

TABLE OF CONTENTS

Preliminary Statement 1

The Company’s Exceptions Should Be Denied 2

1. As a Result of Its Expressed Intention to Hire All of Ashland’s Bargaining Unit Employees, As Described in the APS, Nexeo Was Not Free To Thereafter Offer Employment to Bargaining Unit Employees under Terms That Were Materially Different from Those Contained in the Ashland CBAs 2

2. Nexeo’s Attempt to Rewrite the Clear Language of Section 7.5(d) of the APS Should be Rejected 4

3. Bargaining Unit Employees in Willow Springs Were Repeatedly Assured That They Would Be Hired by Nexeo without Any Change to the Terms and Conditions of Their Employment 7

4. The Company Has Misstated the Facts with Respect to Bargaining 9

5. The ALJ Correctly Rejected the Company’s Arguments Concerning Its Changes to Overtime, Daily and Weekly Guarantees, and the 50-Hour Vacation Week 18

6. The ALJ Correctly Found That Nexeo Violated Section 8(a)(5) by Its Delay in Providing the Plan Document for the 401(k) Plan and the Summary Plan Description for Its Health Insurance Plan 22

Conclusion 27

Certificate of Service 29

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Canteen Company</u> , 317 NLRB 1052 (1995), enforced, 103 F.3d 1355 (7 th Cir. 1997)	21
<u>East Belden Corp.</u> , 239 NLRB 776 (1978), enforced, 634 F.2d 635 (9 th Cir. 1980)	21
<u>Elf Atochem North America, Inc.</u> , 339 NLRB 796 (2003)	3, 20-21
<u>Helnick Corp.</u> , 301 NLRB 128 (1991)	21
<u>Hilton's Environmental</u> , 320 NLRB 437 (1995)	21
<u>NLRB v. Burns International Security Systems</u> , 406 U.S. 272 (1972)	3, 19
<u>Spruce-Up Corp.</u> , 209 NLRB 194 (1974), enforced, 529 F.2d 516 (4 th Cir. 1975)	19

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

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

**ANSWERING BRIEF OF CHARGING PARTY LOCAL 705,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
TO THE EXCEPTIONS FILED BY
RESPONDENT NEXEO SOLUTIONS, LLC**

Preliminary Statement

Charging Party Local 705, International Brotherhood of Teamsters ("the Union" or "Local 705"), submits this Answering Brief in answer to the Exceptions filed by Respondent Nexeo Solutions, LLC ("the Company" or "Nexeo"), to the Decision and Recommended Order of Administrative Law Judge William G. Kocol, issued on August 30, 2012.¹

¹ This Answering Brief addresses those Exceptions filed by Nexeo related to Nexeo's actions toward Local 705 and the bargaining unit employees at the Company's Willow Springs, Illinois, facility whom Local 705 represents. Case Nos. 13-CA-46694 and 13-CA-62070. Local 70, International Brotherhood of Teamsters, has filed its own Exceptions and supporting Brief with respect to the allegations of the Complaint addressing Nexeo's actions toward Local 70 and the
(continued...)

THE COMPANY'S EXCEPTIONS SHOULD BE DENIED

1. As a Result of Its Expressed Intention to Hire All of Ashland's Bargaining Unit Employees, As Described in the APS, Nexeo Was Not Free To Thereafter Offer Employment to Bargaining Unit Employees under Terms That Were Materially Different from Those Contained in the Ashland CBAs

At page 6 of its Brief in support of its Exceptions, Nexeo argues that its Agreement for Purchase and Sale ("APS") with Ashland to purchase Ashland Distribution did not restrict its right to establish terms of employment different from those of Ashland, and that it 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." (Resp.Br. p. 6).²

In fact, Section 7.5(d) of the APS specifically required Nexeo to provide each former Ashland Distribution Employee with "wages no less favorable" than those provided by Ashland, and "other employee benefits" under plans "that are substantially comparable in the aggregate to those provided by Ashland." (G.C.Exh. 6, p. 57 (Section 7.5(d))).

In addition to this contractual restraint, Nexeo was limited as a matter of law by its status as a "perfectly clear successor" to Ashland Distribution. As discussed in Local 705's Brief in support

¹(...continued)
bargaining unit employees at the Nexeo facility in Fairfield, California.

² Pages of Nexeo's Brief in Support of Its Exceptions to the Decision of the Administrative Law Judge are referred to as "Resp.Br. p. X." Pages of the Decision of the Administrative Law Judge are referred to as "ALJD, p. X, Line Y." The Acting General Counsel's exhibits in the NLRB hearing are referred to as "G.C.Exh. X;" exhibits of Respondent Nexeo Solutions, LLC are referred to as "Resp.Exh. X;" exhibits of Charging Party Local 705, International Brotherhood of Teamsters, are referred to as "C.P.Exh. X;" and Joint Exhibits are referred to as "Jt.Exh. X." Pages of the transcript of the hearing before Administrative Law Judge Kocol are referred to as "Tr. X."

of its Exceptions, it is undisputed that Nexeo unequivocally agreed in the APS that it would offer employment to all of Ashland Distribution's bargaining unit employees "in comparable positions" (G.C.Exh. 6, pp. 55, 56, Sections 7.5(a) and 7.5(c), with "continuous and uninterrupted employment immediately before and immediately after" the closing date (G.C.Exh. 6, p. 57, Section 7.5(f)), at "wages no less favorable" and with "other employee benefits" under plans "that are substantially comparable in the aggregate to those provided by Ashland" (G.C.Exh. 6, p. 57 (Section 7.5(d)), and to recognize Local 705 as the bargaining representative of the drivers at the Willow Springs facility (G.C.Exh. 6, p. 57 (Sections 7.5(d)). The APS did not carve out, or otherwise put the employees on notice of, any changes that Nexeo might make to the existing terms and conditions of employment. The promise that everyone would be retained, and that there would be no changes to the existing terms and conditions of employment, was confirmed thereafter in postings (see G.C.Exh. 40/56), and orally stated to Willow Springs unit employees by statutory agents of Nexeo on February 11, 2011 (see Tr. 310-312, 350-351, 355-357, 368-372, 382-383) and other occasions. (See pages 6 to 20 of Local 705's Brief in Support of its Exceptions).

