

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

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

**RESPONDENT NEXEO SOLUTION, LLC'S BRIEF IN SUPPORT OF ITS
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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**RESPONDENT NEXEO SOLUTION, LLC’S BRIEF IN SUPPORT OF ITS
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I. INTRODUCTION

A. Statement Of The Case

On November 5, 2010, Respondent Nexeo Solutions, LLC,¹ whose name at the time was TPG Accolade, LLC, entered into an “Agreement of Purchase and Sale” (“APS”) with Ashland Inc. under which it agreed to purchase the assets of Ashland Distribution Company, a global chemical distribution business with approximately 57 distribution centers in North America. (Tr.

¹ Respondent Nexeo Solutions, LLC is referred to herein as “Nexeo” or the “Company”; Charging Party Truck Drivers, Oil Drivers, Filling Station and Platform Workers’ Union, Local No. 705, is referred to as “Local 705”; Charging Party Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70 of Alameda County, is referred to as “Local 70”; the Administrative Law Judge is referred to as the “ALJ”; and references to the ALJ’s decision and recommended order are abbreviated “ALJD p. ___.”

943-44; GCX 6).² The transaction closed on March 31, 2011, and on April 1, 2011, Nexeo began operating the business (Tr. 451). Of the domestic distribution centers Nexeo acquired, employees at seven of them have union representation (Tr. 447, 951; REX 9).³ These cases arise out of charges filed by Teamsters Local 705, which represents a unit of approximately 32 drivers at the Company's Willow Springs, Illinois facility, and Teamsters Local 70, which represents a 17-employee unit of warehouse leads, drivers, drivers/material handlers, material handlers, and warehousepersons at the Company's Fairfield, California facility (GCX 16 and 92).

Local 705 filed the charge in Case 13-CA-46694 on April 7, 2011, and Local 70 filed the charge in Case 20-CA-35519 on April 8, 2011. While framed somewhat differently, the charges alleged the same claim; namely, that on April 1, 2011, its first day of operation, Nexeo violated Sections 8(a)(1) and (5) of the Act by unilaterally changing terms of employment under which bargaining unit employees last worked at Ashland Distribution. The unions based their claims on an allegation that Nexeo is a "perfectly clear" successor of Ashland Distribution and, as such, was obligated to bargain to agreement or impasse before making any changes to the employment terms that were in effect before the Company commenced operations.

Local 705 filed the charge in Case 13-CA-62072 on August 3, 2011. The charge alleged, among other things, that Nexeo had (1) refused to provide Local 705 with the plan document for the Company's 401(k) plan and the summary plan description ("SPD") for the Company's health insurance plan, and (2) had delayed providing Local 705 with the SPD for the Company's 401(k) plan.

² References to the transcript of the hearing are abbreviated, "Tr. ___"; references to the General Counsel's exhibits are abbreviated, "GCX ___"; references to the Company's exhibits are abbreviated, "REX ___"; and references to joint exhibits are abbreviated, "JEX ___."

³ The facilities are located in: Carteret, New Jersey; Fairfield, California; Louisville, Kentucky; Morrisville, New Jersey; St. Louis, Missouri; Twinsburg, Ohio; and Willow Springs, Illinois, which has two bargaining units.

Complaints were issued in both the Region 13 and Region 20 cases on November 30, 2011. By order dated February 3, 2012, the cases were consolidated and a hearing scheduled in the Region 13 case for April 2, 2012, and the Region 20 case for April 30, 2012. Administrative Law Judge William G. Kocol was assigned to hear them. Prior to the opening of the record in each Region, both complaints were amended once – the complaint in the Region 13 case on March 7, 2012, and the complaint in the Region 20 case on April 10, 2012.

The hearing in the Region 13 case, which was held in Chicago, Illinois, commenced on April 2, 2012, and concluded on April 4, 2012. At issue in the case are: (1) perfectly clear successor-based unilateral change claims, which are derived from Local 705's first charge; and (2) information request-based claims, which are derived from Local 705's second charge, alleging that Nexeo unreasonably delayed providing Local 705 with the plan document and SPD for its 401(k) plan and the SPD for its health insurance plan. The employment terms that Nexeo is alleged to have unlawfully changed as a purported perfectly clear successor are found in Local 705's last collective bargaining agreement with Ashland Distribution, which expired on October 31, 2010 ("the Local 705 CBA"), five months before Nexeo acquired the business (GCX 2). There are five of them. The claims are that on April 1, 2011, Nexeo unilaterally:

1. Ceased making contributions to the Local 705 health insurance plan and moved employees to its health insurance plan;
2. Ceased making contributions to the Local 705 pension trust fund and moved employees to its 401(k) plan;
3. Eliminated the daily guarantee of eight hours pay for each work day and weekly guarantee of 40 hours pay for each work week;
4. Changed the overtime policy to eliminate overtime pay after working more than eight hours a day and to require, instead, that employees work more than 40 hours a week to receive overtime pay; and
5. Reduced employees' vacation pay from 50 hours to 40 hours a week for each week of vacation.

The hearing in the Region 20 case was continued a week and held on May 7 and 8, 2012 in San Francisco, California.⁴ The claims at issue in that case are perfectly clear successor- and successor-based unilateral change claims that stem from Local 70's charge. The claims are that on April 1, 2011, Nexeo unilaterally:

1. Moved the employees from the health and dental insurance plans Ashland had in place to its health and dental plans;
2. Ceased making contractually-required contributions to the union-affiliated pension trust fund and moved employees to its 401(k) plan;
3. Abandoned the practice of using seniority to assign driving routes; and
4. Abandoned the practice of using seniority to allocate unpaid layoff days.

The employment terms Nexeo is alleged to have changed in the first two claims are found in Ashland Distribution's last collective bargaining agreement with Local 70 ("the Local 70 CBA"), the effective dates of which were December 1, 2008 to November 30, 2013 (GCX 77). The other terms were practices that Ashland had allegedly adopted (Tr. 715-17, 788-89, 793-96, 1005-1010).

