

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGIONS 13 AND 20**

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**

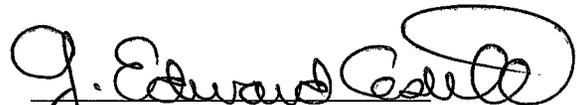
**CASES 13-CA-46694
13-CA-62072
20-CA-35519**

and

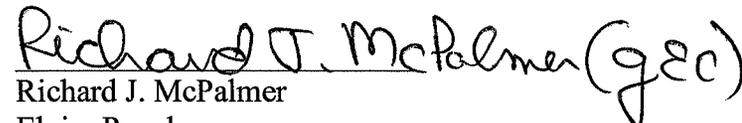
**BROTHERHOOD OF TEAMSTERS AND
AUTO TRUCK DRIVERS, LOCAL NO. 70
OF ALAMEDA COUNTY, AFFILIATED
WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted:


J. Edward Castillo

R. Jason Patterson
Counsel for the Acting General Counsel
National Labor Relations Board, Region 13
209 South LaSalle Street, Suite 900
Chicago, Illinois 60604


Richard J. McPalmer

Elvira Pereda
Counsel for the Acting General Counsel
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, CA 94103

TABLE OF CONTENTS

I. INTRODUCTION	1
II. STATEMENT OF FACTS	4
A. Background	4
B. Facts Pertaining to the Willow Springs, Illinois Facility	6
1. The Willow Springs Drivers are “Employees” Under the P&S Agreement	6
2. Early Communications to Local 705 and Unit Employees Regarding the Sale and Ownership Transition.....	6
3. Paul Fusco provides Local 705 with a Copy of the P&S Agreement and its Pertinent Terms are Shared with the Willow Springs Drivers	8
4. On February 15, 2011, Respondent Meets with Local 705 and Thereafter it Mails Employment Offers to All the Willow Springs Drivers with Terms and Conditions that are Not “Substantially Comparable in the Aggregate to those Provided by Ashland.”.....	11
5. Respondent Ultimately Recognizes Local 705 and Bargaining for	14
An Initial Contract Ensues Despite Respondent’s Failure to Provide	14
Requested Information.....	14
6. On April 1, 2011, Respondent Unilaterally Implements Initial Terms and Conditions of Employment for the Willow Springs Drivers	20
(a) Respondent Implements Substantial Changes to the Drivers’ Retirement Benefits... 20	
(b) Respondent Implements Substantial Changes to the Drivers’ Health Insurance Benefits	22
(c) Respondent Implements Substantial Changes to the Drivers’ Overtime Pay, Vacation Pay, and Daily and Weekly Guarantees.	23
C. Facts Pertaining to the Fairfield, California Facility.....	24
1. The Fairfield Unit Employees Are “Employees” Under the P&S Agreement.....	24

2. Early Communications to Local 70 Regarding the Sale and Ownership Transition.....	25
3. Communications to Fairfield Unit Employees Regarding the Sale and Ownership Transition	26
4. On about February 16, 2011, Respondent Meets with Local 70 and Thereafter Mails Employment Offers to All the Fairfield Unit Employees with Terms and Conditions Changed Materially from Those in Effect Under Ashland.....	33
5. A Majority of the Unit Accepts Respondent’s Employment Offer, Local 70 is Recognized, and Bargaining Ensues.....	35
6. Respondent Implements Its Unlawful Unilateral Changes Upon the April 1 Take-Over of the Fairfield Facility	38
(a) Respondent Implements a 401(k) Retirement Plan in Place of the Western Conference of Teamsters Pension Plan.....	38
(b) Respondent Implements Certain Changes to Employee Health Insurance Benefits	41
III. LEGAL ANALYSIS.....	42
A. The ALJ Erred As A Matter of Fact and Law in Finding and Concluding that Respondent Was Not a Perfectly Clear Successor Based on the Terms of the P&S Agreement Which Legally Obligated Respondent to Retain All of Ashland’s Employees (Exceptions 1-2, 4-7, 10-17, 19, 21-23, 25, 28, 30-33).....	42
1. The ALJ Properly Found that it Was Perfectly Clear as a Matter of Fact that Respondent Planned to Retain All the Unit Employees and They Would Undoubtedly Accept the Offer of Employment (Exceptions 1-2, and 4-7).....	42
2. The ALJ Properly Concluded that the Fact Pattern in <i>Spruce Up Corp.</i> , 209 NLRB 194, 195 (1974), enforced mem., 529 F.2d 516 (4th Cir. 1975) Does Not Cover the Fact Pattern in the Instant Case. However, the ALJ then Erroneously Relied on <i>Spruce Up</i> to Decide that Respondent Was Not a Perfectly Clear Successor (Exceptions 1-2, 4, 16-17, 19, 21, 23, 25, 28, and 30-33)	46
3. The ALJ Erroneously Failed to Follow the Holding in <i>Springfield Transit Management</i> , 281 NLRB 72, 78 (1986) and <i>The Denham Co.</i> , 206 NLRB 659, 660 (1973) and 218 NLRB	

30, 31 (1975) which Established that Respondent Was a Perfectly Clear Successor Based on the Terms of the P&S Agreement that Obligated Respondent to Retain All of Ashland's Employees (Exceptions 15, 17, 23, 25, 28, and 30-33) 50

B. Even if the Terms of the P&S Agreement Did Not Themselves Serve to Convert Respondent to a Perfectly Clear Successor, the ALJ Erred in Concluding that Statements Attributable to Respondent Failed to Render it a Perfectly Clear Successor of the Fairfield Facility by Mid-January 2011 at the Latest (exceptions 2-4, 8, 12-14, 18-21, 23-25, 28, 31, and 33) 54

1. The ALJ Committed Legal Error to the Extent that He Failed to Attribute to Respondent Statements Made in the Documented Transition-Related Message Stream Between November 2010 and January 2011 (Exceptions 3 and 8) 55

2. The ALJ Erred By Making Conclusions Regarding the Substance of Transition-Related Communications Issued to Employees While Failing to Discuss or Address Those Same Communications (Exception 3) 61

3. The ALJ Committed Both Factual and Legal Error by Concluding in Part that the Transition-Related Messaging Stream Did Not Mislead Fairfield Unit Employees in a Manner Sufficient to Render Respondent a Perfectly Clear Successor Before the February 16, 2011 Meeting with Local 70 (Exceptions 4, 18-21, 23, 25, 28, 31, and 33)..... 61

(a) Respondent Rendered Itself a Perfectly Clear Successor by Mid-November 2010 63

(b) Respondent's Consistent Message Stream Further Supports It was a Perfectly Clear Successor..... 69

4. That Respondent Later Clarified its Intent to Hire Employees Under Materially Altered Terms Is of No Legal Import (Exceptions 18-21)..... 73

5. The Judge Erroneously Described the Health Benefits Put at Issue in the Case, and Failed to Find Changes Instituted to Them Upon Respondent's April 1, 2011, Take-Over of Operations (Exceptions 12-14) 75

6. Inasmuch as it Was Raised, The ALJ's Failure to Find and Conclude that There Was No Good Faith Impasse Prior to the April 1 Implementation in Fairfield Constituted Error (Exception 24)..... 77

C. Whether the Employees' Initial Terms Were "Comparable in the Aggregate" to Those Under Ashland is Irrelevant Because, as A Perfectly Clear Successor at the Willow Springs

and Fairfield Facilities, Respondent Was Obligated to Bargain to Impasse Over Any Material and Substantial Changes to the Unit Employees' Conditions of Employment (Exceptions 10, 12-14, and 22) 81

D. The ALJ Properly Found that Respondent Made Three Unilateral Changes at the Willow Springs Facility that Were Not Part of the Announced Initial Terms, But He Inadvertently Failed to Conclude that the Change to the Drivers' Overtime Pay Violated Section 8(a)(1) and (5) of the Act. Due to this Oversight, He Failed to Provide a Remedy for Respondent's Unlawful Unilateral Change to the Drivers' Overtime Pay (Exceptions 9, 26-27, and 29) 89

IV. CONCLUSION..... 90

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Statutes

Fed. R. Evid. 801(d)(2)(D)	56
----------------------------------	----

BOARD CASES

<i>Anderson Enterprises</i> , 329 NLRB 760 (1999).....	79
<i>Antonio's Rest.</i> , 246 NLRB 813 (1979).....	83
<i>Berkshire Nursing Home, LLC</i> , 345 NLRB 220 (2005).....	85
<i>Bio-Medical Applications of Puerto Rico, Inc.</i> , 269 NLRB 827 (1984).....	56
<i>Blitz Maintenance</i> , 297 NLRB 1005 (1990).....	83
<i>Canteen Co.</i> , 317 NLRB 1052 (1995), enf'd 103 F.3d 1355 (7th Cir. 1997).....	47, 50, 74
<i>Carrier Corp.</i> , 319 NLRB 184 (1995).....	83, 84, 85
<i>Dean Industries</i> , 162 NLRB 1078, 1092 (1967).....	56, 58, 60
<i>Dependable Bldg. Maint. Co.</i> , 274 NLRB 216 (1985).....	79
<i>DuPont Dow Elastomers, LLC</i> , 332 NLRB 1071 (2000), enf'd 296 F.3d 495 (6th Cir. 2002)....	62
<i>EAD Motors Eastern Air Devices, Inc.</i> , 346 NLRB 1060 (2006).....	77
<i>East Belden Corp.</i> , 239 NLRB 776 (1987).....	66, 68, 73
<i>Elf Atochem North America, Inc.</i> , 339 NLRB 796 (2003). 2, 45, 47, 49, 50, 63, 66, 68, 70, 73, 74, 82	
<i>EPE, Inc.</i> , 284 NLRB 191 (1987).....	60
<i>Equitable Resources Exploration Div.</i> , 307 NLRB 730 (1992)	84
<i>Fremont Ford</i> , 289 NLRB 1290, 1296 (1988).....	47, 66, 75
<i>Georgia Power Co.</i> , 325 NLRB 420 (1998).....	84
<i>Goya Food of Florida</i> , 352 NLRB 884 (2008),.....	86
<i>Goya Foods of Florida</i> , 347 NLRB 1118 (2006)	83

<i>J.W. Rex Company</i> , 308 NLRB 473 (1992).....	85
<i>Jimmy-Richard Co.</i> , 210 NLRB 902 (1974).....	85
<i>Keystone Steel & Wire</i> , 237 NLRB 763 (1978).....	84
<i>Mercy Hosp. of Buffalo</i> , 311 NLRB 869 (1993).....	85
<i>Monmouth Care Ctr.</i> , 354 NLRB 11 (2009), affd. by 356 NLRB No. 29 (2010).....	78
<i>Morris Healthcare & Rehabilitation Ctr.</i> , 348 NLRB 1360 (2006).....	53, 66, 68
<i>Passavant Mem. Area Hosp.</i> , 237 NLRB 138 (1978).....	59
<i>Pepsi-Cola Bottling Co. of Fayetteville, Inc.</i> , 330 NLRB 900 (2000).....	83
<i>Planned Building Services, Inc.</i> , 347 NLRB 670 (2006).....	82
<i>Pratt Industries, Inc.</i> , 358 NLRB No. 52 (June 5, 2012).....	78, 79, 80
<i>Raysel-IDE Inc.</i> , 284 NLRB 879 (1987)	60
<i>Reapp Typographic Serv., Inc.</i> , 204 NLRB 792 (1973)	85
<i>Red Arrow Freight Lines</i> , 289 NLRB 227 (1988)	60
<i>Road & Rail Services</i> , 348 NLRB 1160 (2006).....	11, 45, 62
<i>Roman Catholic Diocese of Brooklyn</i> , 222 NLRB 1052 (1976)	47, 75
<i>Rosdev Hospitality</i> , 349 NLRB 202 (2007).....	66, 68, 73, 82
<i>Sacramento Union</i> , 291 NLRB 552 (1988)	77
<i>Southern Pride Catfish</i> , 331 NLRB 618 (2000)	56, 58, 60
<i>Spitzer Akron, Inc.</i> , 219 NLRB 20 (1975)	66
<i>Spruce Up Corp.</i> , 209 NLRB 194 (1974), enforced mem., 529 F.2d 516 (4th Cir. 1975)....	43, 46, 50, 62
<i>Taft Broadcasting Co.</i> , 163 NLRB 475 (1967).....	77
<i>The Denham Co.</i> , 206 NLRB 659 (1973) and 218 NLRB 30 (1975).....	52, 53, 68
<i>Tyson Fresh Foods, Inc.</i> , 343 NLRB 1335 (2004)	56

<i>United Hosp. Med. Ctr.</i> , 317 NLRB 1279 (1995).....	85
<i>Wightman Ctr.</i> , 301 NLRB 573 (1991)	83

FEDERAL CASES

<i>Clews v. Jamieson</i> , 182 U.S. 461 (1901)	60
<i>Fall River Dyeing Corp. v. NLRB</i> , 482 U.S. 27 (1987)	42
<i>In re Wellesley</i> , 252 F. 854 (D.C. Cal. 1917).....	60
<i>Indianapolis Rolling Mill v. Railroad</i> , 120 U.S. 256 (1887)	60
<i>Ladies Garment Workers (Bernard Altman Corp.) v. NLRB</i> , 366 U.S. 731 (1961)	45
<i>Machinists v. NLRB</i> , 595 F.2d 664, 673 (D.C. Cir. 1978).....	45, 62
<i>Nazareth Reg'l High School v. NLRB</i> , 549 F.2d 873 (2d Cir. 1977).....	75
<i>NLRB v. Burns International Security Services, Inc.</i> , 406 U.S. 272, 294-95 (1972).....	1, 42
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	52
<i>Sierra Publ'g Co. v. NLRB</i> , 888 F.2d 1394 (9th Cir. 1989)	77
<i>Twin-Lick Oil Co. v. Marbury</i> , 91 U.S. 592 (1875).....	60

I. INTRODUCTION

For nearly forty years, it has been well settled law that a successor employer is not free to set initial terms and conditions of employment for its newly-hired work force where “it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees’ bargaining representative before he fixes terms.” *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 294-95 (1972).

In the instant case, Administrative Law Judge William C. Kocol¹ properly found in his decision that Nexeo Solutions, LLC (“Respondent”) entered into a Purchase and Sale Agreement (“P&S Agreement”) with Ashland, Inc. on November 5, 2010. The P&S Agreement obligated Respondent to retain all of Ashland Distribution Company’s (“Ashland”) employees, including those employed at the Willow Springs, Illinois, and Fairfield, California, facilities, under terms and conditions substantially comparable in the aggregate to those provided by Ashland. It is undisputed that the P&S Agreement was a matter of public record since it was filed with the U.S. Securities and Exchange Commission (“SEC”) on November 10, 2010. Equally important, the ALJ found that Teamsters Local 705 (“Local 705”) and Teamsters Local No. 70 (“Local 70”) “became aware of the terms of the [P&S Agreement] as they related to worker retention and compensation issues; both accurately communicated to their members that [Respondent] planned

¹ Hereinafter the National Labor Relations Act will be referred to as the “Act”; the National Labor Relations Board hereinafter is the “Board”; the Administrative Law Judge hereinafter is the “ALJ” or “The ALJ”; citations to the ALJ’s decision are hereinafter referred to as “ALJD ___”; the Acting General Counsel’s Exhibits are hereinafter referred to as “GC ___”; Respondent’s Exhibits are hereinafter referred to as “R ___”; Charging Party’s Exhibits are hereinafter referred to as “CP ___”; Joint Exhibits are hereinafter referred to as “Joint ___”; and the citations to the transcript are hereinafter referred to as “Tr. ___” followed by applicable page and line numbers.

to retain all the employees under a benefit scheme that would be comparable in the aggregate.”

ALJD p. 5, lines 30-34.

Consistent with his findings of fact, the ALJ properly concluded that it was perfectly clear as a matter of fact that Respondent planned to retain all the unit employees at both the Willow Springs and Fairfield facilities. ALJD p. 15, lines 27-30. He likewise explained that Respondent’s promise, in the P&S Agreement, to retain all the unit employees under terms and conditions substantially comparable in the aggregate to those provided by Ashland would normally not be sufficient to put employees on notice of changes to their benefits.² ALJD p. 17, line 46 to p. 18, line 3. However, he then inexplicably disregarded Board law and held that Respondent was not a perfectly clear successor, based on the terms of the P&S Agreement, because there was allegedly no evidence that employees were misled into believing that their terms and conditions of employment would remain the same. To reach this erroneous decision, the ALJ was forced to conclude that Respondent’s belated attempt to announce initial terms in mid-February 2011 – more than three months after it was already a perfectly clear successor – was somehow timely.

As it relates to the Fairfield facility, the ALJ also incorrectly concluded that Respondent was not a perfectly clear successor under the Acting General Counsel’s second theory – i.e. that Respondent’s agents communicated its intent to offer employment to all of Ashland’s employees under substantially identical terms and conditions. In reaching this erroneous decision, he again concluded that there was no evidence that employees were misled by Respondent and that, at any rate, Respondent’s belated clarification of the initial employment terms somehow served to erase the earlier-fixed bargaining obligation. Equally troubling, the ALJ failed to consider the record

² See *Elf Atochem North America, Inc.*, 339 NLRB 796 (2003) (notice of equivalent salaries and comparable benefits insufficient to place employees on notice of changes to their terms and conditions of employment).

evidence which clearly showed that the benefits offered by Respondent were not comparable in the aggregate to those provided by Ashland, and seemingly relied on the purported absence of evidence to further justify his dismissal of the perfectly clear allegations. ALJD p. 18, lines 7-14. The ALJ's conclusions as to the ultimate issue in these matters are wrong on the facts and wrong on the law and must be reversed.

In addition to the ALJ's erroneous conclusion that Respondent was not a perfectly clear successor, he also made various inadvertent (but important) mistakes in his decision. At the Willow Springs facility, he correctly found that Respondent made three unilateral changes to the drivers' benefits, including overtime pay, that were not part of the announced initial terms. ALJD p. 12, lines 21-24. The ALJ then properly concluded that the unilateral changes to the drivers' vacation pay and daily/weekly guarantees violated Section 8(a)(1) and (5) of the Act, but he mistakenly forgot to include the change to drivers' overtime pay as a third violation. ALJD p. 18, lines 23-34. Consistent with this oversight, the ALJ also failed to provide a remedy for this violation.

As for the Fairfield facility, the ALJ inaccurately described both the allegations and factual circumstances surrounding the changes to unit employees' health benefits. ALJD p. 13, lines 10-11, 15-22 and p. 14, lines 16-17. Also to the extent raised by Respondent, the ALJ erred in failing to specifically to reject the affirmative defense that the alleged changes were justified by good-faith impasse.

Accordingly, pursuant to Section 102.46 of the Board's Rules and Regulations, the Acting General Counsel files this Brief in Support of Exceptions to the ALJ's decision, dated August 30, 2012. The Acting General Counsel respectfully requests that the Board reverse the

portions of the ALJ's decision excepted to herein, and order an appropriate remedy for the unilateral changes that Respondent implemented at its Willow Springs and Fairfield facilities.

II. STATEMENT OF FACTS

A. **Background**

On November 5, 2010, Ashland, Inc., a large oil company, agreed to sell its distribution business, including the Willow Springs and Fairfield facilities, to Respondent for \$930 million as part of an asset sale. ALJD p. 3, lines 21-24; GC 6. The P&S Agreement, which was signed by both parties, set forth all of the terms of the sale and was a matter of public record as of the date it was filed with the SEC on November 10, 2010.³ As the ALJ found, Respondent promised in the following sections of the P&S Agreement to take the following action:

- **Section 7.5(b)(i): Continuation of Employment.**
Where applicable Law does not provide for the transfer of employment of any Employee upon the consummation of the transactions contemplated hereby, Buyer shall, or shall cause a Buyer Corporation to, make offers of at-will (to the extent permitted by applicable Law) employment . . . to be effective as of the Closing . . . to all such Employees.
- **Section 7.5(c): Offers of Employment.**
Buyer shall . . . 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 and shall be made on terms and conditions sufficient to avoid statutory, contractual, common law or other severance obligations . . .
- **Section 7.5(d): Continuation of Compensation and Benefits.**
For a period of eighteen (18) months immediately after the Closing Date . . . Buyer shall (or shall cause the Buyer Corporations to) provide to each Transferred Employee (i) a base salary or wages no less favorable than those provided

³ The SEC filing, made in accordance with the explicit terms of Section 11.7 of the P&S Agreement, can still be viewed by the public at that federal government agency's webpage:
<http://www.sec.gov/Archives/edgar/data/1305014/000095015710002019/0000950157-10-002019-index.htm>.

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 or the applicable Asset Selling Corporation as expected to be in effect on January 1, 2011 . . .

- **Section 7.5(f): Severance Obligations.**

Ashland and Buyer intend that the transactions contemplated by this Agreement shall not result in a severance of employment of any Employee prior to or upon the consummation of the transactions contemplated hereby and that the Employees will have continuous and uninterrupted employment immediately before and immediately after the Closing Date, and Ashland and Buyer shall comply with any requirements under applicable Law to ensure the same.

- **Section 7.5(n): Employee Consultations.**

Buyer or Buyer's Affiliates shall fully comply with all of its or their obligations (however arising) to inform and consult with, and in respect of, the Employees of the Business, whether the same arises under a Union Contract or applicable Law. To the extent such communications occur in writing, Buyer and Buyer's Affiliates will provide a copy to Ashland at the time such communications occur and will provide Ashland any written responses to said communications promptly after the time they are received.

- **Section 7.5(o): Union Contracts.**

From and after the Closing, Buyer shall, and shall cause the Buyer Corporations to . . . recognize any collective bargaining units representing the Transferred Employees that are recognized as of immediately prior to the Closing.

- **Section 11.7 Public Disclosure.**

No communication, release or announcement to the public or to employees or others not directly involved in the negotiation or approval of this Agreement, any Ancillary Agreement or the Contemplated Transactions 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), except as such communication, release or announcement may be required by Law or the rules or regulations of any U.S. or foreign securities exchange or similar organization, in which case the party required to make the communication, release or announcement shall allow the other party reasonable time to comment thereon in advance of such issuance; 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.

ALJD p. 3, line 29 to p. 4, line 48; GC 6.

The ALJ likewise found that Schedule 7.5(a) of the P&S Agreement listed by name each of the unit employees employed at the Willow Springs and Fairfield facilities as employees who would be retained by Respondent. ALJD p. 5, lines 1-2; Tr. 36, 940. It was further stipulated by the parties that Schedule 7.5(a) included then-Ashland Director of Human Resources Paul Fusco,

Willow Springs Plant Manager Tony Kuk, Regional Logistics Manager Pat Cassidy, Fairfield Plant Manager Sharon Hartman, and Regional Logistics Manager Jack Brewer. Tr. 940-41.

B. Facts Pertaining to the Willow Springs, Illinois Facility

For about 20 years, Teamsters Local 705 (“Local 705”) represented 32 drivers that were employed by Ashland at its Willow Springs, Illinois, facility. ALJD p. 3, lines 23-25; Tr. 66. This collective-bargaining relationship was embodied in a series of collective-bargaining agreements, the most recent of which was effective from November 1, 2006, to October 31, 2010. GC 2; Tr. 66. Following the expiration of that contract, Ashland maintained the status quo and the parties began to negotiate a successor contract. Tr. 67-71.

