

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

NEXEO SOLUTIONS, LLC

and

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

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

and

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

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF
IN ANSWER TO RESPONDENT'S EXCEPTIONS**

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I. INTRODUCTION

Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Series 8, as amended, Counsel for the Acting General Counsel ("GC") hereby submits his Brief in Answer to Respondent's Exceptions to Administrative Law Judge William G. Kocol's August 30, 2012, Decision.¹ As will be demonstrated, Respondent's exceptions are largely without merit and should be rejected.

II. ANSWER TO RESPONDENT'S EXCEPTIONS²

A. Respondent's Exceptions 1, 2, 3 and 7

Taken together, Respondent's Exceptions 1, 2, 3 and 7 challenge the factual findings made by Judge Kocol that the November 5, 2012, Purchase and Sales Agreement ("P&S Agreement") obligated Respondent to offer employees in both the Willow Springs and Fairfield facilities employment in their same position, with the same base wages, and with benefits comparable in the aggregate to those provided by the predecessor employer, Ashland.³

As Judge Kocol correctly found, Respondent made several promises regarding the future employment of the unit employees in the P&S agreement. As the ALJ detailed, Section 7.5(b)(i)

¹ Hereinafter the National Labor Relations Act will be referred to as the "Act"; the National Labor Relations Board as the "Board"; the Administrative Law Judge as the "ALJ" or "Judge Kocol"; citations to the ALJ's decision will be referred to as "ALJD" followed by applicable page and/or line numbers; the Acting General Counsel's Exhibits as "GC__"; Respondent's Exhibits as "R__"; Charging Party's Exhibits as "CP__"; Joint Exhibits as "Joint __"; and citations to the transcript as "Tr. __".

² The GC's Answer is organized by reference to the particular exception or exceptions to be analyzed in that particular section. The numbers track those assigned each exception by Respondent in its October 18, 2012, Exceptions to the Administrative Law Judge's Decision and Recommended Order.

³ Respondent's Exception 1 challenges the ALJ's finding that the closing on Respondent's purchase of the assets of Ashland Distribution occurred on April 1, 2011. To the extent that Respondent is arguing the purchase closed at midnight on March 31, 2011, the GC agrees.

and 7.5(c) of the P&S Agreement obligated Respondent to offer employment to all of Ashland's employees and maintain substantially identical terms and conditions of employment. ALJD at 3-4; see also GC 6. Expounding further, Section 7.5(d) obligated Respondent to provide "Transferred Employees" with "wages no less favorable" and "benefits, variable pay, incentive or bonus opportunities under plans, programs and arrangements that are substantially comparable in the aggregate to those provided by Ashland." *Id.* (emphasis supplied).⁴ Because Judge Kocol correctly found that Schedule 7.5(a) of the P&S Agreement listed by name each of the unit employees employed at the Willow Springs and Fairfield facilities as employees who would be retained by Respondent (ALJD at 5:1-2; see also Tr. 36, 940), Sections 7.5(b)(i), 7.5(c), 7.5(d), 7.5(f) and 7.5(o) of the P&S Agreement necessarily applied to the unit employees. Accordingly, Judge Kocol was correct in finding that Respondent repeatedly committed itself to make offers of employment to all unit employees at the same position, at the same wage, and with a comparable benefits package. ALJD at 15:39-41.

To combat findings clearly supported by the record, Respondent attempts to re-write the P&S Agreement by averring that the agreement only obligated Respondent to provide Ashland's employees with benefits substantially comparable in the aggregate to those sponsored by Ashland as opposed to those provided by Ashland. This logic is patently false. A reading of the provisions demonstrates that Respondent had a contractual obligation to offer employees benefits provided by Ashland. Section 7.5(d) of the P&S Agreement states that Respondent would provide benefits "under plans, programs, and arrangements that are substantially comparable in the aggregate to those provided by Ashland...as expected to be in effect on January 1, 2011, as set forth on Schedule 7.5(d)." ALJD at 4:18-20; GC 6.

⁴ Section 7.5(c) of the P&S Agreement makes clear that the term "Transferred Employee" includes those employees accepting employment offers from Respondent. Thus, the term includes the unit employees at issue in these matters.

The definition of “Seller Benefit Plan” in the P&S Agreement provides further support. That term is defined as “each Employee Benefit Plan that is sponsored, maintained, contributed to or required to be contributed to by Ashland...for the benefit of any Employee or in which any Employee participates” GC 6 at p. 14. It is undisputed that Ashland previously contributed to the Local 705 Pension and Health and Welfare plans. Tr. 68-69. The same can be said for Local 70’s Western Conference of Teamsters PEER 80 Pension Plan.⁵ GC 77 at p. 11-12; see also Tr. 625-26; 779:16-19; 824:3-7. Additionally, Schedule 5.19(a) (“Seller Benefit Plans”) lists both the Local 705 Pension Plan and the Western Conference of Teamsters Pension Trust. GC 6 at p. 91-92. Read together, Section 7.5(d), the definition of “Seller Benefit Plan,” and Schedule 5.19(a) establish Respondent’s obligations to the unit employees under the P&S Agreement in a manner consistent with Judge Kocol’s findings.

Moreover, going beyond the terms of the P&S Agreement, the record reflects that the parties understood that the plans bargained for by Local 705 and Local 70 were plans “provided by” Ashland under Section 7.5(d) of the P&S Agreement. As set forth fully in the GC’s Brief in Support of Exceptions to the Decision of the Administrative Law Judge (“GC’s Brief in Support of Exceptions”), Local 705 and Respondent spent much of their time at the bargaining table analyzing the differences between the Local 705 Pension plan and Respondent’s 401(k) plan. GC’s Brief in Support of Exceptions, § II.B.5. Meetings between Local 70 and Respondent included similar comparisons as between the Local 70 Western Conference PEER 80 Plan and Respondent’s 401(k) plan. See *id.* at § II.C.6(a). The parties never discussed any comparison between Respondent’s 401(k) and Ashland’s non-union plans. In short, Respondent’s attempt to utilize Ashland’s non-union plans for benefit comparison purposes under the P&S Agreement is

⁵ Unlike the case in Willow Springs, the Fairfield unit employees were provided health benefits sponsored by Ashland. GC 77 at p. 13; GC 79; see also GC 1(cc) (¶ 7(a)).

a failed attempt to re-write the plain meaning of the document as understood by the unions and Respondent itself.

Respondent additionally argues it was only obligated to offer benefits sponsored by Ashland by virtue of Schedule 7.5(d). Respondent highlights that Section 7.5(d) references plans “expected to be in effect on January 1, 2011, as set forth on Schedule 7.5(d),” and that the unions’ plans are not mentioned in Schedule 7.5(d). Schedule 7.5(d) however, has no bearing on Respondent’s obligations with respect to the benefits it would have to offer to the unit employees. Schedule 7.5(d) is entitled “Changes to Seller Benefit Plans.” GC 27 at p. 5-6. The schedule summarizes substantive changes implemented to certain of the Seller Benefit Plans by Ashland, effective January 1, 2011. *Id.* These changes in no way affected the Local 705 or Local 70 plans.⁶ Nor does Schedule 7.5(d) affect the identification of plans defined as a “Seller Benefit Plan” under Schedule 5.19(a). Plainly, Schedule 7.5(d) serves to disclose to Respondent substantive alterations made to the Seller Benefit Plans identified in Schedule 5.19(a) after the initiation of the purchase. See *id.* at 5 (describing the “summary” as “a general description for information purposes only and is qualified in its entirety by information provided by Ashland to Buyer in the diligence process.”). Thus, Schedule 7.5(d) must be read together, and as an update to, Schedule 5.19(a). Otherwise, the definition of “Seller Benefit Plan” and Schedule 5.19(a) would be read out of the document altogether.

Given the relationship between Schedules 5.19(a) and 7.5(d), the reference to Schedule 7.5(d) in Section 7.5(d) is intended explicitly to include the most recent terms of the plans

⁶ There is certainly no evidence in the record to suggest that the Willow Springs or Fairfield unit employees experienced changes to their health or pension benefits as of January 1, 2011. Indeed, because pension and health benefits are mandatory subjects of bargaining, Ashland could not have unilaterally made changes to the unit employees’ benefits on January 1, 2011. Respondent has admitted as much. Tr. 540. Consequently, the Local 705 plans could not appear on Schedule 7.5(d) because Respondent could not lawfully make changes to the unions’ plans without first bargaining.

identified in Schedule 5.19(a) as among the obligations outlined in Section 7.5(d). In short, Respondent's reading of these portions of the P&S Agreement is in error. Schedule 7.5(d) does not alter the fact that the bargained-for pension and health plans were Seller Benefit Plans, the terms of which governed Respondent's benefit plan obligations under Section 7.5(d) of the P&S Agreement. For the reasons discussed, Respondent's Exceptions 2 and 3 should be rejected.