On August 30, 2012, the ALJ issued his decision in both cases. He found that the Acting General Counsel (the "General Counsel") failed to prove that Nexeo is a perfectly clear successor. Based upon that finding, he dismissed the claims that the Company unlawfully implemented its 401(k) and health insurance plans, in place of the benefit plans under which the employees in each unit had been covered as Ashland employees. The ALJ concluded, however, that Nexeo, based upon its status as a successor employer, violated its bargaining obligations (a) in the Region 13 case by unilaterally eliminating the daily and weekly pay guarantees and 50-

⁴ The hearing date was moved from April 30, 2012, to May 7, 2012, because of the scheduling of an evidentiary hearing in Federal District Court in Chicago on a Section 10(j) petition filed against Nexeo by the Regional Director of 13 based upon the perfectly clear successor-derived claims alleged in Case 13-CA-46694. On June 28, 2012, the Court issued a decision denying the petition in its entirety. A Section 10(j) petition was not filed in the Region 20 case.

hour vacation pay entitlement that Local 705-represented employees had as Ashland employees under the Local 705 CBA, and (b) in the Region 20 case by unilaterally abandoning the Ashland practice of using seniority to assign driving routes and to allocate unpaid layoff days to Local 70-represented employees.⁵ Lastly, on the information request-based claims in the Region 13 case, the ALJ found that Nexeo timely provided Local 705 with a copy of the SPD for its 401(k) plan, but unlawfully delayed providing the union with the plan document for its 401(k) plan and the SPD for its health insurance plan.

The case is now before the Board on exceptions filed by the parties to the ALJ's decision. In its exceptions, Nexeo takes issue with the ALJ's determinations that the Company violated the Act and the findings on which he based those determinations, as well as some findings he made in addressing the claims that he dismissed. This brief focuses on the exceptions relating to the violations the ALJ found. Because the other findings to which the Company has excepted did not lead to a finding of a violation, they are addressed, as relevant, in the discussion of the facts. To the extent necessary, they will be addressed in more detail in responding to exceptions filed by the General Counsel and Charging Parties.

II. STATEMENT OF FACTS

A. The Agreement of Purchase and Sale

Nexeo and Ashland entered into the APS on November 5, 2010 (GCX 6). In Section 7.5 of the APS, Nexeo agreed to make offers of at-will employment, at least 30 days prior to closing, to Ashland Distribution employees (a) effective upon closing, (b) in a position comparable to the one they held prior to closing, (c) at a rate of pay no less favorable than they were paid prior to closing, and (d) with employee benefits substantially comparable in the aggregate to those

⁵ The ALJ neglected to address the claim in the Region 13 case that Nexeo unlawfully eliminated the entitlement employees had under the Local 705 CBA to overtime pay after eight hours of work.

provided by Ashland “as expected to be in effect on January 1, 2011, as set forth on Schedule 7.5(d)” (GCX 6, Sec. 7.5(c) and (d)).

Apart from these provisions and some others contained in Section 7.5 that are not relevant, the APS did not specify the terms under which Nexeo was to offer employment to Ashland Distribution employees. Stated differently, the APS did not otherwise restrict Nexeo’s right to establish terms of employment different from those of Ashland. In particular, Nexeo did not commit to adopt any employment-related policies or procedures of Ashland, and expressly disclaimed that it was assuming any collective bargaining agreements to which Ashland was or had been a party. The disclaimers are found in Sections 1.1 and 2.2(e) of the APS. Section 1.1, in defining the term “Employee Benefit Plan,” states, “[f]or the avoidance of doubt, Union Contracts (as defined in Section 5.18) and other union and collective bargaining agreements . . . are excluded from the definition of Employee Benefit Plan. Section 2.2(e) excludes from the definition of the term “Conveyed Assets” “Union Contracts to the extent not prohibited by law.”

Nexeo, thus, was free under the APS to offer employment to the Local 70- and Local 705-represented employees under terms that were materially different from those contained in the collective bargaining agreements under which they worked for Ashland Distribution. The Company’s right to offer at-will employment to the employees was one of those terms. Both the Local 70 CBA and the Local 705 CBA required just cause to discharge an employee (GCX 2, 77). The Company’s right to establish its own employment-related policies and procedures was another. And most importantly, Nexeo had the right to offer retirement benefits to the Local 70-represented employees, and retirement and group health benefits to the Local 705-represented employees, that were different from those for which the labor agreements under which they worked provided. An examination of the APS leads inescapably to the conclusion that the

Company had that right.

The starting point of the analysis is the clause in Section 7.5(d) of the APS that obligated Nexeo to provide benefits “substantially comparable in the aggregate to those provided by Ashland.” The meaning of that clause is found in the phrase at the end of it that identifies the benefit plans of Ashland to which the benefits must be substantially comparable. That pivotal phrase refers to benefit plans “expected to be in effect on January 1, 2011, as set forth on Schedule 7.5(d).” Schedule 7.5(d), thus, is the key. It lists retirement, group health and other plans sponsored by Ashland, and no others (GCX 27). As such, Section 7.5(d) did not obligate Nexeo to provide benefits to union-represented employees that are substantially comparable in the aggregate to benefits provided under union-sponsored multi-employer benefit plans in which they may have participated under Ashland Distribution’s collective bargaining agreement with their union representative. Rather, it obligated the Company to provide benefits that are substantially comparable in the aggregate to those contained in benefit plans sponsored by Ashland, i.e., those provided to the employees who worked at Ashland Distribution’s main office and 50 or so non-union distribution centers (Tr. 404, 944).

While reading Section 7.5(d) and Schedule 7.5(d) together establishes that the benefit plans by which Nexeo’s benefit plans were to be measured were those sponsored by Ashland, additional evidence supporting that conclusion is found in the definition of the term “Seller Benefit Plan,” which is found in Section 1.1 of the APS, and Schedule 5.19(a), which lists all “Seller Benefit Plans” (GCX 6). The Western Conference of Teamsters Pension Trust, in which the Local 70-represented employees participated under the Local 70 CBA, and the International Brotherhood of Teamsters Local 705 Pension Fund, in which the Local 705-represented employees participated under the Local 705 CBA, are among the plans listed in Section 5.19(a).

What makes that significant is that the term “Seller Benefit Plan” is not found in Section 7.5(d). Having defined the term “Seller Benefit Plan” and created a schedule listing the plans, if the parties had intended Nexeo’s benefit plans to be measured against them, they would have used the term. That they did not use the term amplifies the conclusion that the benefit plans to which reference is made in Section 7.5(d) does not include the union-sponsored plans in which the Local 70- and Local 705-represented employees participated.

