

1 have a management team or drivers or warehouse employees.

2 We are the new company.

3 Immediately following this November 11th town hall
4 meeting, if permitted to testify, Michael Jordan would
5 state that, or testify that, he lingered behind until all
6 the other employees had left the conference room. At that
7 point he approached Mr. Kuk and Mr. Cassidy and asked, is
8 everything in the union contract going to stay the same.
9 Pat Cassidy responded, as far as I'm concerned the new
10 company is going to keep everything the same. Michael
11 Jordan replied, good because I'm about to complete 25
12 years, I need additional time for my pension benefits. Pat
13 Cassidy responded, I don't think there are going to be any
14 issues. And then Tony Kuk nodded his head in agreement and
15 said, nothing's going to change. That completes my offer
16 of proof.

17 ADMIN. LAW JUDGE KOCOL: All right, the offer of proof
18 is noted and rejected. But the, just commenting on that,
19 that it appears you would have been arguing that Nexeo
20 allowed these representatives to tell employees something
21 that was contrary to the very terms of the purchase
22 agreement, is a jump, no I don't, is a jump that seems
23 almost fantastic to me, under these circumstances. So, I'm
24 reaffirming my ruling in that regard and we'll move on to
25 another.

1 MR. ALLISON: I don't think there was anything
2 consistent with the purchase agreement.

3 ADMIN. LAW JUDGE KOCOL: The purchase agreements, we've
4 argued this before, but the purchase agreement says
5 comparable in the aggregate. And the testimony here is
6 that these alleged agents of Nexeo are saying everything
7 will remain the same.

8 MR. ALLISON: That's not inconsistent.

9 MR. CASTILLO: Mr. Allison and I, we understand your
10 ruling, don't necessarily agree with it, but we understand
11 it and we respect it.

12 ADMIN. LAW JUDGE KOCOL: All right, so let's move on.
13 But apart from having, now showing agency, so making that
14 sort of a jump is something I'm not prepared to do. So,
15 let's go ahead. All right, any other questions? We going
16 into another area, right?

17 MR. CASTILLO: I'm moving on, beyond the town hall
18 meetings. I would like to also make an offer of proof with
19 respect to the November 17th bargaining session.

20 ADMIN. LAW JUDGE KOCOL: With Ashland?

21 MR. CASTILLO: Yes.

22 ADMIN. LAW JUDGE KOCOL: All right, please continue.
23 But, at some point you've made your point with offers of
24 proof, haven't you? I mean, we don't need to have this
25 repeated all 17 times that we're going to do it. I mean

1 it's up to you.

2 MR. CASTILLO: I think this will be my last offer.

3 ADMIN. LAW JUDGE KOCOL: Okay.

4 MR. CASTILLO: And then I'm going to jump to mid-
5 December, which I think you said testimony would be heard
6 at that point.

7 ADMIN. LAW JUDGE KOCOL: All right, that's fine.

8 MR. CASTILLO: If permitted to testify, Mike Jordan
9 would have testified that at the November 17th bargaining
10 session BA Messino requested a copy of the purchase
11 agreement, Paul Fusco agreed to provide that agreement. BA
12 Messino then asked Paul Fusco, do you have the authority to
13 bargain on behalf of TPG. Paul Fusco responded, I'm
14 unclear, but did add that Newco had looked, what he
15 referred to as Newco, had looked at all the union contracts
16 and they did not have a problem with them, they can live
17 with the terms and conditions of the current contract.

18 Neil Messino, subsequently during that meeting, asked if
19 TPG's business plan include union employees. Paul Fusco
20 responded, that's the plan. And that completes my offer.

21 ADMIN. LAW JUDGE KOCOL: All right, and that likewise
22 is rejected.

23 Q. BY MR. CASTILLO: Now, Mike, do you recall if you had
24 conversation with any Ashland manager in mid-December of
25 2010?

1 MR. KADELA: The objection is, I believe Your Honor
2 said there was some testimony that Paul Fusco was allegedly
3 hired on December 13. It has nothing to do with Tony Kuk.

4 ADMIN. LAW JUDGE KOCOL: Well, Fusco and Kuk indicated
5 on the 13th, but this is --

6 MR. KADELA: The testimony was that there was a belief
7 that Kuk --

8 ADMIN. LAW JUDGE KOCOL: This is close enough to the
9 13th where I'll hear it first, and I may end up rejecting
10 it anyway. So, tell me what was said.

