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

NEXEO SOLUTIONS, LLC, Respondent, and	:	
TRUCK DRIVERS, OIL DRIVERS, FILLING STATION AND PLATFORM WORKERS' UNION, LOCAL NO. 705, AN AFFILIATE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and	:	Cases 13-CA-46694 13-CA-62072 20-CA-35519
BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS, LOCAL NO. 70 OF ALAMEDA COUNTY, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Charging Parties.	:	

RESPONDENT NEXEO SOLUTIONS, LLC'S BRIEF IN OPPOSITION TO THE ACTING GENERAL COUNSEL'S REQUEST FOR SPECIAL PERMISSION TO FILE INTERIM APPEAL AND INTERIM APPEAL

I. INTRODUCTION

On April 19, 2012, the Acting General Counsel ("GC") filed a request for special permission to file an interim appeal, and an interim appeal, of evidentiary rulings made by Administrative Law Judge William G. Kocol during a three-day hearing that was held from April 2, 2012, to April 4, 2012, in Chicago, Illinois on the Region 13 cases involved in this proceeding. The GC has taken this extraordinary action because Judge Kocol's rulings stymied his hope of making out his agency-based claim that Respondent Nexeo Solutions, LLC ("Nexeo" or the "Company") is a perfectly clear successor of Ashland, Inc. ("Ashland") on the basis of hearsay

testimony from Ashland managers.

In an attempt to save his claim, the GC points the finger at Judge Kocol for what in truth are shortcomings in his evidence. Distilled to its essence, the GC's argument is that Judge Kocol was wrong to rule that the hearsay he sought to introduce was inadmissible because he failed to lay a foundation that the Ashland managers were speaking as actual or apparent agents of Nexeo. That such a foundation was required to be laid before admitting what would otherwise be inadmissible hearsay as an admission against a party, however, is so fundamental a proposition that it does not even require citation.

At a prehearing conference conducted a week before the record opened, and again at the outset of the hearing, Judge Kocol put the GC on notice that foundational evidence would have to be presented before he would admit evidence of what Ashland managers purportedly said Nexeo's hiring plans were. The explanation why the GC, after having been given such notice, failed to present such evidence is simple. It does not exist. The GC's request for special permission to appeal Judge Kocol's rulings effectively amounts to an attempt to be excused from complying with the rules of evidence and to be permitted to advance his agency theory on the basis of speculation and conjecture.[1] The request must be denied.

II. BACKGROUND

This case arises out of Nexeo's acquisition of the assets of Ashland Distribution, an international distribution business, from Ashland. The asset purchase agreement ("APA") was entered into on November 5, 2010. The transaction closed on March 31, 2011, and Nexeo

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[1] As a review of the record shows, the speculation and conjecture is the product of a premeditated attempt by the Union to "set-up" Ashland managers to say things on which it could base a charge that Nexeo is a perfectly clear successor. (Tr. pp. 348-349). Significantly, when Judge Kocol ruled that evidence of those statements was not admissible without proof of agency status, there was a card that the GC could have played but chose not to. He could have subpoenaed the now former Ashland managers to testify. His failure to do so speaks volumes about his confidence in his theory.

commenced operations the next day, April 1, 2011.

The central issue in the consolidated cases is whether Nexeo lawfully exercised its right to establish initial terms and conditions of employment for two bargaining units of employees, one at the Company's facility in Willow Springs, Illinois, and the other at the Company's facility in Fairfield, California. The unit at the Willow Springs facility (the "Facility") is made up of truck drivers who are represented by Teamsters Local 705 ("Local 705" or the "Union"), which filed a charge a week after the sale closed alleging that Nexeo is a perfectly clear successor.[2]

The GC's principal theory is that Nexeo was not entitled to set the initial terms and conditions of employment for the employees in these bargaining units because it was a perfectly clear successor by virtue of the terms of the APA. 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.[3]

In addition to relying on the APA, which by its clear terms does not support the GC's position, the GC relies on an agency theory. In the Region 13 cases, the GC asserts that three former managers of Ashland made certain statements to unit employees between November 8, 2010 and February 15, 2011, which are attributable to Nexeo and establish the Company's

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[2] The warehouse employees at the Facility are represented by Teamsters Local 781. Nexeo reached a pre-close collective bargaining agreement with Local 781, as well as the unions that represented Ashland employees at five other locations. Each of those contracts went into effect on April 1, 2011.