1. The Willow Springs Drivers are “Employees” Under the P&S Agreement

As of the signing of the November 5, 2010, P&S Agreement, all of the Willow Springs drivers were identified as “Employees” pursuant to their inclusion in Schedule 7.5(a) to the Agreement. ALJD p. 5, line 1; Tr. 940:9-14; GC 6, §§ 7.5(a)-(c). The identification of the Willow Springs drivers as “Employees” under the Agreement required Respondent to either receive the drivers as transferees or provide the drivers with employment offers consistent with the other terms of the Agreement. ALJD p. 5, lines 1-2; GC 6, §§ 7.5(a)-(c).

2. Early Communications to Local 705 and Unit Employees Regarding the Sale and Ownership Transition

On November 8, 2010, while in the midst of negotiations for a successor contract, then-Ashland HR Business Partner Paul Fusco called Local 705 Representative Neil Messino and informed him that TPG had agreed to purchase Ashland. Tr. 71-73. That same day, Ashland posted a transition-related notice on Firsthand, its inter-company computer portal. ALJD p. 5,

lines 5-22; GC 40, 56.⁴ The notice presented in a question and answer format included the following:

- “Will Ashland Distribution’s current management team remain in the business? Yes, the current management team will transfer with the business.” GC 40 (¶ 4); GC 56 (p. 2).
- “What plans are known for other Ashland Distribution offices? No immediate changes are planned.” GC 40 (¶ 13); GC 56 (p. 4).
- “When will employees know whether they will transfer to the newly independent company? Employees will be notified as soon as possible about whether they will transfer to the newly independent company and will receive employment offers prior to closing.” GC 40 (¶ 14); GC 56 (p. 5).
- “Does the newly independent company anticipate any layoffs as a result of the transaction? Broadly speaking, the newly independent company’s intent is 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.” GC 40 (¶ 16); GC 56 (p. 5).
- “Does the newly independent company anticipate any changes to compensation and/or benefits? Under the terms of the agreement, for at least the 18 months following closing, the newly independent company 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.” GC 40 (¶ 20); GC 56 (p. 6).
- “What do Ashland Distribution employees do between now and the transaction’s closing? Should employees do anything differently? Please continue to remain focused on your work and on conducting business as usual.” GC 40 (¶ 21); GC 56 (p. 6).

It is undisputed that the November 8 Q&A was shared with agents of Respondent no later than December 2. GC 56 (December 2 cover email); Joint Ex 2.⁵

⁴ But for the email included with GC 56, the Q & A made a part of GC 56 is identical in substance to Q & A that is GC 40. Both documents were admitted into evidence. Tr. 740.

⁵ Specifically, paragraph 3 of Joint Ex. 2 states: “All persons shown on GC Exhibits 56 through 76 utilizing the email domain names “.../PwC@Americas-US”; “...@us.pwc.com”; “...@advisorstpg.com”; “...@tpg.com”; and “...@gloverparkgroup.com” provided consulting services to Nexeo in connection with its acquisition of the assets of

3. **Paul Fusco provides Local 705 with a Copy of the P&S Agreement and its Pertinent Terms are Shared with the Willow Springs Drivers**

On December 3, 2010, after having initially requested that Fusco provide him with a copy of the P&S Agreement during a bargaining session held on November 17, Messino sent a follow-up email to Fusco inquiring as to whether he had been able to obtain the document for Local 705's review. GC 4; Tr. 89. Not surprisingly, Messino stressed that he wanted to receive the P&S Agreement promptly so he would have time to review it before the parties' next scheduled bargaining session on December 6. GC 4; Tr. 89. A few hours later, Fusco called Messino and informed him that his legal department had the P&S Agreement,⁶ but he was still working on obtaining it for Local 705. Tr. 90-91. Messino responded that he needed the P&S Agreement by the end of the day so the parties could have a productive bargaining session. Tr. 91. By that evening, Messino had still not received the P&S Agreement so he called Fusco back. Tr. 91-92. However, Fusco claimed to still not be in possession of it, so that it was necessary to cancel the bargaining sessions scheduled to be held on December 6 and 7. Tr. 94. On December 10, 2010 after Messino threatened to file an unfair labor practice charge, Fusco finally provided him the P&S Agreement as part of an email link. GC 5; Tr. 98-100. Immediately thereafter, Messino printed out the document and began to review it. Tr. 100-01, 244.

Three days later, on December 13, Messino called Fusco to advise him that he needed more time to review the P&S Agreement before the parties held another bargaining session. Tr. 111. While it was agreed that they would reschedule the next day's bargaining session, this

Ashland Distribution Company, and the information exchanges documented in GC Exhibits 56 through 76 as including these persons occurred in the course of these persons acting in the scope of their representative capacities on behalf of Nexeo." The cover email to GC 56 shows the Q&A being forwarded to two persons using the email domain /PwC@Americas-US. See also Tr. 916.

⁶ It is unclear whether this was a reference to Ashland's legal department, Respondent's legal department, or a combination of both. Tr. 90-91.

ultimately never happened for one simple reason – Fusco was hired by Respondent, and as such, no longer had authority to bargain on Ashland’s behalf. Indeed, it is undisputed that during their phone conversation on December 13, Fusco confided that he had already been hired by Respondent.⁷ Tr. 112-13. At that time, Fusco also disclosed that Respondent had already hired Regional Logistics Manager Pat Cassidy to be on its transition team and it was expected that Plant Manager Tony Kuk would receive the same offer. Tr. 112-13. Thereafter, on December 22, Fusco further acknowledged his changed employment status by informing Messino, in writing, that he was “awaiting further direction from the new company.”⁸ GC 8.

Not surprisingly, Messino shared the P&S Agreement’s relevant terms with the Willow Springs drivers at three subsequent union meetings. ALJD p. 5, lines 30-33. The first meeting occurred the week of December 13 when Messino met with 10 to 15 drivers in the break room at their facility. Tr. 106-07, 246-47, 304. Messino showed the drivers the sections of the P&S Agreement where it stated that they would all be retained by Respondent under terms and conditions of employment that were substantially comparable in the aggregate to those provided by Ashland. Tr. 108, 304-06. Afterwards, on December 19, Messino met with an additional eight to ten drivers immediately before Local 705’s general monthly membership meeting. Tr. 109, 306, 366-67. Like he had done earlier that week, Messino showed these drivers highlighted portions of the P&S Agreement which stated they would all be hired and provided benefits that were substantially comparable in the aggregate to their existing benefits. Tr. 109, 306-07, 367-68. Thereafter on January 4, 2011, to make sure that all of the drivers viewed the terms of the P&S Agreement, Local 705 representative Rick Rohe and Messino returned to the Willow

⁷ On cross-examination, Fusco admitted that his superior, Jodi Lewis, notified him in October or November 2010 that he would be retained by Respondent. Tr. 1045. Fusco’s testimony is further corroborated by the fact that his name appears on Schedule 7.5(a) as an employee who would be retained by Respondent. Tr. 940.

⁸ On December 29, Ashland’s Human Resources Representative Kevin Meyers notified Messino that he would be taking over the contract negotiations for Fusco. GC 9 (p. 2); Tr. 118-19.

Springs facility and showed the pertinent terms to additional drivers in the break room. Tr. 109-10, 307-09.

On February 7, 2011, Meyers called Messino to inform him that Respondent wanted to meet with Local 705 on February 15.⁹ Tr. 122. Meyers disclosed that Respondent's Consultant John Hollinshead and its Vice President of Operations Brian Brockson would attend the meeting. However, Meyers did not yet know who else would be attending the meeting or the substance of the meeting. Tr. 122-23.

Four days later, on February 11, Meyers was scheduled to meet with Messino and Rohe to finalize a contract for a different unit of employees employed by Valvoline. Tr. 123. Before that bargaining session began, Meyers asked Messino and Rohe to step outside the meeting room so he could speak to them in private. Once outside, Meyers revealed that Respondent had intended to mail offer of employment letters to all of the Willow Springs drivers until Ashland strongly recommended that the letters first be provided to Local 705. Tr. 124. Meyers further stated to Messino and Rohe that he did not want them "blind-sided," but Respondent was going to offer the drivers employment under different terms and conditions than what they had been led to believe.¹⁰ Tr. 124-26.

Notwithstanding this leak in information, Respondent later that day continued to mislead the drivers into believing that they would all be retained under terms and conditions that were substantially comparable in the aggregate to those provided by Ashland. It is undisputed that, on February 11, Union stewards/drivers Michael Jordan and George Sterba met with Plant Manager

⁹ There is no evidence in the record that, between December 20, 2010 and February 15, 2011, Respondent communicated to Local 705 or the Willow Springs drivers that it intended to alter their terms and conditions of employment. In fact, as shown below, Respondent continued to mislead drivers into believing that they would all be retained under terms and conditions that were substantially comparable in the aggregate to those provided by Ashland as late as February 11, 2011.

¹⁰ Meyers further stated that he knew that Messino would not like the changes to the drivers' terms and conditions, but hoped it would not derail the Valvoline negotiations that were set to be finalized that day. Tr. 124-26.

Tony Kuk in his office. Tr. 310, 368-69, 382. In that meeting, Kuk revealed two important things – first, that he and Regional Logistics Manager Pat Cassidy had been officially hired by Respondent to continue in their respective management positions, Tr. 311-12, 369, 382,¹¹ and second, that all of the drivers would likewise be retained and their terms and conditions of employment would remain the same after the sale closed. Tr. 309-12; 372, 382-83. Kuk went so far as to repeat Respondent’s mantra that it would be “business as usual” and that none of the drivers would even need to reapply. Compare Tr. 311-12, 368-69, 372, 382-83 with GC 40 (¶ 22), 51 (p. 1), 80 (p. 2).

4. **On February 15, 2011, Respondent Meets with Local 705 and Thereafter it Mails Employment Offers to All the Willow Springs Drivers with Terms and Conditions that are Not “Substantially Comparable in the Aggregate to those Provided by Ashland.”**

On February 15, 2011, after having derived significant benefit from Ashland’s written and oral statements for more than three months,¹² Respondent’s representatives met with Local 705 and finally revealed its true intentions. ALJD p. 6, line 38 to p. 7, line 1; Tr. 126, 313-15. Similar to the events that transpired on about that same day at the Fairfield facility, Respondent’s Consultant John Hollinshead informed Local 705 that Respondent would offer employment to all the Willow Springs drivers (Tr. 135), but that the offer was subject to certain changes in their terms and conditions of employment. ALJD p. 7, lines 1-3. Hollinshead then provided Local 705 with a copy of a draft letter to the drivers which detailed how Respondent would maintain their current positions and wages, but would not participate in Local 705’s Pension plan or

¹¹ Following this meeting, Sterba disseminated Kuk’s statements to the rest of the drivers. Tr. 370-71.

¹² As the ALJ stated in his decision, Respondent:

[E]xpressed its clear intention to staff the facilities with the predecessor’s employees and to bargain with the employees’ designated representative, thereby securing a skilled and experienced workforce and avoiding the uncertainty of attempting to recruit new employees based on unilaterally established employment terms.

Road & Rail Services, 348 NLRB 1160, 1160 (2006). See ALJD p. 15, line 45 to p. 16, line 4.

Health and Welfare plan and would instead implement a company-sponsored 401(k) plan and health insurance plan.¹³ ALJD p. 7, lines 6-7, 16-20; GC 10 (p. 1-2); Tr. 132. To try to persuade Local 705 that the drivers' retirement benefits would be substantially comparable under Respondent's 401(k) plan, Hollinshead stated that PricewaterhouseCoopers¹⁴ had prepared an analysis showing that only four out the 32 drivers in the unit would experience a monetary shortfall by moving into the 401(k) plan.¹⁵ ALJD p. 7, lines 8-10; Tr. 128, 216. He further stated that Respondent would make those four employees whole by writing them a check for the shortfall. ALJD p. 7, lines 10-11; Tr. 129, 216-17. In the same manner, Hollinshead sought to induce Local 705 to agree to this change in retirement benefits by signaling that Respondent would consider allowing the drivers to remain in the Union's Health and Welfare plan – if Local 705 would agree to move them to the 401(k) plan. ALJD p. 7, lines 16-17; Tr. 128-29. However, Hollinshead did not provide a copy of the actuarial analysis to Local 705 because Messino immediately pointed out that it failed to take into account the service time that the drivers had accrued with other union employers prior to coming to work for Ashland. ALJD p. 7, lines 11-14; Tr. 129-30, 217-18.

In fact, Respondent was admittedly unaware prior to this meeting that Local 705's Pension plan provided the drivers with a service pension of \$2,500 per month after 25 years of participation in the fund, regardless of age.¹⁶ ALJD p. 6, lines 32-35; GC 22 (p. 15); Tr. 130,

¹³ During this meeting, Respondent did not notify Local 705 that it intended to make changes to the drivers' overtime pay, vacation pay, or the daily and weekly pay guarantees. Tr. 214.

¹⁴ PricewaterhouseCoopers was one of the external consultants that Respondent had retained to oversee the transition process. Tr. 424:18-25; 531-33; 916:1-9; see also GC 50 (p. 3) (naming, *inter alia*, TPG Capital and PricewaterhouseCoopers as external consultants involved in the transition-focused Separation Team); Joint Exh. 2 (describing acquisition-related consulting services performed by persons utilizing PricewaterhouseCoopers and TPG email addresses).

¹⁵ This actuarial analysis showed how the drivers would fare under Respondent's 401(k) plan compared to the Union Pension plan. Tr. 129, 223, 507.

¹⁶ For purposes of calculating total years of service, the Union Pension Fund counts all years in which the driver's employer(s) made contributions to the fund, including any pre-Ashland service. Tr. 129-30.

218, 507, 511. The drivers could also elect to continue to work and receive an additional \$100 per month for each year of service beyond 25 years. ALJD p. 6, lines 35-36; GC 22 (p. 15); Tr. 130-31. Furthermore, Respondent's 401(k) plan was not comparable because it required the drivers to make contributions out their own pay for the first time ever, invest the money so that they receive an annual rate of 7.5% in the volatile stock market, and then continue to work until they were 65 years old in a very physically demanding job. ALJD p. 7, lines 14-15; GC 29, p. 15; Tr. 130, 134, 184-85, 321-22, 543.

Needless to say, Local 705 was stunned to hear Respondent's offer of employment after being misled, for more than three months, into believing that all the drivers would be retained under the same terms and conditions. After calling a short caucus to regroup, Messino accepted the offer of employment on behalf of all the drivers, but firmly stated that Respondent could not make unilateral changes to their terms and conditions without first engaging in good faith negotiations.¹⁷ ALJD p. 7, lines 21-23; Tr. 136-37, 542. Even after everything that had transpired, Hollinshead continued to insist that such changes could be made despite the language in the P&S Agreement. GC 6; Tr. 137.

Before the parties concluded their meeting on February 15, Messino requested the Summary Plan Descriptions (SPDs) for the company-sponsored 401(k) plan and health insurance plan. ALJD p. 7, lines 17-18; Tr. 131. It is undisputed that Hollinshead readily agreed to provide Local 705 with both SPDs so the parties could attempt to work out a solution to Respondent's stated intent to move the drivers into its 401(k) plan and health insurance plan.¹⁸ ALJD p. 7, lines 17-19; Tr. 131. Later that same day, Messino sent an email to Hollinshead

¹⁷ Earlier in the meeting, Hollinshead had stated that Respondent would recognize and bargain with Local 705 as soon as a majority of the drivers accepted its offer of employment. Tr. 135.

¹⁸ In his decision, the ALJ concluded that Respondent unlawfully delayed production of the SPD for the health insurance plan as well as the Plan Document for the 401(k) plan that was initially requested on May 25, 2011. ALJD p. 19, lines 4-20.

reiterating Local 705's position that Respondent could not unilaterally change the drivers' pension and health insurance plans. ALJD p. 7, lines 25-40; GC 11. Messino likewise made it clear that Local 705 was prepared to begin negotiations for an initial contract as soon as possible. ALJD p. 7, lines 40-42; GC 11. In addition, he confirmed his earlier verbal request for the SPDs since Local 705 "need[s] this information in order to bargain about the Company's proposals." ALJD p. 7, line 43 to p. 8, line 2; GC 11; Tr. 137-39.

However, on February 17, over Local 705's objection, Respondent mailed offer of employment letters to the drivers similar to the draft letter provided to Messino two days earlier. ALJD p. 8, line 4 to p. 9, line 21; Compare GC 10 and 13; Tr. 313, 372-73. The drivers, not wanting to be without a job when the sale closed on April 1, ultimately signed the letters at the direction of their union "under protest."¹⁹ ALJD p. 10, lines 45-48; GC 13, 35; Tr. 139-44, 315-17, 374-76, 445.

5. **Respondent Ultimately Recognizes Local 705 and Bargaining for An Initial Contract Ensues Despite Respondent's Failure to Provide Requested Information**

On February 23, Messino sent a letter by email to Hollinshead demanding recognition because all of the drivers had accepted Nexeo's offer of employment. ALJD p. 10, lines 50-52; GC 14 (p. 3); Tr. 145-46. Messino also reiterated Local 705's position that Respondent "having agreed to hire all of the bargaining unit employees – does not have the right to later unilaterally eliminate their pension and health insurance benefits." GC 14 (p. 3). In addition, Messino renewed his request for the SPDs and asked that those documents be provided to him prior to their first bargaining session, which was now scheduled to be held on March 23. ALJD p. 10,

¹⁹ The ALJ inadvertently misstated that all of the drivers employed at the Willow Springs facility initially signed Respondent's offer of employment letter "under protest" and later signed the letter again without adding any language to it. ALJD p. 10, lines 45-48. In fact, the drivers initially signed the letter and redacted certain language in the signature line. GC 12. It is undisputed that they later simply signed the letter "under protest." GC 13, 35.

lines 52-53; GC 14 (p. 3); Tr. 146. However, on March 2, notwithstanding the language in Section 7.5(o) of the P&S Agreement, Hollinshead sent a reply email to Messino wherein he stated that Respondent was still not in a position to recognize Local 705 and for that reason he had not responded to the information requests.²⁰ ALJD p. 10, line 53 to p. 11, line 2; GC 6, 14 (p. 1). As a result, on March 7, Messino sent another email to Hollinshead pointedly stating that all of the drivers had already accepted Respondent's offer of employment and consequently Respondent was required to recognize Local 705. ALJD p. 11, lines 2-3; GC 15.

On March 23, despite still not having received the SPDs for Respondent's 401(k) plan and health insurance plan, Local 705 attended the first scheduled bargaining session. ALJD p. 11, lines 12-13; Tr. 149-50, 318. Local 705's bargaining committee consisted of Attorney Tom Allison, Business Agent Rick Rohe, President Joe Bakes, Recording Secretary Juan Campos, George Sterba, Messino, and Jordan. ALJD p. 11, lines 13-14; Tr. 149-50, 318. Respondent's bargaining committee consisted of Attorney David Kadela, Hollinshead, Brockson, and Kuk. ALJD p. 11, lines 14-16; Tr. 150, 318. This initial bargaining session began with Messino providing to Respondent's representatives a copy of an analysis prepared by Local 705's Pension fund showing the drivers' years of service. GC 16; Tr. 150, 319-20. The analysis further showed how the drivers' monthly pension benefit would be dramatically reduced if they were moved from Local 705's Pension plan to Respondent's 401(k) plan since they would no longer be able to accrue additional years towards a service pension. ALJD p. 11, lines 16-17; GC 16. As Messino explained, for the five drivers who had already reached the 25 year milestone necessary to qualify for a service pension, this meant they would no longer be able to increase their monthly pension benefit by \$100 for each extra year of service accrued. GC 16, 22 (p. 15);

²⁰ Under Section 7.5(o) of the P&S Agreement, Respondent was required to recognize Local 705 as the exclusive collective bargaining representative of its Willow Springs drivers. GC 6.

Tr. 155. For the remaining drivers with less than 25 years of service, the situation was even graver because they would be unable to qualify for a service pension. These drivers would instead only receive a normal pension based on their frozen years of service and would have to wait until age 65 to receive a significantly reduced monthly pension benefit. GC 22 (p. 16); Tr. 151-52. In the alternative, these drivers could request a normal pension at the early age of 57 with the monthly benefit further reduced due to a 4% penalty for each year prior to them reaching the age of 65. GC 16, 22 (p. 17); Tr. 152.

Equally important, Messino explained to Respondent that the drivers would lose retiree health insurance benefits if they were moved out of Local 705's Health and Welfare plan. ALJD p. 11, lines 17-18; Tr. 155-56, 191. This was due to the fact that the drivers had to be participants in the benefit fund for 20 years and have contributions made on their behalf in the three months immediately preceding their retirement date. Tr. 156, 191, 340-41. If Respondent ceased making the required contributions and moved the drivers to its company-sponsored health insurance plan, they would obviously no longer meet the second part of the eligibility test.

In response to Local 705's analysis, Hollinshead reassured Messino that Respondent would make whole any driver, who experienced a shortfall due to moving into the 401(k) plan, by writing them a check and depositing it into their respective 401(k) plan account. ALJD p. 11, lines 18-20; Tr. 156, 322-23. Hollinshead then went on to express concern about potential withdrawal liability if Respondent remained in Local 705's Pension plan for even one day. ALJD p. 11, lines 20-21; Tr. 157-58, 319. However, Local 705's attorney Tom Allison pointed out to Hollinshead that Section 7.5(g)(i) of the P&S Agreement clearly provided that Ashland

would retain legal responsibility for all pre-closing withdrawal liability.²¹ ALJD p. 11, lines 20-22; GC 6.

At the March 23 bargaining session, Respondent and Local 705 both exchanged initial contract proposals. ALJD p. 11, lines 22-24; GC 17 and 18; Tr. 163-65, 323-24, 513. It bears noting that, in Respondent's contract proposal, no changes were proposed with respect to the provisions concerning overtime pay (Article 3, par. 1), daily and weekly guarantees of pay (Articles 9 and 10, respectively), and vacation pay as it relates to drivers receiving 50 hours of pay for each week of vacation taken (Article 12, par. 3), ALJD p. 11, lines 24-26; GC 18 (p. 4, 6, and 7); Tr. 214-15. Local 705 likewise did not propose any substantive changes to those contractual provisions. ALJD p. 11, lines 24-26; GC 17. However, the parties did not reach an agreement on an initial contract at this first bargaining session. Tr. 165, 324, 513. Nor did they reach a tentative agreement on the pension and health insurance issues. Tr. 165, 324. The bargaining session concluded with the parties simply agreeing to review each other's initial contract proposal and then have a conference call on March 28, at which time they would try to reach tentative agreements on non-economic issues. ALJD p. 11, lines 26-27; Tr. 165. The parties would then have another face-to-face meeting on March 31. ALJD p. 11, lines 26-27; Tr. 165.