In addition to Schedule 7.5(d), Respondent uses its Exception 7 to assign error to the ALJ's failure to identify Sections 1.1 (definition of Employee Benefit Plan), 2.2(e), 7.5(g), 7.5(s) as relevant to the assessment of whether Respondent was a perfectly clear successor. As previously discussed, Schedule 7.5(d) does not have the import Respondent argues. Similarly, as discussed below, the remaining P&S Agreement sections identified by Exception 7 fail to support Respondent's Exception.

The P&S Agreement defines Employee Benefit Plan as any "(i) Employee Pension benefit Plan, (ii) Employee Welfare Benefit Plan...or other employee benefit or fringe benefit plan, program or arrangement covering any Employee...For 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." GC 6 at § 1.1. Section 2.2(e) excludes union contracts from the definition of Conveyed Assets. GC 6 Section 2.2. Respondent reads these provisions to support its contention that it was free to set terms that were materially different from those contained in former Ashland collective bargaining agreements. This argument misses the mark on the perfectly clear analysis.

As the ALJ correctly found, Section 7.5(d) obligated Respondent to offer employment to the former Ashland workers at the same rate of pay, in the same positions, and with benefits "substantially comparable in the aggregate" to those provided by Ashland. ALJD at 3-4 (citing,

inter alia, Section 7.5(d) of the P&S Agreement); see also GC 6. The fact that the P&S Agreement states that a union contract is not an Employee Benefit Plan nor a conveyed asset is of no consequence to the explicit promises found in other provisions of the P&S Agreement regarding offers of employment, as discussed above. Indeed, those promises, as set forth in the pertinent portions of the P&S Agreement, played an integral role in converting Respondent to a perfectly clear successor. See GC's Brief in Support of Exceptions, §§ III.A. Accordingly, Judge Kocol correctly (but impliedly) determined that Sections 1.1 and 2.2(e) are of little to no import to the perfectly clear analysis.

Respondent also argues the relevancy of Section 7.5(g) to the perfectly clear analysis. Section 7.5(g) provides that Ashland maintain, among other things, withdrawal liabilities for pension plans in which Ashland participated. GC 6. Again, this provision is of no relevance to the perfectly clear analysis. The fact that Ashland remains responsible for pension liability cannot negate the promises found in the other provisions of the P&S Agreement, discussed above. Judge Kocol did not err in essentially ignoring the provision.

Without explanation, Respondent argues the ALJ should have found Section 7.5(s) relevant to the perfectly clear analysis. Section 7.5(s) states that provisions of Section 7.5 are "solely for the benefit of the respective parties to this Agreement and nothing in this Section, express or implied, shall confer upon any Employee or legal representative or beneficiary thereof, any rights or remedies...." GC 6 Section 7.5(s). As set forth in the GC's Brief in Support of Exceptions, the Board has previously found that an Employer can become a perfectly clear successor by virtue of a contract with a third party. See GC's Brief in Support of Exceptions, § III.A.3. As the ALJ correctly found, Respondent, via the P&S Agreement, repeatedly committed itself to make offers of employment to all unit employees at the same

position, at the same wage, and with a comparable benefits package. ALJD at 15:39-41. It thereafter communicated as much to the unit employees. See *id.* at 5:5-26. Therefore, Respondent became a perfectly clear successor by virtue of the promises made in the P&S Agreement. See GC's Brief in Support of Exceptions, § III.A.3 (discussing *The Denham Co.*, 206 NLRB 659, 660 (1973) and 218 NLRB 30, 31 (1975), and *Springfield Transit Management*, 281 NLRB 72, 78 (1986)). Respondent has not provided authority that supports the contention that a provision such as Section 7.5(s) will shield an entity from perfectly clear successor liability. Accordingly, Judge Kocol did not err failing to find Section 7.5(s) relevant to the perfectly clear analysis. Exception 7 is without merit.

For the reasons discussed, Respondent's Exceptions 2, 3, and 7 should be rejected, and Respondent's Exception 1 should be sustained only to the extent Respondent is arguing the purchase of Ashland's assets closed at midnight on March 31, 2011.

B. Respondent's Exceptions 4 and 5

Exceptions 4 and 5 relate to factual findings made by the ALJ that transition-related communications issued by predecessor-Ashland and Respondent to the unit employees demonstrated Respondent's efforts to retain Ashland's workforce, and that Ashland's and Respondent's transition-related communications "closely track[ed]" each other. ALJD at 5-6.

Regarding Exception 4, the ALJD includes citations to portions of the November 5, 2010, P&S Agreement that make clear that Respondent had an obligation to at least offer employment to the Ashland workforce at the same rate of pay, in the same positions, and with benefits "substantially comparable in the aggregate" to those provided by Ashland. ALJD at 3-4 (citing, *inter alia*, Section 7.5(d) of the P&S Agreement); see also GC 6. Judge Kocol also quoted one transition-related communication to unit employees that contained a description of Respondent's

terms of hire nearly identical to that conveyed in Section 7.5(d) of the P&S Agreement. ALJD at 5; see also GC 40, 56. Thus, Judge Kocol's conclusion that the transition-related communications "reveal that Nexeo made every effort consistent with the APS to retain the existing work forces as part of the transition from Ashland," ALJD at 5:25-26, is supported by the record.

Moreover, the GC fully briefed the ramifications of the terms of the P&S Agreement with regard to Respondent's obligations to offer employment to Ashland personnel. See GC's Brief in Support of Exceptions, §§ II.A, II.C.1 & III.A.1. The GC likewise fully briefed the content and import of the numerous transition-related communications issued to unit employees between November 2010 and January 2011. *Id.* at §§ II.B.2, II.C.2, II.C.3, III.B.1, & III.B.3. In short, pertinent portions of the GC's Brief in Support of Exceptions reveal that the conclusion challenged by Respondent's Exception 4 is fully supported in the record and on the law.

As for Respondent's Exception 5, Judge Kocol's conclusion that "the written communications made by Ashland concerning the sale closely track the communications made by Nexeo itself," ALJD at 6:2-3, is supported by the record in one regard. That is, the transition-related communications issued to unit employees between November 2010 and January 2011 contained similar information and a consistent message stream. See, e.g., GC's Brief in Support of Exceptions, §§ II.B.2, II.C.2, II.C.3. However, as fully argued in the GC's Brief in Support of Exceptions, nearly all the transition-related communications entered into the record and issued to unit employees between November 2010 and January 2011 are fully attributable to Respondent. *Id.* at § III.B.1. Thus, to the extent the conclusion challenged by Respondent's Exception 5 can be read as suggesting that some portion of the transition-related communications relied on by the

GC are not attributable to Respondent, that conclusion is legal error and not supported by the record.

For these reasons, Respondent's Exception 4 should be rejected, and Exception 5 should be rejected to the extent described.

C. Respondent's Exception 6

Here, Respondent challenges Judge Kocol's finding that "Nexeo's plan, unlike the Local 705 plan, required employee contributions." ALJD at 7:7-8. The conclusion is fully supported in the record.

Specifically, Nexeo's 401(k) savings plan functions largely on a matching contribution basis. See GC 29 (Summary Plan Description, p. 2-3); GC 32 (Employee Savings Plan document, p. 15-16). Employees' monthly contribution levels were automatically set at 4% of their compensation. GC 32 at p. 16. In contrast, Local 705's Pension plan was funded solely by employer contributions; employees did not have to contribute any portion of their pay to participate and yet received the same defined benefit.⁷ See GC 2 (CBA, p. 19 [describing employer contributions to the pension plan]); GC 22 (Local 705 Pension Plan Summary Plan Description, p. 15); see also Tr. 130, 134, 184-85, 321-22, 542-43.