The conclusion that Nexeo did not commit to cover the employees under the union-sponsored plans also finds support in the language of the APS by which the Company expressly disclaimed that it was assuming any collective bargaining agreement of Ashland Distribution (see the definition of “Employee Benefit Plan” found in Section 1.1 and Section 2.2(e)). Section 7.5(g) also buttresses the conclusion. That section imposed upon Ashland responsibility for, among other things, all employee-benefit related liabilities, including the payment of any “withdrawal liabilities” under multi-employer pension plans in which Ashland participated, including the plans in which the Local 70- and Local 705-represented employees participated (GCX 6).

B. Communications with Employees About the Transaction

Between November 5, 2010, when Nexeo and Ashland executed the APS, and March 31, 2011, when the sale closed, Ashland issued a number of written communications to employees regarding the terms of the sale, the status of the transaction, and transition-related matters. Beginning in mid-January 2011, Nexeo also communicated some information to the employees through Ashland publications, and later through some that it published. The General Counsel introduced a number of the communications. They were admitted as GCX 40-41, 44-76 and 93-95.

No evidence was presented in the Region 13 cases that any of the documents were

distributed to or seen by any Local 705-represented employees. In the Region 20 case, the General Counsel presented testimony from several witnesses that Ashland had either distributed a number of the documents to the employees who worked at the Fairfield facility, or posted the documents on a bulletin board at the facility, i.e., GCX 40-41, 44, 47-56, and 93-95.

Nexeo entered into stipulations with the General Counsel that, among other things, provide that: at or around the time GCX 44-55 were created, the information contained in the documents was shared between agents of Ashland and consultants of Nexeo acting in the course of their representative capacities; various persons whose email addresses appear on GCX 56-76 provided consulting services to Nexeo in connection with the acquisition and, in exchanging information reflected in GCX 56-76, were acting in the scope of their representative capacities; and the persons with the email addresses “mlugol@aol.com” and “davidbradley88@gmail.com” that appear on GCX 56-76 were agents of Nexeo (JEX 1-2).

C. Initial Union Meetings and the Offer Letters to Employees

In January 2011, Nexeo retained John Hollinshead as a consultant, assigning him primary responsibility for labor relations matters, including responsibility for overseeing the preparation of offers of employment to union-represented employees of Ashland Distribution and communicating with the unions that represented those employees. (Tr. 398-401). In early February 2011, the offer letters were finalized and informational meetings were set up with the eight unions that represented Ashland employees. (Tr. 436-37, 952; REX 7).

The offer letters for the Local 70- and Local 705-represented employees, which were reviewed and approved by members of Ashland’s senior management team, were virtually identical (Tr. 433-36; GCX 12-13; REX 30). Each began by outlining the terms that the Company agreed to offer employees in the APS. They then added that:

- Ashland employment policies would terminate when the sale closed;

- Nexeo policies would generally mirror Ashland's policies, but the Company was not adopting any practices that were inconsistent with the express terms of its policies; and
- Nexeo had not agreed to assume any of Ashland's collective bargaining agreements and had not chosen to adopt, as initial terms of employment, any of the provisions contained in any current or expired Ashland collective bargaining agreement.

At that point, the letter to Local 70-represented employees differed slightly from the letter to the Local 705-represented employees. It provided that accepting the offer meant, among other things, that the employee, upon becoming a Nexeo employee, would participate in the Company's 401k plan, not the multiemployer pension plan in which the employee participated as an Ashland Distribution employee. Besides saying that, the letter to the Local 705-represented employees added that, upon becoming a Nexeo employee, the employee would participate in Nexeo's group health plans, instead of the multiemployer health and welfare plan in which the employee participated as an Ashland Distribution employee. (GCX 12-13; REX 30).

The informational meeting with Local 705 was held on February 15, 2011. (Tr. 126, 438) Nexeo's principal spokesperson was Hollinshead. Local 705 was represented by Contract Administrator Neil Messino. At the meeting, Hollinshead:

- Distributed a copy of the offer letter, reviewed its terms, and indicated that Nexeo planned to mail the letter to the employees on February 17, 2011;
- Provided a written summary of Nexeo's benefit plans, and explained why the Company had decided not to offer coverage under the Local 705-affiliated benefit plans; and
- Indicated that, assuming a majority of employees accepted the Company's offer, the Company would conditionally recognize Local 705 prior to closing and agree to engage in contingent bargaining.

(Tr. 127-36, 438-42; GCX 10).

The meeting with Local 70 was held on February 16, 2011. Because he was unavailable that day, Hollinshead asked Ashland Human Resources Manager Paul Fusco, whom Nexeo planned to offer employment but had not yet done so, to lead the meeting. Local 70 was

represented by its President, Dominic Chiovare, and Business Agent Bob Aiello. At the meeting,

Fusco:

- Addressed the nature and status of the sale of the business;
- Indicated that Nexeo would be mailing offers of employment to the Local 70-represented employees in the near future, and that the employees would have 10 days to mail back their response;
- Distributed a copy of the offer letter, and reviewed its terms, explaining that:
 - Nexeo was adopting its own policies and procedures, and was not adopting any existing practices that were inconsistent with its policies; and
 - Nexeo was not adopting any of the provisions contained in Local 70's collective bargaining agreement with Ashland, including, in particular, the benefit provision under which the employees participated in the Western Conference of Teamsters Pension Plan;
- Distributed a summary of the benefit plans Nexeo had determined to adopt and by which the employees would be covered, and reviewed the summary's contents; and
- Indicated that, assuming a majority of employees accepted the Company's offer, the Company would conditionally recognize Local 70 prior to closing and agree to engage in contingent bargaining.

(Tr. 954-59; GCX 10, 81).

The Company mailed offer letters to all Ashland Distribution employees, including the Local 70- and Local 705-represented employees on February 17, 2011 (Tr. 959).⁶

1. The Local 705-Represented Employees' Response to the Offer Letter

In responding to the offer letter, many of the Local 705-represented employees struck out language in the letter to indicate that they did not agree to Nexeo's covering them under the Company's benefit plans. In doing so, they effectively rejected the Company's offer. Hollinshead communicated that fact to Messino, prompting Messino to ask Hollinshead to have

⁶ Nexeo mailed Ashland managers Brian Brockson, Pat Cassidy and Tony Kuk, as well as Fusco, offer letters that day too. Like those sent to the union-represented employees, the offer letters provided for their employment to begin as soon as the sale closed. (REX 8).

the Company provide clean copies of the offer letter to the employees. Hollinshead agreed to the request. After being provided with new copies of the offer letter, the employees signed and returned the letter to the Company, adding the words “under protest” next to their signatures. (Tr. 140-43, 442-45; GCX 12 and 13).