11 Q. BY MR. CASTILLO: What was said December 10th with Mr.
12 Kuk?

13 A. I went in his office, and it was on the direction of my
14 union representatives to ask Mr. Kuk some question to
15 hopefully clarify what their plans were with, as far as
16 hiring us. So, I asked Tony, I went in his office and as
17 we normally did at the end of the evening, sometimes
18 talked, you know, day to day business. But during that
19 conversation I made sure I asked him what did he think his
20 plans were, or the companies plans were, as far as hiring
21 us. And he answered that their going to hire everybody,
22 keep everyone, everything is going to stay the same.

23 ADMIN. LAW JUDGE KOCOL: Sustained. I will not
24 consider that testimony.

25 MR. CASTILLO: Do I need to make an offer of proof.

1 ADMIN. LAW JUDGE KOCOL: No, you've made it through
2 that.

3 MR. CASTILLO: I've made it through question and
4 answer?

5 ADMIN. LAW JUDGE KOCOL: Yes.

6 Q. BY MR. CASTILLO: Thank you, Your Honor. After this
7 December 10th meeting with Mr. Kuk, did you ever question
8 Mr. Kuk again about whether the new company intended to
9 retain all of the employees and maintain their terms and
10 conditions of employment?

11 ADMIN. LAW JUDGE KOCOL: Let me interrupt you with
12 that. That's not, what did you say at the end, and all the
13 terms and conditions of employment?

14 MR. CASTILLO: And maintain terms and conditions of
15 employment.

16 ADMIN. LAW JUDGE KOCOL: All right, please continue.

17 MR. KADELA: Objection.

18 ADMIN. LAW JUDGE KOCOL: What is the objection?

19 MR. KADELA: Well, it's hearsay, there's no foundation
20 of any agency relationship or other authority from Nexeo
21 with respect to Tony Kuk.

22 ADMIN. LAW JUDGE KOCOL: But here we come again, and
23 I'm just trying to understand you, what you're trying to do
24 Mr. Castillo, so please help me. Either you have the
25 purchase agreement and it says what it says, and I loosely

1 to argue both theories to, to you.

2 ADMIN. LAW JUDGE KOCOL: You know, I'm just not seeing
3 it. But we've gone over this quite a bit, so your next
4 question is what?

5 Q. BY MR. CASTILLO: My next question was, after the
6 December 10th meeting with Mr. Kuk, did you ever question
7 him again about whether the new company intended to retain
8 all the employees and maintain their terms and conditions
9 of employment?

10 MR. KADELA: Objection.

11 ADMIN. LAW JUDGE KOCOL: Sustained.

12 MR. CASTILLO: This would be after December 13th, Your
13 Honor.

14 ADMIN. LAW JUDGE KOCOL: I don't see how this
15 contributes anything to the resolution of this case.

16 MR. KADELA: And I would add, Your Honor, that Mr.
17 Messino's testimony was that Mr. Fusco said he believed
18 that Mr. Kuk would be hired for the transition team --

19 ADMIN. LAW JUDGE KOCOL: That will show what it shows.

20 MR. KADELA: It'll show what it shows, but even at that
21 there's still that, even at that --

22 ADMIN. LAW JUDGE KOCOL: I understand that, I
23 understand.

24 MR. KADELA: There's no designation of authority.

25 MR. CASTILLO: I'd like to make an offer of proof then,

1 if I may do so?

2 ADMIN. LAW JUDGE KOCOL: Yes.

3 MR. CASTILLO: If permitted to testify, Mike Jordan
4 would testify that after the December 10th meeting with Mr.
5 Kuk, he and Mr. Sterber, on a regular basis, two or three
6 times a week, would go into the office and ask the same
7 questions to Mr. Kuk. And each time received the same
8 response. And that was from between December 10th, all the
9 way up through mid-February of 2011.

10 ADMIN. LAW JUDGE KOCOL: And the response was?

11 MR. CASTILLO: And the response was always the same,
12 everybody is going to be retained, nothing is going to
13 change, business as usual. I would also --

14 ADMIN. LAW JUDGE KOCOL: All right, but have you made
15 your point at this point Mr. Castillo, in terms of your
16 offers?