These facts establish that Nexeo was a "perfectly clear successor" to Ashland Distribution. Nexeo's bargaining obligation to Local 705 attached upon execution of the APS containing its unqualified agreement to hire all of Ashland Distribution's bargaining unit employees. See NLRB v. Burns Security Services, 406 U.S. 272, 294-295 (1972); Elf Autochem North America, Inc., 339 NLRB 796, 807 (2003); and other cases cited at pages 43-44 of Local 705's Brief in Support of its Exceptions. As a result, Nexeo was required to bargain with Local 705 about any changes to the existing Ashland terms and conditions of employment. Contrary to Nexeo's assertion in its Brief in support of its Exceptions, Nexeo was not free "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 at Ashland Distribution.” See Resp.Br. p. 6.

2. **Nexeo’s Attempt to Rewrite the Clear Language of Section 7.5(d) of the APS Should be Rejected**

At page 7 of its Brief in support of its Exceptions, Nexeo asserts that Schedule 7.5(d) of the APS gave it the right to unilaterally impose benefit plans that were substantially comparable in the aggregate to the plans **sponsored** by Ashland, rather than plans **provided** by Ashland, including the multi-employer plans in which Local 705 bargaining unit employees participated pursuant to the Ashland CBA. That argument should be rejected.

Section 7.5(d) of the APS states, in pertinent part (G.C.Exh. 6, p. 57, emphasis added):

For a period of eighteen (18) months immediately after the Closing Date..., Buyer shall...provide to each Transferred Employee (I) a base salary or wages no less favorable than those provided immediately prior to the Closing Date and (ii) other employee benefits...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)....

Union representative Neil Messino was given the link to an electronic version of the APS by Paul Fusco at 1:13 p.m. on December 10, 2010 (G.C.Exh. 5, p. 1). Two hours later, at 3:21 p.m., Messino e-mailed Fusco stating that the schedules to the Purchase Agreement were missing, and requesting copies of those schedules from Fusco. (G.C.Exh. 5, p. 1). Most of the schedules were never provided to the Union. See, e.g., G.C.Exh. 25; Tr. 203. However, on June 15, 2011, John Hollinshead e-mailed a copy of “Schedule 7.5(d)” to Messino in the belief that it supported the Company’s argument (G.C.Exh. 27). “Schedule 7.5(d),” as provided to the Union on June 15, 2011, states as follows, in pertinent part (G.C.Exh. 27, pp. 5-6, emphasis added):

Schedule 7.5(d)

Changes to Seller Benefit Plans

Ashland ...amended the Seller Benefit Plans effective January 1, 2011. Proceeding below is a summary of such changes.

[What follows appears to be summaries of certain changes to Ashland's non-union benefits. There was no testimony or other record evidence as to the nature of these benefits, either before or after the purported changes.]

"Seller Benefit Plans" is a defined term in the APS. Article I ("Definitions and Terms") of the APS states, in pertinent part (G.C.Exh. 6, p. 14, emphasis added):

"Seller Benefit Plan" shall mean, as at the Closing Date, 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....

Schedule 5.19(a) to the APS is a list of each material Seller Benefit Plan. Although first requested by Neil Messino on December 10, 2010, and repeatedly requested thereafter, this document was not given to the Union until it was finally produced by Nexeo at the hearing in response to a subpoena. Among the Seller Benefit Plans listed on Schedule 5.19(a) is the International Brotherhood of Teamsters Local 705 Pension Fund (Tr. 503-504; G.C.Exh. 6, p. 2).

The document given to the Union on June 15, 2011 and identified as "Schedule 7.5(d)" (G.C.Exh. 27, pp. 5-6) was clearly not the document attached to the original November 5, 2010 APS. The "Schedule 7.5(d)" that was finally provided to the Union on June 15, 2011, states on its face that it reflects changes to Ashland's "Seller Benefit Plans" made on January 1, 2011 – several months after the APS was executed.

In addition, Ashland could not have unilaterally changed Local 705's benefit plans as of January 1, 2011. Ashland continued to own Ashland Distribution at all times up to April 1, 2011,

and had a continuing bargaining obligation to Local 705 throughout this period (Tr. 540). No changes to the Local 705 benefit plans were ever proposed to or negotiated with Local 705. As far as Local 705 and its bargaining unit employees are concerned, the "Seller Benefit Plans" in effect, and "expected to be in effect," on January 1, 2011, were the Local 705 Pension Plan and the Local 705 Health and Welfare Fund Plan. Whatever changes Ashland may have made (or not made) to its non-union plans are irrelevant to Nexeo's agreement in Section 7.5(d) that it would provide benefits substantially comparable in the aggregate to those "provided by Ashland" on January 1, 2011.

In addition, it is clear that Nexeo understood that it had promised to maintain benefits at the levels provided by Ashland, without regard to whether the plans were sponsored by Ashland. On November 8, 2010, Ashland Distribution issued "Questions and Answers for Employees" (Tr. 58-59; G.C.Exh. 40 (also in the record as G.C.Exh. 56), which stated (emphasis added):³

20. Does the newly independent company anticipate any changes to compensation and/or benefits?

Under the terms of the agreement, for at least the 18 months following closing, the newly independent company is required to provide, to each transferred employee, base salary and wages that are no less favorable than those provided prior to closing; and other employee benefits that are substantially comparable in the aggregate to compensation and benefits as of January 1, 2011.