[3] Pertinent portions of the APA, which was admitted at the hearing as GC Ex. 6, are attached hereto as Exhibit A.

perfectly clear successor status. The February 15, 2011 date is important because it is the date of the first meeting between Nexeo and the Union.

During this initial meeting, Nexeo communicated that it was not adopting any of the terms contained in any current or expired Ashland collective bargaining agreement and that it intended to implement new terms and conditions of employment, including a Company-sponsored 401k retirement plan and a Company-sponsored healthcare plan.

On February 17, 2011, Nexeo sent offers of employment to the employees represented by the Union. The offer letter likewise communicated that 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. The letter also provided a detailed outline of the new terms and conditions of employment.[4] After receiving responses to the offer letters from the Local 705-represented employees, Nexeo extended conditional recognition – conditional upon the closing – to the Union. The Company also agreed, as had been communicated to the Union at the initial meeting, to engage in pre-close collective bargaining negotiations.

During the negotiating sessions, the Company and Union agreed on some minor issues but were unable to reach any form of agreement regarding retirement and health benefits. John Hollinshead, who headed the Company's negotiating team, reminded the Union's negotiating team that the failure to reach a complete 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.

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[4] A copy of one of the offer letters, which was admitted at the hearing as part of GC Ex. 35, is attached hereto as Exhibit B.

The events that took place between February 15, 2011 and the closing on March 31, 2011, put into context why the GC has focused on agency-related issues that pre-date that time period. From February 15, 2011 and going forward, there is no question that Nexeo took the necessary steps to lawfully exercise its right to establish initial terms and conditions of employment. Thus, to prevail, the GC must prove that Nexeo disseminated statements to Ashland employees at the Facility prior to February 15, 2011 and that the alleged statements support a perfectly clear successor finding under current Board law. As made clear at the hearing and discussed below, that is a burden the GC failed to satisfy.

III. THE JUDGE'S PRELIMINARY EVIDENTIARY RULINGS

Prior to the hearing, during a pretrial conference call and in pretrial briefs, the GC and Nexeo had an opportunity to present their position regarding agency issues. In these pretrial communications, the GC indicated that he intended to establish Nexeo's status as a perfectly clear successor by introducing statements regarding what Ashland managers allegedly told represented employees about (a) Nexeo's hiring plans, and (b) whether there would be any changes to the terms and conditions of employment.

On the first day of the hearing, Judge Kocol made it clear that the GC would have every opportunity to establish his agency theory, but that in attempting to do so he would be required to follow the rules of evidence. (Tr. pp. 30-31).[5] Accordingly, the Judge ruled that before he would admit any hearsay statement regarding what Ashland managers said to Ashland employees about Nexeo's future intentions, the GC would first have to lay a "tolerable" foundation that the managers at issue were in fact agents of Nexeo at the time the statements were made. (Tr. pp. 39, 42, 50). To that end, the Judge determined that any alleged statements

[5] Referenced sections of the hearing transcript are attached hereto as Exhibit C.

Ashland managers made to employees prior to February 21, 2011 – the date when the managers at issue accepted Nexeo's February 17, 2011 offer of employment – regarding terms and conditions of employment at Nexeo would not be admitted into evidence absent a foundational showing of agency status. (*Id.*).

IV. ARGUMENT

The GC claims in his request for interim relief that Judge Kocol's evidentiary rulings on the agency issue were erroneous and prejudicial. He then goes on to request that the Board reverse the Judge's exclusion of witness testimony concerning pre-February 20, 2011, conversations, and re-open the record. Nothing the GC offers in support of his request, however, would support a finding that Judge Kocol's rulings were erroneous in any respect. On the contrary, as the discussion that follows demonstrates, Judge Kocol's evidentiary rulings were proper and fully in accord with Board law relevant to agency issues.