Respondent's 401(k) plan does contemplate a "Basic Contribution" for certain employees regardless of their decision to make their own monetary contributions. See GC 29 at p. 5; GC 32 at p. 19. However, the language describing the "Basic Contribution" suggests that Respondent

⁷ The same can be said of the Western Conference of Teamsters PEER 80 Plan, the pension plan provided to the Fairfield unit employees under Ashland. That is, under the PEER 80 Plan, monetary contributions were wholly the responsibility of Ashland. See Tr. 625-26; 779:16-19; 824:3-7; see also GC 77 at p. 12 (detailing Ashland's required contributions to the Pension fund). In contrast, participation in the 401(k) plan is premised largely on an employee contribution, the default of which was set at 4% of the employees' pay. Tr. 785-86:14-25, 1; GC 32 at p. 16; GC 97; GC 105. Indeed, Respondent's own forward-looking projections intending to compare the PEER 80 benefit to the 401(k) benefit assumed a 4% contribution and match. GC 86 (small type at top right of document).

may elect against making such a contribution on behalf of the employees. GC 32 at p. 18-19 (“As of the last day of the Plan Year, the Employer **may in its discretion** make a Nonelective Contribution to the Plan....”) (“The Employer **may** make Nonelective Contributions as set forth below”) (emphases added).

At any rate, Judge Kocol’s statement is clearly intended to draw an important distinction between the Local 705 Plan and Respondent’s 401(k) plan: the former is solely employer funded while the latter is, in large degree, funded by employee contributions and the resultant matching funds. See, e.g., GC 32 at p. 18-19 (describing a 100% employer match of employee contributions, up to 4% of compensation, while the “Basic Contribution” is limited to between 1.5% and 4.5% of the employee’s compensation); see also Tr. 130:2-11 (noting that Respondent’s forward-looking comparison between the Local 705 Pension Plan benefit and the 401(k) benefit assumed a 4% employer-match); R 3 at p. 2 (Hollinshead noting that Respondent’s forward-looking benefit comparisons between the Local 705 Pension Plan and its 401(k) plan assumed employees would “contribute his 4% etc.”). In other words, unlike the 705 Pension plan, meaningful participation in Respondent’s 401(k) plan required employee contributions; hence the default contribution rate of 4% of employees’ compensation.

In short, the challenged finding is fully supported in the record. Respondent’s Exception 6 should be rejected.

D. Respondent’s Exceptions 8 and 11

Respondent’s Exceptions 8 and 11 object to Judge Kocol’s failure to find that a majority of Local 705-represented employees initially rejected Respondent’s offer of employment by striking language from their offer letter and later signing replacement copies “under protest,” and

to Judge Kocol's finding that Local 70 and 705 were shown identical offer letters on February 15 and 16, 2011.

The General Counsel agrees with Respondent's Exception 8 to the extent that Judge Kocol misstated the record evidence. The record reflects that the Willow Springs drivers initially signed the offer letters by striking the reference to changed terms and conditions. Tr. 139-44. Following Respondent's expressed concern with the manner in which the drivers signed the letters, Respondent agreed that the drivers could re-submit their offer letters and sign "under protest." GC 13, 35; Tr. 139-44, 315-17, 374-76, 445. The General Counsel does not agree that the initial letter constituted a rejection of the offer of employment. The drivers were attempting to accept employment while maintaining their position that Respondent did not have the right to change terms and conditions.⁸ Tr. 139-44.

With respect to Respondent's Exception 11, the General Counsel agrees that the Willow Springs and Fairfield facility employment offer letters were slightly different. The difference is mainly captured in the language describing the change in employees' pension and health benefits. The letter to Willow Springs employees provided they would not participate in the multi-employer union pension and also not participate in Local 705's health benefits. GC 13. In contrast, the letter to the Fairfield employees provided they would no longer participate in the multi-employer pension union plan and receive health benefits similar to that which they received from Ashland. GC 81.

The GC's view is that the errors identified by Respondent in its Exceptions 8 and 11 bear no legal import on the merits of the case. However, inasmuch as the record evidence supports these exceptions, the GC agrees that they should be sustained.

⁸ The GC would add, however, that the Willow Springs unit employees' actions tend to demonstrate the material and substantial nature of the changes implemented by Respondent to the pension and health plans.

E. Respondent's Exception 9

Here, Respondent attacks the ALJ's decision to credit the testimony of Neil Messino over that of John Hollinshead, to the extent their testimony differed.

The GC maintains that the Board should not disturb the ALJ's credibility findings in the instant matter because they are supported by evidence in the record and other objective considerations. In this regard, the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Metfab Inc.*, 344 NLRB 215, 215 fn.2 (2005), citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d. Cir. 1951).

Here, it is important to note that Judge Kocol did not rely solely on the testimony of Neil Messino. Rather, the factual findings at issue were reached by relying on "documentary evidence and a composite of the credible testimony of Messino and Hollinshead." ALJD at 12, fn.9. Where there were differences in the testimony, Judge Kocol credited Messino because "his demeanor was convincing, his recollection sharp, and overall he seemed in command of what happened during the meetings and negotiations." *Id.* Thus, Judge Kocol provided a reasoned explanation for this credibility determination, and Respondent has failed to specify record evidence contradicting that explanation. Accordingly, Respondent's Exception 9 should be rejected.

F. Respondent's Exception 10 and 13

Respondent's Exceptions 10 and 13 concern what appear to be inadvertent errors made by Judge Kocol in the ALJD. In fact, the GC excepted to and briefed the same errors. See GC's Brief in Support of Exceptions, §§ II.C.6(b), III.B.5. Therefore, for the reasons set forth in the GC's Brief in Support of Exceptions, the GC concurs with Respondent's Exceptions 10 and 13.

G. Respondent's Exception 12

For much the same reasons as discussed with regard to Exception 9, Respondent's Exception 12 should be rejected.

Here, Respondent attacks Judge Kocol's refusal to credit Paul Fusco's claim that the main obstacle to agreement on a CBA between Local 70 and Respondent was the parties' insistence on their respective retirement plans. See ALJD at p. 14, fn.11. First, Judge Kocol gave specific reasons for making this credibility determination, explaining "the record indicates . . . that Fusco was blending in his subjective feelings with what actually occurred and his testimony was given in response to leading questions; his demeanor was not convincing." Judge Kocol's first point, regarding the blending of subjective feelings, is supported in the record. See Tr. 991:4-11. Judge Kocol's second point, regarding the use leading questions, is also supported. Tr. 992:4-6. Second, other portions of Fusco's testimony reflect inconsistencies on the point. For example, although Fusco recalled the parties being "very fixed" in their positions regarding the retirement plans (Tr. 992:1-6), he also recalled Local 70 making a proposal that would allow for the adoption of Respondent's 401(k) plan. Tr. 993-94; 1036.

In short, Judge Kocol provided a reasoned explanation for this particular credibility determination, and the record supports his explanation. Respondent has not identified record evidence sufficient to overcome the determination. Exception 12 fails.

H. Respondent's Exception 14, 15, 16, 27, and 28

By its Exceptions 14, 15, 16, 27, and 28, Respondent challenges Judge Kocol's factual and legal conclusions relating to Respondent's unlawful unilateral changes to the Fairfield facility's dispatching and layoff policies. As will be demonstrated, the Judge's factual and legal conclusions are well supported in the record and by extant Board law.

1. Record Facts Relating to the Dispatching Policies, and to Respondent's Changes Thereto, Confirm the Challenged Factual Conclusions

(a) Seniority-Based Dispatching Is Maintained on April 4

First, Judge Kocol correctly found that “[o]n April 4 Nexeo assigned routes to drivers based on the same seniority-based systems that had been used by Ashland.” ALJD at 14:19-20 (footnote omitted). In this regard, the last CBA in effect between Ashland and Local 70 recognized the concept of unit seniority in Article VII. GC 77 at p. 6-8. In pertinent part, Article 7.03(C) states that Ashland “agrees that it will make reasonable efforts to use seniority in determining daily job assignments for drivers. Drivers will be responsible to insure [sic] that they have at least 9 hours of driving eligibility each day for all days in a work week.” *Id.* at 7. In practice, the Fairfield facility assigned routes using seniority. See, e.g., ALJD at 14:19-26. Under the process, the dispatcher telephoned drivers in order of seniority, informed drivers of the routes available for the next day, and allowed drivers, by seniority, to select their route. *Id.*; see also Tr. 788; 824-25.

Monday, April 4, was the first day that drivers ran routes for Respondent. R 40 (discussing a quiet period of transition between April 1-3, and stating that Respondent's “trucks cannot be on the road on Friday April 1”); see also Tr. 790:1-11. The assignments were made using the same seniority practice as utilized under Ashland. ALJD at 14:19-20; see also Tr.