The "benefits as of January 1, 2011" for Local 705-represented employees were the Local 705 Pension Plan and the Local 705 Health and Welfare Plan.

In addition, in the parties' negotiations on February 15 and March 23, 2011, Nexeo chief

³ Section 11.7 of the Purchase Agreement stated that neither Ashland or Nexeo could make any communication to the public or the employees without the prior content of the other (G.C.Exh. 6, p. 88). The parties stipulated to the review process (Jt.Exhs. 1, 2). In particular, the parties stipulated that G.C.Exh. 40/56 was reviewed by agents of Nexeo and made available to Ashland employees on about November 8, 2010 (Jt. Exh. 2, ¶¶1-5).

negotiator John Hollinshead assured Local 705 that Nexeo intended to provide bargaining unit employees with benefit plans that were comparable to their Union-based benefits at Ashland, and promised to “write a check” to those employees who lost pension benefits as a result of being moved from the Local 705 Pension Fund to the Nexeo 401(k) plan (Tr. 128-129, 156-158). Both parties spent a substantial amount of time comparing benefits under the Nexeo 401(k) plan and the Local 705 Pension Plan. The Ashland non-union plans were never mentioned (G.C. Exhs. 16, 19; Tr. 150-158, 166-167.) In the real world, the parties understood that Nexeo intended to provide benefit plans to the Willow Springs bargaining unit employees that were substantially comparable to the multi-employer plans in which they participated at Ashland.

Nexeo’s revisionary claim that it agreed in Section 7.5(d) of the APS only to maintain benefits substantially equivalent to benefits under plans “sponsored by Ashland,” rather than plans “provided by Ashland” is contrary to the express language of Section 7.5(d), and has no support in the other language of the APS, or in Schedule 7.5(d), or in the undisputed record evidence of the parties’ shared understanding at the time.

3. Bargaining Unit Employees in Willow Springs Were Repeatedly Assured That They Would Be Hired by Nexeo without Any Change to the Terms and Conditions of Their Employment

At pages 8 and 9 of its Brief in support of its Exceptions, Nexeo states that “No evidence was presented in the Region 13 cases that any of the documents issued to employees were distributed or seen by any Local 705-represented employees.” That is not true. At the hearings in Chicago, counsel for Nexeo agreed that General Counsel Exhibit 40 (also in the record as General Counsel 56) was posted by Ashland on its website for employees on November 8, 2010 (Tr. 57-59). That document, entitled “Questions and Answers for Employees,” and approved by Nexeo prior to its

posting (see footnote 4 above), states, in pertinent part (emphasis added):

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

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

* * * *

16. Does the newly independent company anticipate any layoffs as a result of the transaction?

Broadly speaking, the newly independent company's intent is to retain Ashland employees. Ashland Distribution's people and various support partners will continue to work from their current locations and perform similar roles and functions.

* * * *

20. Does the newly independent company anticipate any changes to compensation and/or benefits?

Under the terms of the agreement, for at least the 18 months following closing, the newly independent company is required to provide, to each transferred employee, base salary and wages that are no less favorable than those provided prior to closing; and other employee benefits that are substantially comparable in the aggregate to compensation and benefits as of January 1, 2011.

It was also established that on February 11, 2011, Local 705 stewards Mike Jordan and George Sterba met with Tony Kuk (manager of the Willow Springs facility under both Ashland and Nexeo) in Kuk's office. In that conversation, Kuk told Jordan and Sterba that he and Pat Cassidy were now employees of the new company, and that the new company was going to keep everyone. Kuk told Jordan and Sterba that the employees would not have to reapply, that everyone would be hired, and that the terms and conditions would stay the same (Tr. 310-312, 350-351, 355-357, 368-372, 382-383).

In addition, as discussed at pages 6 to 20 of Local 705's Brief in Support of its Exceptions,

Tony Kuk and Pat Cassidy repeatedly told the bargaining unit employees during the months of November and December, 2010, and January and February, 2011, that all of the employees would be hired, that they would not have to apply for positions, and that everything would remain the same. Kuk and Cassidy were the plant manager and regional logistics manager, respectively, for Ashland Distribution. Kuk and Cassidy were personally identified in Schedule 7.5(a) to the APS as individuals who would receive offers of employment to comparable positions at Nexeo, which they did. ALJ Kocol sustained Nexeo's objections to testimony concerning Kuk's and Cassidy's statements to bargaining unit employees on hearsay grounds, ruling that they were not statutory agents of Nexeo at the time they made these statements. Local 705 has filed Exceptions to these rulings (Exceptions 2, 4, 7, 8, 9, 10, 11 and 13), and relies on the Board's ruling in decision in Elf Atochem North America, Inc., 339 NLRB 796 (2003), in support of these Exceptions, as discussed at pages 57 to 62 in its Brief in Support of its Exceptions.⁴

4. The Company Has Misstated the Facts with Respect to Bargaining

Throughout its Brief in Support of its Exceptions, Nexeo repeatedly misstates the record evidence with respect to its negotiations with Local 705 and its unilateral changes to the terms and conditions of bargaining unit employees. The facts with respect to these events were substantially undisputed, based on the testimony of chief negotiators Neil Messino and John Hollinshead. The parties had three meetings and a conference call prior to Nexeo's unilateral implementation. The essential facts of these meetings, and the relevant transcript pages, are as follows:

⁴ For the same reasons, the Acting General Counsel's "Second Theory of Violation," that, in addition to the clear commitments in the APS, statements attributable to Nexeo rendered it a "perfectly clear successor" prior to February 15, 2011, applies equally in both Willow Springs and Fairfield.