In the interim, on March 25, Hollinshead emailed Messino a revised analysis comparing how Respondent believed the drivers would fare under Local 705's Pension plan and Respondent's 401(k) plan. ALJD p. 11, lines 29-30; GC 19; Tr. 165-67. While this revised analysis purportedly took into account the drivers' pre-Ashland service (which would be used, in part, to calculate their level of benefits under the Union Pension plan), Respondent still

²¹ On cross-examination, Hollinshead admitted that the P&S Agreement did indeed provide that Ashland would be responsible for all pre-closing withdrawal liability. Tr. 528-29.

maintained that only a handful of drivers would suffer a minor loss by moving into the 401(k) plan. GC 19. Two days later, on March 27, Hollinshead emailed Messino a revised contract proposal. ALJD p. 1, lines 30-31; GC 20; Tr. 167-69. In its revised proposal, Respondent again proposed no changes to the provisions concerning overtime pay (Article 3, par. 1), daily and weekly guarantees of pay (Articles 9 and 10, respectively), and vacation pay as it relates to drivers receiving 50 hours of pay for each week of vacation taken (Article 12, par. 3). GC 20 (p. 5, 7, and 8 of revised contract proposal).²²

On March 28, Messino had a conference call with Respondent's bargaining committee. ALJD p. 11, lines 40; Tr. 169, 277-78. The parties went through all of the articles in their respective contract proposals in an attempt to begin reaching some tentative agreements on issues that did not pertain to retirement and health insurance benefits. ALJD p. 11, lines 40-43; Tr. 170. Along with reaching some tentative agreements on that date, the parties also noted that some of the articles were not in dispute (i.e. neither party had proposed any change to the status quo). ALJD p. 11, lines 40-43; Tr. 170.

Following the conclusion of this conference call, Hollinshead unexpectedly called Messino to have a private one-on-one conversation. ALJD p. 11, line 43; Tr. 170. Hollinshead revealed, at that time, he was no longer authorized to make the drivers whole for the losses they would suffer by moving from Local 705's Pension plan to the Respondent's 401(k) plan. ALJD p. 11, lines 43-46; Tr. 171. Apparently, notwithstanding Respondent's effort to characterize the drivers' losses as insubstantial in its two earlier actuarial analyses, it had come to the realization

²² In Respondent's separate one page package economic proposal, it offered Local 705 two options as it pertained to employee benefits: "(a) Option 1: Nexeo Benefit Plans and Policies; and (b) Option 2: Nexeo Healthcare (medical, dental, vision and flexible spending) and Retirement Plans, and existing vacation, sick pay, funeral leave and jury duty entitlements, as provided in the Union's expired collective bargaining agreement with Ashland." ALJD p. 11, lines 31-38; GC 20 (p. 2.). According to the uncontradicted testimony of Messino, Respondent did not care which option Local 705 chose. Tr. 220-21.

that those losses were indeed much higher than what it wanted to pay. Consequently, Hollinshead now simply offered to “do something to get that number closer.” ALJD p. 1, lines 43-46; Tr. 171.

On March 31, at the parties’ second face-to-face bargaining session, Messino presented to Respondent’s bargaining committee a revised contract proposal which showed where each side stood on the various articles after the conference call.²³ ALJD p. 12, lines 1-2; GC 21; Tr. 171-74, 325-26, 514-15. Both sides then continued to bargain and try to reach tentative agreements as a number of issues unrelated to retirement and health insurance benefits were still open for negotiation. ALJD p. 12, lines 2-3; Tr. 175. Because the parties had only been in negotiations for a mere eight days and were attempting to negotiate an initial contract, this was not surprising. In addition, when the parties turned their attention to the pension and health insurance issues, Messino pointed out to Hollinshead an obvious impediment to Local 705’s ability to effectively bargain over those issues – it still did not have the requested SPDs for Respondent’s 401(k) plan and health insurance plan. ALJD p. 12, lines 3-5; Tr. 175-77. This impediment existed despite the fact that Messino had already requested those two documents several times since February 15. GC 11, 14 (p. 3), 15; Tr. 131, 175. As he had done before, Hollinshead simply promised to provide the SPDs to Messino. ALJD p. 12, line 5; Tr. 175.

In the same breath, Hollinshead confirmed the importance of the SPDs for bargaining purposes by informing Messino and the rest of Local 705’s bargaining committee that retirement benefits were the main issue from Respondent’s perspective. ALJD p. 12, lines 5-7; Tr. 175, 325. Despite this position, Hollinshead immediately thereafter abruptly announced that

²³ As set forth in GC 21, by the March 28 conference call, the parties had reached tentative agreements or come to the conclusion that the following contractual provisions were not in dispute: (1) overtime pay (Article 3, par. 1); (2) daily and weekly guarantees of pay (Articles 9 and 10, respectively); and (3) vacation pay as it relates to drivers receiving 50 hours of pay for each week of vacation taken (Article 12, par. 3). GC 21 (p. 7, 10, and 12).

Respondent intended to unilaterally cease making contributions to Local 705's Pension Fund and Health and Welfare Fund and move the drivers to its 401(k) plan and health insurance plan effective at midnight. ALJD p. 12, lines 7-9; Tr. 175-76, 327, 521. When Messino requested clarification as to whether Respondent believed that the parties were at an impasse, Hollinshead readily conceded that the parties had not reached a lawful impasse. ALJD p. 12, lines 9-10; Tr. 176, 327. Rather, Respondent simply believed it was free to set initial terms and conditions of employment. ALJD p. 12, lines 9-10; Tr. 176, 549. Upon hearing this, Messino disagreed and objected to Respondent's decision to unilaterally implement initial terms and conditions. ALJD p. 12, lines 11-12; Tr. 176. Messino also reiterated that he still needed the SPDs for the company-sponsored 401(k) plan and health insurance plan so the parties could continue to bargain an initial contract. ALJD p. 12, lines 11-12; Tr. 176. Thus, the ALJ properly found that the parties did not reach an agreement or impasse prior to the close of the sale on April 1.²⁴ Tr. 176-77, 326-27.

6. **On April 1, 2011, Respondent Unilaterally Implements Initial Terms and Conditions of Employment for the Willow Springs Drivers**

(a) **Respondent Implements Substantial Changes to the Drivers' Retirement Benefits**

²⁴ Apart from the ALJ's crediting of Messino's (and Union Steward Michael Jordan's) testimony that Hollinshead conceded that the parties had not reached a good faith impasse prior to April 1, 2011, there was additional evidence that supported this conclusion. During the unfair labor practice hearing, Hollinshead admitted that Messino had made it clear in their bargaining sessions prior to April 1, 2011, that Local 705 was not opposed to having the drivers move from Local 705's Pension plan to Respondent's 401(k) plan if the retirement benefits were comparable or the drivers received "shore up" money to make them whole for the loss in benefits. Tr. 519-20. Hollinshead likewise admitted that Respondent would have considered allowing the drivers to remain in Local 705's Health and Welfare plan if the parties could resolve the pension issue. Tr. 128-29, 465, 520, 544-45. These admissions by themselves show the parties were not deadlocked and there was still much room for movement at the bargaining table. The fact that the parties had only been in contract negotiations for eight days, and had a total of just two face-to-face bargaining sessions, further supports the conclusion that the parties were nowhere near impasse on April 1. Tr. 520. Respondent's unlawful failure to provide Local 705 with the requested the Plan Document for the 401(k) plan and the SPD for the company-sponsored health insurance plan until August 11, 2011 and October 19, 2011, respectively, precludes the possibility of an impasse as well. GC 29 and 33; Tr. 521. Obviously, without these important documents, Local 705 could not effectively bargain over these two important issues and thereby reach an impasse. Tr. 210-12.

On April 1, 2011, immediately upon the close of the sale, Respondent unilaterally changed the drivers' terms and conditions by ceasing to make contributions to Local 705's Pension Fund and moving the drivers to its new 401(k) plan. ALJD p. 12, lines 15-17; Tr. 184-86, 335. This had a profound effect on the drivers' retirement benefits because it meant they could no longer accrue the service time necessary to qualify for a 25 year service pension which paid them \$2,500 per month, regardless of age. ALJD p. 6, lines 32-35; GC 22 (p. 15); Tr. 130, 185-87, 337-38, 342.²⁵ The drivers, who had not reached the 25 year milestone, would instead have to settle for a normal pension based on their frozen years of service which would result in a significantly reduced monthly pension benefit, GC 16, 22 (p. 16); Tr. 151-54, and would also have to wait until age 65 to receive a normal pension. GC 16, 22 (p. 16); Tr. 185-86. Alternatively, the drivers could take their normal pension at the early age of 57 with the monthly benefit further reduced by a substantial 4% penalty for each year prior to them reaching the age of 65. GC 16, 22 (p. 17); Tr. 152, 339, 343.

In addition, Respondent's 401(k) plan was clearly inferior to Local 705's Pension plan for a number of reasons. As an initial matter, all of the 401(k) plan benefits were predicated upon the new requirement that the drivers make contributions out of their own paychecks. ALJD p. 7, lines 7-8; GC 36, 38; Tr. 185, 336, 337, 341-342. Equally true was the fact that the drivers had little to no experience investing for their retirement, but were now responsible for intelligently investing their money so that they received an annual rate of 7.5% in the volatile stock market. ALJD p. 7, lines 14-15; Tr. 185, 321-22, 543. In other words, there was no guarantee that the drivers would receive a monthly benefit that was sufficient to cover their expenses during retirement. Under the 401(k) plan, the drivers were also prohibited from

²⁵ The five drivers who had already reached the 25 year milestone necessary to qualify for a service pension could likewise no longer increase their monthly pension benefit by \$100 for each extra year of service accrued. ALJD p. 6, lines 35-36; GC 16, 22 (p. 15); Tr. 130-31, 155, 186-87.

withdrawing their money prior to reaching the age of 59 ½. GC 29 (SPD, p.10). Indeed, Respondent defined the drivers “Normal Retirement Age” as 65 even though they worked a very physically demanding job. ALJD p. 7, lines 14-15; GC 29 (SPD, p. 15).

(b) Respondent Implements Substantial Changes to the Drivers’ Health Insurance Benefits

On April 1, Respondent also unilaterally ceased making contributions to Local 705’s Health and Welfare fund and moved the drivers to its new company sponsored health insurance plan. ALJD p. 1, lines 14-15; Tr. 189-91. These unilateral changes resulted in substantially inferior benefits which negatively impacted the drivers. Specifically, under Local 705’s Health and Welfare plan, the drivers never had to pay any insurance premiums and had low annual deductibles of \$400/\$1,200 (individual/family). GC 23 (p. 6); Tr. 190, 341-42. The drivers also did not have to meet these deductibles before having their doctor’s visits and prescription costs covered. GC 23 (p. 6). They instead simply paid a reasonable \$20/\$40 co pay (primary physician/specialist) for doctor visits and an equally low co pay for prescriptions of \$5 or \$25 (generic vs. brand name drugs). GC 23 (p. 6-7).

In contrast, Respondent’s health insurance plan had much higher annual deductibles of \$1,500/\$3,000 (individual/family). GC 37 (p. 18). The drivers had to meet these deductibles before having their doctor’s visits and prescriptions covered. If, and when, these high deductibles were met, the drivers were required to pay 20% of the cost for all doctor’s visits. GC 37 (p. 18). The drivers were also required to pay 20% of the cost for generic drugs and 100% of the cost for brand name drugs. GC 37 (p. 18). Equally important to the drivers and their

families, Local 705's Health and Welfare plan had excellent retiree health insurance benefits whereas Respondent's plan provided no retiree health insurance benefits. Tr. 190-91, 195.²⁶

(c) **Respondent Implements Substantial Changes to the Drivers' Overtime Pay, Vacation Pay, and Daily and Weekly Guarantees.**

On April 1, to further punish the drivers for their union's refusal to submit to the unilateral changes to their pension and health insurance benefits, Tony Kuk (as Respondent's new plant manager) also abruptly announced three additional changes. ALJD p. 12, lines 17-24; Tr. 180-84, 214-15, 330-35, 377-79. When the drivers reported to work that morning, they initially met with Messino and Rohe in the conference room who briefed them on the status of negotiations and Respondent's decision to unilaterally implement changes to their pension and health insurance benefits. Tr. 178-79, 329, 377. As this almost three hour long union meeting was winding down, Kuk announced to the drivers who had filtered into the break room that there were additional changes to their terms and conditions that had not been previously disclosed to Local 705. Tr. 181, 184, 214-15, 272, 330, 335, 377-79, 549. First, the overtime policy would be changed by eliminating overtime pay for working more than 8 hours per day. ALJD p. 12, lines 20-22; Tr. 181-83, 330-31, 378. Drivers would instead be required to work more than 40 hours per week in order to receive overtime pay. ALJD p. 12, lines 20-22; Tr. 181, 183, 330-31, 378. Second, drivers' vacation pay would be reduced from 50 hours to 40 hours for each week of vacation taken. ALJD p. 12, lines 22-24; Tr. 181-83, 330-31, 378. And third, the daily guarantee of 8 hours pay and the weekly guarantee of 40 hours pay would be eliminated. ALJD p. 12, lines 17-20; Tr. 181-84, 330-31, 378-79.

²⁶ Indeed, driver George Sterba was forced to retire prematurely to avoid losing retiree health insurance benefits for him and his family. Tr. 192-93, 379.

It is undisputed that shortly after the drivers were first apprised of the changes to their overtime pay, vacation pay, and daily and weekly guarantees²⁷, Messino walked into the break room and Jordan asked Kuk to repeat the changes he had already announced to the drivers so Messino could hear for himself. Tr. 181, 215, 331-32. No explanation was given by Kuk for Respondent's failure to notify the Union of these changes at the bargaining table. Rather, the only basis Respondent provided for making these changes was Kuk's sarcastic response: "because [I] can, and there's no contract." Tr. 181, 331. To further undermine Local 705's status as the drivers' bargaining representative, Kuk also told driver Billy Meyers "today we're paying you your regular rate, but tomorrow that could change." Tr. 181-82, 332.

C. Facts Pertaining to the Fairfield, California Facility

For approximately 18 years, Teamsters Local No. 70 ("Local 70") represented a unit of truck drivers and warehousemen that were employed by Ashland Distribution Company ("Ashland") at its Fairfield, California, facility.²⁸ ALJD pg. 3, lines 25-26; *Id.* at pg. 13, lines 15-16; Tr. 620-21. At all material times, the unit consisted of approximately 20 employees, about one-half of whom were drivers. ALJD at pg. 3, lines 26-27; *Id.* at pg. 13 lines 16-17; Tr. 802-03; GC 92.

1. The Fairfield Unit Employees Are "Employees" Under the P&S Agreement

As of the signing of the November 5, 2010, P&S Agreement, all of the Fairfield unit employees were identified as "Employees" pursuant to their inclusion in Schedule 7.5(a) to the Agreement. See Tr. 940:9-14; GC 6, §§ 7.5(a)-(c). The identification of the Fairfield unit

²⁷ The parties stipulated that Respondent unilaterally implemented the above changes to the drivers' overtime pay and vacation pay. ALJD p. 12, lines 24; Tr. 333. Union steward Jordan further testified that there had been at least one occasion where a driver had been denied the daily guarantee in about March 2012. ALJD p. 12, lines 24-26; Tr. 334-35.

²⁸ The unit employees reported to either 2461 Crocker Circle, Fairfield, CA, or to a leased facility located at 2200 Huntington Road, Suite A, Fairfield, CA. GC 77 (p. 2); see also ALJD at 3, fn.6; *Id.* at 13, fn.10.

employees as “Employees” under the Agreement required Respondent to either receive the unit employees as transferees or provide the unit employees with employment offers consistent with the other terms of the Agreement. GC 6, §§ 7.5(a)-(c); see also ALJD at 5:1-2.

2. **Early Communications to Local 70 Regarding the Sale and Ownership Transition**

On around November 8, 2010 then-Ashland Director of Human Resources Paul Fusco telephoned Local 70 business agent Robert Aiello to inform him that Ashland Distribution had been sold to TPG Partners. Tr. 632-33. Soon thereafter, Aiello received some written documentation of the sale. In particular, by letter dated November 8 and received by Local 70 on November 10, Fusco officially informed Local 70 of the sale. GC 80; Tr. 635 lines 12-17. The letter assured Local 70 that contract terms would remain in place, and stated that meetings would be set up in the coming months “to discuss the organizational and contractual matters moving forward.” GC 80. Attached to the November 8 letter from Fusco was a November 8 letter from then-Ashland President and CCO Robert Craycraft. Tr. 636 lines 3-5; GC 80 (p. 2.). The letter appeared on Ashland letterhead and was addressed: “Dear Valued Customer.” GC 80 (p. 2). After announcing the fact of the sale, the letter went on to state in pertinent part:

- “Our goal is to ensure a seamless transaction to Ashland Distribution operating as an independent distribution business.” *Id.*
- “The same great people will provide the same great service.” *Id.*
- “Today, it is business as usual.” *Id.*

Around the time of the creation of this letter, its contents were shared with agents of Respondent.

Joint 1; *cf.* GC 80 *with* GC 46.²⁹

²⁹ Specifically, paragraph 2 of Joint 1 states: “At or around the times that the documents marked as GC Exhibits 44 through 55 were created, the information contained in those documents was shared between agents of Ashland and consultants of Nexeo Solutions, LLC, acting in the course and scope of their representative capacities on behalf of

Although Aiello followed up by meeting with the unit employees around November 9, Tr. 634-35, it was not until early-February 2011 that he again heard from Fusco about the sale transition. Tr. 638-39. In the meantime, written information concerning the sale was regularly disseminated to unit employees.

3. **Communications to Fairfield Unit Employees Regarding the Sale and Ownership Transition**

Over the next several months, Fairfield unit employees received a deluge of written communications regarding the sale and transition. See, e.g., ALJD page 5 lines 24-26. The documents were distributed via employee mailboxes, were posted on a company bulletin board, and were often available on Ashland's computer-based communication system known as "Firsthand." See Tr. 730-33; 746-47.³⁰

As found by The ALJ, and as already discussed in relation to the terms of the P&S Agreement, Ashland and Respondent were required to share and approve transition-related communications issued by them to third parties and employees. ALJD page 4 lines 43-49; GC 6 (§ 11.7). The facts show that the parties did so, and that Ashland's many transition-related communications were shared with and approved by Respondent before being issued to employees.

One of the earliest known examples of transition-related communication to employees was an email from then-Ashland President and CCO Robert Craycraft dated November 7, 2010. Tr. 759-60; GC 48. Entitled "Creating a New Course for Ashland Distribution," the email introduced the reader to the fact of the sale and included the following statements:

Nexeo." GC Exhibit 46 constitutes a copy of the "Dear Valued Customer" letter forwarded to Local 70 and identified as the second page of GC Exhibit 80.

³⁰ Only work-related, company-generated documents and notices were distributed through the employee mailboxes. Tr. 730-31. The same can be said for the information posted on the bulletin board. Tr. 732-33. Firsthand was, in part, Ashland's way of supplying employees with human resource and other information. Tr. 746-47.

- “. . . I am proud to lead this team into the future. TPG has recognized the value of our company and is committed to supporting a thriving, growing distribution business that creates a strong future for all of us.”
- “Looking forward, we are being given the chance to build our own future as an independent distribution business. We’ll take the best of Ashland with us . . .”
- “In total, we anticipate approximately 2,000 Ashland Distribution employees and dedicated resource group and supply chain partners will transfer to the new business.” GC 48 (p. 1).³¹

The email noted the availability of an “Employee Q&A” on Firsthand. GC 48 (p. 2). Craycraft ended the email by stating: “I know that I want to go forward, into the future, with all of you.

You are a great team, and I look forward to starting this new chapter with all of you.” *Id.*

Fairfield Plant Foreman and unit employee Eric Schieber recalled receiving the November 7 email message in his company mailbox. Tr. 755, 759-60; GC 48. The contents of this email were shared with agents of Respondent around the time of its creation. Joint 1.

The Employee Q&A referenced in the November 7, 2010, Craycraft email (GC 48) was disseminated by posting or mailbox on around November 8, 2010. Tr. 738-40; 829-30; GC 40; GC 56.³² In addition to addressing general questions about the sale, the Q&A discussed employees’ terms of hire in some depth. The pertinent questions and answers read as follows:

- “Will Ashland Distribution’s current management team remain in the business? Yes, the current management team will transfer with the business.” GC 40 (¶ 4); GC 56 (p. 2).
- “What plans are known for other Ashland Distribution offices? No immediate changes are planned.” GC 40 (¶ 13); GC 56 (p. 4).
- “When will employees know whether they will transfer to the newly independent company? Employees will be notified as soon as possible about whether they will

³¹ A near-identical message was reiterated in a document posted on the bulletin board and entitled “AD NewCo elevator speech”: “All individuals currently dedicated to supporting the existing Ashland distribution business will be transferred to the new organization; approximately 2,000 employees across North America, Europe and China.” GC 93; Tr. 735 lines 7-9.

³² As noted above, the Q & A made a part of GC 56 is identical in substance to Q & A that is GC 40.

transfer to the newly independent company and will receive employment offers prior to closing.” GC 40 (¶ 14); GC 56 (p. 5).

- “Does the newly independent company anticipate any layoffs as a result of the transaction? Broadly speaking, the newly independent company’s intent is 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.” GC 40 (¶ 16); GC 56 (p. 5).
- “Does the newly independent company anticipate any changes to compensation and/or benefits? Under the terms of the agreement, for at least the 18 months following closing, the newly independent company 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.” GC 40 (¶ 20); GC 56 (p. 6).
- “What do Ashland Distribution employees do between now and the transaction’s closing? Should employees do anything differently? Please continue to remain focused on your work and on conducting business as usual.” GC 40 (¶ 21); GC 56 (p. 6).

As already discussed at the outset of the fact section pertaining to the Willow Springs facility, the November 8, 2010, Q&A was shared with agents of Respondent no later than December 2, 2010. GC 56 at p. 1; Joint 2 (¶ 3).

In keeping with the themes expressed in his November 7 email (GC 48) and the November 8 Q&A, Craycraft announced a contest in about mid-November to name the new company. GC. 47.³³ In the cover email to the contest entry attachment, Craycraft explained: “Now that we’ve charted our new course for Ashland Distribution, it’s time to name the boat, so to speak.” He then welcomed employees to enter the contest. Fairfield unit employee Eric

³³ The cover email to GC Exhibit 47 contains a January 4, 2012, date. The attachment to the email, however, makes clear that entries to the contest were due by December 3, 2010. GC 47 (p. 2); see also GC 94 (p. 1) (November 12, 2010, email from Craycraft referencing a forthcoming “Name the company” contest). The January 4, 2012, date was likely generated either when the email was forwarded to the recipient, Rachel Lutz, or when the email was printed.

Schieber specifically recalled receiving this invitation. Tr. 762-63; GC 47. The contest entry attachment was entitled “What’s in a name?”, and included the following:

- “As a ‘founding’ employee of the new Distribution Company, we’d like to solicit your ideas for our new company name, tagline and colors.” GC 47 (p. 2).

The email and attachment (GC 47) were shared with agents of Respondent at or around the time of their creation. Joint 1.

On about December 6, 2010, Ashland distributed a second Employee Q&A to unit employees entitled “Update to Ashland Distribution Transaction Employee Q&A 12.06.10.” GC 41, 58.³⁴ Purporting to contain responses to employee questions sent to the “Ask Bob” mailbox,³⁵ the Q&A included the following exchanges:

- “How will the pending sale of Ashland Distribution affect staffing in the Resource Groups, e.g., Corporate Real Estate, Tax, Law, etc? [. . .] Over 2,000 employees have already been notified that they will transfer to the new company on the day after the sale closes.” GC 41, 58 (p. 1).
- “Will employees transferred to the new distribution company retain their service time with Ashland? Yes, TPG has agreed to recognize service time.” *Id.*

The December 6, 2010, Employee Q&A was made available to the Fairfield unit employees around the December 6 date via either posting on the bulletin board or distribution through the mailboxes. Tr. 745-46, 830-31; see also GC 95 (final version of Craycraft email shared with Respondent at GC 58). The cover email to GC Exhibit 58 also makes clear that the Q&A was posted to a resource page on Firsthand. See also GC 95. Moreover, the December 6, 2010, Q&A was shared with Respondent’s agents at the time of its creation and distribution. GC 58 at p. 1; Joint 2.