2. Hollinshead’s And Messino’s Post-Meeting Correspondence

Shortly after their meeting on February 15, 2011, Messino emailed Hollinshead a letter expressing the view that the Company did not have the right unilaterally to move the Local 705-represented employees to the Company’s benefit plans. He followed that letter up with one on February 23, 2011. Hollinshead responded to both letters in an email dated March 2, 2011. On March 7, 2011, Messino responded to Hollinshead’s email.

In his letters, Messino argued that, while Nexeo was not required to assume the Local 705 CBA (which had expired months earlier), the Company was obligated to recognize the union and bargain with it to agreement or impasse before it could make any changes to the employees’ terms of employment. Seemingly at odds with that position, he also said in his letter of February 23 that “[w]e have accepted the offers of employment based upon” Nexeo’s promise “to enroll the bargaining unit employees in benefit plans and programs that are comparable in the aggregate to their current Ashland plans.” In referring to plans “comparable in the aggregate” to the Ashland plans, Messino apparently meant the Local 705 plans. However, after the meeting on February 15, 2011, and based upon what the offer letter said, Messino could not have been confused that the benefit plans to which Nexeo’s plans would be comparable were ones sponsored by Ashland (as the APS provides), not multi-employer plans to which Ashland contributed under a collective-bargaining agreement (which the APS excludes).

In any event, Hollinshead’s email of March 2, 2011, should have cleared up any confusion Messino had regarding the Company’s position. That email outlined the facts the

Company maintains show that it properly exercised its right to establish initial terms of employment different from those under which the employees worked for Ashland. (REX 17).

D. Conditional Recognition of the Unions

Shortly after receiving responses to its offer letters from the employees of the eight Ashland Distribution bargaining units, Nexeo extended conditional recognition to the employees' union representatives. The Company also agreed to engage in pre-close, contingent collective bargaining negotiations. (Tr. 445) Prior to the closing, the Company reached a collective bargaining agreement with six of the unions. The two unions with which the Company did not reach agreement were Local 70 and Local 705 (Tr. 445-50; REX 11-16).

E. Pre-Close Collective Bargaining Negotiations

1. Negotiations with Local 70

The Company had three pre-close negotiating sessions with Local 70. The sessions were held on March 22, 23, and 29, 2011. In the hope of reaching an agreement prior to closing, the Company, rather than treat the negotiations like typical first contract negotiations, offered proposals that, in the main, tracked those contained in Local 70's contract with Ashland. The principal differences between the Company's proposals and the provisions of Ashland Distribution's Local 70 CBA involved benefits, with the major difference being the Company's proposal to cover the employees under its 401k plan instead of the union-sponsored pension plan. (Tr. 979-994; REX 32-37).

The main obstacle that prevented an agreement was each side's insistence that the other agree to the retirement plan it had proposed – the Company maintained that it had to have its 401k plan, while Local 70 insisted that it had to have the union-sponsored plan (Tr. 990-92). Fusco, who headed the Company's negotiating team, recognized early on that the parties might not reach agreement on that issue prior to closing. He therefore discussed with Chiovare and

Aiello that if the parties failed to reach an agreement prior to closing, the terms outlined in the Company's offer letter would go into effect when the Company commenced operations. He indicated that, in that event, the employees would be enrolled in Nexeo's benefit plans, including its 401k plan, and that the employees would work under the same terms as other Nexeo employees, with no local practices carrying forward. (Tr. 997).

At the March 29, 2011 bargaining session, Fusco presented the Company's final offer. After he did so, Chiovare and Aiello surprised him with a letter dated March 28, 2011, reflecting that, six weeks after the informational meeting and one week into negotiations, Local 70 was looking at things in an entirely new way. In the letter, they announced for the first time that it was Local 70's position that Nexeo was a "perfectly clear successor under the National Labor Relations Act," and that it was "required to maintain in effect the conditions established under the Ashland Agreement." (Tr. 993-94;GCX 89).

Fusco addressed Local 70's about-face at the negotiating session that day and in an email that he sent to Aiello that evening (Tr. 995; REX 38). In his email, Fusco covered many of the same points that he discussed at the informational meeting with the union in mid-February. In particular, he noted that: "Nexeo Solutions was careful in the offer letter, as [he] was in [their] meeting, to spell out that none of the Ashland labor agreements, or any of their terms, [were] being offered so as not to mislead the employees and to ensure that they [made] an informed decision on whether to accept the Company's offer"; and the offer "letter was clear that the offer of employment included coverage under company sponsored health and welfare plans and the Nexeo Solutions 401k retirement plan." Fusco then reiterated that, "absent reaching contingent agreement at close, Nexeo Solutions will move forward with the terms outlined in its offer letter to employees." He then summarized the highlights of the Company's final pre-close offer, and

closed the email by expressing hope that Local 70 would present the offer for a ratification vote before the closing. (REX 38). Neither Aiello nor Chiovare responded to Fusco's email.

2. Negotiations with Local 705

The Company had two pre-close negotiating sessions with Local 705, one on March 23, 2011, and one on March 31, 2011. (Tr. 149, 171, 464). Between those sessions, on March 28, 2011, the Company's negotiating team also had a conference call with Messino during which proposals were discussed. (Tr. 165-66, 169, 463). In the negotiations, the parties exchanged and discussed comprehensive proposals for a complete, pre-close collective bargaining agreement (Tr. 149-58, 163-76, 458-68; GCX 16-21). The obstacle that prevented the parties from reaching an agreement was retirement benefits – the Company insisted on its plan, while Local 705 insisted on the Local 705 Pension Plan. (Tr. 165-66, 169, 463). At each of the bargaining sessions, Hollinshead reminded the union's negotiating team that the failure to reach an agreement prior to closing would mean that the terms outlined in the Company's offer letter would be implemented. (Tr. 468-469).

F. Post-Close Matters

1. Fairfield

On April 1, 2011, the Local 70-represented employees began their employment with the Company under the terms outlined in the offer letter, which effectively are the same terms under which unrepresented operations employees of the Company at other locations work. Those terms included coverage under Nexeo's 401(k) and health insurance plans. They also included coverage under Nexeo's employment-related policies and procedures, among which was its dispatch policy. (Tr. 997-1011).