February 15, 2011. (Tr. 126-137, 213-223, 438-442, 506-513, 540-544). The parties had what John Hollinshead called a “meet and greet” session on February 15, 2011 (Tr. 442). No contract proposals were exchanged. Hollinshead told the Union that Nexeo wanted to get out of the Local 705 Pension Fund because of the withdrawal liability, and transfer the bargaining unit employees into Nexeo’s 401(k) plan (Tr. 127-128). Hollinshead said that Nexeo was prepared to make formula-based payments into the employees’ Nexeo 401(k) accounts, based on their seniority, to generally make up for the losses they would suffer by being transferring into the Nexeo 401(k) plan. In addition to those payments, Hollinshead said that Nexeo had analyzed the impact of the transfer on each individual bargaining unit employee; that it had identified four bargaining unit employees who would be adversely affected by transferring from the Local 705 Pension Plan into the Nexeo 401(k) plan, even with the formula-based extra contributions; and that Nexeo was willing to write checks to each of those employees to make them whole (Tr. 128, 216-217, 223, 506-507). Neil Messino challenged Hollinshead’s analysis of the effect of the transfer, on several grounds, including the fact that Nexeo did not take into account the employees’ pre-Nexeo participation in the Local 705 Plan and the unrealistic investment assumptions underlying the Company’s analysis. (Tr. 129-131, 216-220, 507-512, 542-544).

Hollinshead also told the Union that Nexeo would prefer to move the employees from the Local 705 Health and Welfare Plan into the Nexeo health insurance plan, but this was not a deal breaker (Tr. 128-129).

With respect to the other terms and conditions of employment, Hollinshead said that they would “mirror” the recently expired Ashland contract (Tr. 135-136). Hollinshead did not say anything about implementing other Nexeo plans or conditions, and did not say what would happen

if the parties were not able to reach agreement on a new contract prior to closing.

In this February 15 meeting, Hollinshead gave the Union two form-letter offers of employment that Nexeo would be mailing in a few days to bargaining unit employees.⁵ The offers specifically stated that the employees would no longer participate in the Local 705 Pension Plan and the Local 705 Health and Welfare Fund. Consistent with Hollinshead's statements in the meeting, the offers did not mention any changes in any other terms and conditions of employment, and no other changes were mentioned at the table (G.C. Exh. 10; Tr. 132-133, 213-215).

Neil Messino stated that the Union did not agree that the Company could unilaterally implement these changes to the existing terms and conditions, and Messino requested copies of the summary plan descriptions for the plans (Tr. 131, 137).

March 23, 2011. (Tr. 149-165, 270-271, 458-461, 513-514, 544-547). The parties met in their first bargaining session on March 23, 2011. They continued to discuss the adverse impact that bargaining unit employees would suffer as a result of being transferred from the Local 705 Pension Plan into the Nexeo 401(k) plan (Tr. 223-224, 458-459). Neil Messino gave John Hollinshead an analysis prepared by the Local 705 Pension Fund, and elaborated on the reasons why the Union believed that Nexeo's analysis understated the impact of the proposed retirement plan shift on bargaining unit employees (G.C. Exh. 16; Tr. 150-157). Hollinshead said that he wanted Nexeo's actuaries to look at this information, and again stated that Nexeo was willing to write checks for the difference and put the money into the members' Nexeo 401(k) accounts (Tr. 156-158). In turn, Neil Messino reiterated that Local 705 was willing to allow Nexeo to transfer the employees into its

⁵ There were two form-letters, depending on the employee's length of service, which affected the nature of the formula-based 401(k) contribution the employee would receive. (Tr. 132-134).

401(k) plan as long as the employees were made whole for any retirement losses they suffered.

The parties also discussed Nexeo's interest in moving employees from the Local 705 Health and Welfare Fund into Nexeo health insurance. Messino explained that bargaining unit employees would lose their retiree health insurance if they left the Local 705 Health and Welfare Plan. Later in the March 23 session, Messino confirmed that employees could continue to participate in the Local 705 Health and Welfare Plan, even if they were removed from the Local 705 Pension Plan. Hollinshead said that Nexeo would be willing to take a look at that, and signaled that this would solve that problem (Tr. 465, 520, 544-545).

The parties exchanged and discussed proposals for a new contract, including all economic and non-economic matters. Each side worked from the recently expired Ashland contract. Both sides proposed to maintain existing Ashland benefits and policies (other than pension and health insurance), including daily overtime, the 40 hour weekly guarantee and 8 hour daily guarantee, and vacation pay at 50 hours/week (G.C. Exhs. 16, 17; Tr. 164-165, 513-514). John Hollinshead did not say anything about changing any of those existing policies (Tr. 214-215).

March 28, 2011. (Tr. 169-171, 463-464, 518-521). The parties met by conference call on March 28, 2011, for the purpose of discussing non-economic issues.⁶ The parties reviewed their entire proposals, and reached tentative agreements on a number of sections (Tr. 170, 463). In a

⁶ On March 27, 2011, Hollinshead sent Messino a revised complete contract proposal. The Company's revised proposal continued to maintain overtime after 8 hours in a day, a guaranteed 8 hour day, a guaranteed 40 hour week, and vacation pay based on 50 hours/week (G.C. Exh. 20; Tr. 167-169, 463). In addition, the Company offered the Union the choice of retaining all of the existing Ashland Distribution policies concerning vacation, sick pay, funeral leave, and jury duty policies, or Nexeo policies (G.C. Exh. 20; Tr. 168, 220-221). As discussed below, no Nexeo policies had been formulated or given to the Union by the date of closing. "Nexeo policies" were not part of Nexeo's proposals to the Union, and in fact were not even formulated by Nexeo until some time after the sale of Ashland Distribution closed on April 1, 2011 (Tr. 468-471, 546-547).

phone call after the conference call, John Hollinshead and Neil Messino agreed that the parties should bring the actuaries to the table to get closer to an agreement on how much it would take to make employees whole for the change in retirement plans. Hollinshead said that he was no longer authorized to make the employees completely whole (presumably as a result of the Company's new appreciation of the scope of the monetary impact the shift in plans would have on the employees), but could write a check to get them "closer" (Tr. 170-171).