A. 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 (1993). The test for determining whether an employee is the agent of an 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.*

Based on the Board authority cited above, the GC cannot prevail on any theory of agency without first establishing that Nexeo, the principal in this case, took some affirmative action to confer agency status on Ashland managers. Thus, as discussed in further detail below, the Judge ruled correctly in requiring the GC to lay a basic foundation for agency status before presenting evidence of the alleged communications to Ashland employees.

B. Judge Kokol's Evidentiary Rulings Were Not An Abuse Of Discretion

Under Section 102.35 of the Board's Rules and Regulations ("Rules"), the administrative law judge has a duty to "rule upon offers of proof and receive relevant evidence." 29 C.F.R. § 102.35. Under well settled Board principles, an administrative law judge's evidentiary rulings will not be disturbed absent a showing that the rulings constituted an abuse of discretion. *See, e.g., Aladdin Gaming, LLC*, 345 NLRB 585, 587 (2005). Application of these principles here establishes that the GC's request for interim relief must be denied.

1. Testimony Of Pre-February 20 Conversations Was Properly Excluded

The GC asserts in his brief that, subject to several exceptions, "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." (GC Brief,

pp. 5-6). In each cited instance, however, the GC was unable to introduce any foundational evidence that the speaker at issue was an authorized agent of Nexeo at the time the statement was allegedly made. Judge Kocol therefore properly excluded these alleged statements. *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); *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).

For example, the GC attempted to introduce testimony that Local 705 Representative Neil Messino had a discussion with Ashland Human Resources Representative Paul Fusco on November 8, 2010, during which Fusco allegedly stated that Nexeo planned to retain all of the unit employees. (Tr. pp. 73-75). The Judge properly sustained the Company's objection to this testimony on the grounds that it was hearsay and that the GC failed to introduce any foundation that Fusco was an agent of Nexeo at the time he allegedly made the statement. (*Id.*)

The GC attempted to introduce similar testimony regarding a discussion Messino allegedly had with Fusco during an Ashland bargaining session on November 17, 2011. Again, Fusco supposedly said that Nexeo planned to hire all unit employees. However, as the GC concedes, Fusco also informed Messino during this conversation that he did not have authority at that time to bargain on behalf of the Company. Thus, Judge Kocol did not abuse his discretion in excluding this testimony on hearsay grounds. (Tr. pp. 83-88).

Next, the GC claims that Ashland managers Pat Cassidy and Tony Kuk were Nexeo agents based on statements they allegedly made during a November 11, 2010, "town hall" meeting with unit employees and because they "aligned themselves with Respondent." (GC Brief, p. 6). Specifically, according to the GC, Union Steward Mike Jordan would have testified that he heard Cassidy and Kuk say at the meeting that they "assumed" Nexeo would hire them, that Nexeo planned to hire the unit employees, and that there would be no changes. (Tr. p. 293).

Again, however, the GC has failed to point to any foundational evidence in support of his claim that Cassidy and Kuk were somehow authorized to communicate this information on behalf of Nexeo. Furthermore, as the Board has made clear, the actions of Kuk and Cassidy 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 light of this authority, the GC's assertion that Judge Kocol erred in excluding this and similar evidence is meritless.

2. Evidence Of Post December 13 Conversations

The GC further claims that evidence of pre- and post-December 13 conversations was improperly excluded from evidence based on the following testimony elicited from Messino at the hearing:

> Q. And do you recall if anything else was discussed during this meeting with Mr. Fusco on December 13th?

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

(Tr. pp. 112-113).

As a preliminary matter, the GC's statement that the Judge excluded all evidence of post-December 13 comments regarding his agency theory misstates the record. (GC Brief, p. 8 n.7). For example, Judge Kocol admitted testimony, over the Company's objection, from Union Stewards George Sturba and Mike Jordan, regarding alleged statements Kuk made on February 11, 2011. He did so based on Jordan's highly questionable testimony that Kuk was a Nexeo employee as of that date.[6] (Tr. pp. 310-312; 368-372, 374).