Nexeo's dispatch policy, like many of its other policies, mirrored the policy that Ashland Distribution had in place. Under the policy, seniority was not a factor in dispatch decisions.

Application of the policy in Fairfield resulted in a change for the Local 70-represented drivers from how they had been dispatched as Ashland Distribution employees. At the Fairfield facility, Ashland Distribution had followed a practice of permitting drivers to select their routes in order of seniority. Having adopted a dispatch policy mirroring that of Ashland Distribution and informed the employees in their offer letters that it was not adopting any practices that were inconsistent with its policies, Nexeo implemented its dispatch policy in Fairfield, terminating the seniority-based practice. The Company also did not strictly adhere to Ashland Distribution's practice of permitting drivers for whom it did not have a route available to work in the warehouse, which resulted in occasional one-day layoffs for drivers. (Tr. 1006-11).

These differences in practices remained in effect for approximately six weeks. At a bargaining session with Local 70 on May 18, 2011, the Company agreed, as Ashland Distribution had, to make every reasonable effort to dispatch drivers on the basis of their seniority, which effectively put the former practices back into effect at the facility. (Tr. 838, 1012).

2. Willow Springs

On April 1, 2011, the Local 705-represented employees also began their employment with the Company under the terms outlined in the offer letter, which are, as was the case in Fairfield, effectively the same terms under which unrepresented operations employees of the Company at other locations work. As it said it would do in the offer letter, the Company covered the employees under its retirement and health insurance plans, instead of the Local 705 benefit plans. Because Nexeo did not adopt any of the terms of Ashland's Local 705 CBA, the Company also covered the employees under its overtime and vacation policies, under which they did not, as they had under the Local 705 CBA, receive daily overtime pay after eight hours work or 50 hours' pay for each week of vacation. (Tr. 180-190; 465-67).

Messino emailed Hollinshead a letter on April 1, 2011, objecting to the Company's termination of the employees' coverage under the Local 705 benefit plans, and asking that the Company rescind all changes it had made to the employees' terms of employment. He also, for the first time in writing, indicated that it was Local 705's position that Nexeo was a perfectly clear successor, submitting that Nexeo could not make any unilateral changes to the status quo because "it is perfectly clear that Nexeo agreed to hire all of the bargaining unit employees and has done so." (REX 17)

Hollinshead responded to Messino's letter by email on April 2, 2011. In his email, Hollinshead addressed head-on the union's contention that Nexeo was a perfectly clear successor. He began by incorporating the points he had made in his March 2, 2011 email. He then explained that the Company had carefully prepared its communications with the union and the employees to ensure that it did not become a perfectly clear successor. Next, he outlined why the Company could not be deemed one. He then closed by saying that, under the circumstances, the Company had no obligation to rescind any of the employment terms that it had put into place unless and until it reached an agreement with the union changing them. (REX 17).

Since the Company commenced operations, it has had only one negotiating session with Local 705. The session was held on June 1, 2011. No proposals were exchanged that day and the parties' positions remained the same as they were on March 31, 2011. The principal obstacle to their making any progress toward an agreement remained each side's fixed position on benefits. (Tr. 200-01). Local 705 has not asked the Company to schedule any negotiating sessions since that session. Messino gave the following explanation as to why:

We haven't requested any dates because we had a pending ULP. And we didn't have, once you changed the, once you implemented the plans we didn't feel that we were at a fair and level playing field to go into a bargaining session.

(Tr. 272).

G. Local 705's Information Requests

Prior to the closing of the sale, Nexeo provided Local 705 with a number of benefits-related documents that described the terms of, and benefits available under, its 401(k) and health insurance plans, including: a summary of those benefits (GCX 10); correspondence, forms, and "heat maps" relating to benefits available under its 401(k) plan (REX 3); spreadsheets outlining projected benefits under the 401(k) plan (GCX 19); and a benefits enrollment guide (GCX 37).

After the closing, the first time that Local 705 requested any benefits-related information from the Company was on May 25, 2011. On that date, Messino sent Hollinshead an email requesting "a copy of the 401(k) plan document and a plan performance history for the last 5 years." Hollinshead responded that day, sending Messino an email in which he indicated that he would ask Fusco to obtain the performance history from Ashland and check on where things stood in terms of preparation of a "Nexeo document." Hollinshead carried through with his promise. On May 26, 2011, he forwarded Messino an email from Fusco indicating that the 401(k) plan SPD was not finalized, adding in his email that "it looks like it might take a while for the SPD on the 401(k). Two days later, on May 28, 2011, Hollinshead forwarded Messino another email, which transmitted the performance history Messino had requested. (REX 22).

Over the next six weeks, Messino and Hollinshead exchanged a number of emails relating to, among other matters, Local 705's request for the plan document and the reason for the delay in providing it. The reason for the delay, which the Company's records prove to be true, was that the document had not yet been finalized (REX 23-27). On July 15, 2011, Hollinshead received the final versions of the 401(k) plan SPD from the Company's outside

counsel. He sent a copy of it later that day to Messino. (REX 22).

On August 2, 2011, Messino sent Hollinshead an email stating that he still had not received the plan document for the 401(k) plan (REX 22). At that point, Hollinshead realized that he had mistakenly concluded Messino wanted the SPD, not the plan document. He requested the plan document internally and was provided a copy of it by outside counsel on August 11, 2011 (REX 28). Later that day, he forwarded the document by email to Messino, expressing that the Company did not dispute that the union was entitled to the document and his not providing it earlier was an oversight (REX 22).

In his email of August 2, 2011, Messino also requested for the first time since the closing a copy of the Company's health insurance plan SPD. In his email of August 11, 2011, Hollinshead advised Messino that he would provide him with the SPD, noting that on April 1, 2011, he had provided him with a copy of the Nexeo Solutions HSA 1500 Plan, the source document used in preparing the SPD. Hollinshead again requested the information internally and on October 19, 2011, was provided with SPDs for the Company's medical, dental, vision, and flexible spending account plans. He sent an email transmitting copies of each of them to Messino that same day. (REX 22).

III. ARGUMENT

A. The ALJ Erred In Finding That Nexeo Unlawfully Implemented Its Employment Policies In Place Of, In Willow Springs, Terms Of The Local 705 CBA And, In Fairfield, Ashland Practices

The Supreme Court's decision in *NLRB v. Burns Int'l Security Services*, 406 U.S. 272 (1972), established the principle that, all else being essentially equal, if a majority of a successor's workforce consists of union-represented employees of the predecessor, the successor inherits a duty to recognize and bargain with the employees' union representative. Before that duty arises, a successor is not constrained by the Act from unilaterally establishing the terms

under which it offers employment. In other words, the Act does not obligate a successor, in staffing a business, to offer employment under the same terms the seller had in place.