Once again, nothing was said about Nexeo implementing changes to any other terms and conditions of employment (Tr. 213-215).

March 31, 2011. (Tr. 171-178, 271, 464-466, 514-518, 548-549). The parties met in their last pre-close bargaining session on March 31, 2011, the day before the closing. Neil Messino gave the Company another revised complete contract proposal, which included all items agreed to or not in dispute (including daily overtime, 40 hour and 8 hour guarantees, and the 50 hour vacation week), and the Union's proposals on the remaining open items. (G.C. Exh. 21; Tr. 172-174, 514-517).

The parties discussed the open items. Neil Messino said that the Union was not able to discuss the Company's proposed health and welfare changes because it was still waiting for the summary plan description which it had requested six weeks earlier, and John Hollinshead again promised to get him the SPDs. Hollinshead reiterated that pension was the Company's main issue, and that if the Union had a problem with the Company's health care proposal, the Company would look into the Local705 plan and it should not be a problem to resolve (Tr. 175).

At that point, John Hollinshead announced that Nexeo was going to transfer all of the bargaining unit employees into the Nexeo 401(k) plan and the Nexeo health insurance plan at midnight that night (Tr. 521, 548-549). Messino asked if the Company thought the parties were at

impasse, and Hollinshead said that the parties were not at impasse, but the Company believed that it could unilaterally set initial terms of employment. The Union objected. Messino testified that the parties were not at impasse. Several open contract items had not yet been discussed; the Union was still waiting for the requested summary plan descriptions for the Nexeo 401(k) and medical plans; the Union had made it clear at every meeting that it was willing to agree to the transfer of employees into the Nexeo 401(k) plan if the employees were made whole for their losses; and Nexeo had signaled a willingness to keep the employees in the Local 705 Health & Welfare Plan (Tr. 175-178, 549).

In its Brief in Support of its Exceptions, Nexeo distorts and misstates these essentially undisputed facts:

- At page 15 of its Brief in Support of its Exceptions, Nexeo states:

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).

This statement is false on several levels. In the first place, the undisputed evidence is that John Hollinshead did not say this.. Neil Messino was questioned about this by Nexeo's counsel (Tr. 271-272):

COMPANY COUNSEL: Well, he [John Hollinshead], it was made clear to you on March 31 that if...the agreement had not been reached, the Company was moving forward with the terms outlined in its offer letter?

NEIL MESSINO: That's not what he stated to me.

COMPANY COUNSEL: Okay, did he state that the Company was not going forward with the terms offered in the offer letter?

MESSINO: No.

COMPANY COUNSEL: Did he state that he was going forwards with any terms different than those outlined in the offer letter?

MESSINO: He stated that they were going to change at midnight, they were going to put the employees in their health care plan and the 401(k). That was the only changes that he told me they were going to make.

Company negotiator John Hollinshead testified to the same thing (Tr. 548-549):

LOCAL 705 COUNSEL: I'm going to March 31 now, which is your last meeting date. You implemented the next morning. You had made it clear by the end of that bargaining session that the Company was going to implement changes in the conditions effective the next morning, correct?

JOHN HOLLINSHEAD: That's correct.

LOCAL 705 COUNSEL: And you told them you were going to change the pension plan, including the 401(k) plan?

HOLLINSHEAD: Correct.

LOCAL 705 COUNSEL: And you were going to take them out of the 705 health and welfare and put them in the Nexeo health and welfare?

HOLLINSHEAD: Correct.

LOCAL 705 COUNSEL: Do you recall telling them any other changes you were going to make that time?

HOLLINSHEAD: I think I also told them that, you know, Union dues wouldn't be deducted, et cetera, just so they weren't surprised there either. It's not a policy issue but.

LOCAL 705 COUNSEL: Okay. Anything else that you can recall.

HOLLINSHEAD: Not that I can recall.

Nothing in the record supports the Company's claim that Hollinshead told the Union that a failure to reach an agreement prior to closing would mean that the terms outlined in the Company's offer letter would be implemented. That was never said.

Transcript pages 468-469, cited by the Company in support of this assertion, are particularly revealing. Those pages are part of Company counsel's direct examination of John Hollinshead. Nothing on those pages supports the Company's assertion that Hollinshead told the Union that failure to reach agreement prior to closing would mean that the terms outlined in the Company's offer letter would be implemented. However, counsel's examination of John Hollinshead did reveal that the Nexeo policies that the Company is now claiming were to be implemented on closing did not even exist at closing, but were created some time later (Tr. 468-469):

COMPANY COUNSEL: And were those policies published anywhere for employees to view?

HOLLINSHEAD: I believe Ashland had them on-line.

COMPANY COUNSEL: And what about Nexeo? When did Nexeo go on-line?

HOLLINSHEAD: Oh, I couldn't tell you. It was well after this.

COMPANY COUNSEL: Okay. Did they go live on April 1 after the closing?

HOLLINSHEAD: I don't think they were up and running on that day.

COMPANY COUNSEL: Okay. Some time subsequent to that.

HOLLINSHEAD: Yes.

This issue was followed up in voir dire examination by Local 705 counsel (Tr. 470-471):

LOCAL 705 COUNSEL: Mr. Hollinshead, do you know whether copies of these policies had been given to the Union at the table prior to April 1?

