

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

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

**BRIEF ON BEHALF OF CHARGING PARTY LOCAL 705,  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS  
IN SUPPORT OF EXCEPTIONS TO  
THE DECISION AND RECOMMENDED ORDER  
OF THE ADMINISTRATIVE LAW JUDGE**

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<b>TRUCK DRIVERS, OIL DRIVERS, FILLING STATION AND PLATFORM WORKERS' UNION, LOCAL NO. 705, AN AFFILIATE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,</b>	)	<b>CASES 13-CA-46694 13-CA-62072 20-CA-35519</b>
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<b>and</b>	)	
	)	
<b>BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS, LOCAL NO. 70 OF ALAMEDA COUNTY, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS</b>	)	

**BRIEF ON BEHALF OF CHARGING PARTY LOCAL 705,  
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**Preliminary Statement**

This matter arose in Region 13 on an unfair labor practice charge filed by Local 705, International Brotherhood of Teamsters ("the Union" or "Local 705"), on April 7, 2011, against Nexeo Solutions, LLC ("Nexeo" or "the Company") (G.C.Exh. 1(a)).<sup>1</sup> NLRB Case No. 13-CA-46694. The charge alleged that on April 1, 2011, Nexeo unilaterally changed terms and conditions

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<sup>1</sup> The Acting General Counsel's exhibits in the NLRB hearing are referred to as "G.C.Exh. X;" exhibits of Respondent Nexeo Solutions, LLC are referred to as "Resp.Exh. X;" exhibits of Charging Party Local 705, International Brotherhood of Teamsters, are referred to as "C.P.Exh. X;" and Joint Exhibits are referred to as "Jt.Exh. X." Pages of the transcript of the hearing before Administrative Law Judge Kocol are referred to as "Tr. X." Pages of the decision of the Administrative Law Judge are referred to as "ALJD, p. X, Line Y."

of employment of its bargaining unit employees at its facility in Willow Springs, Illinois, represented by Local 705, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (“the Act”).

Local 705 filed a second charge on August 3, 2011, alleging that Nexeo refused to provide, and delayed providing, certain requested information, including plan documents and summary plan descriptions related to the health insurance plan and 401(k) plan which Nexeo had unilaterally imposed on bargaining unit employees (G.C.Exh. 1(c). NLRB Case No. 13-CA-62070.

The Acting General Counsel issued a complaint against Nexeo on October 17, 2011, in Case No. 13-CA-62070 (G.C.Exh. 1(e)), and issued a consolidated complaint in both cases on November 30, 2011 (G.C.Exh. 1(h)).

In the meantime, Local 70, International Brotherhood of Teamsters, in Oakland, California, filed a similar unfair labor practice charge against Nexeo in Region 20 on April 8, 2011, alleging that on April 1, 2011, Nexeo also unilaterally changed terms and conditions of employment of bargaining unit employees represented by Local 70 at a Nexeo facility in Fairfield, California (G.C.Exh. 1(s)). NLRB Case No. 20-CA-35519. On November 30, 2011, the Acting General Counsel issued a complaint against Nexeo in the Region 20 case (G.C.Exh. 1(u)).

On February 3, 2012, the Acting General Counsel consolidated the three cases and scheduled hearings in Chicago, Illinois, and San Francisco, California (G.C.Exh. 1(n)). Hearing was held before Administrative Law Judge William G. Kocol, in Chicago, Illinois, on April 2, 3 and 4, 2012, and in San Francisco, California, on May 7 and 8, 2012.

## The Complaint in the Chicago Cases<sup>2</sup>

The consolidated complaint issued against Nexeo on November 30, 2011, and amended on March 7, 2012, based on the unfair labor practice charges filed in Region 13 by Local 705, alleges that Nexeo violated Section 8(a)(5) and (1) of the Act by the following actions:

1. On or about April 1, 2011, Nexeo:
  - a. Unilaterally ceased making required contributions to the Local 705 Health and Welfare Fund, and moved its Willow Springs employees to Nexeo's health insurance plan;
  - b. Unilaterally ceased making contractually required contributions to the Local 705 Pension Fund, and moved its Willow Springs employees to Nexeo's 401(k) plan;
  - c. Unilaterally eliminated its daily guarantee of 8 hours pay to Willow Springs employees for each work day and its weekly guarantee of 40 hours pay for each work week;
  - d. Unilaterally changed the overtime policy by eliminating overtime pay for working more than 8 hours per day, and instead requiring employees to work more than 40 hours per week to receive overtime pay;
  - e. Unilaterally reduced employees' vacation pay from 50 hours per week to 40 hours per week.
  
2. Since at least April 1, 2011, Nexeo:
  - a. Delayed until October 19, 2011 in furnishing Local 705 with the requested summary plan description for Nexeo's health insurance plan covering bargaining unit employees;
  - b. Delayed until July 15, 2011 in furnishing Local 705 with the requested

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<sup>2</sup> Local 705's Exceptions, and this supporting Brief, address the allegations of the Complaint dealing with Nexeo's actions toward Local 705 and the bargaining unit employees at the Company's Willow Springs, Illinois, facility whom Local 705 represents. Case Nos. 13-CA-46694 and 13-CA-62070. Local 70, International Brotherhood of Teamsters, is filing its own Exceptions with respect to the allegations of the Complaint addressing Nexeo's actions toward Local 70 and the bargaining unit employees at the Nexeo facility in Fairfield, California.

summary plan description for Nexeo's 401(k) plan covering bargaining unit employees; and

- c. Delayed until August 11, 2011 in furnishing Local 705 with the requested plan document for Nexeo's 401(k) plan coercing bargaining unit employees.

### **The Administrative Law Judge's Decision**

Administrative Law Judge William G. Kocol issued his Decision and Recommended Order on August 30, 2012. With respect to the allegations in the Chicago cases:

1. Judge Kocol found that "it was perfectly clear (as a matter of fact and not as a legal conclusion) that Nexeo planned to retain all" of its predecessor's employees (ALJD, p. 15, lines 27-30). However, relying on his interpretation of the Board's decision in Spruce-Up Corp., 209 NLRB 194 (1974), *enfd.* 529 F.2d 516 (4<sup>th</sup> Cir. 1975), Judge Kocol dismissed the allegations that Nexeo violated Section 8(a)(5) and (1) of the Act when it unilaterally ceased making contributions to the Local 705 Pension Fund and Health and Welfare Fund (ALJD p. 15, line 8 to p. 18, line 19).

2. Judge Kocol found that Nexeo violated Section 8(a)(5) and (1) of the Act when it unilaterally eliminated its daily guarantee of 8 hours pay to Willow Springs employees for each work day and a weekly guarantee of 40 hours pay for each work week, and when it unilaterally reduced those employees' vacation pay from 50 hours to 40 hours per week (ALJD p. 18, lines 21-34, p. 19, lines 27-30).<sup>3</sup>

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<sup>3</sup> Apparently inadvertently, Judge Kocol failed to rule on the Complaint's allegation that Nexeo also violated Section 8(a)(5) and (1) of the Act when it unilaterally eliminated overtime pay for working more than 8 hours per day, and instead required employees to work more than 40 hours per week to receive overtime pay, as alleged in Section VII(d) of the complaint (G.C.Exh. 1(h), ¶ VII(d)). As discussed below, the record supports this undisputed allegation of the complaint (Tr. 67, 181-183, 214-215), which the Company admitted (Tr. 332-333), and Judge Kocol found that the unilateral change had been made in fact (ALJD, p. 12, lines 20-22). However, Judge Kocol inexplicably did not include a finding of this violation in his conclusions of law and did not address  
(continued...)

3. Judge Kocol found that Nexeo violated Section 8(a)(5) and (1) when it unreasonably delayed providing Local 705 with the summary plan document describing its health insurance plan and the plan document for its 401(k) plan (ALJD, p. 19, lines 4-20).

4. Judge Kocol dismissed the allegation that Nexeo violated Section 8(a)(5) and (1) by its delay in providing Local 705 with the summary plan document for its 401(k) plan (ALJD, p. 18, line 45 to p. 19, line 4).

Local 705 has filed Exceptions related to the ALJ's dismissal of the allegations that Nexeo violated Sections 8(a)(5) and (1) of the Act by unilateral ceasing contributions to the Local 705 Pension Plan and Health and Welfare Plan, and by its delay in providing the summary plan document describing its 401(k) plan, and to the Judge's failure to rule on the allegation that the Company violated Section 8(a)(5) and (1) when it unilaterally changed its overtime policy by eliminating daily overtime and replacing it with weekly overtime. Local 705 submits this Brief in support of these Exceptions.

### **STATEMENT OF FACTS**

#### **The Parties**

The original employer in this case was Ashland Distribution. Ashland Distribution was a division of Ashland, Inc., specializing in the delivery of bulk and packaged chemicals. For many years, Local 705 has represented a bargaining unit of approximately 32 drivers at Ashland Distribution's facility in Willow Springs, Illinois (Tr. 66, 286).

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<sup>3</sup>(...continued)  
this violation in his remedy and recommended order.

### **The Ashland/Local 705 Negotiations**

The most recent collective bargaining agreement between Ashland Distribution and Local 705 expired on October 31, 2010. On November 3, 2010, Ashland Distribution representatives Paul Fusco<sup>4</sup>, Pat Cassidy<sup>5</sup> and Tony Kuk<sup>6</sup> met for the parties' first bargaining session with representatives of Local 705, including Neil Messino, Rick Rohe, Mike Jordan and George Sterba (Tr. 70-71). All of these individuals, on both sides of the table, would subsequently be involved in the negotiations between Nexeo and Local 705.

### **The Announcement of the Sale**

On November 5, 2010, Ashland entered into an Agreement of Purchase and Sale ("APS") to sell its Ashland Distribution division, including the Willow Springs facility, to TPG Accolade, LLC, subsequently renamed Nexeo Solutions, LLC (Tr. 127).

On November 8, 2010, Paul Fusco called Local 705 contract administrator Neil Messino, who was Local 705's chief negotiator, at home at 5:00 a.m. Fusco told Messino that it would be announced at the start of that business day that TPG was purchasing Ashland Distribution. Messino asked Fusco what was going to happen to the employees (Tr. 71-73).<sup>7</sup> *Fusco told Messino that the*

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<sup>4</sup> Paul Fusco was human resources business partner for Ashland Distribution, and was retained by Nexeo in the same position (Tr. 70).

<sup>5</sup> Pat Cassidy was regional logistics manager for Ashland Distribution, and was retained by Nexeo in the same position (Tr. 70).

<sup>6</sup> Tony Kuk was plant manager of the Willow Springs plant, and was retained by Nexeo in the same position (Tr. 70).

<sup>7</sup> Administrative Law Judge Kocol sustained hearsay objections by Nexeo's counsel to certain testimony by Local 705 representatives concerning statements made by individuals who had worked at Ashland Distribution prior to the sale and continued to work in the same positions for  
(continued...)

buyer was going to retain all of the employees (Tr. 75).<sup>8</sup> Messino then called Union Steward Mike Jordan, and told him what he had just learned from Fusco (Tr. 77-78).

When Neil Messino reached his office that morning, he went on the internet and confirmed that Ashland was selling Ashland Distribution to TPG Capital (Tr. 78-79; G.C.Exh. 3).

*When Mike Jordan arrived at work that morning, an Ashland news release was posted on the bulletin board in the drivers' break room, announcing the sale of Ashland Distribution to TPG Capital for \$930 million (Tr. 291; Rejected Exhibit G.C.Exh. 34).*

Also on November 8, 2010, Ashland Distribution issued "Questions and answers for employees" (Tr. 58-59; G.C.Exh. 40). Among other things, this "Q and A" document states (G.C.Exh. 40 (also in the record as G.C.Exh. 56), emphasis added; ALJD p. 5, lines 5-22):<sup>9</sup>

**4. Will Ashland Distribution's current management team remain with the business?**

Yes, the current management team will transfer with the business.

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<sup>7</sup>(...continued)

Nexeo. Counsel for the Acting General Counsel made offers of proof with respect to the statements ruled inadmissible as hearsay. Local 705 has excepted from Judge Kocol's hearsay rulings (Exceptions 2, 4, 7, 8, 9 and 10), and they are discussed below.

In order to place these statements in the context of the other facts of this case, the statements that were ruled inadmissible, and introduced into the record through offers of proof, are set forth in this Brief in italics.

<sup>8</sup> Fusco had already been told by his boss, Jodi Lewis, in October or November 2010, that he would be retained by the new company (Tr. 1045).

<sup>9</sup> Section 11.7 of the APS states that neither Ashland nor Nexeo could make any communication to the public or the employees without the prior content of the other (G.C.Exh. 6, p. 88). The parties stipulated to the review process (Jt.Exhs. 1, 2). In particular, the parties stipulated that G.C.Exh. 40/56 was reviewed by agents of Nexeo and made available to Ashland employees on about November 8, 2010 (Jt. Exh. 2, ¶¶1-5).

\* \* \* \*

**16. 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's people and various support partners will continue to work from their current locations and perform similar roles and functions.

\* \* \* \*

**20. 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.

On November 8, 2010, Ashland Distribution President Robert M. Craycraft distributed a letter to "Dear Valued Customers" (G.C.Exh. 46). It was stipulated that the information contained in this letter was shared between agents of Ashland and Nexeo (Jt.Exh. 1, ¶ 5). The letter stated, in pertinent part (G.C.Exh. 46, emphasis added):

Our goal is to ensure a seamless transition to Ashland Distribution operating as an independent distribution business. The same great people will provide the same great service....<sup>10</sup>

*Willow Springs plant manager Tony Kuk told Local 705 representative Neil Messino that he participated in a conference call with Nexeo CEO and all of the Ashland Distribution managers, in which Ashland Distribution President Robert Craycraft told the managers that they would all be*

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<sup>10</sup> Local 705's Exception 3 excepts to the ALJ's failure to find that this letter was distributed and is attributable to Nexeo.