Stating this point differently, prior to the time that its bargaining obligation attaches, a successor does not have a status quo obligation. It has the right to determine initial terms of employment. Here, the ALJ found that Nexeo had and lawfully exercised that right when he rejected the General Counsel's contention that Nexeo is a perfectly clear successor. The words he used were, "I conclude that the General Counsel has not established that Nexeo was obligated to first bargain with Local 705 or Local 70 before it offered employment upon terms it set forth in the offer of employment letters." (ALJD p. 18).

After reaching that conclusion and dismissing the claims that the Company unlawfully implemented its benefit plans, the ALJ assessed under ordinary successorship principles the legality of the other unilateral changes the complaints alleged Nexeo unlawfully made. He began by noting that the Company admitted that it was a successor and had an obligation to recognize and bargain with the unions after a majority of unit employees accepted the Company's offer of employment. He then addressed whether that duty extended to the changes in issue and, if so, whether the Company satisfied it. That is where he went wrong.

Having correctly concluded that Nexeo had the right unilaterally to set the employment terms it laid out in its offer letters, the ALJ should have, under *Burns*, dismissed all the unilateral change claims in each case, not just those alleging that Nexeo unlawfully implemented its benefit plans. Instead, he erroneously found that, in the Willow Springs case, Nexeo unlawfully "eliminated" the daily and weekly pay guarantees and 50-hour vacation pay entitlement employees had under the Local 705 CBA,⁷ and that, in the Fairfield case, the Company

⁷ The ALJ remarked in his decision that Nexeo did not offer a defense to these claims in its brief. (ALJD p. 18). In making that statement, however, he overlooked that the General Counsel did not

unlawfully abandoned the Ashland practice of using seniority to route drivers and allocate unpaid layoff days. (Id.). While the summary fashion in which he addressed these claims make it difficult to discern exactly what led him astray, the most likely explanation is found in his misstatement, in discussing the claims in the Region 13 case, that “I note that these changes were not contained in the offer of employment letters and therefore were not part of lawful action taken by Nexeo in setting the initial terms of employment.” (Id.). The “changes” were, in fact, contained in the offer letters.

The offer letter the Company sent to both the Local 70- and Local 705-represented employees stated that: “Ashland employment policies will terminate when the sale closes”; Nexeo policies, to the extent possible, “will generally mirror [Ashland] policies”; Nexeo is not “adopting any existing practices that are inconsistent with the express terms of our policies”; Nexeo “has not agreed to assume any of Ashland’s collective bargaining agreements”; and Nexeo has “chosen not to adopt, as initial terms and conditions of employment, any of the provisions contained in any current or expired collective bargaining agreement to which Ashland is a party.” (GCX 12-13; REX 30). The ALJ quoted the entire offer letter in his decision, so it is difficult to discern how he came to conclude the “changes” in issue in the Region 13 case were not “contained in” the letter. The most likely explanation, however, is that he was of the view that the Company was under an obligation to expressly spell out in the offer letter that it was going to “eliminate” the daily and weekly guarantees and 50-hour vacation pay entitlement. If that is accurate, he also presumably was of the same view with respect to the Fairfield practices; that is, that the Company was under an obligation to state in the offer letter that it was abandoning the Ashland practice of using seniority in routing drivers and allocating unpaid

contend that Nexeo had a duty to bargain over the “elimination” of those terms as an ordinary successor. The General Counsel relied upon his claim that Nexeo is a perfectly clear successor, which is the claim on which Nexeo focused its defense.

layoff days. If this reflects what he was thinking, he was mistaken.

The meaning of what the Company said in the offer letter is clear. When the Company communicated in the letter that it had “chosen not to adopt, as initial terms and conditions of employment, any of the provisions contained in any current or expired collective bargaining agreement to which Ashland is a party,” it meant that none of those provisions would be in effect on April 1, 2011, when it commenced operations. The terms of the Local 705 CBA, thus, did not constitute any of the Local 705-represented employees’ initial terms of employment. The offer letter erased all of them, including Articles 2 and 10, which covered the weekly guarantee, Article 9, which contained the daily guarantee, and Article 12, which contained the 50-hour vacation pay entitlement.⁸ Because those terms never went into effect, Nexeo could not have unlawfully changed them. *Burns* makes that clear, and to bring the point home, all that has to be done is substitute “Nexeo” for “Burns,” “April 1” for “July 1,” and “Ashland” for “Wackenhut,” in the following quote from *Burns*:

Although *Burns* had an obligation to bargain with the union concerning wages and other conditions of employment when the union requested it to do so, this case is not like a § 8 (a)(5) violation where an employer unilaterally changes a condition of employment without consulting a bargaining representative. It is difficult to understand how *Burns* could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to July 1, no outstanding terms and conditions of employment from which a change could be inferred. The terms on which *Burns* hired employees for service after July 1 may have differed from the terms extended by Wackenhut and required by the collective-bargaining contract, but it does not follow that *Burns* changed *its* terms and conditions of employment when it specified the initial basis on which employees were hired on July 1.

406 U.S. at 294 (emphasis in original).

Instead of the terms contained in any current or expired Ashland collective bargaining

⁸ Also erased was Article 3, which provided for daily overtime pay, the alleged change that the ALJ neglected to address.

agreement, the offer letter informed the employees that they would be covered by Nexeo employment policies, which would generally mirror those of Ashland and were available for review. Just as it said it would do in the letter, Nexeo put those policies into effect on April 1, 2011, in Willow Springs, Fairfield and elsewhere. That brought the Local 705-represented employees under the Nexeo vacation policy, under which employees are entitled to 40-hours' pay for a week of vacation, the moment they became Nexeo employees.⁹ (REX 19). As Nexeo employees, they did not receive any daily or weekly pay guarantees – the Company does not have any policies that provide any such guarantees and, again, the guarantees they had as Ashland employees disappeared upon their becoming Nexeo employees.