HOLLINSHEAD: I don't recall. I know some unions had them because there was a point of negotiations, but I don't recall which unions had them or which ones didn't.

LOCAL 705 COUNSEL: And do you know whether these policies were included in the collective bargaining agreement proposal that the Company gave to the Union prior to April 1?

HOLLINSHEAD: I don't believe they were.

LOCAL 705 COUNSEL: So, if they weren't given to the Union and they weren't in the proposal, was the Union aware to your knowledge of the substance of these policies prior to their implementation?

HOLLINSHEAD: I don't know if they were or not.

- The Company elaborates on this fundamental misstatement of the record throughout its Brief. At pages 25-26 of its Brief in Support of its Exceptions, the Company states:

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.

In fact, as discussed above, the testimony of Neil Messino and John Hollinshead is that the Company never stated that "failure to reach agreement would mean that the employment terms outlined in its offer letter would go in to effect upon its commencing operations." All that was said was John Hollinshead's announcement on March 31, 2011 that the Company intended to transfer bargaining unit employees into the Nexeo 401(k) plan and the Nexeo medical insurance plan at midnight that night.

In addition, as discussed above, Nexeo had not even prepared any policies by April 1, 2011; it had never given Local 705 copies of any such policies; and had not included any such policies in its contract proposals prior to April 1, 2011. The Company's claim 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" is false and is directly refuted by John Hollinshead's testimony.

- The Company further elaborates on this unfounded assertion at page 25 of its Brief in Support of its Exceptions:

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....The information 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.

As discussed above, other than stating that it wanted to change the employees' retirement and health insurance plans, Nexeo never told the Union prior to April 1, 2011, that it intended to change any other terms and conditions of employment, specifically including overtime, daily and weekly guarantees, and 50-hour vacation weeks. In fact, John Hollinshead assured the Union in their first meeting on February 15, 2011, that, other than the changes to the retirement and health insurance plans, Nexeo intended to "mirror" the employees' terms and conditions of employment under Ashland. (Tr. 135-136). The contract proposals that Nexeo gave to the Union did not propose, or give the Union notice of, any of the changes that the Company unilaterally implemented to overtime, daily and weekly guarantees, and vacation pay (Tr. 470-471). The possibility of those changes was never mentioned in the parties' pre-close bargaining. Neil Messino testified, and John Hollinshead agreed, that the only changes mentioned by Hollinshead in the pre-close negotiations were the transfer of bargaining unit employees into Nexeo's 401(k) plan and health insurance plan. (Tr. 271-272, 548-549).

5. The ALJ Correctly Rejected the Company's Arguments Concerning Its Changes to Overtime, Daily and Weekly Guarantees, and the 50-Hour Vacation Week

Administrative Law Judge Kocol found that the APS provided "a framework for a benefit package the details of which would be determined later," and that Nexeo announced those details in its offer letters of February 17, 2011, which established the initial terms of employment. (ALJD,

p. 17, lines 22-24). Because the offer letters advised the employees that they would no longer participate in the Local 705 Pension Fund and the Local 705 Health & Welfare Fund, the ALJ found that the employees were not “misled,” as that term is used in Spruce-Up Corp., 209 NLRB 194 (1974), enfd. 529 F.2d 516 (4th Cir. 1975). For that reason, the ALJ found, although Nexeo was a “perfectly clear successor in fact,” it was not a “perfectly clear successor in law,” and Nexeo did not have to bargain about its decision to transfer the employees into Nexeo retirement and health insurance plans.⁷

With respect to the unilateral changes to daily overtime, the 8-hour and 40-hour guarantees, and the 50 hour vacation week, ALJ Kocol found 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” (ALJD, p. 18, lines 29-31). Under ALJ Kocol’s analysis, by extending offers of employment to all of the bargaining unit employees without advising them of these additional changes (thereby establishing the initial terms of employment), and six weeks after the employees had accepted these offers unilaterally changing these terms of employment, Nexeo violated Section 8(a)(5) and (1) of the Act, whether it is a Burns successor or a “perfectly clear successor.”

⁷ For the reasons stated in its Brief in Support of Its Exceptions, Local 705 strongly disagrees with ALJ Kocol’s analysis. Nexeo was a “perfectly clear successor” to Ashland as a result of its stated intention in the APS to retain all of the Ashland bargaining unit employees in the same positions, with the same wages, with benefits substantially comparable in the aggregate to their benefits at Ashland. Nexeo’s status as a “perfectly clear successor,” and its bargaining obligation to Local 705, attached on November 6, 2010, when Nexeo executed the APS and thereby established its intention to hire all of the bargaining unit employees. Nexeo violated Section 8(a)(5) and (1) of the Act three months later when it announced, and sent out offers of employment which confirmed, that it was unilaterally reducing the employees’ benefit plans. See pages 37 to 52 of Local 705’s Brief in Support of Its Exceptions, and particularly the cases cited at pages 43 to 45 of that Brief.

The Company does not dispute ALJ Kocol's finding that the initial terms of employment were established by its February 17, 2011 offer letters. Instead, it argues that the employees were put on notice of its intention to change daily overtime, the 8-hour and 40-hour guarantees, and the 50-hour vacation week by two sentences in the offer letter which stated, "To the extent reasonably possible under our structure, Nexeo Solutions employment policies will generally mirror those [Ashland] policies. We are not, however, adopting any existing practices that are inconsistent with the express terms of our policies." (G.C.Exh. 35, p. 3).

ALJ Kocol rejected this argument, finding that "these changes [to overtime, guarantees and vacation weeks] 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." (ALJD, p. 18, lines 29-31).