837:17-20. That is, on Sunday, April 3, dispatcher Anthony Ports telephoned bargaining unit drivers to assign routes as he always had—by seniority selection. Tr. 837:17-20; 790:12-14.

Respondent argues that GC Exhibit 100 somehow refutes the record testimony by demonstrating that an unusually small number of routes (three) were assigned that day. First, GC Exhibit 100 shows that it was not uncommon for there to be four route assignments or less in a day. See, e.g., *id.* at 1 (showing four route assignments on April 8); *id.* at 3 (showing one route assignment on May 7); *id.* at 4 (showing four route assignments on May 24). More importantly, that there were only three routes assigned that day by no means undermines the record testimony cited herein and clearly relied upon by Judge Kocol.

For these reasons, Respondent’s Exception 14 should be rejected.

(b) Respondent Never Informs Local 70 or the Unit Employees that Dispatching Policies Would be Changed

Second, Judge Kocol correctly found that Respondent “never informed Local 70 of its intent to change [the seniority-based dispatching] practice.” ALJD at 14:26. The record demonstrates that, throughout bargaining, Respondent never indicated to Local 70 that it sought to change the dispatching policies established under Ashland. See Tr. 663; 667; 676; see also GC 83 at p. 6-7 (CBA proposal with bargaining notes indicating agreement on slight, non-substantive changes to the Article VII Seniority provision). Discussion of dispatching is absent from the various documents supplied by Respondent to Local 70 to describe Respondent’s employment policies. GC 87; R 38, 39; see also R 40 (email from Fusco to Local 70 regarding employment assignments as of the April 1 transition, failing to mention a change to dispatching procedures). Seniority dispatching is nowhere identified in the employees’ offer letters as a policy subject to change. See ALJD at 8-10; see also GC 81, 96; R 30.

In support of its Exception 15, Respondent cites to its own Exhibit 38, certain statements made in the offer letters, and the testimony of Paul Fusco. The citations do not refute the other record evidence.

Respondent's Exhibit 38 includes no mention of dispatching policies, and does nothing but threaten implementation of the terms outlined in the offer letters should the parties fail to reach agreement. According to Respondent, that was enough. Specifically, Respondent argues that the statements in the offer letters that "Ashland employment policies will terminate when the sale closes," and "We are not . . . adopting any existing practices that are inconsistent with the express terms of our policies," served to inform the employees and Local 70 that seniority dispatching would be abandoned. See ALJD at 8:32-38; see also GC 81, 96. As Respondent admits, however, the letters also indicate: "To the extent reasonably possible under our structure, Nexeo Solutions employment policies will generally mirror [Ashland's] policies." *Id.* Moreover, inasmuch as Respondent's posted policies mirrored those supplied to the Union, anyone taking Respondent up on its offer "to review the policies that we have prepared to date," *id.*, would have seen nothing regarding dispatching. In short, Respondent's communications never indicated a contemplated change to the dispatching policies. Inasmuch as the communications did indicate that Ashland policies generally would be mirrored; and inasmuch as Respondent did take the time to specify policy alterations of other kinds (see GC 87; R 39); Respondent's factual claim to have informed Local 70 of the change to seniority dispatching is proven to be without merit.

Respondent, however, also argues that Fusco's testimony serves to demonstrate that seniority dispatching was a practice "inconsistent with the express terms of [Respondent's] policies" and, therefore, subject to abandonment by April 1. See Tr. 997-1011. First, Fusco's

testimony does not change the ambiguous nature of the statements made in the offer letters, as described immediately above. Second, Fusco's testimony on this particular subject was confused, internally inconsistent, and patently incredible. For example, a foundation objection was sustained regarding Fusco's testimony regarding his knowledge of "Nexeo's policies." Tr. 1006-07. Fusco then testified that Respondent adopted Ashland's dispatch policy, but failed to describe it. Tr. 1008-09. He then testified to instructing Fairfield management to abandon its dispatching practice. Tr. 1010. Finally, he testified that the Fairfield dispatch policy was "inconsistent" with Nexeo's policy—which, apparently, was an undefined policy in effect at some Ashland facilities. Tr. 1011.

Besides being internally inconsistent and confused, Fusco's claim that Respondent adopted a certain policy and communicated as much to Fairfield management is self-serving and nowhere else corroborated in the record. Indeed, Respondent's failure to communicate dispatching changes to Local 70 and its agreement in negotiations to substantively identical seniority language serves to refute the claim. It is no wonder that Judge Kocol implicitly (and correctly) rejected this testimony. See, e.g., Tr. 1011:4-10 (Judge Kocol pointing out inconsistencies in Fusco's testimony).

In short, the record evidence amply supports Judge Kocol's conclusion that Respondent "never informed Local 70 of its intent to change [the seniority-based dispatching] practice." ALJD at 14:26. Respondent's citations and arguments to the contrary do not withstand scrutiny. Respondent's Exception 15 should be rejected.

(c) Seniority-Based Dispatching Is Abandoned on April 5

Finally, the ALJ correctly found that Respondent's abandonment of seniority dispatching did not occur until April 5. ALJD at 14:26-30. In this regard, Supervisor Mark Lilly was tasked

on April 4 with dispatching drivers for April 5. Tr. 790-91; 837-38. Lilly telephoned employees but, instead of calling drivers by seniority and letting drivers choose their route, Lilly assigned delivery routes without regard to seniority and without driver input. *Id.* When bargaining unit employees questioned Lilly about not being able to select a route, Lilly responded that the parties no longer had a CBA; thus, seniority did not matter and Respondent would be assigning drivers more efficiently. Tr. 791:1-8, 838:4-9. Seniority-based route selection was abandoned for approximately a month-and-a-half. Tr. 791-93; 838:10-12.

In an attempt to refute the record facts, Respondent relies on the testimony of Paul Fusco. See Tr. 997. The fact that Fusco “reminded” Local 70 that, without agreement, the terms of the employees’ offer letter would be implemented as of April 1 does not serve to refute the record evidence demonstrating that the dispatch procedures were not changed until April 5. Indeed, even if Fusco’s testimony that he instructed Fairfield management to abandon seniority dispatching were credited (Tr. 1009), it would not establish that Fairfield management actually did so.⁹ And, as already discussed, Respondent never indicated to Local 70 or the unit employees that dispatching policies would be impacted in any way. Thus, the record fails to show that the dispatching change was adopted prior to April 5.

For these reasons, Respondent’s Exception 16 should be rejected.¹⁰

2. Extant Board Law Supports the Judge Kocol’s Conclusion that Respondent’s Changes to the Seniority-Based Dispatching and Layoff Policies Violated Section 8(a)(5) and (1) of the Act

⁹ Likewise, and as already discussed, the fact that only three routes were assigned on April 4 (GC 100) by no means undercuts the evidence regarding how they were assigned.

¹⁰ Respondent does not challenge the ALJ’s factual findings with regard to the seniority-based layoff policies in place under Ashland, or the mid-April changes that Respondent instituted. See ALJD at 14-15. To provide context, however, some record facts are included in the discussion, immediately below, of Judge Kocol’s legal conclusions as to Respondent’s change to the seniority layoff practice.

(a) Respondent Abandoned Seniority-Based Dispatching and Layoff Practices Without Providing Local 70 with Notice and Opportunity to Bargain

Contrary to Respondent's Exception 27, the record evidence and Board law confirms that Judge Kocol correctly concluded that Respondent abandoned seniority-based dispatching and seniority-based layoff practices without providing Local 70 notice or opportunity to bargain.¹¹ ALJD at 18:34-37.

The evidence relating to the April 5 abandonment of seniority-based dispatching is related above. That discussion demonstrates that the Local 70 was never notified of the decision prior to its implementation. In particular, the record demonstrates that Local 70 business agent Bob Aiello was not informed about the dispatching change until steward Ernie Carrion reported the changes following the April 1 transition. Tr. 688-89. Aiello thereafter made a call to Fusco regarding the issue, and bargaining ensued. Tr. 689-90; 1005:1-2; 1011-12. Likewise, the record shows that the change to Ashland's seniority-based layoff policy was made without notice to Local 70.