³⁴ But for the cover email that is a part of GC Exhibit 58, the GC Exhibit 58 Q&A is identical to the GC Exhibit 41 Q&A, which is also admitted into evidence. Tr. 749-50.

³⁵ Referenced also in the cover email to the “What’s in a name?” contest (GC 48), the “Ask Bob” mailbox was a means by which employees could pose questions regarding the transition and thereafter receive some guidance. If the claims in GC Exhibits 41 and 58 are to be taken at face value, Ashland and Respondent determined to answer the most frequently asked questions via company-wide distributions rather than address each question at a time.

In addition to the piecemeal emails, memos, and Q&As distributed to unit employees, Ashland and Respondent kept employees abreast of the progress of the sale and transition in ownership by creating and distributing a newsletter series entitled “Transition Update.” GC 49-55. Numbering seven in all, the Updates were widely disseminated. See Joint 1 (¶ 8) (stating that the Updates were posted on Firsthand and otherwise made available to Ashland employees); GC 49 (p. 1) (email version addressed to “AD NewCo Employees”). All of the Updates were shared with Respondent’s agents around the time of their creation. Joint 1. Indeed, documents in the record make clear that Respondent’s agents were actively engaged in drafting the Updates. See, e.g., GC 69 (email string with Respondent agents drafting and vetting Update issue); GC 70 (same). Moreover, Fairfield unit employees testified to receiving the Updates in hard-copy format. Tr. 751-53 (Robbins testifying to seeing the Updates (GC 49-55) either posted on the bulletin board or distributed through the mailboxes); see also Tr. 831; 760-62.

The first Transition Update disseminated was the December 16, 2010, issue. GC 49. Following a message from Craycraft, the body of Issue 1 references employees’ participation in the process of naming the new company. See *id.* (p. 2) (“Some of you . . . [gave] your input on what we stand for and how we want our new company to be recognized.”) Issue 1 also references the publishing in the prior week of a Q&A, and discussed various other “Employee FAQs,” including when employees would receive new badges and business cards. *Id.* (at p. 2-3). In answer to the latter, the Update states “The goal is to provide new ID badges for all Ashland Distribution employees by Day One . . . The badges will identify you as employees of the new company.” *Id.*³⁶

³⁶ Documents in the record make clear that the December 16 Transition Update, Issue 1, was created with the active participation of Respondent agents. See, e.g., GC 59-63 (email strings discussing drafts of the December 16 Update, and especially GC 62, which includes Craycraft and Amit Jain on a long and detailed email string); Joint 2.

Update Issue 2 was distributed on January 14, 2011. GC 50. Issue 2 began with a message from Craycraft in which he references “this Thursday’s Town Hall meeting” at which he “shared that TPG has asked me to take on the new role of Chief Commercial Officer.” *Id.* (at p. 1). He goes on, “We also announced that David Bradley . . . will serve as President and CEO of our future company.” *Id.* Craycraft promises to deliver a “mission” to “provide a glimpse of the future we know we can build, together,” and “to provide final details of our compensation and benefits plan” so as to “help us retain current and attract future employees.” *Id.*

Similarly David Bradley expressed his excitement “about the opportunity to join this successful team. We’ll face some challenges together. No question, if you remain focused on growing our business, the opportunities will be there. You have to trust in the future—and you have to work for it.” *Id.* Page three contained a table of the “Separation team.” The team included Craycraft and several TPG-associated people, and states “Each team draws some support from external consultants whether they be TPG Capital, Deloitte or PricewaterhouseCoopers.” *Id.* (p. 3).³⁷

As referenced in the January 14, 2011, Update, Ashland and Respondent held a January 13 Town Hall meeting concerning the transition. Tr. 764-72; see also GC 44, 67. According to Fairfield unit employee Eric Schieber, he and other unit employees listened to the Town Hall meeting via phone conference. Tr. 764-66. He recalled the meeting as occurring in January 2011, prior to the naming of the company. Tr. 765 lines 4-6; page 767 lines 5-12. He recalled Craycraft being excited about the transition, stating that jobs would not be lost and, in fact, that the business would grow and that more would likely be added. Tr. 766 lines 1-12; page 769 lines

³⁷ Documents in the record make clear that, like Update Issue 1, Update Issue 2 was created with the active participation of Respondent agents. See, e.g., GC 64-66, 68-69 (email strings discussing drafts of the January 14 Update); Joint 2.

18-23; page 771 lines 22-25. He also recalled Craycraft mentioning that he would be the new company's Chief Commercial Officer. Tr. 770 lines 19-20.

Schieber's recollection, combined with Craycraft's synopsis in the January 14, 2011, Update, is consistent with an outline of "Key Messages" prepared by Ashland and Respondent specifically for use at the Town Hall meeting. GC 44, 67; see also Joint 1 (at ¶ 3) (stating that GC 44 is the final version of the document and "was utilized in the Employee Town Hall meeting that occurred on January 13 or 14, 2011.").³⁸ For example, the "Key Messages" document includes the statement by Craycraft that he would take on the role of Chief Commercial Officer; mentions increased growth opportunities; and introduces David Bradley as the new CEO. GC 44 (p. 1). Like many of the other documents already discussed, the "Messages" uses inclusive language in describing the Respondent's future. See, e.g., GC 44 (p. 1) ("... these are good changes for all of us."); *Id.* (at p. 2) ("... this is a unique opportunity for all of us."); *Id.* ("... we have a unique opportunity to grow this business."). The Messages also states that "The AD Leadership Team remains in place." *Id.* Bradley communicates that "we do not anticipate major changes in the rest of the organization," and that "We're not planning job reductions." *Id.* (at p. 3); see also Tr. 769 lines 20-25. The Key Messages document was shared with agents of Respondent at or around the time of its creation. Joint 1, 2 (the latter identifying the person using the email address mlugol@aol.com as Respondent's agent, with GC 67 including a cover email sending a draft of the document to "Mlugol," among other agents).

Transition Updates with similar communications were distributed in January and February 2011. See GC 51, 52. While continuing the inclusive messaging of prior Updates,

³⁸ The "Key Messages" document is dated January 14. However, the email accompanying the version made a part of GC Exhibit 67 is dated January 12. Moreover, the January 14 Update makes reference to the Town Hall meeting as having occurred "this Thursday." A check of a 2011 calendar will show that January 14, 2011, was a Friday. Thus, January 13 was a Thursday. It seems likely, then, that the Town Hall meeting occurred on January 13.

along with exhortations for employees to approach each day as “business as usual” (GC 51, p. 1), the January 28 and February 11 Updates more frequently referenced forthcoming offers of employment. The February 11 Update, in particular, indicated that important information regarding benefits and compensation would be included in employees’ offer letters. See GC 52. Neither Update, however, contained detailed or specific information regarding benefits or other terms of employment. GC 51, 52.³⁹

4. **On about February 16, 2011, Respondent Meets with Local 70 and Thereafter Mails Employment Offers to All the Fairfield Unit Employees with Terms and Conditions Changed Materially from Those in Effect Under Ashland**

In the early part of February 2011, Fusco called Aiello and asked to schedule a meeting to discuss the details of the sale. Tr. 639 lines 3-8. Fusco and Aiello agreed that their meeting would take place on February 16, 2011. Tr. 698 lines 9-22; page 954-55.

On February 16, Fusco, Ashland Regional Manager Jack Brewer, and Attorney David Kadela met with Aiello and Local 70 President Dominic Chiovare. ALJD page 13 lines 23-34; Tr. 639-40. Fusco, at least, attended this meeting on behalf of Respondent. ALJD page 13 lines 23-24; Tr. 954 lines 22-24 (stating that Respondent consultant John Hollinshead asked him (Fusco) to attend the Fairfield meeting); see also Tr. 1035 lines 16-25 (discussing Hollinshead’s direction regarding labor strategy and negotiations); 1042-44 (same).⁴⁰ Indeed, following introductions, Fusco informed Local 70 that he had accepted an offer of employment from Respondent and that, although Brewer had not yet received his offer, it was anticipated that he

³⁹ The final three Transition Updates—issued on February 28 (GC 53), March 11 (GC 54) and March 25 (GC 55)—came after the February 16 meeting between Respondent and Local 70 and the February 17 issuance of Respondent’s employment offer letters. The GC, however, concedes that the February 16 meeting served to place Local 70—and, thus, the unit employees—on notice of specific and substantial changes to their terms of hire. Thus, the final few Updates are of no import to the GC’s case.

⁴⁰ Hollinshead is an admitted agent of Respondent. GC 1(ee) (¶ 2).

would get one. Tr. 641-42; see also Tr. 940-41 (stipulating as to the inclusion of Fusco and Brewer on the November 5, 2010, version of Schedule A to the P&S Agreement).

Fusco and/or Kadela explained that TPG Partners had purchased Ashland, that Respondent would begin operating the Fairfield facility as of April 1, and that “all the terms and conditions would remain in place until which time we were able to bargain a tentative agreement.” Tr. 641-42, lines 17-19.⁴¹ Fusco relayed that the unit employees would be offered employment in at their current positions and at the same base salary. ALJD page 13 lines 27-29; Tr. 643 lines 4-5; Tr. 955-56.

The conversation turned to the offers of employment that Respondent would mail to unit employees. ALJD page 13 lines 28-33; Tr. 643-45; 956-57. Respondent provided to Local 70 a copy of the draft offer letter. Tr. 643; GC 81; see also ALJD page 13 lines 28-30; *id.* at 8-10. Fusco explained that employees would be asked to return their letters within 10 days and that, once a majority of the unit employees returned their offers signed, the company would recognize Local 70 going forward. Tr. 643-44; see also Tr. 955 lines 10-17, 958-59. As Local 70 officials began to review the letter, Fusco stated that as of April 1, the employees would be covered by Nexeo healthcare benefits but that those benefits would be comparable to those negotiated with Ashland. Tr. 644 lines 8-11. Fusco also communicated Respondent’s position that it would no longer participate in the Western Conference of Teamsters Pension Plan. Tr. 644 lines 13-15; page 956 lines 8-10. In response, Aiello stated that he viewed these matters as “a bargaining issue [,] and that we intend to bargain over all conditions as well as healthcare and the pension retirement.” Tr. 645 lines 5-10.

⁴¹ Fusco testified to essentially the opposite: that Respondent would adopt no Ashland policies or practices, and that employees would be covered by Respondent’s benefits plans. Tr. 955-56. Aiello later clarified that his understanding of Fusco’s instruction was colored by his assumption that the parties would have a CBA by the April 1 close, so that he anticipated that the terms would remain the same until the newly agreed-upon contract terms went into effect on April 1. Tr. 704-05.

The witnesses' recollections of the statements made in the meeting are generally consistent with those made in the draft offer letter that was produced to Local 70 in the meeting and with language included in the final versions that went to employees. GC 81, 96; ALJD at 8-10. In particular, the letters stated that employees' positions would be the same; that the base rate of pay would remain the same; and that employee benefits plans would be "comparable in the aggregate" to Ashland's. *Id.* The letters also stated that no collective-bargaining agreements would be adopted; that policies in place under Ashland but inconsistent with Respondent's practices would be abandoned; and that pension plans would be replaced with a 401(k) savings account option. *Id.* On February 17, Respondent mailed all unit employees offers of employment containing terms consistent with those proffered to Local 70 on February 16. ALJD page 13 line 33; Tr. 959 lines 7-9; GC 96.

Thus, Respondent, by providing the draft employment offer letter to Local 70 on February 16, for the first time, made clear that the unit employees' terms of hire would include materially changed conditions.

5. **A Majority of the Unit Accepts Respondent's Employment Offer, Local 70 is Recognized, and Bargaining Ensues**

On or about February 24, Fusco contacted Aiello and informed him that, because a majority of unit employees accepted their offers of employment, Respondent would recognize and bargain with Local 70. Tr. 648 lines 8-11; page 961 lines 1-4; ALJD page 13 lines 33-34. Soon thereafter, Aiello made arrangements with Fusco to meet and engage in bargaining. Tr. 648 lines 12-16; see also Tr. 961 lines 6-12.

The parties engaged in pre-transition bargaining on March 22, March 23, and March 29, 2011.⁴² ALJD page 13-14; Tr. 650; 964; 664; 981; 666. Each session lasted approximately six-and-a-half hours, including breaks. Tr. 981 lines 11-17; page 1053. Although various terms and proposals were discussed, the topic of the employees' retirement benefit dominated the first day and was revisited on the third. See ALJD pages 13-14; Tr. 654-58, 965-72; 674-75; GC 85; GC 86. The parties reached no agreement regarding the pension issue. Tr. 660 lines 5-8; page 667; 676. Indeed, the parties never reached agreement regarding any economic issues, including wages, health and vision benefits, the Alive & Well Lab work benefit, or the pension. Tr. 662; 667; 676.

As found by The ALJ, the parties made progress on non-economic proposals. ALJD page 14 lines 2-6. Indeed, by midway through the March 29, 2011, session, all non-economic proposals had been tentatively agreed upon. Tr. 668; 989 lines 19-20. But for the pension, however, the parties did not begin discussion of economic proposals until the afternoon of March 29. See ALJD pages 13-14; see also Tr. 669. In fact, while both parties made full contract proposals on the initial day, (see ALJD at 13 lines 38), Respondent did not make a forward-looking wage proposal until after the March 29 session via a March 30 email. Tr. 992-93; 995-96; GC 90 (p. 3-4); R 38; *cf.* GC 83 (p. 3) (initial Respondent proposal). At some point during the March 29 session, Fusco recalled Aiello and Chiovare making a proposal that the amount that Ashland used to contribute to the Western Conference be allocated to employees' wages instead.⁴³ Tr. 993-94; 1036.

⁴² Sometime in early- or mid-March 2011, Aiello telephoned Fusco and verbally requested a copy of the summary plan description ("SPD") for Respondent's proposed health benefits. Tr. 648-49. Aiello did not receive the requested SPD prior to bargaining. Tr. 650 lines 19-21.

⁴³ The GC agrees with the ALJ's rejection of Mr. Fusco's testimony suggesting that the main obstacle preventing agreement was the retirement benefit issue. ALJD at 14, fn 11.

On the afternoon of the March 29, 2011 meeting, Aiello and Chiovare provided Fusco with a letter dated March 28, 2011, informing Respondent that Local 70 believed Respondent to be a perfectly clear successor. ALJD at 14 lines 9-11; Tr. 672; 994; GC 89. Respondent disagreed with Local 70's position (ALJD at 14 lines 11; Tr. 673; 994-95) and, soon after the letter was provided, the parties concluded negotiations for the day. Tr. 674; 995 lines 6-7. As the session was ending, Aiello expressed Local 70's intention to continue bargaining once he had an opportunity to speak with legal counsel. Tr. 674. Respondent indicated that as of April 1, 2011, it would cease participating in the Teamsters Pension Plan and that employees would be covered under Nexeo's health and welfare plan. Tr. 675; see also Tr. 997 lines 5-18 (Fusco testifying that he informed Local 70 that, without agreement by April 1, Respondent would implement the terms specified in employees' offer letters); ALJD at 14 lines 11-13. Aiello expressed the position that Local 70 was prepared to bargain to good faith impasse and that no such impasse was yet reached. *Id.* Neither party made a declaration of impasse. ALJD at 14 line 13.

Although requested, Respondent did not supply Local 70 with a copy of the SPD for Respondent's health benefits or with the SPD for Respondent's 401(k) savings plan until around October 2011. Tr. 680-82; R 48; GC 29. However, some exchanges continued between March 29 and March 31, 2011. ALJD at 14 lines 13-14. For example, Fusco sent Aiello and Chiovare an email on March 30 disputing Local 70's assertion of Respondent's status as a perfectly clear successor; reiterating its intention to implement the terms outlined in employees' offer letters "absent reaching contingent agreement at close;" and attaching a contract proposal. R 38; Tr. 995-96. Later on March 30, Fusco emailed Local 70 again—this time supplying additional information regarding, *inter alia*, pension/401(k) plan comparisons discussed in earlier sessions.

Tr. 997-98; R 39. On March 31, Respondent emailed to Aiello some additional information relating to Respondent's health insurance plan. Tr. 680, 1000-01; R 1; R 41. Although additional bargaining ensued after April 1, no agreement was reached. ALJD at 15 lines 4-6; Tr. 684-85; page 687 lines 12-16; page 1004 lines 6-12; 1020.

6. **Respondent Implements Its Unlawful Unilateral Changes Upon the April 1 Take-Over of the Fairfield Facility**

On April 1, 2011, Respondent began operating what was formerly known as Ashland Distribution, including the Fairfield facility. See ALJD at 6 lines 5-6; Tr. 1037 lines 1-4; R 40; GC 98; GC 99. There is no dispute that, as of April 1, 2011, Respondent implemented the terms and conditions of employment outlined in its offer letters to employees.⁴⁴ ALJD at 14 lines 14-17; GC 1(w) (p. 4) (Respondent Answer); GC 1(ee) (p. 2) (Respondent Answer to Amendment to Complaint); see also Tr. 1002 lines 1-11; R 42; GC 97.

(a) **Respondent Implements a 401(k) Retirement Plan in Place of the Western Conference of Teamsters Pension Plan**

While employed by Ashland, the Fairfield unit employees enjoyed a retirement benefit under the Western Conference of Teamsters Pension Plan. Tr. 621 lines 17-22; page 823 lines 21-25; see also GC 77 (CBA) (p. 11-12). More specifically, the unit employees were covered by a Pension option known as Program for Enhanced Early Retirement (PEER) 80. Tr. 625 lines 16-24; see also GC 77 (p. 12). PEER 80 amounts to a defined benefit retirement plan that allows for early retirement, with full benefits, once any combination of the employee's age and years of service add to the number 80. ALJD at 13 lines 17-20; Tr. 624-25; 778-79; see also GC 78

⁴⁴ In addition, Fairfield unit employees experienced changes to the route assignment and layoff procedures shortly after the April 1 transition. The ALJ correctly found these changes to have gone unarticulated prior to implementation, and to have constituted unilateral and unlawful changes. See ALJD at 14-15, 18; see also Tr. 1048-49 (affirming that the February 16, 2011, meeting between Respondent and Local 70 included no specific discussion regarding seniority-based dispatching or seniority-based layoffs); GC 81, 96 (employment offer letters including no mention of dispatching or layoff policies). The GC does not except to these finding and, therefore, will not detail the changes herein.

(Teamsters Pension Plan Summary Plan Booklet) (p. 41-54) (describing the calculation of retirement benefits under the various PEER options). Coverage under the PEER 80 Plan was funded wholly by employer (i.e., Ashland) contributions. Tr. 625-26; 779 lines 16-19; see also GC 77, p. 12 (detailing Ashland's required contributions to the Pension fund). In other words, the unit employees contributed no part of their wages to participate in the PEER 80 Plan. ALJD at 13 lines 20-21; Tr. 626 lines 17-19; page 779 lines 16-19; page 824 lines 3-7. Employees' monthly benefit was not affected by fluctuations in the stock market. Tr. 627 lines 21-23; page 779 lines 20-23; see also GC 78 (p. 41-54).

Employees working for a non-participating employer do not earn Pension service credit. Tr. 627-28; see also GC 78 (p. 12-17) (explaining the impact of "interruptions of service" on benefits and vesting); *Id.* (at 44-45) (explaining the contributory service years requirements under the PEER plans). Moreover, PEER 80 eligibility may be lost if the employee has not "locked in" their PEER 80 coverage and too much time passes between the last day worked under a PEER-eligible contract and the employee's pension effective date. GC 78 (p. 46.) However, employees eligible to retire under PEER 80 who continue to work under a PEER 80-eligible contract continue to add to their monthly pension benefit. Tr. 779-80 lines 24-25, 1-2; page 807 lines 10-20; GC 78 (p. 46) (Q & A near bottom of page).

As of the April 1 transition, Respondent abandoned its obligations to the Teamsters Pension Plan in favor of a 401(k) savings plan controlled by Fidelity Investments. Tr. 1002 lines 1-11; GC 29 (Summary Plan Description), p. 1 ("The Plan was adopted effective April 1, 2011."); GC 1(w), p. 4 (Respondent Answer); GC 1(ee), p. 2 (Respondent Answer to Amendment to Complaint); see also GC 97; GC 105. Enrollment occurred without any action being taken by the unit employees. Tr. 782 lines 5-8, 21-24; page 858 lines 4-6; see also GC 29

(p. 2). Beginning with the payroll period ending May 15, 2011, and continuing thereafter, unit employees experienced automatic 401(k) plan deductions from their pay. Tr. 785-86 lines 14-25, 1; GC 98 (eighth paystub included, dated May 20, 2011); GC 99 (fifth paystub included, dated May 20, 2011). The default contribution was set at 4% of employees' pay. GC 97; 105.

According to the Summary Plan Description, Respondent's savings plan "is a defined contribution 401(k) profit sharing plan." GC 29 (p. 1). The 401(k) savings plan is funded both by employee contributions and by various Respondent matching contributions. *Id.* (at 2, 4-6); see also GC 37 ("Nexeo Solutions Benefits Enrollment"), p. 34-35. Each employee's ultimate monthly benefit cannot be guaranteed. Rather, the employee's account "may . . . decrease based on losses credited to your account." GC 29 (p. 8); see also Tr. 658-59 (discussing GC 86 and Respondent's assumption of a 7.5% return on investment); Tr. 975 lines 14-16. The account's value is based on "the investments elected by you," and the value of those investments at the end of each day the New York Stock Exchange is open. GC 29 (p. 8). Each employee may elect which "investment fund options" his retirement dollars are invested in. *Id.* One's "Normal Retirement Date" is defined as when one reaches the age of 65. *Id.* (at 15). Withdrawals prior to age 59 ½ are restricted. *Id.* (at 11). In contrast to the Western Conference PEER 80 Plan, there is no option under the 401(k) plan to retire early with full benefits. Tr. 684:7-13.

In bargaining with Local 70 prior to the April 1, 2011, transition, Respondent produced its own calculations showing that some portion of the unit employees would experience shortfalls in transitioning from the PEER 80 Plan to the 401(k) savings plan. Tr. 657 lines 4-7, 20-24; GC 85, 86. Respondent committed to making one-time, lump sum payments into the savings plan accounts of those employees who would experience a shortfall. Tr. 980 lines 13-21; page 1051-52; see also GC 86. The degree to which the one-time payments would "true up" the

accounts, however, was predicated on a 7.5% return on investment. Tr. 658-59; page 975 lines 4-20 (discussing the 7.5% return on investment as an “estimate or assumption”); page 1050 lines 18-21. Indeed, all of the calculations performed by Respondent to enable a comparison between the expected benefit under the PEER 80 Plan versus the expected benefit under the 401(k) plan were premised on a 7.5% return under the 401(k) plan—a return not guaranteed. *Id.*

Despite continuing to bargain over the topic, no agreement was ever reached to return the unit employees to the PEER 80 Plan. Continuing to the present, Fairfield unit employees remain covered by the 401(k) plan. Tr. 684 lines 14-17; page 785-86.