The same argument was made by the employer in Elf Atochem North America, Inc., 339 NLRB 796 (2003), under similar language, and was rejected by the Board. The purchaser in Elf Atochem stated, "Elf Atochem [the buyer] will recognize employees' past years of service with AtoHaas and Rohn and Haas [the sellers], and will provide employees with equivalent salaries and comparable health, welfare and benefits package, including pension, savings plan and vacation." 339 NLRB at 808, emphasis added. Upon closing the sale, Elf Atochem changed overtime pay practices, reduced call-in pay, discontinued meal passes, and made other changes to the terms and conditions that had existed under the seller. In response to the General Counsel's claim that the buyer was a "perfectly clear successor," the respondent employer argued that the reference to a "comparable health, welfare and benefit package" put the employees on notice that changes could be made. The Administrative Law Judge in Elf Atochem rejected that argument, stating (339 NLRB

at 808, footnote omitted):

The term “comparable” used in the Respondent’s message was not specific enough to clearly inform employees of the nature of the changes which Respondent intended to institute in the future. See Helnick Corp. [301 NLRB 128, 134 (1991)]; Hilton’s Environmental [320 NLRB 437, 438 (1995)]; Canteen Co. [317 NLRB 1052 (1995), enfd. 103 F.3d 1355 (7th Cir. 1977)]; and East Belden Corp., 239 NLRB 776, 793 (1978), enfd. 634 F.2d 635 (9th Cir. 1980), a successorship case where a bargaining obligation attached over the employees’ initial terms of employment where it was noted that, “the predecessor’s employees, when offered continued employment by the Respondent, were not clearly informed of the nature of the changes which Respondent intended to institute in the future, rather Respondent’s announcement was couched in generalized and speculative terms.”

The same conclusion applies here, for the same reason. Even accepting ALJ Kocol’s conclusion that Nexeo was free to establish initial terms in February – even after it had stated its intention in the previous November to hire all of the bargaining unit employees with benefits comparable in the aggregate to their Ashland benefits – Nexeo’s statement in its February 17, 2011 offer letters – that “To the extent reasonably possible under our structure, Nexeo Solutions employment policies will generally mirror those [Ashland] policies. We are not, however, adopting any existing practices that are inconsistent with the express terms of our policies.” (G.C.Exh. 35, p. 3) – was “not specific enough to clearly inform employees of the nature of the changes which Respondent intended to institute in the future.” Elf Atochem, at 808. Nexeo’s argument that this vague and generalized statement somehow put the employees on notice of the otherwise undisclosed changes that would later be made to overtime, daily and weekly guarantees, and vacation weeks was properly rejected by the ALJ.⁸

⁸ This conclusion is particularly compelling when one also takes into account that at the February 15, 2011 meeting when Nexeo gave Local 705 copies of these offer letters, Company spokesman John Hollinshead assured the Union that, other than the changes to the retirement and health insurance plans, Nexeo would “mirror” the Ashland terms and conditions of employment (Tr.

(continued...)

6. **The ALJ Correctly Found That Nexeo Violated Section 8(a)(5) by Its Delay in Providing the Plan Document for the 401(k) Plan and the Summary Plan Description for Its Health Insurance Plan**

ALJ Kocol found that Nexeo unreasonably delayed in providing Local 705 with the summary plan description for its health insurance plan and with the plan document for its 401(k) plan (ALJD, p. 19, lines 4-20). Those findings were well supported by the record evidence.

The Plan Document for the Nexeo 401(k) Plan. The facts with respect to the Union's request for the 401(k) plan document are relatively undisputed. Neil Messino first requested this document on May 25, 2011, in advance of the bargaining session scheduled for June 1, 2011 (Tr. 197-200). Messino's request was clear and unambiguous (G.C.Exh. 24, p. 2):

John,

Hope all is well. I am preparing for next week and looking through the files and I have not received a 401k plan document.

Can you please send me a copy of the 401(k) plan document and a plan performance history for the last 5 years in a PDF and Microsoft word format.

Please forward to me before the end of day tomorrow, if you cannot accommodate this time frame please let me know when you can make it available to me.

Thank You

Neil

Nexeo did not provide a copy of the 401(k) plan document in time for the June 1, 2011, bargaining session, and Messino renewed his request the following day, on June 2, 2011 (Tr. 203;

⁸(...continued)

135-136). Hollinshead's false assurance not only fatally undercuts Nexeo's argument that the generalized language of the offer letters put the employees on notice of these other changes to Ashland terms of employment, but also further establishes the "misleading" nature of the Company's actions.

G.C.Exh. 25):

John,

This is a follow up request in writing for a copy of the 401(k) plan document and Local 705 is also requesting any and all annexes, schedules and exhibits that are referenced in the Purchase and Sale agreement. In our negotiations yesterday I made a Specific request for the following schedules 7.5(b), 7.5(d), 5.18(c) and 5.19(a). Please forward the information as soon as it becomes available so I can review and we can then set up some more dates.

Thank You

Neil

On June 4, 2011, Neil Messino again wrote to John Hollinshead, as a result of Nexeo's sudden refusal at the table on June 1, 2011, to provide any more requested information. Messino chastised the Company for having (G.C.Exh. 26):

chosen to be unresponsive and uncooperative. Local 705 has been bargaining in good faith, and we do not understand the Company's refusal to produce relevant requested documents.