*hired by Nexeo (Tr. 868-877).*<sup>11</sup>

On November 12, 2010, Ashland Distribution issued “Talking Points for Customers” stating, among other things (G.C.Exh. 94, p. 2, emphasis added):

**What is not changing:**

- ▶ All current AD [Ashland Distribution] employees are staying with the business
- ▶ Our operating systems and processes
- ▶ Our committed to support your business
- ▶ Delivering reliable supply to our customers
- ▶ Our commitment to safety and high business standards and ethics<sup>12</sup>

In mid-November, 2010, a notice was posted on the employee bulletin boards stating (Tr. 734-735; G.C.Exh. 93, emphasis added):

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.<sup>13</sup>

**The Town Meetings**

*On November 9, 2011, when he arrived at work in Willow Springs, Mike Jordan saw a notice posted on the bulletin board in the break room, announcing that “town hall meetings” would be held on November 10 and 11, 2011, at 8 a.m. and 3 p.m. each day (Tr. 293).*

*Mike Jordan attended the town hall meeting held at 8:00 a.m. on November 11 in the Company’s large conference room. Managers Tony Kuk and Pat Cassidy were present, along with 20 to 25 employees. In this town hall meeting, Tony Kuk stated, “It’s going to be ‘business as*

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<sup>11</sup> Local 705's Exception 4 excepts to the ALJ's ruling sustaining the Company's objection to this testimony and his failure to find that this statement was attributable to Nexeo.

<sup>12</sup> Local 705's Exception 5 excepts to the ALJ's failure to find that Ashland Distribution issued this document and is attributable to Nexeo.

<sup>13</sup> Local 705's Exception 6 excepts to the ALJ's failure to find that Ashland Distribution posted this notice and that it was attributable to Nexeo.

*usual; everyone is going to be retained; and there won't be any changes except the name on the paychecks and the signs on the trucks." During this same town hall meeting, Pat Cassidy stated, "This is a great opportunity for us to grow; nothing should change regarding your employment, and I assume Tony Kuk and I will be retained as well." (Tr. 293).*

*Following these preliminary statements by Kuk and Cassidy, there was a question and answer session, and one of the dock men asked the managers if the new company was going to hire all of the employees. Pat Cassidy replied, "The new company intends on keeping everyone. It's going to keep everything status quo." Tony Kuk followed up those comments by stating, "There actually isn't a 'new company.' They don't have a management team or drivers or warehouse employees. We are the 'new company'" (Tr. 293-293).*

*Mike Jordan lingered after the meeting until the other employees left the conference room. At that point, he asked Kuk and Cassidy, "Is everything in the union contract going to stay the same?" Pat Cassidy responded, "As far as I'm concerned the new company is going to keep everything the same." Jordan replied, "Good, because I'm about to complete 25 years. I need additional time for my pension benefits." Cassidy responded, "I don't think there are going to be any issues." Tony Kuk nodded his head in agreement, and said, "Nothing's going to change." (Tr. 294).<sup>14</sup>*

### **November 17, 2010**

On November 17, 2010, Paul Fusco, Pat Cassidy and Tony Kuk met with Union representatives Neil Messino, Mike Jordan, and George Sterba, among others, in the second

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<sup>14</sup> Local 705's Exception 7 excepts to the ALJ's ruling sustaining the Company's objection to this testimony and his failure to find that these statements were attributable to Nexeo.

bargaining session for a new collective bargaining agreement with Ashland Distribution. Neil Messino asked Paul Fusco if he had the authority to bargain on behalf of TPG. Fusco responded, "I am bargaining on behalf of Ashland for now, and if the sale closes, I or someone else will bargain the agreement between the Union and TPG. Fusco asked Messino if he wanted to change the Union's initial proposal, and the Union took a caucus (Tr. 87, 296).

When the parties reconvened, Neil Messino stated that he didn't know if he wanted to change his proposal. Paul Fusco then clarified, "I understand TPG reviewed all of the union contracts across the country and doesn't want too much of a change which is why I asked you." During this conversation, Messino asked Fusco for a copy of the Purchase Agreement. Fusco agreed to provide a copy (Tr. 87, 296).

During the bargaining session, Messino asked Fusco what TPG's business plan was. Fusco responded, "I understand TPG is planning on keeping the business the way it is and not gutting the operation." Messino then asked, "Does TPG's business plan include bargaining unit employees?" Fusco responded, "That's the plan." The meeting ended with Messino stating, "I'm willing to meet with TPG and Ashland representatives to make it part of the Purchase Agreement that they will honor our negotiated contract." Fusco responded, "I will get that information for you." (Tr. 87-88, 296).

### **December 3, 2010**

On December 3, 2010, Neil Messino e-mailed Paul Fusco, asking if Fusco had the opportunity to obtain a copy of the APS, and that Messino would like to review it before their next bargaining session, scheduled for December 6 and 7, 2010. Messino also asked if Fusco had any luck getting TPG to agree to language that it would honor the terms of the Ashland/Local 705

collective bargaining agreement (Tr. 88-90; G.C.Exh. 4).

Paul Fusco called Neil Messino later that day. Fusco told Messino that the legal department was still looking at the APS, and he had not yet received it. Fusco told Messino that he was working on getting the Agreement for him. Messino told Fusco that he needed to see the purchase agreement by the end of that day if they were still going to meet on Monday, December 6 (Tr. 90-91).

By that evening, Neil Messino had still not received anything from Paul Fusco, so Messino called Fusco that night (Tr. 91). *In that conversation, Fusco stated that the intent was for TPG to offer employment to all current Ashland Distribution employees. Messino asked if the employees would have to reapply, and Fusco said, "employees are not going to have to reapply." Messino asked, "When will the employees receive offers of employment from TPG?" Fusco responded, "Probably before the sale." (Tr. 92).*

*Neil Messino again asked about the APS, and Paul Fusco responded that he "was still working on it." Messino indicated that he needed language in the Purchase Agreement that TPG would assume the labor contract or Ashland Distribution's liability. Fusco responded that TPG was reluctant to put that type of language in the APS, but he understood from his legal department that the Agreement contained the language that Messino was looking for, and stated that the new company would maintain terms and conditions of employment (Tr. 92-93).<sup>15</sup>*

Paul Fusco also told Neil Messino that either he or someone else would be negotiating the initial contract for "Newco," which was how he referred to the new company. The parties agreed to cancel the December 6 and 7 bargaining sessions, and tentatively agreed to meet on December 14.

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<sup>15</sup> Local 705's Exception 9 excepts to the ALJ's ruling sustaining the Company's objection to this testimony and his failure to find that these statements were attributable to Nexeo.

Fusco guaranteed Messino that he would have the APS by the next Friday, December 10 (Tr. 93-94).

### **December 9, 2010**

On December 9, 2010, Neil Messino called Union Steward Mike Jordan, and told Jordan that he wanted Jordan, with a witness, preferably George Sterba, the other Union Steward, to ask plant manager Tony Kuk some direct questions regarding the employees' future employment with the new company. Jordan was directed to ask Kuk: "are they hiring us;" "are they keeping our terms and conditions the same;" and "are we going to have to reapply and will our seniority be the same." Over the next two months Jordan and Sterba regularly asked these questions to Kuk. (Tr. 354-355; see also Tr. 96, 348-349).<sup>16</sup>

### **December 10, 2010**

*On December 10, 2010, per Messino's instructions, Mike Jordan went to Tony Kuk's office, and asked him what the Company's plans were as far as hiring the employees. Kuk responded that "They're going to keep everyone, and everything is going to stay the same." (Tr. 298).*

*After the December 10 meeting with Tony Kuk, and for the next two months, into mid-February 2011, Mike Jordan and George Sterba met with Kuk two or three times a week. They*

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<sup>16</sup> In his decision, ALJ Kocol stated, "Local 705 had a copy of the APS and knew of its content but thereafter seemed to repeatedly question Ashland managers in an effort to get them to say something slightly different" from the APS. (ALJD, p. 5, line 40 to p. 6, line 1). The ALJ's speculation is unfounded and unfair. In the first place, the Union's questions began well before it had received a copy of the APS. Secondly, Judge Kocol refused to allow Neil Messino to testify as to why he asked the Union stewards to ask the retained Ashland managers if Nexeo was going to retain all of the Ashland employees and maintain their existing terms and conditions of employment, and even refused to allow counsel for the Acting General Counsel to make an offer of proof that the Union did so to try and find out what Nexeo's plan was (Tr. 94-98). It was wrong and unfair for the ALJ to sustain the Company's objection to Messino's testimony as to why he did this, and then refuse to allow counsel for the Acting General Counsel to make an offer of proof, and then turn around and make a cynical and totally unfounded finding as to the reasons Messino did this. See Local 705 Exception 39.

*continued to ask Kuk the same questions, and he gave them the same response: that everybody was going to be retained, nothing is going to change; and it will be "business as usual." (Tr. 303).<sup>17</sup>*

Also on December 10, 2010, at 12:59 p.m., Neil Messino e-mailed Paul Fusco stating that he had still not received the APS. Messino stated that their December 14 negotiation date was in danger of being canceled because of the Company's failure to provide the requested documents. Messino stated that if he did not receive the APS by the end of business that day, he would have no choice but to file an unfair labor practice charge or take any and all economic recourse provided under the NLRA (Tr. 99; G.C.Exh. 5, p. 2).

Fusco responded by e-mail at 1:13 p.m., with a link to the APS on the Internet (G.C.Exh. 5, p. 1). Messino clicked on the link, opened up the APS, printed it out, and began to read it for the first time. At 3:21 p.m., Messino sent Fusco an e-mail saying that the schedules and annexes to the APS were missing. Messino asked Fusco to send him all of the annexes, schedules, and exhibits to the APS, including Schedule 5.18(c) ("Union Contracts") (G.C.Exh. 5, p. 1).

### **The Agreement of Purchase and Sale**

The Agreement of Purchase and Sale ("APS") between Ashland, Inc. and TPG Accolade (later "Nexeo") is in the record as General Counsel Exhibit 6. The APS was a public document, filed with the Securities and Exchange Commission and available on the SEC website.

**In the APS, Ashland and TPG agreed that TPG (Nexeo) would retain all of Ashland Distribution's bargaining unit employees and maintain the terms and conditions of their employment:**

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<sup>17</sup> Local 705's Exception 10 excepts to the ALJ's ruling sustaining the Company's objection to this testimony and his failure to find that these statements were attributable to Nexeo.

- Nexeo agreed to offer employment to comparable positions to all of the Willow Springs bargaining employees. (G.C.Exh. 6, pp. 55, 56 (Sections 7.5(a) and 7.5(c).)<sup>18</sup>
- Schedule 7.5(a) of the Purchase and Sale Agreement – which Nexeo never gave to the Union, despite its repeated requests (see pp. 35-37, *infra*), listed by name every member of the Willow Springs bargaining unit, as well as managers Robert Craycraft, Paul Fusco, Brian Brockson, Pat Cassidy, and Tony Kuk, among others, and confirmed that each of them would be retained by the new company (Tr. 36, 575).<sup>19</sup>
- The parties' intention, as stated in the APS, was (G.C.Exh. 6, p. 57 (Section 7.5(f)), emphasis added):

...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.

- Nexeo agreed to provide each former Ashland Distribution Employee with “wages no less favorable” than those provided by Ashland, and “other employee benefits” under plans “that are substantially comparable in the aggregate to those provided by Ashland.” (G.C.Exh. 6, p. 57 (Section 7.5(d))).
- Nexeo agreed to recognize Local 705 as the bargaining representative of the drivers at the Willow Springs facility (G.C. Exh. 6, p. 60 (Section 10(o))). See also Section 5.18(c) and Schedule 5.18(c) of the Purchase Agreement, which confirmed that Local 705 was the bargaining representative of the Willow Springs Employees (G.C.Exh. 6, p. 42 (Section 5.18(d)), and G.C.Exh. 7).
- There was substantial consideration for these mutual promises by Ashland, Inc. and TPG. Ashland did not want to incur any severance obligations to the Employees as a result of this transaction (see G.C.Exh. 6, p. 57 (Section 7.5(f))), and, as Nexeo negotiator John Hollinshead testified before Judge Kocol, TPG wanted to acquire a stable work force (Tr. 501-502, 526).

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<sup>18</sup> Page numbers in G.C. Exhibit 6 are the numbers at the bottom of the page.

<sup>19</sup> Local 705 Exception 1 excepts to the ALJ's failure to find that Schedule 7.5(a) of the APS – dated November 5, 2010, before any of the to-be-retained Ashland representatives discussed the buyer's intentions – confirmed that Robert Craycraft, Paul Fusco, Brian Brockson, Pat Cassidy, and Tony Kuk would be retained by Nexeo (Tr. 36,575).

Judge Kocol correctly found that it was “perfectly clear,” “as a matter of fact,” that Nexeo planned to retain all of the employees in the bargaining unit, that it committed itself to do so in the APS; and that the APS “repeatedly indicated that Nexeo was to make offers of employment to ‘all’ employees” (ALJD, p. 15, lines 27-30).

### **December 13 , 2010**

Neil Messino called Paul Fusco on December 13, 2010, to reschedule the bargaining session of December 14 in order to review the APS. **Fusco told Messino that he had been hired by the new company; that the announcement would be made later in the month; that Pat Cassidy had been hired on the transition team;<sup>20</sup> and that he believed Tony Kuk would also be hired on the transition team** (Tr. 112-113).<sup>21</sup>

During the week of December 13, Neil Messino made his first trip to the Willow Springs facility to discuss the Ashland/Nexeo transaction with bargaining unit employees. Messino brought his copy of the Purchase Agreement with him, and showed the relevant sections of the Agreement to ten to fifteen bargaining unit employees. Messino told the bargaining unit employees that the APS stated that they would all be retained without any changes in the terms and conditions of their employment, and that the Union believed that Nexeo was a “perfectly clear” successor to Ashland Distribution (Tr. 106-109, 247-248, 304-306).

### **December 15, 2010**

On December 15, 2010, Fusco forwarded an e-mail to Messino from Ashland attorney Julie

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<sup>20</sup> Pat Cassidy was in fact named to the Nexeo transition team. See G.C.Exh. 50.

<sup>21</sup> Local 705 Exception 11 excepts to the ALJ’s failure to make any findings with respect to this conversation.

Hopkins, containing an excerpt from Schedule 5.18(c) of the APS. The excerpt confirmed that the Local 705 collective bargaining agreement was expressly referred to in Section 5.18(c) of the APS as one of Ashland's "Union Contracts" ((G.C.Exh. 7; the complete Schedule 5.18(c) is attached to G.C.Exh. 6; Tr. 113-115).