(b) Respondent Implements Certain Changes to Employee Health Insurance Benefits

As of the April 1, 2011, transition, the Fairfield unit employees experienced some changes to their health benefits as well.⁴⁵ In particular, employees of Ashland enjoyed a vision care plan under which three levels of coverage were available—“Employee,” “Employee + Spouse/Partner,” and “Family.” Tr. 787-78; see also GC 79 (Ashland 2011 Annual Benefits Enrollment Guide) (p. 7.) Employees’ monthly contributions for the options, respectively, were \$6.97, \$13.95 and \$17.83. GC 79 (p. 7).

The vision care implemented by Respondent introduced some changes to this format. Specifically, the vision care available as of April 1 included four coverage options: “Employee,” “Employee + Spouse/Partner,” “Employee + Children,” and “Family.” GC 37 (Nexeo Solutions Benefits Enrollment) (p. 8). Employees’ monthly contributions for the options, respectively, were \$6.28, \$12.56, \$10.65, and \$17.28. *Id.*

⁴⁵ The pertinent Complaint makes a broad-based allegation that Respondent unlawfully changed unit employees’ health benefits at the point of the April 1 transition. As made clear on the record, however, the GC determined to narrow the allegation to cover only changes related to vision care and to the “Alive & Well Labwork” benefit. Tr. 567-68, lines 22-25, 1-4; 1022, lines 20-21.

In addition, Ashland provided a benefit entitled “Alive & Well Lab work.” GC 79 (p. 31). This benefit offered unit employees the opportunity to partake in an “Executive lab work panel” for \$22.00. *Id.* Various additional lab screenings were offered at some additional cost. (*Id.*)

Respondent’s Benefits Enrollment guide does not include Alive & Well Lab work as an available benefit. GC 37. Moreover, Paul Fusco admitted in his testimony that this particular benefit was dropped by Respondent. Tr. 1061 lines 12-16.

III. LEGAL ANALYSIS

A. The ALJ Erred As A Matter of Fact and Law in Finding and Concluding that Respondent Was Not a Perfectly Clear Successor Based on the Terms of the P&S Agreement Which Legally Obligated Respondent to Retain All of Ashland’s Employees (Exceptions 1-2, 4-7, 10-17, 19, 21-23, 25, 28, 30-33)

1. The ALJ Properly Found that it Was Perfectly Clear as a Matter of Fact that Respondent Planned to Retain All the Unit Employees and They Would Undoubtedly Accept the Offer of Employment (Exceptions 1-2, and 4-7)

It is well-established that when a new employer acquires a business, makes no change to its essential nature, and hires a majority of the predecessor’s unit employees, the new “successor” employer has a duty to recognize and bargain with the incumbent union. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 36-41 (1987); *NLRB v. Burns Security Services*, 406 U.S. 272, 278-281 (1972).⁴⁶ In these circumstances, the successor employer maintains the right to institute new and different initial terms for the incumbent employees. *Burns Security Services*, 406 U.S. at 294. However, when circumstances make it “perfectly clear” that a successor will

⁴⁶ There is no dispute that Respondent is a successor employer to Ashland. ALJD p. 2, lines 18-21 and 35; GC 1(j) (at ¶ 2(c) where Respondent admits its successor status in its Answer) and GC 1(w) (at ¶¶ 2(c) and (d) where Respondent admits its successor status in its Answer).

retain a majority of the predecessor's employees, an exception occurs whereby the "perfectly clear successor" loses its right to unilaterally establish initial terms. See e.g., *Burns Security Services*, 406 U.S. at 295-96; *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enforced mem., 529 F.2d 516 (4th Cir. 1975).

In his decision, the ALJ properly concluded that it was perfectly clear as a matter of fact that Respondent planned to retain all the unit employees in both the Fairfield and Willow Springs facilities because it committed to do so in the P&S Agreement. ALJD p. 15, lines 27-30. He further concluded that the instant case did not involve a situation contemplated by *Burns* where:

it may not be clear until the successor has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit. *Id.* at 294-95.

ALJD p. 15, lines 32-39. Significantly, in the instant case, the evidence clearly established that Respondent was legally obligated by the terms of the P&S Agreement "to offer employment to all the unit employees in their same position, with the same base wages, and with a comparable benefit package." ALJD p. 15, lines 39-41.

More specifically, Section 7.5(b)(i) and 7.5(c) of the P&S Agreement obligated Respondent to offer employment to all of Ashland's employees and maintain substantially identical terms and conditions of employment. GC 6 (emphasis supplied). Section 7.5(d) of the P&S Agreement went even further as it obligated Respondent to provide the "transferred employees" with "wages no less favorable" and "benefits, variable pay, incentive or bonus opportunities under plans, programs and arrangements that are substantially comparable in the aggregate to those provided by Ashland."⁴⁷ GC 6 (emphasis supplied). In addition, Section

⁴⁷ Respondent repeatedly misrepresented the record by stating that Section 7.5(d) of the P&S Agreement only obligated Respondent to provide Ashland's employees with "benefits substantially comparable in the aggregate to those sponsored by Ashland." A simple reading of that section shows that Respondent is now blatantly attempting

7.5(f) of the P&S Agreement provided that Ashland's employees "will have continuous and uninterrupted employment immediately before and immediately after the Closing Date."

Equally important, the ALJ properly found that Local 70 and Local 705 "became aware of the terms of the [P&S Agreement] as they related to worker retention and compensation issues; both accurately communicated to their members that [Respondent] planned to retain all the employees under a benefit scheme that would be comparable in the aggregate." ALJD p. 5, lines 30-34. Indeed, at the Fairfield facility, Local 70 and the unit employees immediately learned about the relevant terms of the P&S Agreement through a series of documents that were distributed by Ashland. GC 40, 41, 48, 56, 58, 93, 94. At the Willow Springs facility, Paul Fusco personally provided Local 705 Representative Neil Messino with a copy of the P&S Agreement on December 10, 2010 – only three days before disclosing to Messino that he (Fusco) had already been hired by Respondent. Tr. 112-13. Not surprisingly, Messino immediately reviewed the entire P&S Agreement and then shared the relevant terms with the Willow Springs drivers at three union meetings held between December 13, 2010 and January 4, 2011. Tr. 100-01, 106-110; 246-47, 304-09, 366-67.

The ALJ likewise accurately noted that from the time of the announcement of the sale to the public, on November 8, 2010, Ashland made similar assurances to unit employees about Respondent's obligation to retain all of them under terms and conditions substantially comparable in the aggregate to those currently provided. ALJD p. 5, lines 5-25. For example, on that date, Ashland posted a notice on Firsthand, its inter-company computer portal, informing

to re-write the P&S Agreement to serve its unlawful purposes. In addition, there is no evidence in the record that Ashland concurred that Respondent had the right to disregard Board law and establish initial terms and conditions of employment. Thus, Respondent was required to provide the unit employees who were employed at its Fairfield and Willow Springs facilities with benefits substantially comparable to those they were being provided by Ashland, including the Union pension benefits and health insurance benefits that it contributed to until March 31, 2011 – and not, as Respondent contends only those sponsored by Ashland.

all unit employees that its management team would continue to work for Respondent; Ashland offices would remain unchanged; Respondent's intent was to retain the Ashland employees; there would be no changes to employees' benefits and wages; and that employees and customers alike should expect business as usual.⁴⁸ GC 40 and 56.

On these facts, the ALJ correctly concluded that, based on Respondent's commitments in the P&S Agreement, "[t]here was little doubt that a majority, if not all, of the employees, would . . . accept employment at Nexeo."⁴⁹ ALJD p. 15, lines 42-43. The ALJ pointed out, "this was what those provisions in the [P&S Agreement] were designed to accomplish. This is what [Respondent] understood would happen. This is what Local 705 and Local 70 understood would happen. And this is exactly what happened." ALJD p. 15, lines 43-45. Moreover, the language in Section 7.5(o) of the P&S Agreement required Respondent to recognize Local 705 and Local 70 as the exclusive collective-bargaining representatives of the Willow Springs and Fairfield unit employees, respectively. GC 6. Absent Respondent's obligation to hire all of Ashland's unit employees, it would obviously not have agreed to recognize Local 705 and Local 70 because to do so would have unlawfully obligated itself to violate Section 8(a)(2) of the Act.⁵⁰

2. **The ALJ Properly Concluded that the Fact Pattern in *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enforced mem., 529 F.2d 516 (4th Cir. 1975) Does Not Cover the Fact Pattern in the Instant Case.**

⁴⁸ To the extent that the ALJ found that these communications made it clear that Respondent's benefits would be different than Ashland's existing benefits (i.e. unit employees benefits would be "*comparable in the aggregate to those provided by Ashland*" rather than "*identical*" to their existing benefits), his finding should be rejected as it is wrong as a matter of fact and law. See ALJD p. 5, lines 26-30. This argument will be elaborated upon in a later section of the brief.

⁴⁹ *Cf. Road & Rail Services*, 348 NLRB 1160, 1162 at n.13 (2006) (Board recognized that the perfectly clear successor caveat inherently demands an inquiry into the "degree of likelihood that incumbents will work for the successor"), quoting *Machinists v. NLRB*, 595 F.2d 664, 673 at n.45 (D.C. Cir. 1978). There is no reason to believe that employees would refuse Respondent's offer of employment because the benefits would not be identical but rather "substantially comparable in the aggregate." *Cf. Elf Atochem North America, Inc.*, 339 NLRB 796, 796, 808 (2003) (language such as "substantially equivalent" and "comparable" found "not specific enough to clearly inform employees of the nature of the changes which Respondent intended to institute in the future").

⁵⁰ *Ladies Garment Workers (Bernard Altman Corp.) v. NLRB*, 366 U.S. 731 (1961) (employer violates Section 8(a)(1) and (2) and a union violates Section 8(b)(1)(A) of the Act, when the employer grants and the union accepts recognition at a time when the union does not represent a majority of the employees in an appropriate unit).

However, the ALJ then Erroneously Relied on *Spruce Up* to Decide that Respondent Was Not a Perfectly Clear Successor (Exceptions 1-2, 4, 16-17, 19, 21, 23, 25, 28, and 30-33)

Contrary to Respondent's arguments, the ALJ correctly found that the fact pattern in *Spruce Up* was distinguishable from the fact pattern in the instant case. ALJD p. 16, lines 7-32. In *Spruce Up*, the successor employer from the outset expressed a general willingness to hire all of the predecessor's employees. *Spruce Up Corp.*, 209 NLRB at 195. At the same time, the successor employer made it clear that he intended to set his own initial terms and conditions of employment. *Id.* Based on those facts, the Board held that the successor employer had lawfully set initial terms of employment since they were simultaneously announced with the intent to hire all of the predecessor's employees. *Id.* To hold otherwise, the Board believed, would disregard the real possibility that employees might not accept the successor employer's offer of employment due to the new terms and conditions. *Id.*

Unlike the facts in *Spruce Up*, in the instant case Respondent did not simultaneously make clear its intent to set its own initial terms and conditions either when it entered into the P&S Agreement with Ashland, on November 5, 2010 or any time thereafter until well over three months later when on February 15 and 16, 2011, Respondent finally notified Local 705 and Local 70 that it intended to change the unit employees' terms and conditions. By that time, however, Respondent was no longer free to set initial terms and conditions of employment as its bargaining obligation as a perfectly clear successor had been fixed since the beginning of November 2010.⁵¹

⁵¹ Importantly, the terms of the P&S agreement including its assurances that it would hire all of its predecessor's employees and provide them with comparable benefits as those provided by Ashland were directly disseminated to its employees at both the Willow Springs and Fairfield facilities well before Respondent made its belated attempt to change the terms of the deal in mid February, 2011. ALJD p. 5, lines 30 - 34

Post-*Spruce Up* cases cited by the Acting General Counsel and Local 705 only further underscored this point. For example, in *Canteen Co.*, 317 NLRB 1052, 1053 (1995), enf'd 103 F.3d 1355 (7th Cir. 1997), the Board applied the perfectly clear exception to hold that a successor employer was not free to unilaterally establish new wage rates when it had previously expressed to the union a desire to have employees serve a probationary period. There, when the successor employer contacted the union to say that it wanted employees to serve a probationary period, and the employees to say that it wanted them to apply for employment, it “did not mention in these discussions the possibility of any other changes in its initial terms and conditions of employment.” *Id.* at 1052. Thus, in finding that the employer was a perfectly clear successor, the Board scrutinized not only the successor’s plans regarding the hiring of the predecessor’s employees, but also the clarity of the successor employer’s communicated intentions concerning existing terms and conditions of employment when it initially indicated it would be hiring the predecessor’s employees. *Id.* at 1053-54.⁵² As in the instant case, the fact that the successor employer later announced its intention to implement material changes (albeit, prior to its presentation of formal employment offers) did not alter the legal significance of its earlier-issued perfectly clear assurances. *Id.* at 1053.

In the instant case however, after correctly finding that *Spruce Up* was factually distinguishable from the instant matter, the ALJ took a turn in his decision which led to a series

⁵² See also *Elf Atochem North America, Inc.*, 339 NLRB at 796, 808 (Board applied perfectly clear exception where successor employer initially informed employees that they would be offered employment, that their seniority would be recognized, and that they would receive equivalent salaries and comparable benefits. The fact that employer later announced initial terms and conditions concurrent with its offers of employment did not matter); *Fremont Ford*, 289 NLRB 1290, 1296-1297 (1988) (employer manifested intent to retain the predecessor’s employees by informing union it would retain a majority of the predecessor’s employees and did not announce significant changes in initial terms until conducting hiring interviews; employer’s stated desire to alter the seniority system and institute a flat pay rate insufficient to indicate intent to establish new terms); *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976), *enforcement denied in relevant part sub. nom.*, *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977) (employer told the union that it intended to hire all of the predecessor’s lay teachers, but did not mention any changes in terms and conditions of employment).

of errors beginning with his claim that Respondent could not be found to be a perfectly clear successor due to the absence of some evidence of deception concerning the unit employees' initial terms and conditions of employment. ALJD p. 17, lines 19-22. Here, the ALJ ignored his own findings of fact regarding the terms of the P&S Agreement itself which misled Local 705, Local 70, and the unit employees to believe that they would be retained under similar terms and conditions as they had experienced under Ashland. Specifically, the ALJ correctly noted that Respondent would "offer employment to all the unit employees in their same position, with the same base wages, and with a comparable benefit package." See ALJD p. 15, lines 39-41. It was for this very reason the ALJ found there "was no reasonable basis to conclude that the Fairfield and Willow Springs unit employees would not accept the offers of employment." ALJD p. 15, lines 42-43.

The ALJ likewise ignored other evidence that Respondent misled employees from the outset to understand that their terms and conditions of employment would remain substantially unaltered if they continued their employment with Respondent. Thus, during the period November 5, 2010 to February 15, 2011, through various documents, employees were consistently advised that Ashland's management team would continue to work for Respondent; Ashland's offices would remain unchanged; Respondent's intent was to retain the Ashland employees; there would be no changes to employees' benefits and wages; and that employees and customers alike should expect business as usual. See e.g. GC 40 and 56. These misrepresentations continued for more than three months, culminating on February 11 when Willow Springs's Plant Manager Tony Kuk met with union stewards/drivers Michael Jordan and George Sterba in his office. Tr. 310, 368-69, 382. At that meeting, Kuk revealed two important things – first, that he and Regional Logistics Manager Pat Cassidy had been officially hired by

Respondent to continue in their respective management positions, Tr. 311-12, 369, 382,⁵³ and second, that all of the drivers would likewise be retained and their terms and conditions of employment would remain the same after the sale closed. Tr. 309-12; 372, 382-83. Kuk went so far as to repeat Respondent's mantra that it would be "business as usual" and that none of the drivers would even need to reapply. Compare Tr. 311-12, 368-69, 372, 382-83 with GC 40 (§ 22), 51 (p. 1), 80 (p. 2).

As a matter of fact and law, the ALJ was also wrong in concluding that the P&S Agreement "did not purport to set initial terms of employment; rather it, indicated a framework for a benefit package the details of which would be determined later. On February 15 and 16 [Respondent] announced those details." First of all, it bears repeating that Respondent, in the P&S Agreement, promised to "offer employment to all the unit employees in their same position, with the same base wages, and with a comparable benefit package." See ALJD p. 15, lines 39-41. Put another way, unit employees were promised that they would maintain their current job, with its all of its attendant duties and rights, at the same rate of pay they had received from Ashland. In addition, the promise to provide benefits that "are substantially comparable in the aggregate to those provided by Ashland" was not legally sufficient to put unit employees on notice that Respondent intended to implement new or substantially different benefits. *Elf Atochem North America, Inc.*, 339 NLRB at 796, 808 (language such as "substantially equivalent" and "comparable" found "not specific enough to clearly inform employees of the nature of the changes which Respondent intended to institute in the future"). Finally, for the reasons already discussed, the ALJ was wrong as a matter of law when he disregarded well-established Board law to conclude that Respondent's announcement of new terms of

⁵³ Following this meeting, Sterba disseminated Kuk's statements to the rest of the Willow Springs drivers. Tr. 370-71.

employment on February 15 and 16 was timely, despite having rendered itself a perfectly clear successor three months earlier based on its unambiguous promise to hire all of Ashland's employees. See e.g. *Spruce Up Corp.*, 209 NLRB at 195; *Canteen Co.*, 317 NLRB at 1053; *Elf Atochem North America, Inc.*, 339 NLRB at 796, 808.

3. **The ALJ Erroneously Failed to Follow the Holding in *Springfield Transit Management*, 281 NLRB 72, 78 (1986) and *The Denham Co.*, 206 NLRB 659, 660 (1973) and 218 NLRB 30, 31 (1975) which Established that Respondent Was a Perfectly Clear Successor Based on the Terms of the P&S Agreement that Obligated Respondent to Retain All of Ashland's Employees (Exceptions 15, 17, 23, 25, 28, and 30-33)**

While the evidence established that the unit employees at the Willow Springs and Fairfield facilities were misled into believing that Respondent would hire them all under substantially comparable terms and conditions of employment, the ALJ could have avoided reversible error by simply following Board law that was right on point. In his decision, the ALJ acknowledged that the Board has applied a perfectly clear successor analysis, and recognized a successor's obligation to bargain before changing the existing terms and conditions, based on the terms of a contract with a third party ALJD p. 16, line 43 to p. 17, line 17, however the ALJ improperly failed to apply this precedent to the instant matter. Thus, in *Springfield Transit Management*, 281 NLRB 72, 78 (1986), the successor employer entered into a service contract with a transit authority whereby it agreed to become the management contractor for the bus line operation. This contract obligated the successor employer to hire its predecessor's employees and maintain their terms and conditions of employment. *Id.* at 78. The administrative law judge in that case explicitly invoked the perfectly clear exception in finding that a successor

employer's contractual commitment to hire the predecessor's employees obligated the successor employer to negotiate initial terms and conditions of employment with the employees' union:

In instances when "it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms," then an obligation to notify and bargain with the Union exists prior to setting any initial terms and conditions of employment . . . I conclude such an obligation existed here when [the successor employer] commenced operations.

. . .

Being bound to hire all [the predecessor's] office clerical personnel, Respondent was thereby bound to recognize their collective-bargaining representative and to negotiate terms and conditions of employment with that representative. Respondent's conditional offer – "we'll hire you if you will work on our terms" – is precisely the kind of ambivalence in which it was not free to engage. Having said, and been required to say, that it would hire the [predecessor's] office staff, it was then obligated to negotiate their initial wages, hours, and terms and conditions of employment with the Union.

Id. (emphasis supplied). Thereafter, the Board adopted the administrative law judge's decision and likewise concluded that the successor employer violated Section 8(a)(1) and (5) of the Act by unilaterally changing the unit employees' terms and conditions of employment. *Id.* at 72.

This case is directly on point to the facts of the instant matter, and clearly supports a finding that Respondent was a "perfectly clear" successor based solely on the terms of the P & S agreement which bound and obligated Respondent to hire all of its predecessor's employees under the terms and conditions they had previously received. The ALJ's failure to so find constitutes reversible error.

To avoid being found a perfectly clear successor, Respondent has attempted to distinguish *Springfield Transit Management* by arguing that the Board in that case should have

instead decided the case on “contract adoption principles.”⁵⁴ However, the fact that Respondent believes that the Board should have based its decision on a different rationale, does not change the actual holding in that case. Furthermore, the Board has never seen fit to overrule or limit the holding in that case since it was decided 25 years ago.

In fact, in *The Denham Co.*, 206 NLRB 659, 660 (1973) and 218 NLRB 30, 31 (1975), the Board likewise found a perfectly clear successor bargaining obligation based, in large part, on the successor employer’s agreement with the predecessor employer to retain its employees for 30 days. The Board there also relied on the absence of a hiatus in operations during which the successor employer interviewed incumbent employees, or others, for the jobs to be filled before it decided whom to hire – indeed, the successor employer retained the employees on the payroll without any interruption. *Id.* However, the Board stressed the terms of the agreement as a key factor in its holding:

[A]ll available evidence indicates that Respondent, on July 28, 1969, the date of formal takeover, planned to retain all of the incumbent employees in the unit. One of the express conditions of takeover imposed by the predecessor-employer, Swift & Company (hereinafter Swift), was that Respondent retain Swift’s employees for a minimum period of 30 days. The record further reveals that, pursuant thereto, all of the unit employees remained on the plant payroll after the takeover date without any interruption in employment.

...

As Respondent planned, as of July 28, 1969, to retain all of the unit employees previously employed by Swift, and did indeed so retain them, an obligation to consult with their bargaining representative before setting initial terms of employment matured at that time. By failing to honor this obligation, we find that Respondent violated Section 8(a)(5) and (1) of the Act.

⁵⁴ The Acting General Counsel does not contend that Respondent was obligated to adopt the expired labor contract between Ashland and the Union. Rather, the terms of that contract remained in effect while Respondent was negotiating an initial contract with the Union. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

The Denham Co., 206 NLRB at 660 (emphasis supplied).⁵⁵ See also *Morris Healthcare & Rehabilitation Ctr.*, 348 NLRB 1360, fn. 2, 1363, 1367 (2006), (Board upheld the ALJ's findings that employer was a perfectly clear successor where County Board approved the transfer of a nursing home to the successor employer and the lease agreement, by its terms, required the successor employer to give employment deference to the predecessor's employees).

Respondent has attempted to distinguish the Board's holding in *The Denham Co.* by arguing that the Board there considered the "totality of the circumstances" to determine whether the successor employer intended to retain the predecessor's employees. But even under such an analysis, the outcome would be identical in the instant matter. Indeed, the same factors cited in *Denham* form an additional basis for finding that Respondent intended to retain Ashland's employees in the instant case, specifically: (1) Respondent's lack of a formal hiring process; (2) its failure to interview the unit employees or other applicants; (3) the P&S Agreement's reference to the unit employees as "transferees;" (4) the stated intent of the parties to avoid severance obligations; (5) the fact that all of the unit employees were provided offers of employment; and (6) the lack of a hiatus in operations. See *The Denham Co.*, 206 NLRB at 660 and 218 NLRB at 31.