The same analysis applies to the Local 70-represented employees. The terms of the Local 70 CBA, including its seniority and layoff provisions, never became part of the terms under which the employees worked; instead, they began working under Nexeo's employment policies, which did not provide for seniority-based dispatching or layoffs, when they reported for work on April 1, 2011. (Tr. 1006-11). The Company was also careful to ensure in its offer letter that any Ashland practices that were inconsistent with its policies disappeared at that time too. The Company's statement that it was not adopting any practices that were inconsistent with its policies meant that any such practices never went into effect. Because they never went into effect, the Company could not have unlawfully changed the seniority-based dispatching and layoff practices that Ashland had adopted. *Burns*, 406 U.S. at 294.

In his brief to the ALJ, the General Counsel argued that Nexeo could be held liable for abandoning these practices as an ordinary successor, theorizing that the Company put the practices into effect, and then unilaterally abandoned them. He only offered evidence, however,

⁹ The Nexeo overtime policy also immediately applied to the employees. Under it, employees are eligible for overtime pay after working 40 hours in a workweek. (REX 20)

that the seniority-based dispatching practice was in effect for a day, and the evidence was thin, at best. It came from two employees who testified that, on April 4, 2011, the first day Nexeo made any deliveries, they were given their choice of routes, but the next day and for the next six weeks or so thereafter they were assigned their routes. (Tr. 788-91, 825-26, 837-38). The only evidence the General Counsel presented with respect to the seniority-based layoff practice was that Nexeo did not follow it for the same period of time – he had no evidence Nexeo adopted the practice at any point before then. (Tr. 794, 848-49; GCX 102-104)

The two employees' testimony that they were given their choice of routes on April 4, 2011, is far from enough to overcome Nexeo's evidence that it did not adopt any practices that were inconsistent with its policies. That the employees may have been given their choice of routes that day is insufficient, standing alone, to support a finding that Nexeo adopted the practices even for a moment. Beyond that, the record shows that there were only three routes assigned on April 4, 2011, which was less than 50% of the number assigned on a typical day and well below a number that would justify drawing any conclusions as to how Nexeo had determined to dispatch its drivers. (GCX 100).

In summary, the ALJ had no evidentiary basis for finding in the Region 13 case that any of the terms contained in the Local 705 CBA, and no evidentiary basis for finding in the Region 20 case that any of the terms contained in the Local 70 CBA and any preexisting practices, were ever part of the terms under which Nexeo employed the employees. As such, he plainly erred in finding that, as an ordinary successor, Nexeo unlawfully eliminated the daily and weekly guarantees and 50-hour vacation pay entitlement in the Region 13 case, and unlawfully abandoned the seniority-based dispatching and layoff practices in the Region 20 case.

Besides making that error, the ALJ also incorrectly found that Nexeo failed to provide the

unions an opportunity to bargain over these topics. Nexeo gave the unions notice of the initial employment terms it had established at the meetings it held with them in mid-February 2011, and an opportunity to bargain over the terms in the pre-close bargaining sessions. (Tr. 127-36, 149-58, 163-76, 438-42, 458-68, 954-59, 979-97; GCX 10, 16-21, 81; REX 32-38). The information the Company shared with the unions at the initial meetings and in connection with the negotiations provided the unions with more than sufficient notice of the nature of the employment terms it had established to inquire about and request to bargain over those terms, if they were interested. The unions, however, were focused on negotiating with the Company over the benefit plans, not other ways the employees' terms of employment would be different.

In *Burns*, the Supreme Court explained the nature of a successor's duty to bargain in circumstances like those presented here:

Here, for example, Burns' obligation to bargain with the union did not mature until it had selected its force of guards in late June. . . . It is true that the wages it paid when it began protecting the Lockheed plant on July 1 differed from those specified in the Wackenhut collective-bargaining agreement, but there is no evidence that Burns ever unilaterally changed the terms and conditions of employment it had offered to potential employees in June after its obligation to bargain with the union became apparent. If the union had made a request to bargain after Burns had completed its hiring and if Burns had negotiated in good faith and had made offers to the union which the union rejected, Burns could have unilaterally initiated such proposals as the opening terms and conditions of employment . . . without committing an unfair labor practice.

406 U.S. at 295. This passage teaches that a successor that sets new terms of employment establishes the status quo from which the parties bargain, whether bargaining commences before the successor begins operations or afterwards. See *TNT Logistics North America*, 2006 NLRB LEXIS 30 (Feb. 1, 2006). Here, Nexeo notified the unions that it was establishing new employment terms, as well as that it was prepared to begin negotiations with the unions after a majority of the employees accepted its offer of employment. Once negotiations began, the Company maintained throughout that failure to reach agreement would mean that the

employment terms outlined in its offer letter would go into effect upon its commencing operations. In these circumstances, the conclusion is inescapable that the unions had notice of and an opportunity to bargain over all of the terms the Company had established, including each of those in issue.

Because they were never part of the employees' terms of employment as Nexeo employees, as well as because the unions had notice of and an opportunity to bargain over the initial employment terms the Company had established, Nexeo did not violate the Act by: (a) "eliminating," in the Region 13 case, the daily and weekly pay guarantees and 50-hour vacation pay entitlement the Local 705-represented employees had under the Local 705 CBA; and (b) "abandoning," in the Region 20 case, Ashland's practice of using seniority to dispatch Local 70-represented employees and to allocate unpaid layoff days. The ALJ's finding to the contrary is plainly erroneous. The paragraphs of the complaints in which these claims appear must be dismissed in their entirety.¹⁰

B. The ALJ Erred In Finding That Nexeo Unreasonably Delayed Providing The 401(k) Plan Document And The Health Insurance Plan SPD To Local 705

Paragraph 8 of the complaint in the Region 13 case, as amended, contains three information request-based claims. One alleges that, beginning on April 1, 2011, Local 705 asked Nexeo to furnish it with the SPD for its health insurance plan, and that the Company unlawfully delayed providing the SPD to the union until October 19, 2011. Another alleges that, beginning on April 1, 2011, Local 705 asked Nexeo to furnish it with the SPD for its 401(k) plan, and that the Company unlawfully delayed providing the SPD to the union until July 15, 2011. And the last one alleges that, beginning on May 25, 2011, Local 705 asked Nexeo to furnish it with the

¹⁰ That includes the claim in the Region 13 case, which the ALJ did not address, that the Company unlawfully eliminated the entitlement to daily overtime that the Local 705-represented employees had as Ashland employees under the Local 705 CBA.

plan document for its 401(k) plan, and that the Company unlawfully delayed providing the plan document to the union until August 11, 2011. In his decision, the ALJ dismissed the claim that Nexeo unlawfully delayed providing the SPD for its 401(k) plan to Local 705, finding that the evidence showed that Nexeo had difficulty creating the document and did not drag its feet in preparing it to delay giving it to the union. (ALJD p. 19). On the other two claims, however, he found that Nexeo's delay in furnishing the information violated the Act.