### **December 19, 2010**

Local 705 holds a regular membership meeting at the union hall on the third Sunday of each month. Union Steward George Sterba posted a notice about the December 19 meeting, and another eight to twelve Ashland Distribution drivers attended. Neil Messino met with the drivers, and again showed them the sections of the APS dealing with their employment by the new company, and discussed the implications of the contractual language (Tr. 109, 306-307, 366-368).

### **John Hollinshead's Arrival on the Scene**

John Hollinshead had worked for TPG on other purchase and take-over projects, including TPG's 2010 attempt to take over Dow Chemical, which did not happen when TPG was outbid by Bain Capital. In "November-ish," 2010, Dan Smith, the chairman of TPG, asked Hollinshead if he could help with the Ashland Distribution deal, which had already been agreed to. Hollinshead said that he would be willing to help (Tr 399-401, 525).

In "late December," 2010, Hollinshead was given more details of the deal by TPG, including copies of the executed APS. Hollinshead testified that he spent "a lot of time with Paul Fusco," as well as with Ashland labor person Kevin Meyers, discussing TPG's "labor strategy" and "how to make the operations function on a positive note." Hollinshead testified that Fusco spent 60-80 per cent of his time on Ashland Distribution business, and Hollinshead presumed that Fusco would be

going with TPG/Nexeo (Tr. 412).<sup>22</sup> Although he technically remained an Ashland employee, Fusco was now receiving directions from TPG, and was trying to schedule bargaining sessions on behalf of TPG (Tr. 495, 526).

**December 22, 2010**

Paul Fusco e-mailed Neil Messino on December 22, 2010, to update Messino on the situation. Fusco had requested from Messino the summary plan descriptions for the Local 705 plans so that the new company could review them. Messino had arranged for Local 705 Fund Administrator Jack Witt to send these plan documents to Fusco. In his e-mail, Fusco thanked Messino for his help, and said that he had still not received the Union plan documents. Fusco also told Messino that he wanted to schedule negotiating dates for the new company. Fusco's email stated (Tr. 116-118; G.C.Exh. 8, emphasis added):

Neil:

I want to provide you an update.

As of today, I have not received the 705 summary plan description documents sent by Mr. Witt. I was told today that the documents were received in Lexington, KY [another Ashland facility]. They are being forwarded to my attention in Dublin, Ohio. Thank you for personally asking Mr. Witt for that information. I would like to review the materials once reviewed.

**I am also awaiting further direction from the new company.**

Given that, I would like to ask you for your availability for other negotiation dates in the month of January. **We will not be in a position to have a productive meeting next week on behalf of the new company. I would ask that we instead set dates to meet next month.**

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<sup>22</sup> Hollinshead testified that he was aware that offers would be made to all of the Willow Springs employees and to the Ashland managers working at the Willow Springs facility, including Pat Cassidy and Tony Kuk (Tr. 490-494).

Please advise at your convenience.

Thanks.

Paul

**Paul Fusco copied Pat Cassidy and Tony Kuk on the e-mail to Neil Messino.**<sup>23</sup>

### **Discussions with Kevin Meyers**

Ashland has another division, called Valvoline. Valvoline's and Ashland Distribution's facilities were located on the same piece of property in Willow Springs. Valvoline had its own collective bargaining agreement with Local 705, covering Valvoline's drivers and warehousemen. Kevin Meyers was an Ashland labor relations representative, and was in the process of negotiating a new Local 705/Valvoline contract with Neil Messino.

On December 29, 2010, Kevin Meyers sent an e-mail to Neil Messino, stating that he would also be taking over the Ashland Distribution negotiations from Paul Fusco. Messino and Meyers had a series of e-mail exchanges and telephone calls concerning resumption of negotiations between Ashland Distribution and Local 705 (at the same time they continued to negotiate a new Valvoline contract), and whether to negotiate an extension of the Ashland Distribution contract to expire on the closing date of the sale to Nexeo, or a full-term contract (G.C.Exh. 9; Tr. 118-122).

### **January 4, 2011**

Neil Messino visited the Willow Springs facility again on January 4, 2011, to discuss the situation with the bargaining unit employees. He again brought his copy of the APS, and showed the pertinent provisions stating Nexeo's obligation to retain all of the drivers, at the same wages and

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<sup>23</sup> Local 705 Exception 12 excepts to the ALJ's failure to make any findings with respect to this conversation.

comparable benefits, and to recognize Local 705 as their bargaining representative. Messino met with fifteen to twenty drivers that day (Tr. 109-110, 307-309).

### **February 7, 2011**

On February 7, 2011, Kevin Meyers called Neil Messino and said that he was instructed to set up a meeting on February 15, 2011, between Local 705 and TPG. Meyers told Messino that John Hollinshead and Brian Brockson, the former Ashland Distribution operations manager, would be representing TPG (Tr. 121-123).

### **February 11, 2011**

After talking with Kevin Meyers, Neil Messino asked Union Stewards Mike Jordan and George Sterba to talk with Tony Kuk and find out what they could about the TPG/Local 705 meeting scheduled for February 15 (Tr. 309, 368, 380-381).

Mike Jordan and George Sterba met with Tony Kuk in Kuk's office on February 11, 2011.

**Kuk told Jordan and Sterba that he and Pat Cassidy were now employees of the new company, and that the new company was going to keep everyone. Kuk said that the employees would not have to reapply, that everyone would be hired, and that the terms and conditions would stay the same** (Tr. 310-312, 350-351, 355-357, 368-372, 382-383).<sup>24</sup>

### **The Meeting of February 15, 2011**

Representatives of TPG and Local 705 met for what John Hollinshead referred to as a "meet and greet" on February 15, 2011 at the Willow Springs facility. Union contract administrator Neil Messino, Union business agent Rick Rohe, and Union counsel Thomas Allison were present for

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<sup>24</sup> Local 705 Exception 13 excepts to the ALJ's failure to make any findings with respect to this conversation.

Local 705. John Hollinshead and former Ashland operations manager Brian Brockson, now Nexeo's Vice President of National Operations, were present for the new company. Kevin Meyers (who remained an Ashland employee) introduced Hollinshead to the Union representatives, but otherwise did not say anything.

Hollinshead did all of the talking for the Company. He announced that the new company would be called Nexeo Solutions, LLC. He said that Nexeo intended to send out offers of employment to the drivers in a few days. He said that Nexeo had a problem with the withdrawal liability of the Union's multi-employer pension plan.<sup>25</sup> Hollinshead said that Nexeo's actuary had compared the Nexeo 401(k) plan to the Local 705 Pension Plan, and that only 4 of the 32 bargaining unit employees would lose money, by transferring into the 401(k) plan, given their age and time in the plan. Hollinshead said that the other 28 bargaining unit employees would be better off in the Nexeo 401(k) plan (Tr. 128).

John Hollinshead told Neil Messino that Nexeo would "write a check," and make whole any employees who lost retirement benefits as a result of being transferred from the Local 705 Pension Plan into the Nexeo 401(k) plan.

Hollinshead also talked about the Local 705 Health & Welfare Plan. He said that Nexeo would prefer to have the employees in the Nexeo medical insurance plan, but this was not a "deal breaker." If the Union would allow the Company to withdraw from the Local 705 Pension Plan, the Company would "look" at keeping the employees in the Local 705 Health & Welfare Plan.

Neil Messino looked at the Company's actuarial analysis of the effect of leaving the Local

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<sup>25</sup> Hollinshead stated that the withdrawal liability from the Local 705 plan would be \$9 million. Messino corrected him, and stated that it would be \$1.6 million if the Company withdrew (Tr. 127-128)

705 Pension Plan on bargaining unit employees, and immediately noticed that Nexeo was only counting the time the employees had worked for Ashland Distribution, and had not counted their earlier time in the Plan with other Local 705 employers. Benefits under the Local 705 Pension Plan, including the “25 years and out” feature,<sup>26</sup> are based on total years in the plan, and not merely the years with one employer. Messino told Hollinshead that the Company would have to include all of the employees’ time in the Plan in its calculations.

Messino also explained that Local 705 members would be required to contribute 4% of their wages into the Nexeo 401(k) plan, and that the Local 705 Pension Plan did not require any employee contribution (Tr. 130).

In the meeting, Neil Messino asked Hollinshead for the summary plan descriptions for the Nexeo 401(k) plan and the Nexeo health care plan. Messino said he needed them to see what the benefits were, and to follow-up on Hollinshead’s commitment to make employees whole for moving into the Nexeo 401(k) plan. Hollinshead said that he would get the documents for Messino.

Hollinshead asked Messino for the bargaining unit employees’ years of service in the Local 705 Pension Plan, so that the Company could more accurately calculate make-whole amounts for the employees (Tr. 132).

John Hollinshead gave the Union generic versions of the two letters Nexeo intended to send to bargaining unit employees in the next few days, offering them employment at Nexeo, but without the Local 705 Pension Plan and Health & Welfare Plan (G.C.Exh. 10; Tr. 132-134). One version would be sent to employees with 10 or more years of service with Ashland Distribution as of July

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<sup>26</sup> Participants in the Local 705 Pension Fund receive a life-time pension of \$2,500/month after 25 years of participation in the plan. Thereafter, the pension goes up \$100/month for each additional year of participation in the plan, without a cap (Tr. 130-131).

1, 2003, and the other version would be sent to employees with less than 10 years of service. Nexeo intended to make different transition contributions to employees' 401(k) plans for the two groups.

The Union objected to the Company's announced unilateral changes to these important terms and conditions of employment, in light of the fact that Nexeo had already committed to hire all of the bargaining unit employees. Hollinshead agreed that Nexeo was retaining all of the employees, and said that Nexeo would recognize Local 705 as their bargaining representative as soon as it had majority status.

The Company did not propose or mention changes to any other terms and conditions of employment. Hollinshead told the Union that Nexeo would "mirror the current expired [Ashland] agreement" except for the Local 705 Pension Fund and the Company would "look at" the Local 705 Health & Welfare Fund. Hollinshead said that Nexeo would maintain the current Ashland Distribution wages (Tr. 135-136).

After a caucus, Neil Messino told Hollinshead that the Union accepted Nexeo's offer of employment on behalf of all of the bargaining unit employees, but did not agree with the changes to the terms and conditions of employment, and that the Company could not make these changes without bargaining (Tr. 137).

After returning to his office after the February 15 meeting, Neil Messino e-mailed a letter to John Hollinshead (G.C.Exh. 11; Tr. 138-139). The letter stated that the Union appreciated the fact that Nexeo intended to retain all of the current bargaining unit employees and recognize Local 705 as their bargaining agent, but that Local 705 did not believe that the Company could unilaterally eliminate the employees' pension and health insurance plans. Messino confirmed that the employees' acceptance of offers of employment from Nexeo was without prejudice to the Union's

position, and did not constitute a waiver by the Union or the employees of their position that these terms could not be unilaterally changed.

Messino's February 15 letter went on to say that Local 705 was prepared to discuss a new contract with Nexeo, including Nexeo's desire to move these employees from the Local 705 Pension Plan into Nexeo's defined contribution plans, while making employees whole for whatever losses they suffered as a result of that move. Messino said that the Union was prepared to begin those negotiations as soon as possible, in the hope that agreement on a new contract could be reached before the announced March 31, 2011 Ashland/Nexeo closing date.

Finally, in his letter of February 15, 2011, Messino reiterated his request for (1) the summary plan description for the Nexeo health insurance plan, including retiree health insurance; (2) the summary plan description for the pension plans into which Nexeo wished to move bargaining unit employees; and (3) the Company's analyses of the impact on bargaining unit employees of their movement from the Local 705 plans into the Company's plans, and the assumptions used by the Company in making these analyses.

### **February 17, 2011**

Nexeo mailed "Offers of Employment" to all bargaining unit employees on February 17, 2011, contingent on the closing of Nexeo's purchase of Ashland Distribution. The offers stated that the employees would have the same position as at Ashland, the same base rate of pay, and "benefits under plans and programs that are comparable in the aggregate to plans and programs sponsored by Ashland immediately prior to closing."<sup>27</sup> (G.C.Exh. 35, emphasis added). The offer also stated that

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<sup>27</sup> This was a deliberate misstatement by Nexeo of the language of the Ashland/Nexeo Agreement of Purchase and Sale, which Nexeo has maintained to the present day. In Section 7.5(d)  
(continued...)

the former Ashland Distribution employees would no longer participate in their multi-employer pension plan and multi-employer health and welfare plan. The offer of employment contained a signature line for the employee, which stated (G.C.Exh.35):

I accept this contingent offer of employment under the terms and conditions set forth above.

Union Steward George Sterba called Neil Messino when he received his offer of employment. Messino instructed Sterba to tell the bargaining unit employees to cross out certain words in the acceptance line so that it read (see G.C.Exh. 12):

I accept this...offer of employment.....

All of the 32 bargaining unit employees accepted the offers of employment with this redaction (Tr. 139-141).<sup>28</sup>

### **February 21, 2011**

Neil Messino received a telephone call from John Hollinshead on February 21, 2011, in response to the employees' redaction of their employment offers. Hollinshead said that he wasn't

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<sup>27</sup>(...continued)

of the APS Agreement, Nexeo agreed to provide each former Ashland Distribution employee with employee benefits under plans "that are substantially comparable in the aggregate to those provided by Ashland." (G.C.Exh. 6, p. 57; ALJD, p. 4, lines 14-20, emphasis added).

As discussed below, the Local 705 Pension Plan and Local 705 Health & Welfare Plan were "provided by" Ashland Distribution to bargaining unit employees as a result of the Company's contractually required contributions to the Plans, even though those Union Plans were not "sponsored by" Ashland Distribution. See the definition of "Seller Benefit Plan" at page 14 of the APS (G.C.Exh. 6, p. 14).

This deliberate misstatement by Nexeo is addressed in Local 705's Exception 18.

<sup>28</sup> In his decision, ALJ Kocol misstated the facts with respect to the method of the employees' signing these offers of employment. (ALJD, p. 10, lines 45-48). Local 705 Exception 19 addresses this misstatement.

sure if Nexeo was going to be happy with that, and didn't want any "wrinkles" in the employees being hired. Messino told Hollinshead that the Union's position was that the Company could not unilaterally change these terms and conditions of employment. Hollinshead said that he understood the Union's position, and understood that the Union did not want to waive that position. Messino and Hollinshead agreed that the Company would reissue the offers of employment, and the employees would sign them "under protest" (Tr. 141-143).