Accordingly, Respondent was a perfectly clear successor based on the terms of the P&S Agreement itself which unambiguously obligated Respondent to offer employment to all of Ashland's unit employees under terms and conditions substantially comparable in the aggregate to those provided by Ashland.

⁵⁵ See also *The Denham Co.*, 218 NLRB at 31.

**B. Even if the Terms of the P&S Agreement Did Not Themselves Serve to Convert Respondent to a Perfectly Clear Successor, the ALJ Erred in Concluding that Statements Attributable to Respondent Failed to Render it a Perfectly Clear Successor of the Fairfield Facility by Mid-January 2011 at the Latest.
(Exceptions 2-4, 8, 12-14, 18-21, 23-25, 28, 31, and 33)**

Should the ALJ's conclusions regarding the legal import of the terms of the P&S Agreement be upheld, the GC is of the view that the Judge nevertheless erred in failing to conclude that Respondent rendered itself a perfectly clear successor at the Fairfield facility by no later than January 14, 2011.⁵⁶ The ALJ's failure in this regard is a mix of factual and legal error that can be summarized as follows:

- 1) To the extent that The ALJ failed to attribute to Respondent transition-related statements made in written communications to unit employees between November 7, 2010, and January 14, 2011, the Judge has committed legal error.
- 2) The ALJ erred by making conclusions regarding the substance of transition-related written communications issued to unit employees issued between November 7, 2010, and January 14, 2011, without discussing or addressing the actual substance of those communications.
- 3) The ALJ erred both factually and legally by concluding that Respondent never misled unit employees regarding their anticipated terms of hire.
- 4) The ALJ committed legal error by reasoning that Respondent's employment offer letter rendered its prior transition-related statements moot.
- 5) The ALJ erred by failing accurately to describe the health benefits put at issue in the case and the changes that ensued.
- 6) The ALJ committed both factual and legal error by failing to make findings of fact and conclusions of law rejecting Respondent's impasse defense.

⁵⁶ There is no dispute that Respondent is a successor employer to Ashland Distribution. ALJD at 2 line 35; GC 1(j) (at ¶ 2(c), where Respondent admits its successor status in its Answer); GC 1(w) (Answer) (¶¶ 2(c) and (d)); GC 1(ee) (Answer to Amendment to Complaint) (¶ 1).

The record clearly demonstrated that predecessor Ashland's documented communications to employees were reviewed and approved by Respondent and were therefore attributable to Respondent. Moreover, the documents reveal a consistent messaging stream that served for several months to allay employees' concerns by misleading them into believing that Ashland employees would be retained with essentially no change to their terms and conditions of employment.

1. **The ALJ Committed Legal Error to the Extent that He Failed to Attribute to Respondent Statements Made in the Documented Transition-Related Message Stream Between November 2010 and January 2011 (Exceptions 3 and 8)**

The ALJ made no stated conclusions regarding whether and to what degree the messaging stream documented in GC Exhibits 44 through 76 would be attributed to Respondent. All but one of these documents, however, was allowed into evidence over the repeated objections of Respondent. See Tr. 564-622; 612 (rejecting GC 72.) Thus, the GC reads The ALJ's decision as implicitly reaffirming his decision to allow the records in as attributable to Respondent. See, e.g., Tr. 582-87 (discussing GC 46, the import of Joint Exhibit 1 and concluding, at least tentatively, that an agency link between Respondent and the documents had been demonstrated); 597-602 (discussing GC 56, the import of Joint Exhibit 2, and ultimately allowing GC 56 into evidence). To the extent that The ALJ did not view the documented communications as attributable to Respondent, however, that decision constituted error.

It is well settled that "[a] principal is responsible for its agents' conduct if such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent. In other words, it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted." *Bio-Medical*

Applications of Puerto Rico, Inc., 269 NLRB 827, 828 (1984), quoted with approval in *Tyson Fresh Foods, Inc.*, 343 NLRB 1335, 1337 (2004); see also Fed. R. Evid. 801(d)(2)(D) (“a statement by a party’s agent . . . concerning a matter within the scope of the agency . . . made during the existence of the relationship,” is “not hearsay” but, rather, an admission by the party whose agent made that statement).

‘[A]ctual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied. Apparent authority, on the other hand, results from a manifestation by a principal to a third party that another is his agent. Under this concept, an individual will be held responsible for actions of his agent when he knows or ‘should know’ that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him.’

Tyson Fresh Foods, Inc., 343 NLRB at 1336, quoting Restatement 2d, Agency, § 27.

Finally, there is the concept of ratification. “[R]atification is defined as ‘the affirmance by a person of a prior act that did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.’” *Service Employees Local 87 (West Bay Maint.)*, 291 NLRB 82, 83 (1988), quoting Restatement 2d, Agency § 82. “Affirmance” can be inferred from a failure to repudiate the conduct. *Id.*, citing Restatement 2d, Agency § 94. In particular, where a principal has knowledge of a purported agent’s activity, reaps the benefits of the activity, and fails to disavow the activity, the act or statement is in a sense “affirmed” by and attributable to the principal. See, e.g., *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 without disavowing them); *Southern Pride Catfish*, 331 NLRB 618, 619 (2000) (where non-employee

pastor approached employer about speaking to employee-parishioners, anti-union speeches found attributable to employer because employer was in a “cooperative effort” to oppose the union and failed to disavow the pastor’s message).

In the instant case, Respondent utilized third-party entities to represent its interests in the sale-related transition process. In this regard, John Hollinshead testified that Respondent itself did not have on its staff any “of the normal management staff.” Tr. 401 line 2; see also Tr. 408 lines 20-23. Thus, entities such as PricewaterhouseCoopers and Glover Park were brought in by Respondent to oversee the transition process. Tr. 424 lines 18-25; pages 531-33; page 916 lines 1-9; see also GC 50 (p. 3) (naming, *inter alia*, TPG Capital and PricewaterhouseCoopers as external consultants involved in the transition-focused Separation Team); Joint 2 (describing acquisition-related consulting services performed by persons utilizing PricewaterhouseCoopers and TPG email addresses).⁵⁷

Second, Respondent has admitted that a large majority of the transition-related communications disseminated to Fairfield unit employees were reviewed by its agents at or around the time of their creation. Specifically, Respondent admits in Joint Exhibit 1: “At or around the times that the documents marked as GC Exhibits 44 through 55 were created, the information contained in those documents was shared between agents of Ashland and consultants of Nexeo Solutions, LLC acting in the course and scope of their representative capacities on behalf of Nexeo.”⁵⁸ Respondent admits in Joint Exhibit 2 that persons identified by certain email addresses provided acquisition-related consulting to it, and that the information exchanges documented in GC Exhibits 56-76 “occurred in the course of the [identified] persons acting in

⁵⁷ Hollinshead erroneously referred to Glover Park as “Clover Park.” Cf. Joint 2 (¶ 3).

⁵⁸ GC Exhibits 44 through 55 include all the Transition Update newsletters and, in addition, the November 7, 2010, email from Craycraft announcing the sale (GC 48); the November 8 “Dear Valued Customer” letter from Craycraft (GC 46); the mid-November email and form regarding naming Respondent (GC 47); and the “Key Messages” document relating to the January 13/14 Employee Town Hall meeting (GC 44).

the scope of their representative capacities on behalf of [Respondent].”⁵⁹ From the latter admission, we can tell that draft versions of some of GC Exhibits 44 through 55 were actively reviewed and approved by the identified persons. See, e.g., GC 59, 61, 65, 67, 69, 70, 73, 76.

Because Respondent hired these particular third-parties to represent its interests and to otherwise oversee the sale-related transition; and because the “sharing” and other information exchanges underlying GC Exhibits 44 through 76 admittedly occurred in the course and scope of the third-parties’ representative capacities; the review and approval of GC Exhibits 44 through 76 were “done in furtherance of the principal’s interest and [] within the general scope of authority attributed to the agent.” In other words, the third-party agents had actual authority to engage in the review and approval of communications issued to the predecessor’s employees during the transition process. Thus, statements contained within GC Exhibits 44 through 76 are deemed the statements of Respondent.

The one possible exception to this conclusion is the November 8 Employee Q&A, which appears in the record both as GC Exhibit 40 (in a modified format) and as an attachment to GC Exhibit 56. Tr. 740 lines 3-11. The cover email made a part of GC Exhibit 56 suggests that the content of the Q&A was not shared with Respondent agents until December 2—nearly a month following its initial dissemination. Under the circumstances, however, Respondent clearly ratified the statements within the November 8 Q&A. See *Dean Industries*, supra; *Southern Pride Catfish*, supra. In this regard, GC Exhibit 56 establishes that Respondent agents knew of the Q&A by December 2. Inasmuch as the Q&A supplies answers to employee concerns regarding transition-related operational and HR matters, Respondent would benefit by the document’s tendency to allay concerns and keep employees on board with the process.

⁵⁹ Respondent flatly admitted the agency status of the persons utilizing the email addresses “mlugol@aol.com” and “davidbradley88@gmail.com.” Joint 2, ¶ 4.

Finally, Respondent could point to no disavowal of the November Q&A at any time prior to the February 16 meeting with Local 70—over three months after its dissemination, over two months after Respondent’s proven receipt of it, and after the knowing issuance of repeated communications mirroring messaging contained in the November 8 Q&A. See, e.g., GC 47 (mid-November “What’s in a name” distribution referring to the reader as “a ‘founding’ employee of the new Distribution Company.”); GC 41, 58 (December 6 Q&A iterating that “[o]ver 2,000 employees have already been notified that they will transfer to the new company” and that Respondent would recognize employees’ Ashland service time); GC 49 (p. 2-3) (December 16 Transition Update stating, *inter alia*, that Respondent’s “goal is to provide new ID badges for all Ashland Distribution employees by Day One . . . The badges will identify you as employees of the new company.”); GC. 44 (p. 3) (“Key Messages” script for January 13/14 Town Hall Meeting stating, *inter alia*, “The AD Leadership Team remains in place;” “we do not anticipate major changes in the rest of the organization;” and “We’re not planning job reductions.”). In other words, the message that Ashland employees would be hired without material (if any) change to their terms of employment, as contained in the November 8 Q&A, was repeatedly and knowingly emphasized by Respondent to the unit employees.⁶⁰ And, even assuming Respondent could argue that its statements in the February 16 meeting served to clarify and disavow prior inconsistent statements regarding employee health and retirement benefits, the disavowal was untimely.⁶¹ See, e.g., *Passavant Mem. Area Hosp.*, 237 NLRB 138-39 (1978)

⁶⁰ The consistency in transition-related messaging should come as no surprise given the P&S Agreement’s requirement that transition-related communications to third parties and employees be reviewed and approved by both parties prior to dissemination. See GC 6 (§ 11.7).

⁶¹ The theory of ratification applies with equal force to the entirety of the communications introduced as GC 44 through 76. In this regard, it is clear that the content of these materials was reviewed by agents of Respondent. Respondent benefitted from the dissemination of the communications inasmuch as the documents served to allay employee concerns regarding the transition and kept them focused on their work tasks. Finally, there was no later disavowal of the communications. Thus, even if the pertinent agents are not deemed to have been acting with actual authority in performing their communications review tasks, they nevertheless supply Respondent with knowledge of

(attempted disavowal of prior unlawful conduct, issued seven weeks after, was untimely); *Red Arrow Freight Lines*, 289 NLRB 227, n.1 (1988) (under *Passavant* and its progeny, disavowal posted more than 5 months after the event was untimely); *EPE, Inc.*, 284 NLRB 191, n.1 (1987) (disavowal about a month after the event was untimely); cf. *Raysel-IDE Inc.*, 284 NLRB 879, 881 (1987) (disavowal 24 hours after the event was timely); *Broyhill Co.*, 260 NLRB 1366 (1982) (disavowal 5 weeks after the event, and immediately after higher management learned of a supervisor's misconduct, was timely).⁶²

Under the circumstances, Respondent must be held to account for the communications contained in GC Exhibits 44 through 76. The parties were *required* by the terms of the P&S Agreement to share and approve each other's transition-related communications. Documentary evidence, combined with Joint Exhibits 1 and 2, demonstrate that they followed the dictates of their agreement. Specifically, Respondent agents reviewed and often edited and approved the text contained in the communications. Under well-established common law agency principles, the statements were Respondent's. Alternatively, Respondent ratified the statements. Either way, to the extent The ALJ failed to view the statements contained in GC Exhibits 44 through 76 as attributable to Respondent, that failure constituted legal error and the Board should reverse.

the content and dissemination of the communications and, for the reasons stated, Respondent otherwise ratified the communications so as to render them their own. See *Dean Industries*, supra; *Southern Pride Catfish*, supra.

⁶² Indeed, in applying common law agency principles, the courts have historically demanded the principal's prompt or immediate action to timely effect a disavowal. See, e.g., *Clews v. Jamieson*, 182 U.S. 461, 484 (1901) ("The failure of the complainants to repudiate the action of their agents in the sale immediately after it was reported to them would operate as a ratification."); *Indianapolis Rolling Mill v. Railroad*, 120 U.S. 256, 259 (1887) ("The rule of law upon the subject of the disaffirmance or ratification of the acts of an agent required that, if they had the right to disaffirm it[, t]hey should do it promptly . . ."); see also *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 592 (1875) ("The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done, after the party with whom that right is optional is aware of the facts which give him that option, are numerous . . ."); *In re Wellesley*, 252 F. 854, 856 (D.C. Cal. 1917) (purported admission successfully disavowed "at once," i.e., the day following the partners' cognizance of the admission).

2. **The ALJ Erred By Making Conclusions Regarding the Substance of Transition-Related Communications Issued to Employees While Failing to Discuss or Address Those Same Communications (Exception 3)**

In the section of the ALJD describing the facts pertinent to the Fairfield, California facility, The ALJ essentially picks up the story at February 16. No mention is made of the many transition-related communications distributed to the Fairfield unit employees between November 7, 2010, and January 14, 2011. See ALJD at 13-15. Earlier, The ALJ makes brief mention of three transition-related questions and answers distributed to employees. See ALJD at 5 (quoting portions of GC Exhibits 40/56). While the Judge admits that “[m]any other documents” with similar assurances were disseminated, he goes on to conclude in part that “the communications made clear that the benefits would be different and the employees would be informed of them as soon as they were developed.” *Id.* at 5 lines 24-25, 29-30.

The ALJ reached this conclusion without addressing, quoting or even citing to the pertinent communications. The Judge’s conclusion is therefore unsupported by record evidence and constitutes error.

3. **The ALJ Committed Both Factual and Legal Error by Concluding in Part that the Transition-Related Messaging Stream Did Not Mislead Fairfield Unit Employees in a Manner Sufficient to Render Respondent a Perfectly Clear Successor Before the February 16, 2011 Meeting with Local 70 (Exceptions 4, 18-21, 23, 25, 28, 31, and 33)**

Despite finding that [t]here was little doubt that a majority, if not all, of the [unit] employees, would under these conditions accept employment at Nexeo,” ALJD at 15 lines 41-43, The ALJ concludes, without citation to evidence, that “the employees and the Unions were never misled into believing that their benefits would be *identical* as opposed to *comparable in the aggregate* to the ones they enjoyed at Ashland. Rather, the communications made clear that the

benefits would be different and the employees would be informed of them as soon as they were developed.” ALJD at 5 lines 27-30; see also page 17 lines 37-38 (emphasis in original). The GC avers that the first conclusion misses the legal point, and that Respondent’s use of the term “comparable in the aggregate” and similar vague phrases failed to properly put employees on notice that their terms of hire would include materially changed circumstances. Moreover, the second conclusion is wrong as a matter of fact and law. Contrary to the ALJ’s erroneous conclusion, the various communications distributed to unit employees between November 2010 and January 2011 rendered Respondent a perfectly clear successor and Respondent was therefore prohibited from establishing terms and conditions different than those initially offered to entice unit employees to remain in Respondent’s employ.

As the ALJ correctly set forth, the “perfectly clear” exception applies when the successor’s communications actively or implicitly mislead employees into believing that they will be retained by the successor under the same terms and conditions, or where the intention to hire employees under materially changed circumstances is not clearly communicated. ALJD at 16 lines 32-37 (citing *Spruce Up Corp.*, 209 NLRB at 195). This standard requires “both a manifestation of intent on the part of the employer to retain all or substantially all of its predecessor’s employees and also a substantial likelihood that those offered employment will accept it.” *DuPont Dow Elastomers, LLC*, 332 NLRB 1071, 1073 (2000), enf’d 296 F.3d 495 (6th Cir. 2002) (employer found to be perfectly clear successor where it had remained silent and withheld any notice of changes in preexisting terms and conditions until hiring and acceptance process was already underway). For, at bottom, the perfectly clear caveat demands an inquiry into the “degree of likelihood that incumbents will work for the successor.” *Road & Rail Servs.*, 348 NLRB at 1162, n.13 (quoting *Machinists v. NLRB*, 595 F.2d at 673, n.45).

The instant case presents a situation in which repeated communications attributable to Respondent indicated that it would hire all or substantially all of Ashland's employees while for months failing to indicate that the terms of hire would include materially changed circumstances. It was not until the February 16, 2011, meeting with Local 70 that Respondent made clear that it would not be adopting the CBA's terms and that unit employees' initial conditions would not include coverage under the Teamster's PEER 80 plan, among other changes. See ALJD at 13; Tr. 644; 956; GC 81 (draft employment offer letter). The vagueness of phrases such as "comparable in the aggregate" simply fail to alert employees that their hiring terms will change in any material way. There was thus no reason to suspect, based on such statements, that the unit employees would not accept employment. See, e.g., *Elf Atochem North America, Inc.*, 339 NLRB at 796, 808 (informing employees that they would receive equivalent salaries and comparable benefits insufficient to communicate changes substantial enough to call into question the likelihood of majority employee acceptance).

(a) **Respondent Rendered Itself a Perfectly Clear Successor by Mid-November 2010**

As of the signing of the November 5, 2010, P&S Agreement, Respondent was obligated to retain all of the Fairfield unit employees under the terms consistent with Agreement's provisions. ALJD at 5:1-2; Tr. 940:9-14; GC 6 (§§ 7.5(a)-(c)). Respondent thereafter set out to do so, and communicated as much to the unit employees. By mid-November 2010, the following documents and communications—indisputably shared with Respondent agents, and thus imputable to Respondent—had been disseminated to and received by Fairfield unit employees:

- GC 48: November 7 Email from Craycraft entitled “Creating a New Course for Ashland Distribution” stating, most importantly:
 - “. . . I am proud to lead this team into the future. TPG . . . is committed to supporting a thriving, growing distribution business that creates a strong future for all of us.”
 - “Looking forward, we are being given the chance to build our own future as an independent distribution business. We’ll take the best of Ashland with us”
 - “In total, we anticipate approximately 2,000 Ashland Distribution employees and dedicated resource group and supply chain partners will transfer to the new business.”

- GC 46/80: November 8 “Dear Valued Customer” letter forwarded to Local 70 by Fusco stating, most importantly:
 - “Our goal is to ensure a seamless transaction to Ashland Distribution operating as an independent distribution business.”
 - “The same great people will provide the same great service.”
 - “Today, it is business as usual.”

- GC 40/56: November 8 Employee Q&A stating, most importantly:
 - “Will Ashland Distribution’s current management team remain in the business? Yes, the current management team will transfer with the business.”
 - “What plans are known for other Ashland Distribution offices? No immediate changes are planned.”
 - “Does the newly independent company anticipate any layoffs as a result of the transaction? Broadly speaking, the newly independent company’s intent is 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.”
 - “Does the newly independent company anticipate any changes to compensation and/or benefits? Under the terms of the agreement, for at least the 18 months following closing, the newly independent company 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.”

- “What do Ashland Distribution employees do between now and the transaction’s closing? Should employees do anything differently? Please continue to remain focused on your work and on conducting business as usual.”⁶³]
- GC 47: Mid-November announcement by Craycraft regarding the contest to name the new company stating, most importantly:
 - “Now that we’ve charted our new course for Ashland Distribution, it’s time to name the boat, so to speak.”
 - “As a ‘founding’ employee of the new Distribution Company, we’d like to solicit your ideas for our new company name, tagline and colors.”

The clear message conveyed in these communications is that the unit employees need not worry: they will be hired onto the new team—as “founding employees,” no less—and that, per the requirements of the P&S Agreement, employees’ terms of employment would remain essentially the same. Admittedly, the November 8 Q&A contains the statement “Employees will be notified as soon as possible about whether they will transfer to the newly independent company and will receive employment offers prior to closing.” (GC 40, 56.) It is immediately after this, however, that the Q&A states Respondent’s “intent . . . to retain Ashland employees” and that “Ashland Distribution people . . . will continue to work from their current locations and perform similar roles and functions.” Indeed, the unit employees had already been identified as among those who would be offered employment, and Respondent was obligated to do so under the P&S Agreement. In total, the communications serve to convey the impression that all

⁶³ Two additional communications received by Fairfield unit employees by this time, GC Exhibits 93 and 94, contained reiterations of several of the statements contained in GC Exhibits 48 and 40/56. Specifically, GC Exhibit 93 (“AD NewCo elevator speech”), states “All individuals currently dedicated to supporting the existing Ashland Distribution will be transferred to the new organization,” and estimates the number of transferees as approximately 2000 employees. In addition, the second page of GC Exhibit 94 (“Talking Points for Customers”) lists under things “not changing,” “All current AD employees are staying with the business.” GC Exhibits 93 and 94 are not, however, shown by Joint Exhibits 1 or 2 or by other documents to have been reviewed or approved by Respondent’s agents.

Ashland Distribution employees would at least be given offers of employment—an impression clearly flowing from Respondent’s contractual obligations.

The statements here described are precisely the kind of assurances historically relied on by the Board to find a perfectly clear successor. See, e.g., *Spitzer Akron, Inc.*, 219 NLRB 20 (1975) (before taking over operations, employer stated “I want every man to stay on the job, and we will carry on as usual.”); *Morris Healthcare & Rehabilitation Ctr.*, 348 NLRB at 1363 (stating, inter alia, “there would be a smooth transition, everything would remain the same”); *Fremont Ford*, 289 NLRB 1290, 1296-1297 (1988) (among other assurances, respondent’s owner indicated to the union representative that he had doubts about retaining only a few of the predecessor’s employees, and a supervisor directly informed two employees that they would be retained and assured another employee that nothing was going to change when the respondent took over operations).

That Respondent did not explicitly promise that employees’ terms of hire would be *identical* is of no import inasmuch as Respondent’s November communications were too vague to place employees on notice that material changes would ensue. *Rosdev Hospitality*, 349 NLRB 202, 207 (2007) (“generalized or speculative statements that a successor employer may make future unspecified changes are not sufficient to put employees on notice.”) (citing *East Belden Corp.*, 239 NLRB 776, 793 (1987)); see also *Fremont Ford*, 289 NLRB at 1296-97 (stated desire to alter seniority system and institute flat pay rate insufficient to indicate intent to establish new terms). In this regard, the *Elf Atochem* decision is squarely on point.