17 MR. CASTILLO: I just have one more thing, which is a
18 little bit different twist, and then I'll be done with it.

19 And then also, if permitted to testify, Mr. Jordan would
20 testify that on January 10th, sometime in the morning
21 between 8 a.m. and 10 a.m. he called Tony Kuk, and Mr.
22 Jordan indicated that some of the drivers were concerned
23 about their seniority. Tony Kuk indicated that the new
24 company would honor the drivers existing seniority.

25 ADMIN. LAW JUDGE KOCOL: All right, the same ruling,

1 they have to hire everybody, have to keep our terms and
2 conditions the same, and that our benefits would stay the
3 same.

4 Q. Now in February of 2011 did there come a time when you
5 learned that representatives from the new company were
6 going to be meeting with the union?

7 A. Yes.

8 Q. How did you learn about that?

9 A. I believe I got the call from Neil. Neil or Rick said
10 that Nexeo was coming down for a meeting with the, with the
11 union.

12 Q. Did he tell you when the meeting was going to be held?

13 A. February 15th.

14 Q. And approximately when did this conversation take place
15 with Mr. Messino or Mr. Rowe?

16 A. 11th, 10th, 11th, a few days before the meeting.

17 Q. At any time after you learned of the meeting did you
18 speak to any manager about that particular meeting?

19 MR. KADELA: Objection.

20 ADMIN. LAW JUDGE KOCOL: And your --

21 MR. CASTILLO: Well, at this point we're in mid-
22 February, so there's been a transition to, I believe Nexeo.
23 There's been testimony that --

24 ADMIN. LAW JUDGE KOCOL: Ask your question, I'm just
25 asking you to ask your question concerning managerial.

1 Q. BY MR. CASTILLO: Did you speak to any manager
2 about the February 15th that was scheduled to take
3 place?

4 A. Yes.

5 Q. Who did you speak with?

6 A. Tony Kuk.

7 Q. Did anyone else participate in that conversation?

8 A. Yes.

9 Q. Who?

10 A. George Sterber.

11 Q. Where, and who is George Sterber?

12 A. He is also a union steward, or was the union steward
13 for Ashland.

14 Q. And where did this meeting with Mr. Kuk take place?

15 A. In his office again.

16 Q. What was said during your conversation with Mr. Kuk?

17 MR. KADELA: Objection.

18 ADMIN. LAW JUDGE KOCOL: What is your objection?

19 MR. KADELA: He's an Ashland manager, and it's hearsay.

20 ADMIN. LAW JUDGE KOCOL: Now this is another time where
21 I'm going to hear the answer and then decide. So, please.
22 answer.

23 THE WITNESS: Well, initially --

24 MR. ALLISON: I'm going to object, I don't think we
25 have a date for this conversation. Maybe I missed it.

1 THE WITNESS: February 11th.

2 MR. KADELA: February 11th, 10th or 11th.

3 THE WITNESS: February 11th. We initially went in
4 there to ask if Mr. Kuk, if he knew anything that was going
5 to go on in the February 15th meeting, because George and I
6 were excluded from the meeting. So, just kind of having a,
7 you know, head up if he knew, knew anything. And he had
8 just informed me that, that it was just a get to know
9 session, the company, the new company and the union wanted
10 to first meet, get to know each other and have their first
11 formal introductions. And we, we were not scheduled to
12 attend.

13 Q. BY MR. CASTILLO: Do you recall if anything else was
14 said during that meeting on February 11th?

15 A. Yes, yes.

16 Q. What was said?

17 A. And, as I did quite often, I asked Mr. Kuk again, I
18 said, the question I asked this time was, you know, are we
19 going to have to reapply? Some of the drivers were, were
20 you know, kind of throwing around an idea that we were
21 going to have to reapply to keep our jobs, so I used that
22 time to ask Tony, Mr. Kuk, are we going to have to reapply.

23 Q. And what was his response?

24 A. And he says, no we're not going to have to reapply.

25 And he says as a matter of fact, himself, he says I'm a

1 Nexeo employee, he says I'm already a Nexeo employee.

2 Q. And do you recall if he said anything else?

3 A. And he said Pat Cassidy is a Nexeo employee also.

4 Q. Do you recall if anything else was said during that
5 February 11th meeting?

6 A. That the, we weren't going to have to apply and we're
7 all going to be hired.

8 Q. Do you recall if anything else was said during that
9 meeting?

10 A. And everything was going, I mean he always reiterated
11 everything was going to stay the same, our terms and
12 conditions. He was always very adamant about that.