Tony Kuk then reissued the offers of employment. The employees wrote "under protest" on the signature line, and returned them to the Company. All of the bargaining unit employees accepted employment from Nexeo in this way, except for one employee who retired in connection with the sale (G.C.Exh. 13; Tr. 143-144). See Local 705 Exception 19, discussed above.

#### **February 23, 2011**

Neil Messino wrote to John Hollinshead on February 23, 2011, stating that he understood that all of the bargaining unit employees had accepted Nexeo's offer of employment and renewing Local 705's demand for recognition. Messino reiterated the Union's position that, having agreed from the beginning to hire all of the bargaining unit employees, Nexeo did not have the right to later unilaterally change their pension and health insurance plans. Messino also renewed his February 15, 2011 demand for information (G.C.Exh. 14, p. 3).

#### **Early March, 2011**

On March 2, 2011, John Hollinshead responded to Neil Messino's letters of February 15 and 23, 2011. Hollinshead laid out the Company's legal defense of its announced unilateral changes to health insurance and pension plans. Hollinshead continued to incorrectly assert that Nexeo's obligation under the Purchase Agreement was to provide "benefit plans that are comparable in the

aggregate to those Ashland sponsors.” (G.C.Exh. 14). Hollinshead did not provide any of the requested information, and did not respond to Messino’s requests for this information (Tr. 146-147).

Neil Messino responded to John Hollinshead by letter of March 7, 2011. Messino pointed out that the employees had twice accepted offers of employment from Nexeo, and that the Company was still refusing to provide the requested information and refusing to schedule bargaining. Messino again stated that he was looking forward to bargaining with Nexeo about a new contract, including benefits, and that Nexeo had no right under these circumstances to unilaterally change the employees’ benefit plans. Messino again renewed his request for information, and asked the Company to schedule bargaining for a new contract (G.C.Exh. 15; Tr. 147-148).

In response to Neil Messino’s request of February 15, 2011, John Hollinshead e-mailed Messino on March 12, 2011, the “heat maps” prepared by Nexeo’s actuaries. These documents broke down the impact on bargaining unit employees of moving from the Local 705 Pension Fund to the Nexeo 401(k) plan. Based on different overtime assumptions, the “heat maps” divided the employees into cells by age and years of service, and showed the number of employees in each cell, and the positive or negative impact the change in pension plan would allegedly have on each group of employees. (Resp.Exh. 3; Tr. 267-270).

### **March 23, 2011 - The Parties’ First Bargaining Session**

Nexeo and Local 705 met in their first bargaining session on March 23, 2011, at the Marriott Hotel in Burr Ridge, Illinois. The Union was represented by Neil Messino, Rick Rohe, Mike Jordan, George Sterba, Thomas Allison, Local 705 Secretary-Treasurer Juan Campos, and Local 705

President Joe Bakes.<sup>29</sup> The Company was represented by John Hollinshead, Brian Brockson, Tony Kuk, and Company counsel David Kadela. Neil Messino gave the Company a table prepared by the Local 705 Pension Fund, which showed the years of pension service and other information for each bargaining unit employee, the amount of their pension under the Local 705 Pension Fund, and information concerning the losses they would suffer by going into the Nexeo 401(k) plan. Messino explained the document, and discussed how much money individual employees would lose as a result of a shift from the Local 705 Pension Plan to the Nexeo 410(k) plan (G.C.Exh. 16; Tr. 149-154).

The parties continued to compare the Local 705 Pension Plan to the Nexeo 401(k) plan (Tr. 223). Messino explained that there were other problems with the switch into the Nexeo 401(k) plan. The Company's analysis assumed that members would make 7.5% annually on the investments in their self-directed 401(k) plan, which he said was totally unrealistic. In addition, the Company's analysis assumed that employees would work a substantial amount of overtime, and would receive various performance bonuses "if the Company hit all of its targets" (Tr. 157). The Company's analysis also assumed that employees would work until age 65, whereas many employees would be able to leave after 25 years of service under the Local 705 Pension Plan (Tr. 321). Both sides agreed that it made sense to bring the parties' actuaries into the negotiations to reach an agreement on the impact of the change in pension plans on the employees, so that the promised "shore up" payments could be made to the adversely affected employees (Tr. 543-544). Unfortunately, the Company

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<sup>29</sup> Campos and Bakes were also Trustees of the Local 705 Pension Plan and the Local 705 Health & Welfare Plan.

unilaterally pulled out of the benefit plans on April 1, 2011, before these meetings could occur.<sup>30</sup>

John Hollinshead said that he wanted Nexeo's actuaries to look at these numbers, and again said that if there were any deficiencies between the Local 705 Pension Plan and the Nexeo 401(k) plan, the Company would write checks for the difference and put the money into the employees' 401(k) plans (Tr. 156, 322-323). Neil Messino again stated that the Union was willing to allow the Company to move the employees from the Local 705 Pension Plan into the Company 401(k) plan if in fact the employees were made whole for any losses that they suffered.

The parties also discussed Nexeo's withdrawal liability if its employees remained in the Local 705 Pension Fund. Hollinshead had stated that Nexeo would immediately assume Ashland Distribution's withdrawal liability if Nexeo employees participated for one minute in the Local 705 Pension Plan. The Union contested that, and pointed out that, under Section 7.5(g) of the Purchase Agreement, Ashland had agreed to indemnify Nexeo for any withdrawal liability accrued under Ashland's ownership (G.C.Exh. 6, p. 58; Tr. 158).

Neil Messino also explained that bargaining unit employees would lose their retiree health insurance if they were taken out of the Local 705 Health & Welfare Plan and transferred into the Nexeo health insurance plan. Employees had to participate in the Local 705 Health & Welfare Plan during the last three months of their employment to qualify for retiree health insurance under the Local 705 Plan (Tr. 155-156).<sup>31</sup>

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<sup>30</sup> Local 705 Exception 20 addresses the ALJ's failure to make a finding with respect to the parties' agreement to bring their actuaries into the negotiations to help calculate the "share up" payments that Nexeo had agreed to make to make employees whole for losses suffered by going from the Local 705 Pension Fund into the Nexeo's 401(k) plan.

<sup>31</sup> In a sidebar meeting on March 23, 2011, the Union determined that the employees  
(continued...)

The parties exchanged initial contract proposals, and each side discussed its proposal (G.C.Exhs. 17-18; Tr. 163-165, 323-324).<sup>32</sup> No agreements were reached, and the parties agreed to exchange more information; to have a conference call bargaining session on March 28, 2011 to discuss non-economic issues; and have a third bargaining session on March 31, 2011, the day before the closing of the Ashland/Nexeo sale (Tr. 163-165).

### **March 25 and 27, 2011**

On March 25, 2011, John Hollinshead e-mailed updated “heat maps” to Neil Messino. The updated charts included information based on the employees’ actual benefit entitlement under the Local 705 Pension Plan, including the “25-and-out” feature. The Company continued to compare the Local 705 Pension Plan to the Nexeo 401(k) plan. This time the Company determined that 6 employees “could experience a shortfall,” depending on how much overtime they worked (G.C.Exh. 19; Tr. 166-167, 462-463). See Local 705 Exception 21.

On March 27, 2011, Hollinshead sent Messino a revised contract proposal. The Company’s revised proposal continued to maintain overtime after 8 hours in a day, a guaranteed 8 hour day, a guaranteed 40 hour week, and vacation pay based on 50 hours/week. See Local 705 Exception 22.

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<sup>31</sup>(...continued)  
could withdraw from the Local 705 Pension Fund and still remain in the Local 705 Health & Welfare Fund, thereby preserving their retiree health insurance. John Hollinshead “signaled” that the Company would be open to doing that. The Union agreed, stating that, regardless of what happened with the Pension Fund, the parties should agree to keep the employees in the Local 705 Health & Welfare Fund. A week later, on April 1, 2011, the Company unilaterally terminated the employees’ participation in both Union plans (Tr. 544-545).

<sup>32</sup> The Company’s proposal (G.C.Exh. 18) maintained, the 40 hour weekly guarantee (Article 10, p. 6); the 8 hour daily guarantee (Article 9, p. 6); daily overtime (Article 3 (1), p. 4); and vacation pay computed on the basis of 50 hours/week (Article 12 (3), p. 7). Nothing was ever said about changing these existing terms and conditions of employment. See ALJD, p. 11, lines 24-27.

The Company offered the Union a choice of retaining their existing (Ashland Distribution) vacation, sick pay, funeral leave and jury duty policies or the Nexeo policies (G.C.Exh. 20; Tr. 167-168, 463).<sup>33</sup>

### **March 28, 2011 - The Second Bargaining Session**

The parties met by conference call to discuss non-economic issues in their second bargaining session on March 28, 2011. Neil Messino participated for the Union. John Hollinshead, Brian Brockson, Tony Kuk and David Kadela participated for the Company. The parties went through the proposals and reached tentative agreements on a number of sections (Tr. 169-170, 463-464).

On March 28, 2011, the Union membership voted to strike, in a 31-0 vote (Tr. 325).

On the same day, John Hollinshead called Neil Messino to give him a “heads-up” that the Company may pull some work out of the plant because of its concern about a strike. Messino testified that the call was informational, and not threatening. In that call, Hollinshead again stated that the parties should get their actuaries involved to get closer to the number that would make the employees whole for the change from the Local 705 Pension Plan to the Nexeo 401(k) plan. See Local 705 Exception 20. Hollinshead said that he was no longer authorized to make the employees completely whole, but he could write a check to get them “closer” (Tr. 170-171).

### **March 31, 2011 - The Third Bargaining Session**

The parties met in their third bargaining session on March 31, 2011 – on the eve of the

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<sup>33</sup> ALJ Kocol found that “the record does not allow me to make any assessment as to whether the benefit packages, in their entirety, were comparable in the aggregate” (ALJD, p. 18, lines 9-13). That is simply not true. In its proposal of March 27, 2011, Nexeo explicitly proposed to maintain all of Ashland’s benefit plans unchanged, except for Nexeo’s pension and health insurance plans, each of which was objectively and significantly inferior to the Ashland plans. See G.C.Exh. 20, p. 2. See Local 705 Exceptions 42 and 43.

closing of the Ashland/Nexeo transaction. Neil Messino, Rick Rohe, Mike Jordan, George Sterba, Juan Campos and Joe Bakes were present for the Union. John Hollinshead, Brian Brockson, Tony Kuk and David Kadela were present for the Company. Messino presented the Company with a revised proposal, which reflected articles not in dispute and tentatively agreed to on March 28, and reviewed it with the Company (G.C.Exh. 21).

Neil Messino told the Company that he was not able to discuss the health and welfare article because he still had not received the requested summary plan description for the Company's medical plan, which he had first requested on February 15, 2011. John Hollinshead again promised to get Messino the SPDs. (Tr. 175).

At that point, John Hollinshead announced that the Company was going to unilaterally put all of the employees into the Nexeo health and welfare plan, and out of the Local 705 Pension Fund and into the Nexeo 401(k) plan, at midnight that night. Neil Messino asked Hollinshead if the Company was doing this because it thought the parties were at impasse, or because it believed that it could set initial terms of employment. Hollinshead responded that the parties were not at impasse, but that he believed that the Company could set the initial terms of employment (Tr. 176). See Local 705 Exception 24. Messino objected to the Company's unilateral action, and said that the Union needed the SPDs for the Nexeo health insurance plan and 401(k) plan so that they could continue to bargain on these important issues.

Neil Messino testified that he did not believe the parties were at impasse. Several open contract items had not even been discussed. The Union was still waiting for the requested summary plan descriptions for the important pension and health and welfare issues. In addition, Messino had made it clear at every meeting that the Union was willing to move on the pension issue. Messino

had consistently stated, including on March 31, 2011, that the Union did not object to Nexeo coming out of the Local 705 Pension Plan, as long as the affected employees were made whole (Tr. 176-178). See Local 705 Exception 24.

#### **April 1, 2011 - Unilateral Implementation**

The Ashland/Nexeo deal closed on March 31, 2011. The Company told the Willow Springs employees not to come to work on April 1 because of insurance issues. Neil Messino wanted to make it clear that all of the employees had accepted employment and were available to work, and told the Union members to report to work, which they all did. Neil Messino arrived at the facility around 7:00 a.m., and met with the drivers (Tr. 178-180, 225, 328-330, 376-377).

Around 11 a.m., Plant Manager Tony Kuk spoke to the employees, and told them that, in addition to the loss of the Local 705 Pension Fund and the Local 705 Health & Welfare Fund, the Company would no longer pay overtime after 8 hours in a day; no longer guarantee employees 8 hours of pay a day; no longer guarantee employees 40 hours of pay a week; and was reducing vacation pay from 50 hours/week to 40 hours/week. When Billy Meyers, one of the drivers, asked Kuk what rate of pay they were going to be paid, Kuk responded sarcastically, "Today, we're paying your regular rate, but tomorrow that could change." (Tr. 181-182, 330-332, 378).

It is undisputed that, effective April 1, 2011, Nexeo unilaterally (Tr. 182-187, 332-335, 378-379):

- Stopped making contributions to the Local 705 Pension Fund, and moved the bargaining unit employees into the Nexeo 401(k) plan;
- Stopped making contributions to the Local 705 Health & Welfare Fund, and moved the bargaining unit employees into the Nexeo health insurance plan;

- Stopped paying overtime after 8 hours in a day;
- Stopped guaranteeing employees 8 hours of pay a day and 40 hours of pay a week;<sup>34</sup>
- Reduced vacation pay from 50 hours/week to 40 hours/week.

See ALJD, p. 12, lines 14-26.

The changes to overtime, vacation pay and the guarantees had never been mentioned. In particular, when the Company described the new terms and conditions of employment in its February 17 offers of employment to bargaining unit members, it did not mention any changes, other than the pension and health insurance plans. The changes to overtime, vacation pay and the guarantees were never included in any of the Company's pre-implementation proposals or brought up in any of the four pre-implementation meetings between Nexeo and the Union (Tr. 184, 335).