As in our case, the respondent in *Elf Atochem* had agreed to purchase certain assets of the predecessor. 339 NLRB at 798. Soon after announcement of the sale, the predecessor and respondent-successor issued a joint memorandum to employees then working for the

predecessor. The memo, issued in question and answer format, stated the respondent-successor's intent to retain the predecessor's employees. It went on to state that employees could expect "equivalent salaries and comparable health, welfare and benefits package, including pension, savings plan and vacation." *Id.* The purchase agreement also required respondent-successor to offer employment to all employees dedicated to the predecessor's operation. *Id.* at 808. On these facts, a Board majority agreed with the ALJ's determination that, as of the issuance of the memorandum, respondent-successor became a perfectly clear successor, *id.* at 796, 808, and, specifically, that "[t]he term "comparable" used in the Respondent's message was not specific enough to clearly inform employees of the nature of the changes which Respondent intended to institute in the future." *Id.* at 808. Therefore, the changes instituted as of the later date of hire of the predecessor's employees violated the Act. *Id.* at 809.

If one compares the Respondent's communications to those at issue in *Elf Atochem*, Respondent's perfectly clear status as of mid-November 2010 is confirmed. See, e.g., GC 48 ("... we are being given the chance to build our own future as an independent distribution business. We'll take the best of Ashland with us . . ."), ("... we anticipate approximately 2,000 Ashland Distribution employees and dedicated resource group and supply chain partners will transfer to the new business."); GC 46/80 ("Our goal is to ensure a seamless transaction to Ashland Distribution operating as an independent distribution business."), ("The same great people will provide the same great service."); GC 40, 56 ("Broadly speaking, the newly independent company's intent is 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."), ("... the newly independent company is required to provide . . . 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.”); GC 47 (“As a ‘founding’ employee of the new Distribution Company, we’d like to solicit your ideas for our new company name, tagline and colors.”). In short, and as in *Elf Atochem*, Respondent communicated that the employees would be employed by Respondent while failing to clearly place employees on notice that their terms of hire would contain material changes. The conclusion is, in part, bolstered by the requirements of the P&S Agreement.⁶⁴ The ALJ’s failure to so conclude constituted legal error.

Moreover, The ALJ was wrong as a matter of fact when he states in his Decision that “the communications made clear that the benefits would be different and the employees would be informed of them as soon as they were developed.” ALJD at 5:29-30. None of Respondent’s communications to employees by mid-November contained the message that employees could expect different terms of employment to be fleshed out later. See GC 46, 47, 48, 40/56, 93, 94.⁶⁵ The ALJ’s factual conclusion to the contrary is therefore error. In addition, even if Respondent indicated vaguely that further details were forthcoming regarding benefits, such communications constitute “generalized or speculative statements” insufficient to place employees on proper notice. See *Rosdev Hospitality*, 349 NLRB at 207 (quoting *East Belden Corp.*, supra); *Elf Atochem North America, Inc.*, supra. The conclusion thus constitutes legal error as well.

⁶⁴ See, e.g., *Morris Healthcare & Rehabilitation Ctr.*, 348 NLRB 1360, fn. 2, 1367 (2006) (relying on the successor’s contractual obligations and verbal assurances to find a perfectly clear successor); see also *Springfield Transit Mgt.*, supra; *The Denham Co.*, supra.

⁶⁵ The closest such reference is found in GC 94 when, in a November 12 email, Craycraft states, “Resolving the questions about employee benefits is a top priority. [] We want a competitive total package, and to achieve this will take very diligent efforts.” First, this is not one of the documents demonstrated by Joint Exhibits 1 and 2 to have been reviewed by, and thus attributable to, Respondent. Second, the email was issued after all but possibly one of the communications relied upon to demonstrate perfectly clear status, i.e., GC 46, 47, 48, and 40/56, with GC 47 being the only communication possibly issued after November 12. Third, and especially considering the other communications disseminated just prior to this one, the statement falls well short of indicating with clarity that employees could expect material changes to their initial terms of employment.

(b) Respondent's Consistent Message Stream Further Supports It was a Perfectly Clear Successor

Similarly, the ALJ's failure to conclude that Respondent's December 2010 and January 2011 communications with employees further established Respondent as a perfectly clear successor to Ashland, constituted both legal and factual error. Thus, in addition to those communications discussed with regard to the mid-November date, the following additional communications were disseminated to and received by Fairfield unit employees:

- GC 41/58: December 6, 2010, Employee Q&A stating, most importantly:
 - "How will the pending sale of Ashland Distribution affect staffing in the Resource Groups, e.g., Corporate Real Estate, Tax, Law, etc? [. . .] Over 2,000 employees have already been notified that they will transfer to the new company on the day after the sale closes."
 - "Will employees transferred to the new distribution company retain their service time with Ashland? Yes, TPG has agreed to recognize service time."
- GC 49: December 16, 2010, Issue 1 of the Transition Update stating, most importantly:
 - "Coming up with Ashland Distribution's new name: Sandstrom Partners, a strategic brand design firm, is assisting us with a name and brand identity. Some of you met with them last week to give your input on what we stand for and how we want our new company to be recognized. Thank you for participating."
 - "The goal is to provide new ID badges for all Ashland Distribution employees by Day One . . . The badges will identify you as employees of the new company."

The highlighted statements continue the refrain from the November-issued communications, the clear message being that the Ashland Distribution employees would be offered employment (if not simply transferred) to Respondent. It is particularly significant that Respondent notified the unit employees that it would recognize Ashland service time for those

retained by Respondent. See, e.g., *Elf Atochem North America, Inc.*, 339 NLRB at 796, 808 (employer assuring, *inter alia*, that it would recognize predecessor employees' seniority). In addition, the December 16 notice is particularly clear-cut when it states Respondent's intention to "provide new ID badges for all Ashland Distribution employees by Day One." Again, these statements are consistent with Respondent's contractual obligation to make offers of employment to the Fairfield unit employees.

At the same time, mention of new or different terms and conditions of employment is conspicuously absent.⁶⁶ Indeed, contrary to The ALJ's conclusion, GC Exhibits 41/58 and 49 contain no communication that different or altered hire terms were to be expected but fleshed out later.⁶⁷ But for the vague and imprecise references made in GC Exhibit 94, discussed above, no communications issued to the unit employees by December 16 contained the message that hiring terms would be altered materially and that the details of those alterations would be forwarded later. Again, The ALJ's conclusion to the contrary constitutes both factual and legal error.

In January, 2011, the following additional communications were disseminated to and received by Fairfield unit employees:

- January 13 Employee Town Hall Meeting - Fairfield unit warehousemen attended the meeting by conference call (Tr. 764-66) and, according to testimony and a

⁶⁶ In the December 6 Q&A, there is a question and answer relating to "employees in departments that support all AD lines of business." GC 41, 58 (¶ 1). The response is similar to one issued with the November 8 Q&A: that "Employees will be notified as soon as possible about whether they will transfer to the newly independent company and will receive employment offers prior to closing." *Id.* Although the record is unclear as to whether the Fairfield unit employees "support[ed] all AD lines of business," this document and others seem to draw a distinction between such employees and the Ashland Distribution employees. See *Id.* at ¶ 3 (referring to "Ashland Distribution teams"); GC 49 (referring to "Ashland Distribution employees"). At any rate, the possible hedge of Paragraph 1 of GC 41/58 cannot overcome the earlier assurance that Respondent intended to "retain Ashland employees" (GC 40, 56) and the later, clearer statement that Respondent was "to provide new ID badges for all Ashland Distribution employees by Day One . . . The badges will identify you as employees of the new company." GC 49. Respondent is clearly expressing the inevitability, as required by the P&S Agreement, that the unit employees would be transferred or offered employment. See GC 6, (§§ 7.5(a)-(c)); Tr. 940 lines 9-14.

⁶⁷ Nor, for that matter, does the cover email to the December 6, 2010, Q&A, GC Exhibit 95, make reference to changed initial terms to be detailed later.

“Key Messages” script prepared for use in the meeting (GC 44; Joint 1), heard the following important messages:

- Craycraft communicated his excitement about the transition, that jobs would not be lost and, in fact, that the business would grow and that more employees would likely be added.
 - Craycraft stated that he would take on the role of Respondent’s Chief Commercial Officer.
 - Craycraft announced that David Bradley would be Respondent’s CEO.
 - Craycraft spoke inclusively about the opportunities that awaited them all.
 - Respondent CEO David Bradley stated: “The AD Leadership Team remains in place.”
 - Bradley stated: “[W]e do not anticipate major changes in the rest of the organization,” and “We’re not planning job reductions.”
 - Bradley stated: “We are working hard to flesh out final plans for our new company’s compensation and benefits program.”
 - Both Craycraft and Bradley exhort employees to continue to work hard toward the transition.
- GC 50: January 14, Issue 2 of the Transition Update stating, most importantly:
 - In reference to the January 13 Town Hall meeting, Craycraft states that he “shared that TPG has asked me to take on the new role of Chief Commercial Officer.”
 - Craycraft goes on: “We also announced that David Bradley...will serve as President and CEO of our future company.”
 - Craycraft promises to deliver a “mission” to “provide a glimpse of the future we know we can build, together,” and “to provide final details of our compensation and benefits plan” so as to “help us retain current and attract future employees.”
 - Bradley states: “We’ll face some challenges together. No question, if you remain focused on growing our business, the opportunities will be there.”
 - Again, both Craycraft and Bradley exhort employees to continue to work hard in their jobs.

There can be little doubt that, in combination with the November and December 2010 statements, the January 13 and 14, 2011, communications served to place the Fairfield unit employees on notice that they would be retained with little to no change to their terms of employment. Bradley's statements that "[W]e do not anticipate major changes in the rest of the organization," and "We're not planning job reductions," cannot be clearer. In addition, the January 2011 communications continue the inclusive, forward-looking messaging contained in the November and December 2010 communications. The statements remain consistent with Respondent's obligations under the P&S Agreement.⁶⁸

While the "Key Messages" document vaguely notes that Respondent was "working hard to flesh out final plans for [its] compensation and benefits program," (GC 44, p. 3.), and while a similar statement is made in the January 14 Transition Update (GC 50, p. 2), those statements were made in the context of Respondent already having conveyed that the P&S Agreement required it to "provide . . . 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." GC 40, 56 (November 8 Q&A). Thus, while The ALJ is correct that, as of January 14, Respondent had given some indication that more details regarding compensation and benefits were forthcoming, he is still incorrect that Respondent "made clear that the benefits would be different and the employees would be informed of them as soon as they were developed." ALJD at 5:29-30. The statements in GC Exhibits 44 and 50 do not convey that compensation or benefits would necessarily be different

⁶⁸ Nor can there be any doubt that the January statements of Craycraft and Bradley are properly imputed to Respondent. In addition to the "Key Messages" and January 14 Transition Update being indisputably reviewed by agents of Respondent, Craycraft and Bradley announced their hires as high-ranking agents. Bradley's status certainly is not in doubt. See, e.g., GC 1(ee), (¶ 2) (admitting that Bradley is Respondent's President and CEO and, as such, was a supervisor and agent of Respondent). If Craycraft and Bradley did not have actual authority to make the statements they did, the Town Hall meeting and subsequent Transition Update certainly gave the reasonable employee the impression that they were speaking as agents of Respondent, thus demonstrating their apparent authority.

and, given prior communications, certainly did not indicate that material changes were to be expected. The ALJ's factual conclusion to the contrary again constitutes error.

Additionally, "generalized or speculative statements that a successor employer may make future unspecified changes are not sufficient to put employees on notice." *Rosdev Hospitality*, 349 NLRB at 207 (citing *East Belden Corp.*, supra); see also *Elf Atochem North America, Inc.*, supra. The statements in GC Exhibits 44 and 50 are clearly insufficient to place employees on proper notice that material changes—i.e., a complete alteration to their retirement plan and changes to their health insurance coverage—were in the offing. The ALJ's conclusion to the contrary thus constitutes legal error as well.

Respondent's communications from November 2010 through January 14, 2011 consistently conveyed an inclusive, forward looking message to unit employees; clarified Respondent's intention to offer employment to the Ashland employees, in keeping with its obligations under the P&S Agreement; and failed to specify changes to employees' terms and conditions of employment, and thereby rendered Respondent to be a perfectly clear successor. The ALJ's failure to so conclude constitutes error.

4. **That Respondent Later Clarified its Intent to Hire Employees Under Materially Altered Terms Is of No Legal Import (Exceptions 18-21)**

In rejecting the Acting General Counsel's second theory of violation as to the Fairfield, California unit employees, The ALJ additionally concluded as follows:

The General Counsel is correct that had Nexeo told employees that they would receive benefits that were "substantially equivalent" or "comparable" without a more detailed explanation, it could have been a perfectly clear successor because it would not have sufficiently advised employees of the details of their initial terms. *Elf Atochem North America*, 339 NLRB 796, 796, 808 (2003). But here Nexeo did, in a timely fashion, provide the employees with specific details concerning the initial terms.

ALJD at 17-18 lines 46-48, 1-4. The conclusion contained in the second sentence is wrong as a matter of law.

As already discussed in this brief, in *Canteen Co.*, 317 NLRB at 1053, the Board applied the perfectly clear exception to a successor employer, who merely expressed to the union a desire to have unit employees serve a probationary period, since it “did not mention in these discussions the possibility of any other changes in its initial terms and conditions of employment.” *Id.* at 1052. The employer’s clarification concerning its intention to implement material changes, after initial discussions with the union but prior to its presentation of formal employment offers to employees, did not alter the legal significance of its earlier-issued perfectly clear assurances. *Id.* at 1053. Indeed, the Board discussed this point at length, concluding “because the Respondent did not announce the new wage rates until June 23, after it had effectively announced its intent to retain the predecessor employees, we agree with the judge that the Respondent violated the Act by unilaterally changing the terms and conditions of employment.” *Id.* at 1054.

The same outcome was reached on similar facts in *Elf Atochem*, supra. There, the respondent-successor’s perfectly clear assurances on January 27 came well before its written employment offers, issued in October, conveying specific and substantial changes in initial terms. 339 NLRB at 798-99, 801-02. Citing *Canteen Co.*, amongst other cases, the ALJ concluded in part:

an actual offer of employment is not required to establish the “perfectly clear” successor’s obligation to bargain. Rather, it has an obligation to bargain over initial terms of employment when it displays an intent to employ the predecessor’s employees without making it clear to those employees that their employment will be on terms different from those in place with the predecessor employer.

Id. at 807; see also *Fremont Ford*, 289 NLRB at 1296-1297 (employer manifested intent to retain the predecessor's employees, but did not announce material changes in initial terms until conducting hiring interviews); *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976), enf. denied in relevant part sub. nom., *Nazareth Reg'l High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977) (employer told the union that it intended to hire all of the predecessor's lay teachers, but did not mention any changes in terms and conditions of employment until forwarding hiring contracts to the teachers, prior to the actual hire).

The cases stand in part for the proposition that a successor will render itself a perfectly clear successor once it conveys the message to employees (or their union) that a majority of the predecessor workforce will be retained without simultaneously communicating that the initial terms of hire will be altered. Given this type of communication, there is no reason to suspect that a majority of the predecessor's workforce would refuse employment with the successor. Therefore, once such communication has occurred, the perfectly clear successor's subsequent clarification of its intent to alter initial terms is of no legal import—the bargaining obligation over initial terms has been fixed. In the instant case, Respondent's perfectly clear bargaining obligation was fixed as early as November, 2010 and no later than January 14, well before Respondent conveyed specific and materially altered terms to Local 70 and its members. Inasmuch as The ALJ relied on the February 16 transmission of information to Local 70 to essentially absolve Respondent of its earlier assurances and to wash away the earlier-fixed bargaining obligation, the conclusion constituted legal error.

5. **The Judge Erroneously Described the Health Benefits Put at Issue in the Case, and Failed to Find Changes Instituted to Them Upon Respondent's April 1, 2011, Take-Over of Operations (Exceptions 12-14)**

At several points in his decision, The ALJ referred to changes to employees' health benefits by way of Respondent's move away from "Local 70's health insurance fund." ALJD p. 14, lines 16-17; see also ALJD p. 13, lines 10-11 (erroneously referencing a move away from "Local 705's health and welfare" fund). While the initial Complaint made reference to a Local 70 health and welfare fund (GC 1(u) (§ 7(a)), the Amendment to Complaint altered the allegation so as to allege unlawful changes to unit employees' health benefits in effect at the time of the April 1 transition. GC 1(cc) (§ 7(a)). Thus, to the extent The ALJ described the alleged changes to Fairfield unit employees as an abandonment of a Local 70 health and welfare fund, he erred.

Moreover, during the hearing the Acting General Counsel narrowed this particular allegation to cover only changes related to vision care and to the "Alive & Well Labwork" benefit. Tr. 567-68, lines 22-25, 1-4; 1022, lines 20-21. In this regard, the record established that the Fairfield unit employees enjoyed these benefits prior to the April 1 transition and experienced changes to them upon the transition. In particular, employees' vision plan was altered such that their coverage options and the costs differed as between Ashland and Respondent. Compare GC 79 (Ashland 2011 Annual Benefits Enrollment Guide) (p. 7) with GC 37 (Nexeo Solutions Benefits Enrollment) (p. 8). In addition, the "Alive & Well Labwork" benefit, available under Ashland (GC 79, p. 31), was discontinued under Respondent. GC 37; Tr. 1061:12-16.

To the extent that The ALJ failed to particularize the vision and "Alive & Well Labwork" benefits enjoyed by the Fairfield unit employees under Ashland, and further failed to find the changes to them implemented by Respondent upon its April 1 take-over of operations, the Judge erred.

6. **Inasmuch as it Was Raised, The ALJ's Failure to Find and Conclude that There Was No Good Faith Impasse Prior to the April 1 Implementation in Fairfield Constituted Error (Exception 24)**

It is anticipated that Respondent will argue, as to the Fairfield facility, that the parties had reached good faith impasse by the time it implemented its initial terms of employment.

Although The ALJ made some findings of fact relevant to the impasse issue, he did not pass on the legal question. Inasmuch as the Judge failed to set out facts relevant to the issue, and furthermore failed to reject the impasse defense, there has been error.

The party asserting the existence of a bargaining impasse bears the burden of proof to demonstrate an impasse. See, e.g., *EAD Motors Eastern Air Devices, Inc.*, 346 NLRB 1060, 1063 (2006). Impasse occurs when there is “no realistic possibility that continuation of discussion at the time would have been fruitful.” *Sacramento Union*, 291 NLRB 552, 557 (1988), enfd. mem. sub nom. *Sierra Publ'g Co. v. NLRB*, 888 F.2d 1394 (9th Cir. 1989); see also *EAD Motors Eastern Air Devices, Inc.*, 346 NLRB at 1063 (defining impasse as “a situation where good-faith negotiations have exhausted the prospects of concluding an agreement.”) (internal quotations and citations omitted). “The question of whether a valid impasse exists is a ‘matter of judgment’ and among the relevant factors are ‘[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations.’” *EAD Motors Eastern Air Devices, Inc.*, 346 NLRB at 1063 (quoting *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967)).

Here, the parties held only three bargaining sessions (March 22, 23 and 29) prior to Respondent's April 1 implementation. ALJD at 13-14; Tr. 648-50; 961-64. With breaks, each session lasted approximately 6-and-a-half hours, meaning that the parties actually bargained less

than nineteen-and-a-half hours. See Tr. 981:11-17; 1053. Setting aside discussion of the 401(k) issue on March 22, economics were not even broached until the final session on March 29.

ALJD at 13-14. Given the limited discussion of economics and the fact that this was bargaining with a new employer, engaging in only three sessions prior to implementation strongly militates against a finding of impasse. See *Pratt Industries, Inc.*, 358 NLRB No. 52, at *12 (June 5, 2012) (citing *Monmouth Care Ctr.*, 354 NLRB 11, 59 (2009), *affd.* by 356 NLRB No. 29 (2010)).

The withholding of essential proposals and information also precluded impasse. Respondent's initial proposal did not include a forward-looking wage proposal. GC 83 (p. 3); see also ALJD at 14:8-9. Indeed, it appears that Respondent did not make its first forward-looking wage proposal until *after* the March 29 bargaining session, by email dated March 30. Tr. 992-93; 995-96; GC 90 (p. 3-4); R 38. Little discussion appears to have been had regarding wages.

As for the proposed changes in health benefits, Local 70 had requested the pertinent SPD well prior to the initiation of bargaining. Tr. 648-49. It was not until around October 2011 that Respondent supplied a copy of the SPD to the Union—some seven months after the April 1 implementation. Tr. 680-81; R 48. The most detailed health benefits information Local 70 received at this time came via March 31 emails from Fusco. Tr. 680; R 1; Tr. 1000-01; R 41. Moreover, the particular changes attacked as unlawful—the changed terms to the vision plan and the abandonment of the Alive & Well Labwork benefit—were never explicitly discussed in pre-April 1 bargaining. Tr. 662; 667; 676.

Detailed information regarding the 401(k) plan was provided to Local 70 throughout the three days of March bargaining. However, Local 70 did not receive the SPD for Respondent's 401(k) savings plan until around October 2011. Tr. 681-82. Moreover, information requested by

the Union further detailing Respondent's computations was not supplied until March 30. Tr. 997-98; R 39. Although not alleged to be unlawful, Respondent's delay in providing information going to essential economic issues had a negative impact on Local 70's ability to intelligently bargain. See, e.g., *Dependable Bldg. Maint. Co.*, 274 NLRB 216 (1985) (because union did not have relevant information for a sufficient period of time prior to implementation, implementation was unlawful).

Local 70's movement on key terms also demonstrates the absence of impasse. As to one of the primary issues in bargaining—the adoption of 401(k) plan—Local 70 clearly signaled its willingness to consider alternative proposals to accommodate Respondent's desire to move away from the Teamsters' PEER 80 pension plan. Specifically, Fusco recalled Local 70 proposing that the amount that Ashland used to contribute to the pension be allocated to employees' wages instead. Tr. 993-94; 1036. In post-April 1 bargaining, Local 70 made a further proposal premised on shielding Respondent from certain pension-related liabilities for a particular period of time. Tr. 1013-14. Local 70's proposed modifications to this key term provides further evidence that no impasse was reached as of the April 1 implementation. See *Pratt Industries, Inc.*, 358 NLRB at *12 (citing cases); see also *Anderson Enterprises*, 329 NLRB 760, 772 (1999) (proposal by union regarding key term in negotiations signaled willingness to consider employer's position and potential fruitfulness of further negotiations).

Indeed, significant progress occurred in both pre- and post-April 1 bargaining. It is undisputed that, on the morning of the March 29 session, the parties reached agreement on the final non-economic proposal. Tr. 668; 989: 19-20; see also ALJD at 14:2-6. Moreover, the proposal Local 70 members ultimately voted on, in October 2011, contained significant alterations to Respondent's positions as of March 31. Tr. 686-87; 1017; cf. GC 90 with GC 91.

The history of significant movement by both parties helps demonstrate that there was, in fact, room to explore the various outstanding issues.