First, the ALJ correctly described the seniority-based layoff procedure in effect under Ashland, and Respondent's mid-April abandonment of the use of seniority to allocate layoffs. ALJD at 14-15. Specifically, the last CBA between Ashland and Local 70 states that layoffs will be conducted by reverse order of seniority, and bumping by seniority into other classifications was generally allowed. GC 77 (at Article 7.02, p. 6). Ashland followed the CBA terms in practice. In their last few years of employment with Ashland, drivers did not experience layoffs for lack of work. Tr. 826:13-16; see also Tr. 793:17-19. If there were not enough delivery

¹¹ The conclusion is a necessarily element of the legal analysis leading to the ALJ's determination that the dispatching and layoff policy changes were violative of the Act. See ALJD at 18; see also, e.g., *Banknote Corp. of America*, 315 NLRB 1041, 1045 fn.9 (1994). The legal analysis supporting this ultimate conclusion is set forth in response to Respondent's Exceptions 28, below.

routes for a particular day, the driver with the least seniority would be given the option of performing warehouse work for the day. Tr. 826:9-12; see also Tr. 795:5-10.

Second, the ALJ correctly found that the practice changed in mid-April. On April 21, driver Gary Robbins was laid off out of seniority. Tr. 794; see also GC 103 (Start Time Sheet for April 21 indicating Robbins was laid off without a route), GC 92 (seniority list). He had never before experienced a temporary, one-day layoff of this kind. Tr. 793:17-19. On April 22, driver and Local 70 steward Ernie Carrion was also laid off for lack of work. Tr. 848-49. The Start Time sheet for the day showed all other drivers—including less senior drivers—being assigned a route except for Carrion. *Id.*; see also GC 102 (April 22 Start Time Sheet showing Carrion as “No-Pay,” with all drivers besides Carrion assigned to routes or on vacation); see also GC 92 (seniority list). Carrion was not offered the option of performing warehouse work and did not get paid for the day. Tr. 856. Documentary evidence shows that other drivers were laid off out of seniority throughout April and May. GC 104 at p. 1 (April 14 Start Time Sheet indicating Jeff Thompson being “off without pay”); *id.* at p. 2 (same with date of May 4); *id.* at p. 3 (May 13 Sheet showing Robbins and Thompson as laid off); *id.* at p. 4 (May 20 Sheet showing Randy Bell as laid off); see also Tr. 853-55.

The ALJ also correctly found that Local 70 business agent Bob Aiello was informed of the change by his steward, Carrion, at or around the time Carrion told him of Respondent’s change to the route assignment practice. ALJD at 14-15; see also Tr. 688-89. As with the dispatching practices, Aiello sought and engaged in bargaining with Fusco. Tr. 689.

Finally, the record demonstrates that neither Local 70 nor the unit employees were informed of contemplated changes to the layoff policy until they were put into practice. The changes were not discussed in bargaining. See Tr. 663; 667; 676; see also GC 83 at p. 6-7 (CBA

proposal on Seniority provision). The various documents supplied by Respondent to Local 70 to describe Respondent's employment policies fail to discuss layoffs. GC 87; R 38, 39; see also R 40. Layoff policies are nowhere mentioned in the employees' offer letters as a policy subject to change. See ALJD at 8-10; see also GC 81, 96; R 30.

For the same reasons advanced with regard to the dispatching practices, Respondent argues that Local 70 was on notice that Respondent's initial terms of employment would not include seniority-based layoffs. For all the reasons discussed above in relation to the dispatching practices, the argument fails. Accordingly, inasmuch as Respondent's Exception 27 rests on its quibble with the factual finding that Local 70 was not informed of the changes until their implementation, that finding is well supported in the record and the Exception must fail.

On the law, Judge Kocol's conclusion regarding notice and opportunity to bargain was also correct. "Before implementing a change involving a mandatory bargaining subject, an employer is required to give timely notice to the union and a meaningful opportunity to bargain."¹² *McGraw-Hill Publishing Co., Inc.*, 355 NLRB No. 213, at *3 (Sept. 30, 2010). In other words, "advance notice and an opportunity to bargain" is required. *Fast Food Merchandisers*, 291 NLRB 897, 900 (1988) (emphasis in original). If an employer implements a change without proper and advanced notice, the union is presented with a "fait accompli" and the

¹² Respondent does not appear to challenge the proposition that route dispatching and layoff practices are mandatory subjects of bargaining. See, e.g., *Goya Foods of Florida*, 347 NLRB 1118, 1120-21 (2006) (agreeing with the ALJ's conclusion that the assignment of driving routes and sales territories constituted mandatory subjects, thus precluding unilateral changes); *Ohio Valley Hosp.*, 324 NLRB 23, 24 (1997) ("issues concerning seniority, and its effect on unit employees' wages, hours, and other terms and conditions of employment, are mandatory subjects of bargaining."); *Tri-Tech Services, Inc.*, 340 NLRB 894, 895 (2003) ("It is well established that the layoff of unit employees is a change in terms and conditions of employment over which an employer must bargain."). Nor does Respondent challenge the proposition that the alleged changes were material and substantial in nature. See, e.g., *Goya Foods of Florida*, 347 NLRB at 1120-21; *Champion Enterprises, Inc.*, 350 NLRB 788, 791 (2007) (unilateral one-day layoff, unlawful); see also *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900, 903-04 (2000) ("zero settlement policy," which required salesmen to settle accounts every day as opposed to every week and which could serve to alter salesmen start times, was material and substantial).

violation is complete. See *The Bohemian Club*, 351 NLRB 1065, 1067 (2007); see also *Nat'l Steel and Shipbuilding Co.*, 348 NLRB 320, 324 (2006).

As Judge Kocol found, and as the record amply demonstrates, Local 70 and the Fairfield unit employees were not made aware of any contemplated changes to route dispatching or layoff practices until they were implemented on April 5 and in mid-April, respectively. This is true even considering Respondent's statements in the employee offer letters, for proper notice requires details that "adequately set forth what the changes entail." *Standard Motor Products*, 331 NLRB 1466, 1490 (2000); see also *Sierra Int'l Trucks, Inc.*, 319 NLRB 948, 950 (1995) ("'inchoate and imprecise' announcement" is insufficient notice) (citing *Oklahoma Fixture Co.*, 314 NLRB 958, 960-61 (1994)); *Melody Toyota*, 325 NLRB 846, 848 (1998) (scant and indirect assertions regarding possible sale of company was not proper notice).

Here, Respondent disclaimed the Ashland CBA and employment practices "inconsistent" with its own policies while simultaneously stating that its policies would "generally mirror" those under Ashland. Respondent gave some details regarding changes to be expected (i.e., health benefits and pension plans), but did not implicate dispatching or layoff policies. Later communications to Local 70 that included detailed descriptions of Respondent policies failed to mention or discuss dispatching or layoff policies. In the circumstances, Local 70 could not possibly have understood that the seniority-based practices would be abandoned by Respondent. See, e.g., *Cora Realty Co., LLC*, 340 NLRB 366, 367 (2003) (where the employer, in offering employment to the incumbent employees, articulated some changes to their terms but not others, employer implicitly communicated an intent to leave unmentioned terms in place). There was no proper notice.

Based on the record evidence and extant Board law, Judge Kocol's conclusion that Respondent implemented the dispatching and layoff changes without affording Local 70 notice or opportunity to bargain is clearly correct. Thus, Respondent's Exception 27 should be rejected.

(b) The ALJ Correctly Concluded that Respondent's Belated Abandonment of Seniority-Based Dispatching and Layoff Practices Violated Section 8(a)(5) and (1) of the Act

Finally, Respondent's Exception 28 challenging the ALJ's legal conclusions regarding the illegality of its abandonment of seniority-based dispatching and layoff practices should be rejected.

"It is well established that an employer is prohibited from making changes related to wages, hours, or terms and conditions of employment without first affording the employees' bargaining representative a reasonable and meaningful opportunity to discuss the proposed modifications." *Flambeau Airmold Corp.*, 334 NLRB 165, 165 (2001) (citing *NLRB v. Katz*, 369 U.S. 736, 743 (1962)). This is true even where a successor employer has instituted its initial terms of employment. See *Cora Realty Co., LLC*, 340 NLRB at 367 (post-takeover termination of fringe benefits unlawful because successor failed to announce them prior to takeover); *Western Paper Products, Inc.*, 321 NLRB 828, 832 (1996), enf'd in part 153 F.3d 289 (6th Cir. 1998) (although *Burns* successor lawfully announced certain changes prior to takeover, unannounced change in attendance policy 1 month later was unlawful). The length of time between the take-over and implementation does not matter so long as the implementation occurs after the bargaining obligation occurs and concerns previously unannounced changes. See *Banknote Corp. of America*, 315 NLRB 1041, 1044 fn.9 (1994) (changes implemented 4 days after take-over and not previously announced to unit employees or the union, unlawful).