#### **Post-Implementation Communications**

On April 1, 2011, Neil Messino e-mailed a letter to John Hollinshead, objecting to Nexeo's unilateral actions. Messino asked the Company to rescind the unilateral action, reinstate the established terms and conditions of employment, and bargain over any changes. Messino stated, "since it is perfectly clear that Nexeo agreed to hire all of the bargaining unit employees, and has done so, Nexeo is not able to unilaterally implement initial terms and conditions of employment which differ from the terms and conditions of employment under Ashland Oil." (C.P.Exh. 1; Tr.

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<sup>34</sup> Judge Kocol found that, as to the 8 hour guarantee, "in March 2012, an employee was sent home early but apparently was not paid his 8 hours; this is the only time this issue has arisen since the April 1 announcement" (ALJD, p. 12, lines 24-26). Local 705 excepts this finding. Local 705 Exception 23. Union steward Mike Jordan was aware of only one incident (Tr. 334-335), but there was no evidence that was the only such occasion.

The Company stipulated that all of the other changes, including the change in overtime from daily overtime to weekly overtime went into effect on April 1, 2011 (Tr. 332-333; See ALJD, p. 12 lines 17-26).

226).

John Hollinshead responded on April 2, 2011, asserting Nexeo's right to unilaterally implement initial terms and conditions of employment (Resp.Exh. 17, pp. 11-12).

Messino responded on April 8, 2011, reiterating the Union's position (Resp.Exh. 17, p. 13). Hollinshead responded to that letter on April 10, first stating that he did not see anything to be gained by "continuing a tit-for-tat on our respective positions," and then reiterating the Company's position (Resp.Exh. 17, p. 16).

Throughout these months, the Company never responded to the Union's February 15, 2011 requests for information. On May 25, 2011, Neil Messino e-mailed John Hollinshead requesting a copy of the 401(k) plan document. Hollinshead replied by forwarding an email from Paul Fusco – now working for Nexeo Solutions – that the summary plan description was still not finalized. (G.C.Exh. 24; Tr. 197-200).

#### **June 1, 2011 - The Fourth Bargaining Session**

The parties met for their fourth bargaining session at the Willowbrook Holiday Inn on June 1, 2011. Present for the Union were Neil Messino, Rick Rohe, Mike Jordan, George Sterba, Joe Bakes, and Thomas Allison. Present for the Company were John Hollinshead, Brian Brockson, Tony Kuk, and David Kadela (Tr. 200-202).<sup>35</sup>

#### **The Union's Requests for Information**

The next day, June 2, 2011, Neil Messino followed up with a request for the 401(k) plan document and the annexes, schedule and exhibits to the APS. Hollinshead responded, saying that

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<sup>35</sup> Judge Kocol limited testimony on post-implementation events to information related to the Company's refusal to provide information (Tr. 201-202).

Fidelity was providing the draft SPD the next week, and it should be ready in the next few weeks. Hollinshead refused to provide any of the requested annexes, schedules and exhibits to the APS (G.C.Exh. 25; Tr. 203).

Messino renewed his request for this information by an e-mailed letter on June 4, 2011. Messino pointed out that Section 402(a)(1) of ERISA requires that plans be established and maintained pursuant to a written instrument. The Company had unilaterally moved bargaining unit employees into Company plans, and the Union was requesting copies of the legally required plan documents (G.C.Exh. 26).

Hollinshead responded on June 15, 2011. He provided one of the requested schedules to the Purchase Agreement, only because it purportedly helped the Company's case, but refused to provide any of the other requested schedules (G.C.Exh. 27).<sup>36</sup> In a cover e-mail, Hollinshead said that he had been out of the country, and that the SPD was in final review and would be available the next week. (Resp.Exh. 23, p. 7).

Messino responded on June 19, 2011, again requesting the summary plan descriptions, the 401(k) plan document, and the schedules to the APS (G.C.Exh. 28).

On July 15, 2011 – five months after it was requested – Hollinshead finally sent Messino a copy of the Nexeo 401(k) summary plan description. Hollinshead also provided a “First Amendment” to the 401(k) plan document, but continued to refuse to provide the plan document itself, as well as the summary plan description for the Nexeo health insurance plan and the schedules

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<sup>36</sup> The Company never produced the requested Schedule 7.5(a) to the APS Agreement, but finally stipulated, that Schedule 7.5(a) confirmed that Nexeo had agreed by name to hire each of the Willow Springs bargaining unit employees, as well as Robert Craycraft, Paul Fusco, Brian Brockson, Pat Cassidy, and Tony Kuk, all of whom were in fact retained by Nexeo (Tr. 575).

to the APS (G.C.Exh. 29).

On August 2, 2011, Messino responded to Hollinshead. Messino renewed his requests for the 401(k) plan document, the summary plan description for the Nexeo health insurance plan, and the schedules to the Purchase Agreement (G.C.Exh. 30).

On August 3, 2011, the Union filed an 8(a)(5) unfair labor practice charge with respect to the Company's refusal to provide information (G.C.Exh. 1 (c)).

On August 11, 2011 – three months after it was requested – Hollinshead finally produced the plan document for the Company's 401(k) plan. Hollinshead stated, without explanation, that his failure to provide this requested information was “an oversight” (G.C.Exh. 31).

On October 19, 2011 – eight months after it was requested – the Company finally produced the summary plan description for the health and welfare plan (G.C.Exh. 33).

## ARGUMENT

### **I. Nexeo Solutions, LLC Is a “Perfectly Clear” Successor to Ashland Distribution**

#### **A. The “Perfectly Clear” Doctrine**

The “perfectly clear” doctrine has its origin in the Supreme Court's decision in NLRB v. Burns International Security Systems, 406 U.S. 272 (1972), the “bedrock” decision for successorship law. In Burns, the Supreme Court held that a successor employer has a duty to bargain with the union that represents the predecessor's employees if the successor hires a majority of its bargaining unit employees from the predecessor. Burns, at 278-279. The Supreme Court in Burns recognized that, in some cases, it will not be clear that the union represents a majority until the successor has hired a full complement of employees. In those cases, the successor employer has a

window of opportunity – prior to the actual hiring of the predecessor’s employees – to unilaterally establish the initial terms on which the predecessor’s employees will be hired. In that case, the bargaining obligation does not attach to the successor until the predecessor’s employees are actually hired, which is at a point in time after the initial terms have been unilaterally established. That scenario describes the “Burns successor.”

However, the Supreme Court in Burns also recognized that in some instances “it is perfectly clear that the new employer plans to retain all of the employees in the unit.” In that case, the court held, “it will be appropriate to have the successor initially consult with the employees’ bargaining representative before he fixes terms.” Burns, at 294-295, emphases added. In other words, where the successor has made it “perfectly clear” that it intends to hire all or substantially all of the predecessor’s employees, the successor’s bargaining obligation attaches at that earlier point in time, before the employees are actually hired, and (unless the successor makes it clear at that earlier point in time that it intends to change the terms of employment, which did not happen here) there is therefore no “window of opportunity” for the successor to act unilaterally with respect to the terms of employment. The bargaining obligation has already attached as a result of the successor’s demonstrated intent to hire all of the predecessor’s employees. Any unilateral changes after that time violate Section 8(a)(5) of the Act. **This scenario describes the “perfectly clear” caveat to the Burns successorship situation, which the Acting General Counsel has alleged applies in this case.**

The facts in Elf Atochem North America, Inc., 339 NLRB 796 (2003), are uncannily similar to the present case. On January 27, 1998, the day the sale of the company in Elf Atochem was first announced, the employees received memoranda from managers of the seller (who soon went to work

for the buyer). The question and answer portion of the memoranda stated (339 NLRB at 807, emphasis added):

Elf Atochem will provide employment to all of the existing workforce dedicated to the AtoHaas business.

and

Elf Atochem will recognize employees' past years of service with AtoHaas and Rohm and Haas, and will provide employees with equivalent salaries and comparable health, welfare and benefits package, including pension, savings plan and vacation.

These same statements were made orally to an employee by a manager of the seller, who also went to work for the buyer. Id. at 807-808.

The ALJ and the Board in Elf Atochem found that the buyer's bargaining obligation attached on January 27, 1998, when this information was given by the seller's managers to the employees. 339 NLRB at 796 and 808. Months later, on October 13, 1998, the buyer issued offers of employment to the employees to start work on November 2, 1998, when the transaction was to close. The offers of employment informed the employees, for the first time, that the method of paying overtime was being changed. When the transaction closed on November 2, 1998, the buyer implemented that and other unilateral changes as well.

The Board found that the buyer's bargaining obligation attached under the "perfectly clear doctrine" on January 27, 1998, when the employees were informed that all of the employees would be retained and they would be provided with "equivalent salaries and comparable health, welfare and benefits package, including pensions savings plan and vacation." The buyer violated Section 8(a)(5) of the Act when it later offered employment to the employees based on unilaterally changed terms and conditions of employment. The Board ordered the buyer to reinstate the previous terms and

conditions of employment until the union and the buyer reached agreement on a new collective bargaining agreement. Elf Atochem, 339 NLRB at 796, n. 4.

See also Canteen Company, 317 NLRB 1052 (1995), enforced, 103 F.3d 1355 (7<sup>th</sup> Cir. 1997), discussed in Elf Atochem, 339 NLRB at 807, in which the Board held that, once it is “perfectly clear” that the successor intends to retain the predecessor’s employees, the successor is not entitled thereafter to unilaterally change the employees’ terms and conditions of employment; Helnick Corp., 301 NLRB 128, 134 (1991), in which the Board held that the bargaining obligation attached when the successor stated that all of the predecessor’s employees could expect to be retained, and that the successor’s unilateral changes to the employees’ initial terms and conditions of employment violated Section 8(a)(5); and Fremont Ford, 289 NLRB 1290, 1297 (1988), in which the Board found that the successor had made it “perfectly clear” that it intended to retain a majority of the predecessor’s employees, and the subsequent announcement of changes to terms of employment at the time the offers of employment were made violated Section 8(a)(5).

**B. The ALJ Correctly Found That It Was “Perfectly Clear” That Nexeo Planned to Retain All of the Ashland Distribution Employees in the Willow Springs Bargaining Unit**

In the Agreement for Purchase and Sale, Ashland and Nexeo expressly agreed that Nexeo would hire all of the bargaining unit employees (G.C.Exh. 6, pp. 55-56 (Sections 7.5(a) and 7.5(c)); maintain their wages and provide benefits that are “substantially equivalent in the aggregate” to their benefits provided by Ashland (G.C.Exh. 6, p. 57 (Section 7.5(d)); and recognize Local 705 as their bargaining representative (G.C.Exh. 6, p. 60 (Section 10(o)).

Based on these commitments in the APS, ALJ Kocol correctly found that it was “perfectly clear” that Nexeo planned to retain all of the Ashland Distribution employees in the bargaining unit.

The ALJ stated (ALJD, p. 15, lines 27-to p. 16, line 4):

...I agree with the General Counsel that it was perfectly clear (as a matter of law and not as a legal conclusion) that Nexeo planned to retain all the employees in both units. Nexeo committed itself to do so in the APS; that document repeatedly indicated that Nexeo was to make offers of employment to “all” employees.

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...Nexeo was obligated not only to offer employment to all the unit employees; it also had to offer the employees employment in their same position, with the same base wages, and with a comparable benefit package. There was little doubt that a majority, if not all, of the employees, would under these conditions accept employment at Nexeo. That was what those provisions in the APS were designed to accomplish. This is what Nexeo understood would happen. This is what Local 705 and Local 70 understood would happen. And this is exactly what happened. Stated differently, Nexeo:

[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).

The ALJ’s conclusion that “it was perfectly clear ... that Nexeo planned to retain all the employees in both units” directly tracks the test of a “perfectly clear successor” as articulated by the Supreme Court in NLRB v. Burns Security Services, 406 U.S. 272, 294-295 (1972) (“...there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit”). The ALJ’s controlling finding was not only supported by the clear and unambiguous language of the APS, but was also supported by Schedule 7.5(a) to the APS, listing each bargaining unit employee by name and confirming that each would be offered employment by Nexeo (Tr. 36).<sup>37</sup>

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<sup>37</sup> The Dunham Co., 218 NLRB 30 (1975), and Springfield Transit, 281 NLRB 72 (1986), discussed by ALJ Kocol at pages 16 and 17 of his decision, stand for the proposition that  
(continued...)

This controlling finding is also supported by the substantial record evidence of repeated messages to the employees, approved by Nexeo, that this was Nexeo's plan, including the November 8, 2010 "Questions and answers for employees" (G.C.Exh. 40, 56); Robert M. Craycraft's letter to "Dear Valued Customers" (G.C.Exh. 46); "Talking Points for Customers" (G.C.Exh. 94, p. 2); the mid-November, 2010 notice to employees (G.C.Exh. 93; Tr. 734-735); and Tony Kuk's statements on

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<sup>37</sup>(...continued)

proof of a "perfectly clear successor" can be established solely through the terms of a purchase/sale agreement. The successor in The Dunham Co. purchased an ice cream company from the predecessor. One of the express conditions of takeover imposed by the seller was that the buyer retain the seller's employees for a minimum period of 30 days, which the buyer did. Based on that agreement between the buyer and the seller, and other evidence establishing that all of the employees would be offered employment with the buyer, the Board found that the buyer was a "perfectly clear" successor, and therefore had a duty to bargain with the union over any changes to the employees' terms and conditions of employment.

The successor in Springfield Transit took over the management of a bus line owned and operated by a public authority. The contract between the predecessor authority and the successor stated that all of the employees would be retained. The successor offered jobs to the employees, but did so on the basis of unilaterally implemented reductions in wages and benefits. Based on the successor's contractual commitment to hire all of the employees, the Board found that it was a "perfectly clear successor" and the unilateral changes to terms and conditions of employment violated Section 8(a)(5) of the Act. The Board's analysis in Springfield Transit was based exclusively on the successor's obligations under the "perfectly clear" doctrine, not on whether it was obliged by the purchase agreement to assume the predecessor's collective bargaining agreement. The Board stated (281 NLRB at 78, emphasis added):

Being bound to hire all SSRC'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 SSRC office staff, it was then obligated to negotiate their initial wages, hours, and terms and conditions of employment with the Union.

In the present case, as discussed above and as the ALJ found, both the specific terms of the APS and substantial record evidence of communications to the employees, discussed above, overwhelmingly established that it was "perfectly clear" that Nexeo planned to retain all of the bargaining unit employees.