Perhaps most importantly, the parties signaled to each other that further bargaining was possible. Respondent never claimed that the parties were at impasse prior to the April 1 implementation. ALJD at 14 line 13; Tr. 1036 lines 6-8. Indeed, written communications from Fusco to Local 70 indicate that the April 1 implementation was premised on Respondent's view of its right to implement initial terms as a *Burns* successor. See, e.g., R 38 (March 30 email disputing Local 70's contention made in the March 29 session that Respondent was a perfectly clear successor, and iterating its intention to implement the terms outlined in employees' offer letters "absent reaching contingent agreement at close."). Verbal communications in bargaining lead to the same conclusion. See, e.g., Tr. 997 lines 5-18 (Fusco testifying that he informed Local 70 that, without agreement by April 1, Respondent would implement the terms specified in employees' offer letters); ALJD at 14 lines 11-13. In addition, Local 70 communicated its desire to continue negotiations—and, in fact, negotiations continued for months after. Tr. 674; 684-85; 1004 lines 6-12. These facts strongly militate against a finding that the parties understood, as of March 31, that further negotiations would be fruitless. *Pratt Indus., Inc.*, 358 NLRB at *12 (citing cases).⁶⁹

Although the preservation of the pension was of utmost importance to Local 70 and its membership, Local 70 leaders communicated their intent to explore alternative proposals to accommodate Respondent's position. Respondent, however, did not allow time for the bargaining process to complete itself. Respondent, who bears the burden of demonstrating impasse as of the April 1 implementation, will fail to do so on this record. Therefore, all the

⁶⁹ Inasmuch as Respondent made a "final" proposal to Local 70, it was described by Fusco as a "final pre-close offer" and was not transmitted to Local 70 until March 30. See Tr. 995-96; R 38, 39; GC 90.

initial changes instituted by Respondent on April 1 at the Fairfield facility and alleged by the GC to be unlawful were in fact implemented in violation of Section 8(a) (5) of the Act.⁷⁰ The ALJ's failure to so find constitutes error.

C. Whether the Employees' Initial Terms Were "Comparable in the Aggregate" to Those Under Ashland is Irrelevant Because, as A Perfectly Clear Successor at the Willow Springs and Fairfield Facilities, Respondent Was Obligated to Bargain to Impasse Over Any Material and Substantial Changes to the Unit Employees' Conditions of Employment (Exceptions 10, 12-14, and 22)

In concluding his analysis of the GC's second theory of perfectly clear liability, The ALJ states:

Local 705 and the General Counsel argue that Nexeo "misled" employees and the Union into believing that they would receive a benefit package that would be comparable in the aggregate but then were offered initial terms that were not comparable in the aggregate. But they rely only on the differences in the retirement and health insurance plans. There record does not allow me to make any assessment as to whether the benefit packages, in their entirety, were comparable in the aggregate. Nor could I comfortably make such an assessment even if the record was fully developed and substitute my judgment for that of Nexeo or Ashland, the parties who made that agreement.

ALJD at 18 lines 6-13. GC submits that The ALJ's focus on whether the employees' initial terms were comparable in the aggregate to those experienced under Ashland is misplaced.⁷¹

First, the pertinent question is not whether employees were misled into expecting benefits "comparable in the aggregate" to Ashland's but then received benefits not "comparable in the

⁷⁰ As already noted, The ALJ correctly found that the April 5 alterations to the route dispatching and layoff policies were unilaterally implemented in violation of the Act. To the extent these changes might be viewed as having constituted part of Respondent's "initial" terms—a conclusion correctly rejected by The ALJ—the impasse argument would fail as a defense for the same reasons discussed. The GC would note, in addition, that the changes were never specifically discussed or contemplated in bargaining. Tr. 663; 667; 676.

⁷¹ For the same reasons articulated in this section of the brief, The ALJ's analysis would be equally faulty under the GC's first theory of perfectly clear liability (i.e., that the terms of the P&S Agreement rendered Respondent a perfectly clear successor to both facilities). To the extent that this portion of The ALJ's analysis is applicable to the GC's first theory, the GC specifies herein the material and substantial changes made to unit employees' initial terms of hire at both the Willow Springs and the Fairfield facilities.

aggregate.” Rather, the pertinent question is whether, based on extent Board law, Respondent’s use of the phrase “comparable in the aggregate” served sufficiently to communicate to the unit employees that their hire would be premised on materially altered terms. See, e.g., *Elf Atochem North America, Inc.*, 339 NLRB at 807-09 (considering whether the term “comparable” adequately put employees on notice of changed terms, while never considering whether the terms implemented were in fact comparable to those of the predecessor). Put another way, the question is whether Respondent’s communications between November and January put employees on notice that their initial hires would be conditioned upon acceptance of terms so different as to put into question whether a majority of said employees would accept the employment offers. For the reasons already proffered, the answer to this question is “no.”

Second, the question of whether Respondent’s initial terms of hire were comparable in the aggregate to those experienced under Ashland is irrelevant inasmuch as any material and substantial changes unilaterally implemented by Respondent after the perfectly clear bargaining obligation arose would violate the Act. In this regard, once an employer binds itself as a perfectly clear successor, it must maintain the predecessor’s terms and conditions of employment until either a collective-bargaining agreement or good-faith impasse is reached with the union. See *Planned Building Services, Inc.*, 347 NLRB 670, 674-75 (2006) (describing the perfectly clear successor’s bargaining obligation as requiring “agreement” or “bargaining impasse”); see also *Rosdev Hospitality*, 349 NLRB at 203 (stating that a perfectly clear successor “may not unilaterally change the terms and conditions of employment . . .”); *Elf Atochem North America, Inc.*, 339 NLRB at 809-10 (ALJ entertaining impasse defense). The obligation to avoid unilateral implementation applies whether the terms are particularized in a collective-bargaining

agreement or are established as a matter of past practice. *Rosdev Hospitality*, 349 NLRB at 203 (citing *Blitz Maintenance*, 297 NLRB 1005, 1008-09 (1990)).

The duty to bargain in good faith relates to those conditions of employment considered to be “mandatory” subjects of bargaining. See *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495-98 (1979) (discussing the duty to bargain under Section 8(a)(5) and defining mandatory subjects as those matters that are “plainly germane to the working environment and not among those managerial decisions, which lie at the core of entrepreneurial control.”) (internal quotations and citations omitted). However, only unilateral changes having a material and substantial impact on employment conditions will violate the Act. See, e.g., *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900, 902 (2000). In this regard, even unilateral changes resulting in improved conditions for the affected employees may violate the Act. *Carrier Corp.*, 319 NLRB 184, 193 (1995) (citing *Wightman Ctr.*, 301 NLRB 573, 575 (1991); *Antonio’s Rest.*, 246 NLRB 813 (1979)); see also *Goya Foods of Florida*, 347 NLRB 1118, 1120 (2006) (“[T]here is no requirement that the bargaining unit be adversely affected in order for there to be a violation of Section 8(a)(5).”)

Here, Respondent’s initially implemented employment terms for the Fairfield unit employees, instituted as of the April 1, 2011, transition, included the following:

- Monthly contribution rates and plan options for unit employees’ vision care were altered. ALJD at 14 line 17; Tr. 787-78; GC 79 (Ashland 2011 Annual Benefits Enrollment Guide) (p. 7); GC 37 (Nexeo Solutions Benefits Enrollment) (p. 8).
- Respondent no longer provided its employees the option of the “Alive & Well Labwork” benefit. ALJD at 14 line 17; Tr. 1061 lines 12-16; cf. GC 79 (p. 31) with GC 37.
- Respondent instituted a 401(k) retirement savings plan in place of the Teamsters’ PEER 80 Pension Plan. ALJD at 14 line 17; Tr. 1002 lines 1-11; GC 29 (Summary Plan Description) (p. 1) (“The Plan was adopted effective April 1,

2011.”); GC 97 (April 5, 2011, letter from Fidelity Investments congratulating unit employee Gary Robbins in his enrollment in his employer’s workplace savings plan); cf. GC 77 (Ashland CBA), p. 11-12 (discussing Ashland contributions to the Pension Plan).

On the same day, Respondent implemented the following changes for the Willow Springs unit employees:

- Respondent ceased making contributions to Local 705’s Pension Fund and moved the drivers to its new 401(k) plan. ALJD p. 12, lines 15-17; GC 2 (Art. 29), 29 (SPD), 36; Tr. 184-86, 335.
- Respondent ceased making contributions to Local 705’s Health and Welfare fund and moved the drivers to its new company sponsored health insurance plan. ALJD p. 1, lines 14-15; GC 2 (Art. 28), 37; Tr. 189-91.
- Respondent eliminated overtime pay for working more than 8 hours per day. ALJD p. 12, lines 20-22; GC 2 (Art. 3, par. 1); Tr. 181-83, 330-31, 378. Drivers would instead be required to work more than 40 hours per week in order to receive overtime pay. ALJD p. 12, lines 20-22; Tr. 181, 183, 330-31, 378.
- Respondent reduced the drivers’ vacation pay from 50 hours to 40 hours for each week of vacation taken. ALJD p. 12, lines 22-24; GC 2 (Art. 12, par. 3); Tr. 181-83, 330-31, 378.
- Respondent eliminated the daily guarantee of 8 hours pay and the weekly guarantee of 40 hours pay. ALJD p. 12, lines 17-20; GC 2 (Art. 9 and 10, respectively); Tr. 181-84, 330-31, 378-79.

All of the above changes implemented at the Fairfield and Willow Springs facilities relate to mandatory subjects of bargaining. See, e.g., *Keystone Steel & Wire*, 237 NLRB 763 (1978) (bargaining obligation regarding employees’ health and dental insurance); *Georgia Power Co.*, 325 NLRB 420, 420 (1998) (“future retirement benefits of currently active unit employees are mandatory bargaining subjects, and . . . unilateral changes in those benefits violate Section 8(a)(5).”); *Carrier Corp.*, 319 NLRB 184, 193-196 (1995) (pension plan merger arrangement is a mandatory subject of bargaining); *Equitable Resources Exploration Div.*, 307 NLRB 730 (1992) (changing overtime policy and thereby depriving employees of up to 5 hours of overtime each

week found unlawful); *Jimmy-Richard Co.*, 210 NLRB 902 (1974) (unilateral changes to company vacation policy unlawful); *J.W. Rex Company*, 308 NLRB 473 (1992) (eliminating employee wage-hour guarantee policy unlawful).

Moreover, the changes contemplated here were material and substantial in nature. The particularities for each alleged change at the Fairfield facility are taken in turn as follows:

- Vision Coverage: The evidence showed that Respondent's changes to employees' vision coverage resulted in one additional form of coverage being made available, and lowered the monthly contribution rates for the previously-available options. Cf. GC. 79 (p. 7) with GC 37 (p. 8). Although arguably a positive for the unit employees, the change is nevertheless material and substantial. See *Berkshire Nursing Home, LLC*, 345 NLRB 220, 220 n.2 (2005) (addition of health plan options and increased employee costs were substantial and material changes); *United Hosp. Med. Ctr.*, 317 NLRB 1279 (1995) (changes in health plan options and deductibles); see also *Carrier Corp.*, 319 NLRB at 193 (merger of pension funds resulting in reduction of deficits and more security for the funds found material and substantial).
- Alive & Well Labwork Benefit: Respondent's Benefits Enrollment guide does not include Alive & Well Labwork as an available benefit. GC 37; see also Tr. 1061:12-16. Ashland provided this benefit, which allowed unit employees the opportunity to partake in an "Executive labwork panel" for \$22.00, and offered other screenings at varying costs. GC.79, p. 31. The changes were material and substantial. See *CBC Indus.*, 311 NLRB 123, 123 n.1 (1993) (unilateral substitution of one insurance plan with another, unlawful); see also *Reapp Typographic Serv., Inc.*, 204 NLRB 792, 793, 795 (1973) (unilateral discontinuation of sickness, accident and life insurance coverage, where \$1.10 weekly employee contribution was returned to employees' paychecks, unlawful); *Mercy Hosp. of Buffalo*, 311 NLRB 869, 872 (1993) (unilateral eliminating of 2 to 4 a.m. cafeteria hours on weekends "germane to the working environment" and unlawful).
- Substitution of 401(k) Retirement Savings Plan for the Teamsters' PEER 80 Pension Plan. The differences between the two plans are detailed in the Facts section above. The most important differences include:
 - 1) The Teamsters' PEER 80 plan is a defined benefit program allowing for early retirement, with full benefits, once any combination of the employee's age and year of service add to the number 80. ALJD at 13 lines 17-21; Tr. 624-

25; 778-79; see also GC 78 (Teamsters Pension Plan Summary Plan Booklet), p. 41-54 [describing the calculation of retirement benefits under the various PEER options]. In contrast, there is no option under the 401(k) plan to retire early with full benefits. Tr. 684 lines 7-13. Moreover, the benefit under the 401(k) plan is not guaranteed but, rather, may increase or decrease depending on the performance of the stock market. GC 29 (p. 8); see also Tr. 658-59 (discussing GC 86 and Respondent's assumption of a 7.5% return on investment); Tr. 975 lines 14-16.)

- 2) Under the PEER 80 plan, monetary contributions were wholly the responsibility of Ashland. ALJD at 13 lines 17-21; Tr. 625-26; page 779 lines 16-19; page 824 lines 3-7; see also GC 77 (p. 12) (detailing Ashland's required contributions to the Pension fund). In contrast, participation in the 401(k) plan is premised on an employee contribution, the default of which was set at 4% of the employees' pay. Tr. 785-86 lines 14-25, 1; GC 97, 105.
- 3) Withdrawal from the PEER 80 plan negatively impacts vested employees by precluding them from continuing to increase their guaranteed monthly benefit. Tr. 779-80 lines 24-25, 1-2; page 807 lines 10-20; GC 78 (p. 46) (Q & A near bottom of page). For those not vested, withdrawal means that they may never vest in the system. GC 78, p. 46.

These differences alone establish that the change was material and substantial in nature. See *Goya Food of Florida*, 352 NLRB 884 (2008), adopted as modified by 356 NLRB No. 184 (June 22, 2011) (unilateral substitution of 401(k) plan in place of pension plan, unlawful).

Respondent's changes to the Willow Springs drivers' benefits were likewise material and substantial in nature.

- Substitution of Respondent's 401(k) plan for Local 705's Pension plan. The most important differences include the fact that Local 705's Pension plan was a defined benefit program which provided the drivers a service pension of \$2,500 per month after 25 years of participation in the fund, regardless of age.⁷² ALJD p. 6, lines 32-35; GC 22 (p. 15); Tr. 130, 185-87, 337-38, 342. The drivers could also elect to continue to work and receive an additional \$100 per month for each year of service beyond 25 years. ALJD p. 6, lines 35-36; GC 22 (p. 15); Tr. 130-31. In contrast, as detailed above, Respondent's 401(k) plan required the drivers to make contributions out their own pay for the first time ever, invest the money so that

⁷² For purposes of calculating total years of service, the Union Pension fund counts all years in which the driver's employers (not just Ashland) made contributions to the fund. Tr. 129-30.

they receive an annual rate of 7.5% in the volatile stock market, and then continue to work until they were 65 years old in a very physically demanding job. ALJD p. 7, lines 14-15; GC 29 (SPD, p. 15); Tr. 130, 134, 184-85, 321-22, 543.

- Substitution of Respondent's Health insurance plan for Local 705's Health and Welfare plan. The most important differences include:
 - 1) Under Local 705's Health and Welfare plan, the drivers never had to pay any insurance premiums and had low annual deductibles of \$400/\$1,200 (individual/family). GC 23 (p. 6). The drivers also did not have to meet these deductibles before having their doctor's visits and prescription costs covered. GC 23 (p. 6). They instead simply paid a reasonable \$20/\$40 copay (primary physician/specialist) for doctor visits and an equally low copay for prescriptions of \$5 or \$25 (generic vs. brand name drugs). GC 23 (p. 6-7). In contrast, Respondent's health insurance plan has much higher annual deductibles of \$1,500/\$3,000 (individual/family). GC 37 (p. 18). The drivers also must meet these deductibles before having their doctor's visits and prescriptions covered. If, and when, these high deductibles are met, the drivers are required to pay 20% of the cost for all doctor's visits. GC 37 (p. 18). The drivers are also required to pay 20% of the cost for generic drugs and all 100% of the cost for brand name drugs. GC 37 (p. 18).
 - 2) Equally important to the drivers and their families, Local 705's Health and Welfare plan had excellent retiree health insurance benefits whereas Respondent's plan provides no retiree health insurance benefits. Tr. 190-91, 195.
- Changes to overtime pay, vacation pay, and the daily and weekly guarantees. The fact that changes were material and substantial is so obvious that there is no need to cite legal authority. Indeed, the drivers clearly suffered financial hardship by having their overtime pay and vacation pay drastically reduced. There is also evidence that at least one driver lost pay due to the changes to the daily and weekly guarantees. Tr. 334-35.

In short, because Respondent's bargaining obligation was fixed as early as November 2010 and clearly no later than January 14, 2012; because the above-specified changes impacted mandatory subjects of bargaining in a material and substantial way; and because the changes were instituted on April 1, 2012, in the absence of bargaining impasse, Respondent violated the

Act as alleged. Whether the changed conditions were “comparable in the aggregate” is irrelevant to the GC’s first or second theory of liability.

Third, assuming that some comparison of Respondent’s and Ashland’s terms is appropriate, Respondent’s terms cannot be viewed as comparable to Ashland’s. As already detailed, inasmuch as the changes to unit employees’ initial terms contained material and substantial changes from those experienced under Ashland, they cannot be considered “comparable in the aggregate.” Put another way, because the implemented changes constituted legally significant changes, they cannot be viewed as “comparable” under Board law. Whatever “comparable in the aggregate” meant to the drafters of the P&S Agreement, the facts show that Respondent’s initial terms were materially and substantially altered from those in effect under Ashland.⁷³

In summary, the quoted passage from the ALJD asks the wrong question and reaches the wrong legal result. Whether Respondent’s initial terms were “comparable in the aggregate” to Ashland’s terms is legally irrelevant. The GC has, in fact, proven up facts sufficient to place a bargaining obligation upon Respondent at the Fairfield and Willow Springs facilities. Thus, the material and substantial changes to employees’ benefits violated Section 8(a)(5) of the Act. The ALJ’s failure to so find, and to focus on comparability instead, constitutes error.

⁷³ It is worth noting that The ALJ’s reluctance to discern what terms might be viewed as “comparable in the aggregate” serves to strengthen the GC’s argument regarding the misleading nature of Respondent’s communications. In this regard, if on this lengthy record an experienced ALJ cannot feel comfortable discerning the meaning of the pertinent phrase, how can a layperson be expected to derive meaning from the same phrase? As discussed at length, Board law places the onus not on the employee to discern meaning from contractual legalese but, rather, on the successor to make its intentions clear. The ALJ’s struggle with the meaning and intent of the phrase thus serves to exemplify the insufficiency of the wording to place employees on notice of material changes to their initial terms.

D. The ALJ Properly Found that Respondent Made Three Unilateral Changes at the Willow Springs Facility that Were Not Part of the Announced Initial Terms, But He Inadvertently Failed to Conclude that the Change to the Drivers' Overtime Pay Violated Section 8(a)(1) and (5) of the Act. Due to this Oversight, He Failed to Provide a Remedy for Respondent's Unlawful Unilateral Change to the Drivers' Overtime Pay. (Exceptions 9, 26-27, and 29)

In addition to the ALJ's erroneous conclusion that Respondent was not a perfectly clear successor, he also made one inadvertent (but important) mistake in his decision. At the Willow Springs facility, he correctly found that, on April 1, 2011, Respondent made three unilateral changes to the drivers' benefits that were not part of the announced initial terms. ALJD p. 12, lines 21-24. First, the overtime policy was changed by eliminating overtime pay for working more than 8 hours per day. ALJD p. 12, lines 20-22; Tr. 181-83, 330-31, 378. Drivers would instead be required to work more than 40 hours per week in order to receive overtime pay. Tr. 181, 183, 330-31, 378. Second, drivers' vacation pay was reduced from 50 hours to 40 hours for each week of vacation taken. ALJD p. 12, lines 22-24; Tr. 181-83, 330-31, 378. And third, the daily guarantee of 8 hours pay and the weekly guarantee of 40 hours pay was eliminated. ALJD p. 12, lines 17-20; Tr. 181-84, 330-31, 378-79.

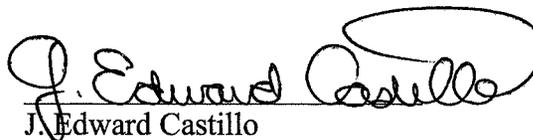
The ALJ then properly concluded that the unilateral changes to the drivers' vacation pay and daily/weekly guarantees violated Section 8(a)(1) and (5) of the Act, but he mistakenly forgot to include the change to drivers' overtime pay as a third violation. ALJD p. 18, lines 23-34. Consistent with this oversight, the ALJ also failed to provide a remedy for this third violation. Accordingly, the Acting General Counsel requests that the Board correct this error in the ALJ's decision and order an appropriate remedy for Respondent's unlawful unilateral change to the drivers' overtime pay at the Willow Springs facility.

IV. CONCLUSION

Based upon the foregoing, Counsel for the Acting General Counsel respectfully requests that the Board find merit to its Exceptions to the Decision of the Administrative Law Judge and conclude that Respondent, as a perfectly clear successor, violated Section 8(a)(1) and (5) of the Act by unilaterally implementing initial terms and conditions of employment at the Willow Springs and Fairfield facilities on April 1, 2011. The Acting General Counsel further requests that the Board correct the various inadvertent errors contained in the ALJ's decision, including his failure to conclude that Respondent violated Section 8(a)(1) and (5) of the Act by making unlawful unilateral change to the drivers' overtime pay at the Willow Springs facility that were not part of the announced initial terms. Finally, the Acting General Counsel requests that the Board provide an appropriate remedy for all of these violations of the Act.

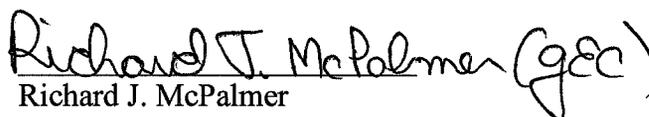
Dated at Chicago, Illinois, this 18th day of October 2012.

Respectfully submitted,



J. Edward Castillo

R. Jason Patterson
Counsel for the Acting General Counsel
National Labor Relations Board
Region 13
209 South LaSalle Street, Suite 900
Chicago, Illinois 60604



Richard J. McPalmer (gsc)

Richard J. McPalmer
Elvira Pereda
Counsel for the Acting General Counsel
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Counsel for the General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge have been filed electronically with the Office of the Executive Secretary of the National Labor Relations Board on this 18th day of October 2012, and true and correct copies have been served on the parties in the manner indicated below on that same date.

ELECTRONIC MAIL

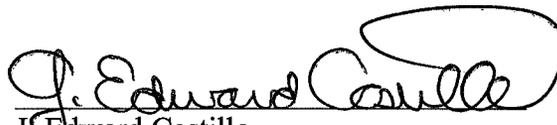
David A. Kadela, Esq.
Littler Mendelson, P.C.
21 E. State Street, Suite 1600
Columbus, OH 43125

Adam C. Wit, Esq.
Littler Mendelson, P.C.
321 N. Clark Street, Suite 1000
Chicago, IL 60654

Thomas D. Allison, Esq.
Allison, Slutsky & Kennedy, P.C.
230 West Monroe Street, Suite 2600
Chicago, IL 60606

Jason McGaughy, Esq.
Allison, Slutsky & Kennedy, P.C.
230 West Monroe Street, Suite 2600
Chicago, IL 60606

David A. Rosenfeld, Esq.
Weinberg, Roger & Rosenfeld, P.C.
1001 Marina VLG Parkway, Suite 200
Alameda, CA 94501-6430


J. Edward Castillo

Counsel for the Acting General Counsel
National Labor Relations Board
200 South LaSalle Street, Suite 900
Chicago, Illinois 60604
(312) 353-7586