Insofar as the record indicates, Respondent's initial terms of hire did not include changes to the dispatching or layoff practices followed by Ashland. Because its communications in fact detailed some changes while failing to articulate the dispatching and layoff policies changes at issue, Respondent implicitly communicated its intent to leave those policies in place. See *Cora Realty Co., LLC*, 340 NLRB at 367. Moreover, Respondent's Fairfield management abided by seniority-based dispatching for the initial route assignments under Respondent's control, only to abandon the practice thereafter. Later in the month, Respondent abandoned seniority-based layoffs. Because these changes were not announced or implemented as of Respondent's April 1 take-over, and because Local 70 and the unit employees were not otherwise informed of the changes until their post-April 1 implementation (i.e., given no notice or opportunity to bargain), Judge Kocol was correct in concluding that Respondent's actions violated Section 8(a)(5) and (1) of the Act, and Respondent's Exception 28 should be rejected.

I. Respondent's Exceptions 17, 18, 19, 20, 21, and 22

Respondent's Exceptions 17 through 21 attack various conclusions reached by way of the ALJ's analysis of what he described as "the General Counsel's first argument" on successor liability. See ALJD at 15:22. Exception 22 challenges a conclusion reached by the ALJ in the course of analyzing the GC's "second theory" on successor liability. ALJD at 17:30.

The GC has fully briefed the fact and legal issues raised by Respondent's Exceptions 17 through 21. See GC's Brief in Support of Exceptions, §§ II.A, II.B.1-.3, II.C.1-.3, III.A. The GC likewise has fully briefed the fact and legal issues raised by Respondent's Exception 22. See *id.* at §§ IIB.3, II.C, III.B. And, to the extent the challenged conclusions touch on the meaning of various, additional terms of the P&S Agreement, those issues have been briefed here in response to Respondent's Exceptions 1, 2, 3, and 7.

For the reasons set forth in the GC's Brief in Support of Exceptions, and for the additional reasons set forth herein, Respondent's Exceptions 17 through 22 should be rejected.

J. Respondent's Exceptions 23, 24, 25, and 26

By its Exceptions 23 through 26, Respondent challenges Judge Kocol's factual and legal conclusions relating to Respondent's unlawful unilateral changes to the Willow Springs facility's weekly and daily pay guarantees, vacation policy and overtime policy.¹³ The Exceptions should be rejected.

Specifically, Judge Kocol correctly concluded that Respondent eliminated the guarantees employees previously enjoyed of 8 hours of pay for each day worked, and 40 hours of pay for each week worked. ALJD at 12, 18. He rightly concluded, as well, that Respondent reduced employees' vacation pay from 50 hours to 40 hours for each week of vacation taken. *Id.* Finally, the ALJ correctly concluded that Respondent changed the overtime policy by linking the accrual of overtime to the 40-hour week rather than to the 8-hour day. ALJD at 12. All these conclusions are supported by the record. See GC's Brief in Support of Exceptions, § II.B.6(c). As explained in the GC's Brief in Support of Exceptions, § III.D, Judge Kocol's failure to include the overtime change among the unlawful changes recited in his legal conclusions was clearly inadvertent.

Judge Kocol also correctly found that the changes to employees' pay guarantees and vacation pay were not contained in Respondent's employment offer letters and that Respondent did not otherwise provide Local 705 with notice of the change so as to allow an opportunity to bargain. ALJD at 18:23-31. In fact, the record supports the conclusion that all three changes—

¹³ As explained in the GC's Brief in Support of Exceptions, § III.D, the ALJ correctly found the three changes to have been unilaterally implemented, but went on to inadvertently exclude the change to the overtime policy as violating the Act. Compare ALJD at 12:17-26 with ALJD at 18:23-34. At any rate, for the reasons stated by the ALJ and elaborated upon herein, all three changes were unlawful and must be remedied.

including the change to the overtime policy—were never shared with Local 705 prior to implementation.

In this regard, no mention is made of the three changes in Respondent's employment offer letters to the Willow Springs employees. GC 13. For the same reasons articulated above in relation to Respondent's Exception 15, statements in the offer letters that "Ashland employment policies will terminate when the sale closes," and "We are not . . . adopting any existing practices that are inconsistent with the express terms of our policies," did not serve to inform the employees or Local 705 of the three changes. *Id.* In particular, the record contains no evidence that the pay guarantees, vacation policy and overtime policy were somehow "inconsistent" with Respondent's policies, or that Respondent's policies would not "mirror" Ashland's in this regard. GC 13.

Nor did Respondent otherwise inform Local 705 of the three changes during their pre-close meetings or bargaining sessions. The record demonstrates that on February 15, 2011, Respondent met with Local 705 and announced that Respondent would make offers of employment to the Willow Springs drivers subject to certain changes in their terms and conditions of employment. Tr. 135. Respondent announced that it would not participate in Local 705's Pension or Health and Welfare plans but made no mention of changes to overtime pay, vacation pay, or the daily and weekly work pay guarantees. Tr. 214. On March 23, Respondent met with Local 705 for their first bargaining session. Tr. 149-150, 318. At this time, the parties exchanged initial contract proposals. GC 17, 18; Tr. 163-65, 323-24, 513. In Respondent's contract proposal, no changes were proposed with respect to the provisions concerning overtime pay (Article 3, par. 1), daily and weekly pay guarantees (Articles 9 and 10,

respectively), or vacation pay (Article 12, par. 3). GC 18 at p. 4, 6, 7; Tr. 214-15. Local 705 likewise did not propose any substantive changes to those contractual provisions. GC 17.

On March 27, Respondent emailed a revised contract proposal to Local 705. GC 20; Tr. 167-169. In its revised proposal, Respondent again proposed no changes to the provisions concerning overtime pay (Article 3, par. 1), daily and weekly pay guarantees (Articles 9 and 10, respectively), or the vacation pay provision affording 50 hours of pay for each week of vacation taken (Article 12, par. 3). GC 20. On March 28, the parties agreed during a conference call that overtime pay, daily and weekly pay guarantees, and vacation pay were not in dispute. Tr. 170-174. On March 31, Local 705 presented a revised contract proposal reflecting no dispute over the issues of overtime pay, pay guarantees, and vacation pay. GC 21; Tr. 171-74, 325-26, 514-15. In sum, throughout this period Respondent did not just fail to mention plans to implement changes to the pay guarantees, vacation pay, and overtime pay; rather, it affirmatively agreed that the contract provisions covering these terms were not in dispute.

While the GC maintains its position that Respondent was a perfectly clear successor, even if Respondent had the right to set initial terms and conditions of employment, its elimination of the pay guarantees and the 50-hour vacation pay guarantee, and its changes to the overtime policy, were unlawful.

As already explained, “an employer is prohibited from making changes related to wages, hours, or terms and conditions of employment without first affording the employees’ bargaining representative a reasonable and meaningful opportunity to discuss the proposed modifications.” *Flambeau Airmold Corp.*, 334 NLRB at 165. This is true even where a successor employer has instituted its initial terms of employment. See *Cora Realty Co., LLC*, 340 NLRB at 367; *Western Paper Products, Inc.*, 321 NLRB at 832; *Banknote Corp. of America*, 315 NLRB at 1044.

In the instant case, the changes were unlawful because they were not included in employees' offer letters and because they were not otherwise communicated to Local 705. While Respondent argues that the letters served to announce the changes, the text merely states that Respondent was not assuming the CBA and would not adopt policies "inconsistent" with its own. Simultaneously, the letters indicate that Respondent's policies would "generally mirror" Ashland's. Finally, the letters detail only certain changes, i.e., to employees' pension and health and welfare benefits. See *Cora Realty Co., LLC*, 340 NLRB at 367 (detailing some changes in employment offer implicitly communicates no change to terms not discussed). As such, the three changes at issue were not part of Respondent's initial terms of hire.

Moreover, as was the case with Local 70, these vague and internally inconsistent previews were insufficient to place the unit employees or Local 705 on notice of the substantial changes contemplated. See *Elf Atochem North America, Inc.*, 339 NLRB 796, 796, 808 (2003); see also *Sierra Int'l Trucks, Inc.*, 319 NLRB 948, 950 (1995) ("inchoate and imprecise" announcement," insufficient notice), citing *Oklahoma Fixture Co.*, 314 NLRB 958, 960-61 (1994); *Melody Toyota*, 325 NLRB 846, 848 (1998) (scant and indirect assertions, insufficient notice). Therefore, there was no notice affording the Union the opportunity to bargain.