February 11, 2011 to Union stewards Mike Jordan and George Sterba, that he was now a Nexeo employee, that Nexeo was going to keep all of the employees, and that the terms and conditions of their employment would remain the same (Tr. 310-312, 350-351, 355-357, 368-372, 382-383). Finally, this conclusion is further supported by the repeated statements to this effect by Ashland representatives hired by Nexeo, presented through offers of proof as a result of ALJ Kocol's hearsay rulings discussed below. See Local 705 Exceptions 1 through 13.

For all of these reasons, ALJ Kocol's finding that "it was perfectly clear...that Nexeo planned to retain all the employees in both units" is overwhelmingly supported by the record evidence.

**C. Nexeo's Bargaining Obligation to Local 705 Attached When It Signed the Purchase and Sale Agreement, Memorializing Its Intention to Hire All Bargaining Unit Employees, And Its Subsequent Unilateral Changes to Employees' Pension and Health Insurance Plans Violated Section 8(a)(5)**

The fundamental principle of the "perfectly clear doctrine" is that, where it is "perfectly clear" that a buyer intends to hire all of the seller's employees, the bargaining obligation attaches at the time that intention is made clear, and any subsequent unilateral changes to these employees' terms and conditions of employment violates Section 8(a)(5). NLRB v. Burns Security Services, 406 U.S. 272, 294-295 (1972). See also, e.g., Elf Atochem North America, Inc., 339 NLRB 796, 807 (2003) ("[The successor] 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"); DuPont Dow Elastomers, LLC, 332 NLRB 1071, 1074 (2000), *enfd.* 296 F.3d 495 (6<sup>th</sup> Cir. 2002) ("The Board has consistently found that an announcement of new terms will not justify a refusal to bargain if, as in this case, the employer has earlier expressed an intent to retain its

predecessor's employees without indicating that employment is conditioned on acceptance of new terms.”); Canteen Company, 317 NLRB 1052, 1054 (1995), enforced, 103 F.3d 1355 (7<sup>th</sup> Cir. 1997) (“...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” (emphasis in original)); Helnick Corp., 301 NLRB 128, 128, n. 1 (1991) (“We agree with the judge that the Respondent’s bargaining obligation attached when it informed employees that they could expect to be retained when it took over the operation”); Fremont Ford, 289 NLRB 1290, 1296 (1988) (“Since Spruce Up the Board has adhered to this distinction based on when the successor employer announces its offer of different terms of employment in relation to its offer of expression of intent to retain the predecessor’s employees unless the successor has misled them”); Starco Farmers Market, 237 NLRB 373, 373 (1978) (“However, where the offer of different terms was subsequent to the expression of intent to retain the predecessor’s employees, the Board has regarded the expression of intent as controlling and has found that the new employer was obligated to bargain with the union before fixing initial terms”); C.M.E., Inc., 225 NLRB 514, 514-515 (1976) (“..we conclude that Respondent made it ‘perfectly clear’ that it planned to retain all or substantially all of the employees in the unit as of February 25, and that the obligation to bargain...commenced on that date...”). In addition to these Board decisions, it is important to note that the Willow Springs aspect of this case arises in the Seventh Circuit, which has adopted the clear meaning of the Supreme Court’s decision in Burns. See Canteen Corp. v. NLRB, 103 F.3D 1355, 1364-1365 (1997) (“...when [the successor] determines that it will retain the workforce of its predecessor, it cannot ignore the Union those employees have chosen when it comes time to determine the conditions of

employment.”).

In the present case, as the ALJ found, Nexeo stated its unambiguous intention to hire all of Ashland Distribution’s bargaining unit employees when it signed the Agreement for Purchase and Sale on November 5, 2010, (G.C.Exh. 6, p. 1). That unqualified statement of Nexeo’s intention was repeated thereafter to employees in a variety of messages expressly approved by Nexeo. Nexeo’s bargaining obligation to Local 705 attached on November 5, 2010. Its subsequent announcement on February 15, 2011, that it was going to unilaterally slash the employees’ pension and health insurance benefits violated that bargaining obligation, and violated Section 8(a)(5) and (1) of the Act.

**D. The Board’s Holding in Spruce-Up Does Not Require a Contrary Result. To the Extent That It Does, Spruce-Up Should Be Overruled as Inconsistent With the Supreme Court’s Decision in Burns**

Despite his finding that “it was perfectly clear...that Nexeo planned to retain all the employees in both units,” and that Nexeo did not announce its elimination of the employees’ pension and health insurance plans until over three months later, the ALJ nevertheless found that Nexeo was not a “perfectly clear successor” under Burns. In reaching this surprising conclusion, the ALJ relies exclusively on one of the four decisions issued by Board members in Spruce Up Corporation, 209 NLRB 194 (1974).

Spruce Up is a problematic decision. Issued shortly after the Supreme Court’s decision in Burns, the five members of the Board wrote four different decisions in Spruce Up. The actual holding in Spruce Up was completely in line with the Supreme Court’s decision in Burns and the Board’s subsequent holdings, as described above. The Board in Spruce Up found that the successor announced his decision to reduce the employees’ wages at the same time that he announced his

intention to hire the existing work force<sup>38</sup>.

Thus, the Board in Spruce Up found – because the successor’s notice of changed terms of employment was simultaneous with his announced intention to hire the predecessors’ employees – the bargaining obligation had not yet attached, and the successor’s unilateral change did not violate the Act. That holding in Spruce Up is completely consistent with Burns and with the Board’s other “perfectly clear” decisions, discussed above. However, that holding in Spruce Up does not apply to the present case, where Nexeo announced its unilateral changes over three months after it stated its intention to hire all of Ashland Distribution’s bargaining unit employees.

ALJ Kocol disregarded the Board’s holding in Spruce Up, and relied on what he characterized as “dicta that has since become a holding that the caveat in Burns should be restricted to circumstances in which the new employer has either actively or by tacit inference, misled employees into believing that they would all be retained without change in their working conditions or at least in circumstances where the new employer failed to clearly announce its announcement to establish a new set of working conditions prior to making the offer of employment. Spruce Up therefore makes it clear that we are not to rely on the language used by the Supreme Court in Burns alone; rather there must be at least a finding that a successor employer misled employees into believing their working conditions would remain the same.” ALJD p. 16, lines 32-41.

Based on this distortion of the holdings in Burns and Spruce Up, ALJ Kocol found that Nexeo’s unilateral changes to the employees’ pension and health insurance benefits over three months after Nexeo announced its intention to offer employment to all bargaining unit employees

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<sup>38</sup> See 209 NLRB 194, 195 (“Although, at the February meeting, Fowler expressed a general willingness to hire the barbers employed by the former employer, he at the same time indicated that he was going to be paying different commission rates.”)

did not violate Nexeo's bargaining obligation. Despite the holdings of Burns and the many Board decisions on this issue, the ALJ found that Nexeo's bargaining obligation did not attach on November 5, 2010, when it announced its unambiguous intention to hire all of the bargaining unit employees.

There are significant problem with the ALJ's reliance on this distorted interpretation of Spruce Up. First, the ALJ's interpretation of Spruce Up is completely at odds with the controlling holding of the Supreme Court in NLRB v. Burns Security Services, 406 U.S. 272 (1972), the source of the "perfectly clear" language and doctrine. As ALJ Kocol admits (ALJD, p. 15, lines 10-30), the core of the Supreme Court holding in Burns is that a successor becomes bound by a bargaining obligation to the union representing the predecessor's employees if "it is perfectly clear that the new employer plans to retain all of the employees in the unit." Burns, 406 U.S. at 294-295. However, the ALJ's reliance on a distorted reading of one of the four decisions in Spruce Up turns Burns on its head, with the result that he finds that Nexeo had no bargaining obligation, even though it was "perfectly clear" "as a matter of fact" that it "planned to retain all the employees in both units." ALJD p, 15, lines 27-30.

In addition to being contrary to the holding in Burns, the ALJ's analysis and conclusions are inconsistent with the holding in Spruce Up is as well. In Spruce Up, as discussed above, the Board found that the successor was not a "perfectly clear" successor because he announced changes to the terms and conditions of the employees at the same time he stated his general willingness to hire all of the employees. ALJ Kocol's decision should be reversed, and that can be done without overturning Spruce Up, if the actual holding in Spruce Up is recognized. If, however, Spruce Up is read as meaning what ALJ Kocol says that it means, it must be overturned. That reading of Spruce

Up is completely at odds with the Supreme Court's controlling decision in Burns Security Services, 406 U.S. 272 (1972), and should be reversed if necessary.

ALJ Kocol's analysis of one of the four Spruce Up decisions is also at odds with the many Board decisions applying Burns's "perfectly clear" doctrine over the past 40 years. Significantly, the only NLRB decisions cited by the ALJ – Springfield Transit Management, The Denham Co., and DuPont Dow Elastomers, LLC – do not support the ALJ's analysis, nor do the "perfectly clear" decisions discussed above, at pages 43-44. Contrary to the ALJ's analysis, none of these Board cases, nor Burns itself, requires a finding that the "new employer has either actively or by tacit inference, misled employees into believing that they would all be retained without change in their working conditions." In addition, the ALJ's statement that at the least it must be shown that "the new employer failed to clearly announce its announcement to establish a new set of working conditions prior to making the offer of employment" (ALJD p. 16, lines 35-37, emphasis added) turns on its head the consistent Board precedent, described above, holding that the new employer must announce his intention to change terms of employment prior to, or contemporaneous with, the statement of his intention to offer employment to the existing work force. The core of the "perfectly clear doctrine" is that the bargaining obligation attaches when the purchaser makes clear his intention to hire everyone. ALJ Kocol's shifting of that analysis downstream, which would allow an employer to announce unilateral changes to working conditions months after it has stated its intention to hire all of the existing employees, is directly contrary to Burns and its progeny and – as the present case demonstrates – eviscerates the "perfectly clear" doctrine.

Finally, even if the ALJ's distorted analysis of Spruce Up is adopted, despite its flat inconsistency with the Supreme Court's controlling decision in Burns and substantial Board

precedent, discussed above, the Acting General Counsel still established that Nexeo had “either actively or by tacit inference, misled employees into believing that they would all be retained without change in their working conditions.” ALJD p. 16, lines 34-35.

Statements found to be attributable to Nexeo which support the conclusion that Nexeo misled the employees include:

- Section 7.5(d) of the November 5, 2010 APS, made available to bargaining unit employees, stated that Nexeo would provide each bargaining unit employee with “wages no less favorable” than those provided by Ashland, and “other employee benefits” under plans “that are substantially comparable in the aggregate to those provided by Ashland.” (G.C.Exh. 6, p. 57).
- On November 8, 2010, Ashland issued “Questions and answers for employees,” which had been reviewed by agents of Nexeo (Jt. Exh. 2, ¶¶1-5) and which stated that Nexeo would “provide, to each transferred employee,...wages that are no less favorable than [those provided by Ashland]...and other employee benefits that are substantially comparable in the aggregate to compensation and benefits as of January 1, 2011.” (G.C.Exh. 40 and 56, ¶20).<sup>39</sup>
- On February 11, 2011, Tony Kuk told Union stewards Mike Jordan and George Sterba that he and Pat Cassidy had been employed by the new company, that the new company was going to hire everyone, that the employees would not have to reapply, and that the terms and conditions of employment would remain the same (Tr. 310-312, 350-351, 355-357, 368-372, 383-383).

In addition, counsel for the Acting General Counsel attempted to introduce into evidence the

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<sup>39</sup> As of January 1, 2011, all Willow Springs bargaining unit employees were participating in the Local 705 Pension Plan and Local 705 Health and Welfare Plan.

following additional statements attributable to Nexeo, which testimony was rejected by the ALJ based on hearsay objections, from which Local 705 has filed exceptions, and which were the subject of offers of proof:

- In a “town hall meeting” of Willow Springs bargaining unit employees on November 11, 2011, managers Tony Kuk and Pat Cassidy<sup>40</sup> spoke to the employees. Kuk told them, “It’s going to be ‘business as usual,’ everyone is going to be retained; and there won’t be any changes except the name on the pay checks and the signs on the trucks.” (Tr. 293). Cassidy told the employees, “This is a great opportunity for us to grow; nothing should change regarding your employment; and I assume Tony Kuk and I will be retained as well,” and “The new company intends on keeping everyone. It’s going to keep everything status quo.” (Tr. 292-293)

- Union steward Mike Jordan spoke with Kuk and Cassidy after the “town hall meeting.” Jordan asked Kuk and Cassidy, “Is everything in the union contract going to stay the same?” Pat Cassidy responded, “As far as I’m concerned the new company is going to keep everything the same.” Jordan replied, “Good, because I’m about to complete 25 years. I need additional time for my pension benefits.” Cassidy responded, “I don’t think there are going to be any issues.” Tony Kuk nodded his head in agreement, and said, “Nothing’s going to change.” (Tr. 294).

- Neil Messino had requested an assurance from Paul Fusco<sup>41</sup> that Nexeo would honor

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<sup>40</sup> As discussed at page 15, n. 20, Kuk and Cassidy had already been identified by name in Schedule 7.5(a) to the APS as managers whom Nexeo intended to hire and who were hired in fact (Tr. 575).

<sup>41</sup> Paul Fusco was a human resources business partner for Ashland Distribution, and Messino and Fusco were in the process of negotiating a new collective bargaining agreement at Ashland when the Nexeo transaction was announced. Fusco had been assured by his boss, Jodi Lewis, in October or November 2010, that he would be retained by the new company (Tr. 1045), and  
(continued...)

the terms of the Ashland/Local 705 collective bargaining agreement. In a telephone call on December 3, 2010, Fusco told Messino that he understood from his legal department that the APS contained the language that Messino was looking for and that the new company would maintain terms and conditions of employment (Tr. 92-93).

- On December 10, 2010, and thereafter, Union stewards Mike Jordan and George Sterba asked Tony Kuk what the new company's plans were. Kuk responded, "They're going to keep everyone, and everything is going to stay the same" (Tr. 298).

The record evidence establishes that Nexeo and its representatives had, in fact, actively and by tacit inference, "misled employees into believing that they would all be retained without change in their working conditions." ALJD p. 16, lines 34-35. Even under the ALJ's reading of Spruce Up, Nexeo was a "perfectly clear" successor to Ashland, and its subsequent unilateral changes to the employees' pension and health and welfare plans violated Section 8(a)(5) and (1) of the Act.