Additionally, while the GC claims the Judge should have admitted evidence of other conversations Jordan and Sturba had with Kuk prior to February 11, 2011, the GC has no proof that Nexeo gave Kuk or any other Ashland employee any direction or authorization to act on its behalf in connection with the job prospects of Ashland employees prior to this date. Thus, the GC's position that the Judge abused his discretion in excluding evidence of certain conversations that allegedly took place prior to February 11, 2011, is baseless.

3. The Judge Properly Excluded The Exhibits At Issue

In an attempt to establish general agency status on the part of all Ashland managers, the GC references the following four exhibits that were presented at the hearing: (1) a November 8,

[6] Significantly, Jordan later admitted on cross-examination that he had no personal knowledge when Kuk became an employee of Nexeo. (Tr. p. 351). Beyond this, the testimony presented at the hearing established that Kuk was not offered employment until February 17, 2011 and that his employment was not effective until the sale closed on April 1, 2011. (Tr. pp. 439-440; 486)

2010 letter from Ashland's president to Ashland's customers; (2) a November 8, 2010 document posted on Ashland's website with questions and answers regarding the sale ("GC 40"); (3) a December 6, 2010 document entitled "Update to Ashland Distribution Transaction"; and (4) an "Ashland Distribution Transition Update." (GC Brief, pp. 5, 8). At the hearing, the Judge admitted GC 40 into evidence, but excluded the remaining documents on the grounds that the GC provided no foundation for their relevance to the agency issue. While the GC vaguely asserts in his brief that the documents are "supportive" of his agency theory, he fails to articulate any connection between these documents and his theory that Fusco, Kuk and Cassidy were acting as agents of Nexeo when they made the alleged statements regarding Nexeo's intentions with regard to unit employees. (*Id.*). The GC also has adduced no proof that the excluded exhibits were disseminated to, and received by bargaining unit employees at the Facility. The Judge therefore did not abuse his discretion in excluding them as evidence.

C. Messages Distributed By Ashland Do Not Support A Finding That Nexeo Was A Perfectly Clear Successor

Relying on its pretrial brief, the GC next argues that he demonstrated a "messaging stream common to Ashland and Respondent." (GC Brief, p. 7). However, the GC's position is without merit because he has no factual or legal basis for attributing any alleged statements by Ashland to Nexeo. Moreover, the GC's purported ratification theory fails because, as discussed, Nexeo informed the Union and the Ashland employees it 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. (*See,* Respondent's Pretrial Brief at pp. 7-11, submitted as Exhibit B to the GC's Interim Appeal).

D. <u>The GC Suffered No Prejudice As A Result Of The Judge's Rulings</u>

Lastly, the GC's assertion that the Judge's rulings have "severely prejudiced the GC's presentation of its alternative theory" is simply much ado about nothing. Contrary to the GC's characterization of the Judge's ruling as "precluding witness testimony concerning pre-February 20, 2011 conversations," the Judge has simply required that the GC abide by the rules of evidence and lay a basic foundation prior to presenting any such testimony. This ruling was clearly proper and the GC has provided no basis for the interim relief he has requested. Indeed, the GC was provided with substantial leeway on the agency issue and was permitted to introduce multiple avenues of testimony regarding his agency theory. (Tr. pp. 57-62, 76-78, 89, 112-113, 310-312, 368-372, 374). Beyond this, the Judge ruled that the GC would be permitted to supplement the record with additional evidence of agency, if any, that Nexeo produces after the hearing in response to a subpoena request. (Tr. pp. 386-387). For these reasons, and because the arguments raised by the GC fall woefully short of establishing that Judge Kocol abused his discretion, the GC's request to re-open the record in Chicago for the purpose of allowing the excluded evidence in the record must be denied.

V. CONCLUSION

For the reasons stated above, it is clear that the Administrative Law Judge did not abuse his discretion when he exercised his inherent authority regarding the admissibility of evidence at the hearing. Accordingly, Nexeo respectfully requests that the General Counsel's Request For Special Permission To File Interim Appeal And Interim Appeal Of Rulings Of The Administrative Law Judge be denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April 2012, I served the foregoing upon the following parties of record via email:

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