In short, even as a *Burns* successor, Respondent unlawfully abandoned policies relating to daily and weekly pay guarantees and vacation pay. It also unlawfully altered established overtime policies. Accordingly, Judge Kocol correctly found Respondent violated Section 8(a)(5) and (1) of the Act with respect to the pay guarantees and vacation pay (ALJD at 18:31-34), and appears to have inadvertently failed to so conclude as to the overtime policy changes. See GC's Brief in Support of Exceptions, § III.D.

For the reasons discussed, Respondent's Exceptions 23 through 26 must be rejected.¹⁴

K. Respondent's Exception 29

Here, Respondent assigns error to Judge Kocol's failure to conclude that Respondent satisfied its duty "to consult or bargain" with Local 705 and Local 70 regarding those terms found to have been unlawfully implemented. The exception is without merit.

The GC has already demonstrated that Judge Kocol correctly concluded that Respondent's changes to the pay guarantee and vacation and overtime policies at the Willow Springs facility, and to dispatching and layoff policies at the Fairfield facility, were not included in Respondent's announced initial terms and conditions of employment. Because those changes were not included in Respondent's initial terms but, rather, implemented only after the April 1 transition, Respondent was obligated to bargain in good faith with the unions over changes to these mandatory subjects of bargaining. Its duty to bargain over these terms was no different from that of a non-successor employer. See, e.g., *Cora Realty Co., LLC*, 340 NLRB at 367; *Banknote Corp. of America*, 315 NLRB at 1045. Respondent's apparent argument that it had some lesser duty to bargain with the unions, and that it satisfied this lesser duty, is without legal precedent and is unsupported by the record.

For these reasons, and for those articulated in the ALJD, Judge Kocol did not commit error by failing to conclude that Respondent satisfied its duty to bargain over the terms found to have been unilaterally implemented. Respondent's Exception 29 should be rejected.

¹⁴ With specific regard to Exception 24, the GC notes that regardless of whether Respondent offered a defense to the alleged changes, the record and extant Board law support the ALJ's findings of unlawful unilateral conduct.

L. Respondent's Exceptions 30, 31, 32, 33, and 34

Respondent's Exceptions 30-34 challenge Judge Kocol's factual and legal conclusions relating to his determination that Respondent violated Section 8(a)(5) and (1) of the Act by unreasonably delaying in providing Local 705 with a copy of the summary plan description of its healthcare plan and plan documents for its 401(k) plan. These exceptions are without merit.

The legal principles are long-established and not in dispute. Under Board law, an employer must provide a union with requested information that is potentially relevant to its duty of representation. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). It must also furnish the requested information with reasonable dispatch. *Consolidated Coal Co.*, 307 NLRB 69 (1992). The Board has, thus, consistently found an unexplained or otherwise unreasonable delay in furnishing relevant information to be a separate and distinct unlawful act. See *IronTiger Logistics, Inc.*, 359 NLRB No. 13, *slip op.* at 2 (Oct. 23, 2012); see also *Woodland Clinic*, 331 NLRB 735, 736-37 (2000) (delay of seven weeks unreasonable, absent explanation); *Bundy Corp.*, 292 NLRB 671, 672 (1989) (delay of over two months unreasonable, and explanation offered for delay inadequate); *Local 12, International Union of Engineers*, 237 NLRB 1556, 1558-1559 (1978) (information supplied six weeks after initial request and after charge filed); *Pennco Inc.*, 212 NLRB 677, 678 (1974) (employer unreasonably failed to respond to information requests for over one month and did so only after charge filed).

First, Respondent challenges the ALJ's conclusion that it had a duty to provide the healthcare SPD prior to April 1. However, this conclusion is supported by the record and is legally correct. As the ALJ found, on February 15, 2011, Local 705 Representative Neil Messino first verbally requested the SPDs for Respondent's 401(k) plan and health insurance plan. ALJD at p. 18-19; see also Tr. 131. Respondent's Consultant John Hollinshead readily

agreed to provide Local 705 with both SPDs so the parties could attempt to work out a solution to Respondent's stated intent to move the drivers into its 401(k) plan and health insurance plan. Tr. 131. Later that day, Messino sent an email to Hollinshead confirming his verbal request for the SPDs. GC 11; Tr. 137-39.

Hollinshead failed immediately to respond to this written request or a subsequent email that Messino sent to Hollinshead, on February 23, wherein he renewed his request for the SPDs. GC 14 at p. 3; Tr. 146. In fact, it was not until March 2 that Hollinshead sent a reply email to Messino claiming that Respondent's failure to provide the SPDs was due to the fact that it was still not in position to recognize Local 705. GC 14 at p. 1. On March 7, Messino sent another email to Hollinshead repeating his request for the SPDs, as the first bargaining session was now only two weeks away. GC 15. Finally, on March 12, Hollinshead sent an email to Messino expressing optimism that he would have the SPD for the 401(k) plan "fairly soon." R 3. He made no mention, though, as to when Local 705 could expect the SPD for the health insurance plan.

At the March 23 bargaining session, serious discussion occurred regarding employees' retirement and health insurance plans. Messino provided Respondent's bargaining committee a copy of an analysis prepared by Local 705's Pension fund showing how the drivers' monthly pension benefit would be dramatically reduced if they were taken out of Local 705's Pension plan. GC 16; Tr. 150, 319-20. He also explained how the drivers would lose retiree health insurance benefits if they were moved out of Local 705's Health and Welfare plan. Tr. 155-56, 191. In turn, Hollinshead promised Messino that Respondent would make whole any driver, who experienced a shortfall due to moving into its 401(k) plan. Tr. 156, 322-23.

Discussion about these benefits continued throughout the pre-April 1 bargaining. Five days later, immediately after the parties' March 28 conference call, Hollinshead had a private phone conversation with Messino wherein he hinted that Respondent's 401(k) plan was not comparable to the Union's Pension plan. For that reason, Hollinshead now revealed that Respondent would not be able to make the drivers' whole and would instead "do something to get that number closer." Tr. 171. Without the SPDs, however, Local 705 could not ascertain how much more inferior Respondent 401(k) plan was to the existing Pension plan. Nor could it compare Respondent's health insurance plan to the Union's Health and Welfare plan.¹⁵

Thus, at the second face-to face bargaining session held on March 31, Messino pointed out to Hollinshead an obvious impediment to Local 705's ability to effectively bargain over those two issues – it still did not have the requested SPDs for Respondent's 401(k) plan and health insurance plan. Tr. 175-77. As he had done before, Hollinshead simply promised to provide the SPDs to Messino with no mention whatsoever that the documents were purportedly in the process of being drafted. Tr. 175. At the same meeting, however, Hollinshead abruptly announced that Respondent intended to unilaterally cease making contributions to Local 705's Pension Fund and Health and Welfare Fund and move the drivers to its 401(k) plan and health insurance plan effective at midnight. Tr. 175-76, 327, 521.

The above-related facts clearly support Judge Kocol's conclusion that Respondent had an obligation to provide the healthcare SPD even prior to the April 1 close. By early-March, the Willow Springs drivers had accepted Respondent's offer of employment (albeit, under protest), and there was an obligation under Section 7.5(o) of the P&S Agreement to recognize Local 705. See ALJD at 4, 10. Moreover, Respondent recognized Local 705 by agreeing to meet and

¹⁵ This was important because Respondent had signaled that it would consider allowing the drivers to remain in Local 705's Health and Welfare plan if the parties could resolve the pension issue. Tr. 128-29, 465, 520, 544-45.

bargain in the pre-April 1 period. See ALJD at 19:7-8; see also GC 14-15 and Tr. 149-154. Contemplated changes to the retirement and healthcare plans loomed large in the bargaining, and the topics were discussed in detail in the pre-April 1 meetings. There is no evidence that Respondent disputed the relevancy of the SPD and, at any rate, information pertaining to contract negotiations is relevant to a union's statutory duties. See, e.g., *Zukiewicz, Inc.*, 314 NLRB 114, 121-24 (1994) (citing cases); *Oliver Corp.*, 162 NLRB 813, 814 (1967); see also *Ideal Corrugated Box Corp.*, 291 NLRB 247, 248 (1988) ("It is . . . well established that information concerning wages, hours, and other terms and conditions of employment, such as hospitalization insurance, for employees actually represented is presumptively relevant for purposes of collective bargaining."). That Respondent was an incoming successor employer to Ashland is of no legal import. See, e.g., *Dearborn Garage Co.*, 346 NLRB 738 (2006) (successor employer violated Section 8(a)(5) by refusing to provide information to the union regarding its interrelationship with the predecessor). Therefore, as a matter of fact and law, Respondent's Exception 30 should be rejected.