The ALJ rejected this analysis under Spruce Up, based on a finding that "the totality of the messages that were conveyed to the employees and to Local 70 and Local 705, to its members, were consistent with the terms of the APS and advised employees that details of the employment offers would follow. On February 15 and 16 Nexeo gave the Local 70 and Local 705 the promised details in the form of the extremely detailed letters fully described above." (ALJD, p. 17, lines 38-42). That factual finding was not supported by any record evidence, and the ALJ's analysis was inconsistent with Burns, the consistent Board decisions under Burns, and even the dicta in Spruce Up on which

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<sup>41</sup>(...continued)

his name was included in Schedule 7.5(a) to the APS as someone whom Nexeo would retain (Tr. 575). Fusco was retained, became John Hollinshead's right hand man, and was responsible for negotiating the Nexeo agreement in Fairfield, California.

the ALJ purportedly relied.

In fact, as discussed above, Nexeo and its agents consistently assured the bargaining unit employees that the terms of their employment would not be changed and, in particular, that their benefits under Nexeo would be comparable in the aggregate to their benefits at Ashland. That was the “consistent message streaming” from Nexeo to the employees. In particular, nothing in the record supports the ALJ’s finding that the employees were ever told “that details of the employment offers would follow.” (ALJD, p. 40). In fact, they were told the opposite: their Nexeo benefits would be substantially comparable in the aggregate to their Ashland benefits (which, as discussed below, they were not).

The “extremely detailed letters” to which the ALJ refers are presumably the offers of employment mailed to the bargaining unit employees on February 17, 2012, in which they learned for the first time that, in fact, their benefits were being drastically reduced and would not be anywhere close to comparable to their Ashland benefits. At that point, Nexeo was already a “perfectly clear successor,” even under the ALJ’s reading of Spruce Up, as a result of having repeatedly “misled its employees into believing they would all be retained without change in their working conditions,” and its belated announcement of unilateral changes violated Sections 8(a)(5).

**E. The Benefits Provided by Nexeo Were Not “Substantially Comparable in the Aggregate” to the Benefits the Employees Received at Ashland**

Finally, it appears that Administrative Law Judge Kocol did not know what to do with the fact that Nexeo had agreed, in Section 7.5(d) of the APS, to provide bargaining unit employees “wages no less favorable” than their Ashland wages and “other employee benefits...that are substantially comparable in the aggregate to those provided by Ashland.” On the one hand, the ALJ

appears to have felt that this unambiguous contractual commitment had no meaning whatsoever, and allowed Nexeo to implement whatever benefit changes it wanted, of whatever severity. At the same time, the ALJ refused to make any findings with respect to the comparability of benefits provided by Ashland and Nexeo, saying that the record did not allow him to make that determination, and even if it did, he was not “comfortable” in doing so, and thereby “substitute my judgment for that of Nexeo or Ashland, the parties who made that agreement. (ALJD, p. 18, lines 6-13). The ALJ’s refusal to make this critical factual determination, at the same time that he treated Nexeo’s contractual commitment as some type of giant loophole that allowed Nexeo to do whatever it wants, should be reversed.

In the first place, the record establishes, clearly and objectively, that Nexeo benefits were not “substantially comparable in the aggregate” to the benefits the bargaining employees received at Ashland. The only differences between the Ashland benefit package and the Nexeo benefit package were the pension plan, health insurance, and vacations. Everything else stayed the same. The Company’s March 28, 2011 “Package Economic Proposal” explicitly proposed keeping all of the Ashland benefits the same, except for a shift into the Nexeo 401(k) plan and Nexeo health insurance (G.C.Exh. 20, p. 2). This was consistent with John Hollinshead’s statement to the Union on February 15, 2011, that, with the exception of the pension plan and health insurance plan, the rest of the Company’s proposed collective bargaining agreement would “mirror the current expired [Ashland] agreement” (Tr. 135).

As far as the pension plan, health insurance, and vacations are concerned, it is undisputed that the Nexeo plans were vastly inferior to Ashland benefits. Under the Local 705 Pension Plan, employees received a life-time defined pension benefit of \$2,500/month after 25 years, with a

monthly increase of \$100/month for each year of service beyond that. The Nexeo 401(k) plan required employees to contribute 4% of their wages to a 401(k) plan, while the employees were not required to make any contributions to the Local 705 Pension Plan.

The significant difference between the retirement plans is highlighted by the fact that, even assuming that the employees contributed 4% of their wages to the Nexeo 401(k) plan, and assuming that the employees could somehow make a year-after-year 7 per cent annual investment return on their 401(k) plan investments, and assuming that the employees all worked until age 65 (rather than leaving after 25 years of service under the Local 705 plan), the 32 bargaining unit employees would still lose \$1,329,021 in retirement benefits by transferring into the Company's 401(k) plan (G.C.Exh. 43, p. 1).<sup>42</sup> That is not comparable!

The Company itself recognized that at least 6 bargaining unit employees would be adversely affected by the change, and promised to "write a check" to make them whole (ALJD p. 7, lines 8-11; ALJD p. 11, lines 18-20; Tr. 156, 322-323; G.C.Exh. 19 at 1; Resp.Exh. 3 at 2). Later, however, Nexeo's negotiator stated that he was no longer authorized to make the employees whole (ALJD, p. 11, lines 43-46).

Bargaining unit employee Mike Jordan had 24 years and 8 months of service in the Local 705 Pension Plan when Nexeo unilaterally pulled him out of the Plan on April 1, 2011. Jordan would have reached 25 years of service at age 48 on July 17, 2011 – three and one-half months later.

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<sup>42</sup> The ALJ's statement that the record did not allow him to determine if the benefit packages, in their entirety, were comparable in the aggregate (ALJD, p. 18, lines 9-11), is not only wrong, but disingenuous. The Union's attempt to adduce evidence as to the lack of comparability was rejected by the ALJ as irrelevant (Tr. 218-219). Having refused to allow this evidence into the record, the ALJ complains in his decision that the record evidence was not sufficiently developed for him to make that determination.

Jordan planned to retire at that time with a life-time pension of \$2,500/month. As a result of his involuntary transfer into the Nexeo 401(k) plan, the earliest Mike Jordan can now retire from the Local 705 Fund is at age 57, when he will receive a pension of only \$600/month (Tr. 337-339; see also Tr. 185-188). That is not comparable!

The Nexeo health insurance program is not comparable to the Local 705 Health & Welfare Plan. All of the premium payments to the Local 705 Health & Welfare Plan were paid by Ashland. Under the Nexeo health insurance plan, employees must personally make large premium payments, which are deducted from their paychecks (G.C.Exh. 38; Tr. 184-185, 190. 341). In addition, the Nexeo health insurance plan is an inferior plan. The deductibles are almost twice as high, and the coverage is less (Tr. 190-191).

Bargaining unit employees also received retiree health insurance as a result of their active participation in the Local 705 Health & Welfare Plan. There is no retiree health insurance at Nexeo (Tr. 191). George Sterba has an adult child with significant health insurance needs. Sterba was forced to retire prematurely as a result of the sale to Nexeo in order to preserve his important retiree health insurance benefits (Tr. 192-193).

Finally, with respect to vacations, at Ashland the bargaining unit members were paid 50 hours for each vacation week; this was unilaterally cut to 40 hours/week by Nexeo.

Nexeo did not change the rest of the Ashland benefit plan. It is patently obvious, based on the undisputed record evidence, that the benefits provided by Nexeo are not substantially comparable in the aggregate to those provided by Ashland. ALJ Kocol's claim that "The record does not allow me to make any assessment as to whether the benefit packages, in their entirety, were comparable in the aggregate" is simply not true.

Finally, ALJ Kocol's statement that it made him "uncomfortable" to make an assessment as to the comparability of the benefit plans, because he did not want to "substitute [his] judgment for that of Nexeo or Ashland, the parties who made that agreement" (ALJD, p. 18, lines 11-13), should be reversed. It is entirely and appropriately within the province of the Administrative Law Judge to make such an assessment. Otherwise – as in this case – the successor's obligations under the Board's "perfectly clear" doctrine become a nullity.

The same issue, involving similar language, arose in Elf Atochem North America, Inc., 339 NLRB 796 (2003). The purchaser in that case stated, "Elf Atochem will recognize employees' past years of service with AtoHaas and Rohm and Haas, and will provide employees with equivalent salaries and comparable health, welfare and benefits package, including pension, savings plan and vacation." 339 NLRB at 808 (emphasis added). Upon closing the sale, Elf Atochem discontinued meal passes, changed starting times, changed overtime pay practices, reduced call-in pay, changed shift differential practices, reduced sick and accident benefits, eliminated training rates, reduced the period of rate protection, stopped paying union representatives for time spent in contract negotiations, reduced workers compensation supplemental benefits, and made other unilateral changes. 339 NLRB at 810-811. The Board rejected Elf Atochem's argument that this was consistent with its promise to provide equivalent salaries and comparable benefits, saying, "The 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 issue in the future." 339 NLRB at 808.

In order to deal with the issues in this case, Judge Kocol was required to make the same analysis of comparability that the Board made in Elf Atochem. He is not excused from making this required determination simply because it makes him "uncomfortable." Nor is the issue of

comparability a matter to be determined exclusively by the corporate parties to the APS. By repeatedly telling the employees that they would all be hired with benefits that were “substantially comparable in the aggregate” to their Ashland benefits, Nexeo made important promises and representations to those employees. The “perfectly clear” doctrine requires the ALJ to decide whether that promise to the employees was kept. In the present case, the promise clearly was not kept, and the ALJ was required to make such a finding.

## **II. The Administrative Law Judge’s Hearsay Rulings Should Be Reversed**

The Administrative Law Judge sustained objections by counsel for Nexeo to testimony from Local 705 representatives and bargaining unit employees concerning statements made to them by Paul Fusco, Pat Cassidy and Tony Kuk. Fusco, Cassidy and Kuk had worked in upper management and labor relations positions for Ashland Distribution, and were retained in the same positions by Nexeo. The ALJ ruled that there was insufficient evidence that these individuals were agents of Nexeo at the time they made these statements.

The ALJ did allow testimony concerning statements by these individuals once the individual told the Union that he had been hired by Nexeo. Thus, Paul Fusco told Neil Messino on December 13, 2010 that he had been hired by the new company; that Pat Cassidy had been hired on the new company’s transition team; and that he believed that Tony Kuk would be hired on the transition team. On February 11, 2011, Tony Kuk told Union Stewards Mike Jordan and George Sterba that he and Pat Cassidy were employees of the new company, and again assured Jordan and Sterba that everyone would be hired and terms and conditions would remain the same.

However, the ALJ sustained objections to testimony concerning (1) Paul Fusco’s statements to Neil Messino on November 8 and 17, and December 3, 2010 (Tr. 75, 87-93, 296); (2) the

statements of Pat Cassidy and Tony Kuk to employees in Company “town meetings” on November 10 and 11, 2010 (Tr. 293-294, 363); (3) Tony Kuk’s statements to Union Stewards Mike Jordan and George Sterba in meetings on December 10, 2010 and thereafter (Tr. 298, 303); and (4) Tony Kuk’s statement to Neil Messino on May 12, 2012 (Tr. 875-877). Those hearsay rulings should be reversed.

There is no question that Paul Fusco, Pat Cassidy and Tony Kuk had all been promised employment by Nexeo from the outset, based on the following record evidence:

- Fusco testified that his boss, Jodi Lewis, told him before the transaction was even announced, in October or November, 2010, that he would be retained by the new company (Tr.1045).
- The APS, signed November 5, 2010, specifically identified Fusco, Cassidy and Kuk by name as individuals who would be retained by the new company. Schedule 7.5(a) of the APS is a list of the names of all “Employees,” as that term is defined in the APS, and contains the names of Paul Fusco, Pat Cassidy and Tony Kuk (G.C.Exh. 6, p. 55; Tr. 36, 575). Sections 7.5(b) and (c) of the APS state that the purchaser will offer employment to all of these identified “Employees” (G.C.Exh. 6, pp. 55-56).
- On November 8, 2010, Ashland Distribution issued “Questions and answers for employees” to bargaining unit employees, after the document had been reviewed by Nexeo. See Jt. Exh. 3, ¶¶1-5. This “Q and A” document stated (G.C.Exh. 40, 56, emphasis added):

**4. Will Ashland Distribution’s current management team remain with the business?**

Yes. the current management team will transfer with the business.

- On the same day, Ashland Distribution President Robert M. Craycraft distributed a

letter to “Dear Valued Customer,” also reviewed by Nexeo before it was distributed (Jt.Exh. 1, ¶5).

That letter stated, in pertinent part (G.C.Exh. 46, emphasis added):

Our goal is to ensure a seamless transition to Ashland Distribution operating as an independent distribution business. The same great people will provide the same great service....

- On November 12, 2010, Ashland Distribution issued “Talking Points for Customers”

stating, among other things (G.C.Exh. 94, p. 2, emphasis added):

**What is not changing:**

- ▶ All current AD [Ashland Distribution] employees are staying with the business
- ▶ Our operating systems and processes
- ▶ Our committed to support your business
- ▶ Delivering reliable supply to our customers
- ▶ Our commitment to safety and high business standards and ethics

- In mid-November, 2010, a notice was posted on employee bulletin boards stating (Tr.

734-735; G.C.Exh. 93, emphasis added):

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.

The same issue of whether employees of the seller can be considered agents of the buyer in a “perfectly clear” context arose in Elf Atochem North America, Inc., 339 NLRB 796 (2003). R&H sold its interest in a subsidiary, called AtoHaas, to Elf S.A. Structurally, the deal was analogous to Ashland’s sale of its Ashland Distribution subsidiary to Nexeo. Albert Caesar was vice-president of R&H in charge of performance and president of AtoHaas. Douglas Sharp was an AtoHaas area manager. On January 27, 1998, Caesar and another vice-president sent a memo to the employees of AtoHaas, and R&H employees working with AtoHaas, announcing the sale. The memo stated (339 NLRB at 798):

Elf Atochem will provide employment to all of the existing workforce dedicated to the AtoHaas business.

and

Elf Atochem will recognize employees' past years of service with AtoHaas and Rohm and Haas, and will provide employees with equivalent salaries and comparable health, welfare and benefits package, including pension, savings plan and vacation.