In *West Penn Power Co.*, 339 NLRB 585, 587 (2003), *enforced in part*, 394 F. 3d 233 (4th Cir. 2005), the Board gave the following description of the standard by which it assesses delays in responding to an information request:

In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. "Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a *per se* rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). In evaluating the promptness of the response, "the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information.

Applying this standard here, the ALJ clearly erred in finding that Nexeo unlawfully delayed providing the plan document for its 401(k) plan and the SPD for its health insurance plan to Local 705.

The little over two months it took Nexeo to furnish Local 705 with the plan document for the 401(k) plan, in and of itself, was not unreasonable. Upon considering the totality of the circumstances, that conclusion is inescapable. What the circumstances show is that the delay, such as it was, was the product of a bona fide misunderstanding. While Local 705 Representative Messino requested the plan document on May 25, 2011, it was unclear that he wanted the plan document, as opposed to the SPD, until he reiterated his request in his August 2,

2011 email to Company Consultant John Hollinshead. Their email exchange reflects that, from the outset, Hollinshead was under the impression that Messino wanted a copy of the SPD – that is the document to which Hollinshead referred in his emails and Messino never corrected him. Only after Hollinshead emailed him the SPD on July 15, 2011, did Messino make an unambiguous request for the plan document, stating in his email of August 2, 2011, that he still wanted it. Hollinshead then realized that he had apparently misunderstood Messino’s request and that he needed to get him a copy of the plan document too. He did so nine days later, attaching a copy of it to his email of August 11, 2011. (REX 22).

The ALJ did not disagree that there was “some understandable confusion initially that Local 705 was requesting something other than the summary plan document.” (ALJD p. 19). Without explanation, however, he found that “after a week or so this should have become clear to Nexeo.” (Id.). Whether or not it should have been clear to Nexeo, the evidence establishes that it was not. It remained a good faith misunderstanding until Messino finally made his unambiguous request for the plan document. That Hollinshead’s misunderstanding was genuine is reflected not just in his emails but by his track record of timely responding to Local 705’s information requests. Prior to providing it with copies of the plan document and the SPD for the 401(k) plan, the Company, at the parties’ pre-close negotiating sessions, timely provided Local 705 with a wealth of information on its 401(k) plan, including information on elective, non-elective, matching and projected shortfall contributions, investment options, and projected benefits for each employee. Hollinshead’s good faith is the decisive consideration and establishes that Nexeo’s delay in furnishing the plan document cannot be found to be unlawful. See *Day Automotive Group*, 348 NLRB 1257, 1263 (2006) (delay excused by good faith effort to provide union with relevant information it needed to evaluate healthcare proposal); *Decker Coal*

Co., 301 NLRB 729, 733 (1991) (delay excused by misunderstanding as to information sought).

Although the complaint alleges that Local 705 asked Nexeo to provide it with the SPD for its health insurance plan beginning on April 1, 2011, it is undisputed that the first time Messino requested the SPD after Nexeo's bargaining obligation attached was August 2, 2011. Hollinshead provided Messino with a copy of the SPD on October 19, 2011, two and a half months later. In the interim, unlike with the request for the 401(k) plan documents, Hollinshead did not receive any follow-up inquiries from Messino regarding the status of the Company's response to the request. In addition, as was true with respect to its retirement plan, Nexeo had previously provided Local 705 with all the information it needed to understand and bargain over the Company's health insurance plan, including the plan document (from which the SPD was derived), a benefits summary, and a benefits guide. In these circumstances, the Company's taking two and a half months to provide Local 705 with the SPD was not unreasonable. *Day Automotive Group*, 337 NLRB at 1263.

In finding that Nexeo unlawfully delayed providing the SPD, the ALJ dismissed the Company's argument that the length of the delay should be measured from Messino's request for the document on August 2, 2011. He determined that it should be measured from February 15, 2011, because Messino requested a copy of the SPD that day during the Company's and Local 705's initial meeting. In coming to that conclusion, he found that it was of no moment that Nexeo was not under a legal obligation to recognize Local 705 at that time, finding that the Company promised to recognize the union and did so a short time later.

The Company's promise, however, was not enforceable under the Act and, as such, cannot be used to support a finding of a violation. The earliest the clock could start to run on an information request was when Nexeo's duty to recognize Local 705 arose under the Act, not

when the Company extended conditional recognition to the union. That date was April 1, 2011, the date Nexeo became the Local 705-represented employees' employer, and the date the complaint alleges Local 705 began requesting the SPD. The ALJ, thus, erred in measuring the length of the delay from February 15, 2011. He also erred in failing to find that the period should be measured from the first time Local 705 requested the SPD after Nexeo's bargaining obligation was triggered on April 1, 2011. Again, that date was August 2, 2011. Until that date, Nexeo had no reason to believe that Local 705 was dissatisfied with the amount of information the Company had provided it pertaining to the health insurance plan and that it still wanted the SPD.

Lastly, putting to the side whether the Company unreasonably delayed providing the plan document for the 401(k) plan and the SPD for the health insurance plan to Local 705, Nexeo should not be held to have been under an obligation to provide Local 705 with any benefit-related information after June 1, 2011. The reason is that, after the parties' negotiating session that day, Local 705 determined to suspend bargaining while the unfair labor practice case it filed on April 7, 2011, was pending (Tr. 272). That action should be deemed to likewise suspend the union's entitlement to information like that in issue here, which it ostensibly needs for bargaining, for the duration of its refusal to bargain, because the action demonstrates that it has no legitimate need for the information during that period. Viewed another way, even if the amount of time the Company took to provide Local 705 with the plan document for the 401(k) plan and SPD for the insurance plan could be found to be unreasonable, which it cannot be, issuing an order against the Company plainly would not effectuate the purposes of the Act.

IV. CONCLUSION

For all of the foregoing reasons, Nexeo respectfully requests that the Board reverse each finding the ALJ made that the Company violated the Act, and issue an order dismissing the

complaints in their entirety.

Respectfully submitted,



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