For much the same reasons, Exception 31 must also be rejected. In this regard, the healthcare SPD and the 401(k) Plan Document remained relevant in the post-April 1 period.

In the months following Respondent's unlawful April 1 implementation of its initial terms, Local 705 continued to request information pertaining to Respondent's healthcare and 401(k) plans, since it remained interested in attempting to bargain in good faith for an initial contract. Thus, on May 25, Messino sent an email to Hollinshead, requesting a copy of the Plan Document for the 401(k) plan by the end of the next day, as the parties were scheduled to meet for negotiations on June 1. GC 24; Tr. 197. The following day, on May 26, Hollinshead forwarded to Messino an email from Paul Fusco claiming for the first time that the SPD for the

401(k) plan was “still not finalized,” although the plan had gone into effect two months earlier. GC 24; Tr. 198-99. As he had done with previous information requests, Hollinshead failed to address the information that was still outstanding – namely, the Plan Document for the 401(k) plan and the SPD for the health insurance plan. GC 24.

On both June 1 and 2, Messino renewed his request for the Plan Document for the 401(k) plan, as he had received no response the previous week to his initial request for that document. GC 25; Tr. 202. On that second day, Hollinshead sent a reply email to Messino promising him that the SPD for the 401(k) plan would be ready “in the next few weeks.” GC 25; Tr. 202. Hollinshead continued in his failure to provide Local 705 with any explanation for the failure to furnish the Plan Document for the 401(k) plan and the SPD for the health insurance plan. GC 25.

As a result, on June 4, Messino sent a letter by email to Hollinshead stating his objection to Respondent’s failure to provide the SPD and Plan Document for the 401(k) plan. GC 26. In response, on June 15, Hollinshead sent a letter by email to Messino wherein he asserted that he understood Local 705 to merely be requesting the SPD for the 401(k) plan. GC 27 at p. 2.

On June 19, Messino sent another email to Hollinshead clarifying that he was requesting both the Plan Document and the SPD for the 401(k) plan.¹⁶ GC 28. Nevertheless, on July 15, Hollinshead only provided Messino with the SPD for the 401(k) plan that had initially been requested five months earlier. GC 29. No explanation was given for the failure to provide the other documents. However, in a tacit admission that Local 705 could not intelligently bargain about the pension issue without the SPD and Plan Document for the 401(k) plan, Hollinshead

¹⁶ Respondent incorrectly argues that Hollinshead’s misunderstanding continued through Messino’s clarification on August 2. The record reflects that the clarification occurred no later than June 19.

concluded his letter on that date by stating “now that you have the 401(k) SPD, please let us know when you would like to schedule our next bargaining session.”¹⁷ GC 29.

Messino made one final effort to obtain the Plan Document for the 401(k) plan and the SPD for the health insurance plan. On August 2, Messino sent a letter by email to Hollinshead renewing his numerous earlier requests for the two documents. GC 30 at p. 2. On August 11, Hollinshead finally provided to Messino a copy of the Plan Document for the 401(k) plan and claimed his failure to provide it earlier was “an oversight.” GC 31. During cross-examination, however, Hollinshead admitted that his failure to provide the Plan Document for the 401(k) plan was not an oversight. Tr. 524.

On August 11, Hollinshead also failed to provide the SPD for Respondent’s health insurance plan that had been implemented on April 1. While he promised to furnish that important document shortly (GC 31), Hollinshead once again failed to live up to his word and instead provided the SPD for the health insurance plan on October 19 – more than 8 months after Messino had initially requested it. GC 32. No explanation for this unreasonable delay was ever provided to Local 705. Tr. 212.

First, in the post-April 1 period, there is no dispute that a majority of Ashland’s Willow Springs employees had been hired by Respondent. Indeed, negotiations for an initial contract continued throughout this period. Second, the topics to which the requested information pertained—Respondent’s 401(k) and healthcare plans—were continuing topics of bargaining. There is no doubt that the information continued to be relevant and necessary to Local 705’s statutory duties. That negotiating meetings occurred less frequently does not mean that negotiations were not on-going; nor does the point undermine the presumptive relevance of the

¹⁷ In the same vein, Local 705 was obviously unable to effectively bargain about health insurance benefits without the SPD for the health insurance plan.

information. See *Merchant Fast Motor Lines, Inc.*, 324 NLRB 562, 563 (1997) (information pertaining to retirement benefits was presumptively relevant); *Ideal Corrugated Box Corp.*, 291 NLRB at 248. For these reasons, Judge Kocol's conclusion that Respondent had a continuing obligation on and after June 1 to provide the 401(k) Plan Document and the healthcare SPD is supported in law and on the record. Exception 31 must be rejected.

Moreover, the foregoing discussion demonstrates that Exceptions 32 through 34 are also without merit. In this regard, the record demonstrates that Local 705 repeatedly requested the 401(k) Plan Document and the healthcare SPD. That Respondent was somehow "confused" regarding which 401(k) documents were requested is belied by both documentary evidence (GC 24, 25, 26, 28, 30) and the testimony of Hollinshead himself. Tr. 524. Indeed, Local 705's multiple requests for both the 401(k) SPD and the Plan Document should have served to leave no question that the Plan Document was requested. See, e.g., GC 26, 28. Respondent's unexplained, months-long delay in providing the documents was a clear violation of the Act. See *IronTiger Logistics, Inc.*, 359 NLRB No. 13, *slip op.* at 2 ("...Respondent was required to timely provide [presumptively relevant] information or to timely present the Union with its reasons for not doing so."); see also *Woodland Clinic*, 331 NLRB at 736-37; *Bundy Corp.*, 292 NLRB at 672; *Pennco Inc.*, 212 NLRB at 678. Exceptions 32 through 34 fail.

In sum, Judge Kocol correctly found that that Respondent violated Section 8(a)(5) and (1) of the Act by unreasonably, and without explanation, delaying its production of the following documents: (1) the Plan Document for Respondent's 401(k) plan; and (2) the Summary Plan Description for Respondent's health insurance plan. Respondent's Exceptions 30 through 34 have no merit and should be rejected.

M. Respondent's Exceptions 35 and 36

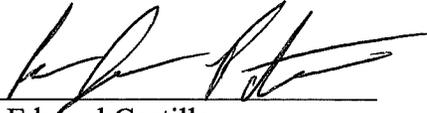
Respondent's Exceptions 35 and 36 challenge aspects of Judge Kocol's recommended remedy and order. The GC has fully briefed its view of those portions of the recommended remedy and order that should be altered. See GC's Brief in Support of Exceptions, §§ III.A, .B, and .D. As demonstrated by the GC's own Exceptions and Brief, Judge Kocol erred in dismissing the allegations made in the pertinent complaints premised on Respondent's perfectly clear successor liability. He also erred in failing to provide for a remedy and order addressing those violations. As demonstrated here, Judge Kocol correctly found some violations and, but for his inadvertent failure to remedy the unilateral change to Willow Springs employees' overtime pay, correctly remedied those violations. Thus, for the reasons set forth here and in the GC's Brief in Support of Exceptions, Respondent's Exceptions 35 and 36 should be rejected.

III. CONCLUSION

The record evidence and extant Board law demonstrates that Respondent was a perfectly clear successor to Ashland at both the Willow Springs and Fairfield facilities. Thus, the material changes implemented as of April 1 violated the Act and must be remedied. And for the additional reasons articulated, Respondent violated the act by implementing changes to Willow Springs policies relating to pay guarantees, vacation pay, and overtime; by implementing changes to Fairfield policies relating to dispatching and layoffs; and by inexplicably delaying in providing to Local 705 presumptively relevant, requested information. The GC respectfully requests that, but for the particularized instances in which the GC concurs, Respondent's Exceptions be rejected as without merit.

Dated at Chicago, Illinois, this 29th day of November 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Counsel for the General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge have been filed electronically and by Certified Mail with the Office of the Executive Secretary of the National Labor Relations Board on this 29th day of November 2012, and true and correct copies have been served on the parties in the manner indicated below on that same date.

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