Douglas Sharp and an R&H manager posted a memo on an R&H site e-mail news board the same day, with the same statements.

The purchaser, Elf Atochem, contested Caesar's agency status in its answer to the General Counsel's complaint that it was a "perfectly clear" successor. The ALJ found that Caesar and Sharp, managers of the seller, were also statutory agents for Elf at the time they issued these memos. 339 NLRB at 807-808. The ALJ relied on the following specific facts in determining that these managers of the selling company were agents of the buyer (339 NLRB at 808):

- Albert Caesar retained his position after the sale (just as Paul Fusco, Pat Cassidy and Tony Kuk did).
- Douglas Sharp and an R&H labor relations manager who worked at AtoHaas were told by Elf at the time that Elf intended to offer them employment. (In the present case, all of the Ashland Distribution managers, had been told before the announcement of the transaction that they would be retained (Paul Fusco), or were identified in Schedule 7.5(a) of the APS as employees to be retained by the new company.)
- The ALJ in Elf Atochem concluded that the "Q and A" memo to the employees would not have been issued without authorization from Elf. (In the present case, it was stipulated that the November 8, 2010 "Q and A" memo had been approved by Nexeo.)

- An R&H labor relations manager who was hired by Elf (just as Paul Fusco was) testified that she understood that Elf was prepared to offer employment to all bargaining unit employees (just as Paul Fusco told Neil Messino on November 8, 2010).

- In discussions which included some Elf managers, it was stated that it was in Elf's interest to provide employment to the hourly employees. (In the present case, both in the APS and in notices vetted by Nexeo, the buyer consistently stated it was in its interest to retain all of the Ashland Distribution hourly employees.)

- In a later conversation, Sharp told a union representative that he expected to stay as plant manager, and that Elf was going to offer employment to all of the bargaining unit employees. (Plant manager Tony Kuk said the same thing to Union Stewards Mike Jordan and George Sterba.)

- In addition, the purchase agreement between R&H and Elf stated that Elf would offer employment to all of the R&H unit employees whose work had been dedicated to the AtoHaas operation. (The APS in the present case was even more explicit, listing the unit employees and managers by name (including Paul Fusco, Pat Cassidy and Tony Kuk) who were to be retained by Nexeo.)

Based on these findings, the ALJ in Elf Atochem found that Caesar and Sharp were statutory agents of Elf on January 27 when they issued these memos, and that Elf's bargaining obligation attached on that date based on the statements in those memoranda. 339 NLRB at 808.

The Board adopted the ALJ's findings in Elf Atochem. 339 NLRB at 796:

We agree with the judge that the Respondent was obligated to bargain with the Union as a "perfectly clear" successor as of January 23, 1998, when it informed employees that it would provide employment to employees dedicated to the AtoHaas business, that their seniority would be recognized, and that they would receive equivalent salaries and comparable benefits.

The facts of the present case are extraordinarily similar to the facts in Elf Atochem North America, Inc., with respect to both the agency issue and the ultimate conclusion that the buyer was a “perfectly clear” successor. The same operative facts that supported the finding that Albert Caesar and Douglas Sharp were agents of the buyer in Elf Atochem are present in the instant case. Those facts require findings that Paul Fusco, Pat Cassidy and Tony Kuk were agents of Nexeo on and after November 8. Their statements further establish that Nexeo was a “perfectly clear” successor, and testimony concerning these statements should have been allowed into the record.

**III. The ALJ’s Apparently Inadvertent Failure to Find That Nexeo Violated Section 8(a)(5) of the Act on April 1, 2011, When It Unilaterally Eliminated Overtime after Eight Hours in a Day and Replaced That with Overtime after Forty Hours in a Week, Should Be Corrected (Local 705 Exceptions 47, 50 and 53)**

In addition to the unilateral termination of bargaining unit employees’ participation in the Local 705 Pension and Health and Welfare Fund, Nexeo made the following additional unilateral changes to unit employees’ terms and conditions of employment on April 1, 2011:

- Nexeo stopped paying overtime after 8 hours in a day, and began paying overtime only after 40 hours in a week;
- Nexeo reduced vacation pay from 50 hours/week to 40 hours/week; and
- Nexeo stopped guaranteeing employees 8 hours of pay a day and 40 hours of pay a week.

Each of these changes is alleged in the Complaint to violate Section 8(a)(5) and (1) of the Act. (G.C.Exh. 1(h)), ¶ VII (d)).

Unlike the changes to the employees’ pension plan and health insurance, Nexeo never stated that it intended to make these changes before its unilateral action on April 1, 2011. Notice of these

changes was not included in the offers of employment mailed to employees on February 17, 2011 (G.C.Exh. 35); they were not included in the Company's contract proposals prior to April 1, 2011, which in fact proposed to maintain the existing terms of employment on these issues; they were never mentioned at the bargaining table. (G.C.Exhs. 18, 20). The first time these changes became known was when Tony Kuk announced them to the employees at the Willow Springs facility on April 1, 2011 (Tr. 181-182, 330-332, 378).<sup>43</sup>

In addition to the substantial record evidence concerning these unilateral changes (Tr. 67, 181-183, 214-215, 288), the Company finally stipulated to them at the hearing (Tr. 332-333).<sup>44</sup> As ALJ Kocol found, the Company did not offer a defense to this conduct in its brief (ALJD, p. 18, line 29).

ALJ Kocol correctly found that these unilateral changes violated Section 8(a)(5) and (1) of the Act, and ordered that they be rescinded and the affected employees made whole. (ALJD, p. 18 lines 21-34).

However, in making these findings, ALJ Kocol apparently inadvertently overlooked the Complaint's allegation concerning the significant unilateral change to overtime, no longer paying overtime after 8 hours in a day, but only after 40 hours are worked in a week. Although this allegation is clearly stated in the Complaint (G.C.Exh. 1(h), ¶ VII (d)), Judge Kocol inexplicably failed to include it in his summary of the Complaint's allegations at the beginning of his decision

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<sup>43</sup> These changes appear to have been Tony Kuk's opportunistic lark. They were not implemented at Nexeo's Fairfield, California facility.

<sup>44</sup> There was a question as to how often employees were affected by the change in the daily guarantee. However, there is no question that the other changes were implemented and affected bargaining unit employees – including the change in overtime from daily overtime to weekly overtime. (Tr. 332-333).

(ALJD, p. 6, lines 13-23; See 705 Exception 16).

Thereafter, in the body of his decision, the ALJ expressly found that the Company had made this significant unilateral change to its overtime policy on April 1, 2011 (ALJD, p. 12, lines 20-22). However, the ALJ failed even to mention or discuss this violation in his legal analysis, as well as in his conclusions of law, remedy and recommended order.

It appears that ALJ Kocol simply lost track of this important allegation. There is no dispute that Nexeo violated Section 8(a)(5) and (1) of the Act by unilaterally changing this important overtime practice, and Local 705 asks the Board to correct Judge Kocol's decision and recommended order to include findings and a remedy for this significant violation of the Act.

**IV. Nexeo's Five -Month Delay in Furnishing the Summary Plan Description for Its 401(k) Plan Violated Section 8(a)(5) and (1) of the Act**

The Complaint alleges that Nexeo violated Section 8(a)(5) and (1) of the Act by failing or delaying furnishing certain information requested by Local 705, particularly, the summary plan description for the Nexeo 401(k) plan, the summary plan description for the Nexeo health insurance plan; and the plan document for the 401(k) plan. (G.C.Exh. 6, ¶ VIII). Judge Kocol correctly found that Nexeo violated the Act by its unreasonable delays in producing the summary plan description for its health insurance plan and the plan document for its 401(k) plan. (ALJD, p. 19, lines 4-20). However, the ALJ dismissed the allegation that the Company violated the Act by its three-month delay in furnishing the Union with the summary plan description for its 401(k) plan. (ALJD, p. 18, line 45 to 19, line 4). Local 705 has excepted from that dismissal. Local 705 Exceptions 48 and 51.

Neil Messino orally requested a copy of the summary plan description for Nexeo's 401(k) plan in the parties initial "meet and greet" meeting on February 15, 2011, when the Company first

announced that it wanted to remove the unit employees from the Local 705 Pension Fund and put them in the 401(k) plan (Tr. 131). Messino renewed that request in writing the same day, after he returned to his office (G.C.Exh. 11; Tr. 138-139).

Messino continued to request the 401(k) plan summary plan description:

- On February 23, 2011 in an e-mail to John Hollinshead (G.C.Exh 14, p. 3; Tr. 146), a request that Hollinshead simply ignored in his response (G.C.Exh. 14, p. 1; Tr. 147).

- In an e-mail to Hollinshead on March 7, 2011 (G.C.Exh. 15; Tr. 147-148).

- In a bargaining session on March 31, 2011, when Hollinshead announced that the Company intended to unilaterally move bargaining unit employees into the 401(k) plan at midnight (Tr. 175-176). In response, Hollinshead promised to provide the document.

- In an e-mail on May 25, 2011, in preparation for the parties' negotiations on June 1, 2011, the first negotiations since Nexeo's unilateral transfer of employees into its 401(k) plan (G.C.Exh. 24; Tr. 197-200).

- On June 2, 2011, the day after the negotiating session, in an e-mail to Hollinshead. Hollinshead responded that he would be getting a draft of the document the next week and would forward it to Messino (G.C.Exh. 25; Tr. 203).

- In a letter on June 4, 2011 to Hollinshead. As this letter reflects, Nexeo's refusal to provide the summary plan description for the 401(k) plan was part of an overall refusal by Nexeo to provide any requested documents, including the summary plan description for the Nexeo health insurance plan, the plan document for the 401(k) plan, and relevant schedules to the Agreement for Purchase and Sale, all of which were critical to the parties' post-implementation negotiations for a new contract (G.C.Exh. 26).

Hollinshead responded by letter on June 15, with a cover e-mail saying that “the SPD is in final review and will be available next week” (G.C.Exh. 27; Resp.Exh. 23, p. 7).

- By e-mail dated June 19, 2011. In this e-mail, Neil Messino pointed out that the Company had been violating ERISA since April 1, 2011, by making contributions to a “plan” which had not been established or maintained pursuant to a written instrument (G.C.Exh. 28).

Finally, on July 15, 2011 – five months after it was first requested – John Hollinshead forwarded a copy of the Nexeo 401(k) summary plan description to Neil Messino. (G.C.Exh. 29). The other requested documents were provided even later, on August 11 and October 19, 2011, and only after the Union filed an unfair labor practice charge.

The requested summary plan description was critical to the important issue of Nexeo’s unilateral transfer of employees into its 401(k) plan – which the Union’s actuaries estimated would cost unit employees over \$1 million. Even John Hollinshead admitted that he had the summary plan description on June 15, and that it would be available in a week. (G.C.Exh. 27). The Company did not provide any explanation as to why it took another month to forward the document to the Union.

The Company does not dispute that it was obligated to turn over this plan document that was directly related to the critical pension issues. See G.C.Exh. 31. The Board has held that an employer’s “unreasonable delay in furnishing...information is as much as a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all.” Amersig Graphics, Inc., 334 NLRB 880, 885 (2001); see also Britt Metal Processing, 322 NLRB 421, 425 (1996), *affd.* 134 F.3d 385 (11<sup>th</sup> Cir. 1997); Leland Stanford Junior University, 307 NLRB 75, 80 (1992). Nexeo’s delay in providing this important document clearly violated Section 8(a)(5) and (1) of the Act. Airo Die Casting, Inc., 354 NLRB No. 8, slip op. 35 (2009) (3 month delay violated the Act); Oaktree Capital

Management, LLC, 353 NLRB No. 127, slip op. 54 (2009), affd. and adopted, 355 NLRB No.147 (2010), enfd. 452 Fed.Appx. 433 (5<sup>th</sup> Cir. 2011) (4 month delay violated the Act); Bundy Corp., 292 NLRB 671, 671-672 (1989) (2 ½ month delay violated the Act).

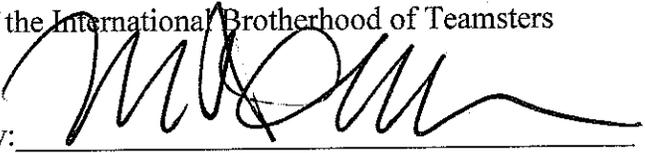
Local 705 asks the Board to modify Judge Kocol's decision and recommended order to find that Nexeo's five-month delay in furnishing the summary plan description for its 401(k) plan violated Section 8(a)(5) and (1) of the Act.

### **CONCLUSION**

For the foregoing reasons, Charging Party Local 705, International Brotherhood of Teamsters, respectfully requests the National Labor Relations Board to modify the Decision and Recommended Order issued by Administrative Law Judge Kocol (1) to find that Respondent Nexeo Solutions, LLC, also violated Section 8(a)(5) and (1) of the Act as described in the First Amended Complaint in Case NLRB Case Nos. 13-CA-46694 and 13-CA-62072, by unilaterally changing terms and conditions of bargaining unit employees on April 1, 2011 by (a) unilaterally removing these employees from the Local 705 Pension Plan and placing them in the Nexeo 401(k) plan; (b) unilaterally removing these employees from the Local 705 Health & Welfare Plan, and placing them in the Nexeo medical plans; (c) refusing to pay daily overtime after 8 hours in a day; and (d) by its delay in providing the summary plan descriptions for the Nexeo 401(k) plan, (2) to enter additional appropriate remedies, including, but not limited to, posting an appropriate notice, ceasing and desisting from future violations of the Act, and requiring the Company to rescind its unilateral changes, restore the prior terms and conditions of employment, including restoring the employees' participation in the Local 705 Pension Plan and the Local 705 Health & Welfare Plan, make the employees whole for all of the losses that they have suffered as a result of these unilateral changes,

and make past contributions to the Local 705 Pension Plan and the Local 705 Health & Welfare Plan that it would have been required to make under the prior terms and conditions of employment.

Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union, Local No. 705, an Affiliate of the International Brotherhood of Teamsters

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October 18, 2012

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he served the foregoing Brief on Behalf of Charging Party Local 705, International Brotherhood of Teamsters, in Support of Exceptions to the Decision and Recommended Order of the Administrative Law Judge on the following parties of record by e-mail on October 18, 2012:

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