13 Q. Did he do so on February 11th?

14 A. Yes.

15 MR. KADELA: I renew my objection and move to strike.

16 ADMIN. LAW JUDGE KOCOL: No, I'm going to allow this
17 in. It's close enough to the, what's the date, February
18 11th?

19 MR. CASTILLO: February 11th.

20 THE WITNESS: It was the 11th.

21 ADMIN. LAW JUDGE KOCOL: It's close enough where I'm
22 going to allow that to stand in the record, and I'll decide
23 later what weight I'll give that. But it's close enough,
24 so I'll keep it in there.

25 Q. BY MR. CASTILLO: After February 15th were you offered

P R O C E E D I N G S

April 4, 2012

9:07 a.m.

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3 ADMIN. LAW JUDGE KOCOL: Good morning, Mr. Castillo,
4 we're still with you.

5 MR. PATTERSON: Before we get started, we just wanted
6 to make you aware, Your Honor, per your rulings previously
7 that with our future, last witness, we won't go into
8 establishing offers of proof on the issue of statements
9 made by Ashland's managers and we're still of the same
10 position but we won't take up any more time.

11 ADMIN. LAW JUDGE KOCOL: All right. So, you're not
12 waiving your position.

13 MR. PATTERSON: We're not waiving our position.

14 ADMIN. LAW JUDGE KOCOL: And you made sufficient offers
15 of proof?

16 MR. PATTERSON: Yes, sir.

17 ADMIN. LAW JUDGE KOCOL: Okay, very good.

18 MR. PATTERSON: At this time, General Counsel would
19 like to call George Sterba.

20 ADMIN. LAW JUDGE KOCOL: Mr. Sterba, come up around
21 here. Be careful, there's some cords here. Raise your
22 right hand.

23
24
25

1 be, stay the same. The drivers would be hired and the
2 contract would be carried on.

3 Q. After December, did the new company make any plans to
4 meet with the Union?

5 A. Yes.

6 Q. And how did you find out about the plans to meet with
7 the Union?

8 MR. KADELA: I'll just object to the form of the
9 question, which company.

10 ADMIN. LAW JUDGE KOCOL: Yes, okay, let's make it
11 clear. Sustained.

12 MR. PATTERSON: The company at the time, Your Honor,
13 is --

14 ADMIN. LAW JUDGE KOCOL: Please rephrase the question
15 so it's clear.

16 Q. BY MR. PATTERSON: After December did the company that
17 you worked for make any plans to meet with the Union?

18 A. Yes.

19 Q. And how did you find out about this meeting?

20 A. On February 11th, Neil Messino called Mike Jordan,
21 myself and says that on the 15th there was going to be a
22 meeting with TPG and the Union, and we were instructed to
23 find out what this meeting was going to be all about.

24 Q. Now, where did this conversation take place?

25 A. In Tony Kuk's office.

1 Q. And who was present?

2 A. Mike Jordan, Tony Kuk and myself.

3 Q. And what was said in this conversation?

4 MR. KADELA: Objection.

5 ADMIN. LAW JUDGE KOCOL: And what is the objection?

6 MR. KADELA: Hearsay.

7 ADMIN. LAW JUDGE KOCOL: Are you offering for the truth
8 of the matter as certain?

9 MR. PATTERSON: At this time, yes, Your Honor, this is
10 a meeting in which the Agency issue was actually discussed
11 by the representative of Ashland.

12 ADMIN. LAW JUDGE KOCOL: So, I'll overrule it for now.
13 I'll hear the testimony. Please answer.

14 THE WITNESS: Okay. We asked Tony Kuk what this
15 meeting was supposed to be about and Tony told us that it
16 was supposed to be an introduction between TPG and the
17 Union. They wanted to introduce themselves.

18 ADMIN. LAW JUDGE KOCOL: All right. So, it's not
19 hearsay. So, I'll allow the testimony to stand. Objection
20 overruled.

21 Q. BY MR. PATTERSON: Did Mr. Kuk say anything about his
22 status with the new company?

23 A. That this was the first time that we were officially
24 notified that Tony Kuk and Pat Cassidy would be hired by
25 the new company.