With respect to the 401(k) plan document, Messino made it clear that he was looking for the Plan Document, and not simply the summary plan description (G.C.Exh. 26, emphasis added):

I also object to Nexeo's failure to provide the 401(k) plan and summary plan description which we have been requesting for months. Section 402(1)(1) of ERISA requires that every plan must be established and maintained pursuant to a written instrument. Nexeo unilaterally implemented a new "401(k) plan" on April 1, 2011 over Local 705's objections, and has been withholding money from employees' paychecks pursuant to a "plan" which it now turns out does not exist. We object to this, and ask that contributions to the "401(k)" plan be terminated until we are provided with a plan document and summary plan description, and that all contributions to that "plan" be returned to the employees. This request for plan documents is pursuant to Section 8(a)(5) of the National Labor Relations Act and Section 104(b)(4) of ERISA.

John Hollinshead responded on June 15, 2011, acknowledging that the Union was seeking

both “the plan and SPD.” (“You then ask that Nexeo cease withholding contributions from employees’ pay until the plan and SPD are provided to the Union and that the Company return to the employees all contributions made by them to date.”) (G.C.Exh. 27, emphasis added).

Neil Messino replied on June 19, 2011, renewing “our request for the 401(k) plan documents and the summary plan description.” (G.C.Exh. 28).

On July 15, 2011, John Hollinshead forwarded a copy of the summary plan description for the 401(k) plan, but still did not provide a copy of the plan document (G.C.Exh. 29).

On August 2, 2011, Neil Messino yet again renewed his request for the plan document for the 401(k) plan, and again explained the direct relevance of that request to the issues at the bargaining table (G.C.Exh. 30):

We have still not received the Plan Document for the Company’s 401(k) Plan, although I have been requesting this document since at least June 1, 2011. I renew my request for the Plan Document, which is essential to our negotiations about amending the Plan Document to make bargaining unit employees whole for the retirement benefits which they lost as a result of the Company’s unilateral withdrawal of the employees from the Local 705 Pension Plan.

On August 3, 2011 the Union finally filed an unfair labor practice charge alleging that the Company’s continuing refusals to provide this information violated Section 8(a)(5) and (1) of the Act (G.C.Exh. 1(c)).

On August 11, 2011 – three months after it was first requested, and only after the Union was forced to file an unfair labor practice charge – John Hollinshead finally turned over a copy of the Plan Document for the Nexeo 401(k) plan. Hollinshead did not explain why he had not responded earlier to Messino’s repeated and precise requests for the plan document, other than to say that it was “an oversight.” (G.C.Exh. 31).

In its Brief in Support of its Exceptions, the Company argues that it was unclear that Neil Messino was requesting the Plan Document, as opposed to the SPD, and that Messino did not make an unambiguous request for the Plan Document until August 2, 2011 (Co.Brief, pp. 27-28).⁹ That argument is contrary to the record evidence, and was rejected by ALJ Kocol, who found that there may have been “some understandable confusion initially that Local 705 was requesting something other than the summary plan document,” but that it should have become clear within a week or so after May 25, 2011 – in Messino’s subsequent requests of June 2, June 4, and June 19, 2011 -- that the Union was seeking the Plan Document itself (ALJD, p. 19, lines 15-20). Judge Kocol’s finding that the Company violated Section 8(a)(5) and (1) of the Act by its unreasonable delay in providing the Plan Document for the 401(k) plan is clearly supported by the record.

The Summary Plan Description for the Nexeo Health Insurance Plan. The Company does not deny that it unreasonably delayed in providing a copy of the summary plan description for the Nexeo health insurance plan, but argues that the clock should not begin on its obligation to provide this document until August 2, 2011. The record evidence concerning this violation of the Act is as follows:

- Neil Messino first requested copies of the summary plan descriptions for the Nexeo health insurance plan and the Nexeo 401(k) plan on February 15, 2011, when John Hollinshead first told the Union that the Company wanted to transfer the bargaining unit employees into these plans. Hollinshead told Messino he would get him those documents (Tr. 131).

⁹ Here, too, the Company’s arguments, while creative, have absolutely no basis in the record evidence. At the hearing, John Hollinshead did not claim that he was confused about what document had been requested, but claimed that the Company did not have a copy of the Plan Document until August 11, 2011, a claim not supported by the record and not relied on by the Company in its brief (Tr. 524).

- Messino reduced his request to writing, and e-mailed it to Hollinshead that same day, February 15, 2011, after Messino returned to the office (G.C.Exh. 11; Tr. 138-139).

- **On February 23, 2011, after all of the bargaining unit employees had accepted Nexeo's offer of employment, and there was no question that a bargaining obligation had attached, Neil Messino again wrote to John Hollinshead, renewing the Local's demand for recognition, and renewing the Local's request for this information** (G.C.Exh. 14, p. 3; Tr. 146).

Hollinshead did not refer to this request for information in his response (G.C.Exh. 14, p. 1; Tr. 147).

- Messino again renewed his request for this information on March 7, 2011 in connection with the parties' on-going negotiations over health insurance plans (G.C.Exh. 15; Tr. 147-148). At the bargaining sessions on March 23 and 28, 2011, Messino told Hollinshead that he was unable to respond to the Company's proposal to move the employees into the Nexeo health insurance plan because he had still not received the requested summary plan description for the plan. Hollinshead again promised to provide the document (Tr. 175-176).

- On August 2, 2011, Messino again renewed his request for a copy of the summary plan description for the health insurance plan (G.C.Exh. 30).

- On October 19, 2011 – eight months after it was first requested – the Company finally produced the summary plan descriptions for its health insurance plans, with no explanation of the eight-month delay (G.C.Exh. 33).

Neither John Hollinshead in his testimony, nor the Company in its Brief in Support of its Exceptions, even tries to explain why it delayed eight months in responding to the Union's request for this important document. Instead, the Company argues a technicality – that the clock on its delay should not begin on February 15, 2011 (when Neil Messino first requested the SPD for the health

insurance plan from John Hollinshead) or on February 23, 2011 (when Messino renewed the request after all of the bargaining unit employees' had accepted Nexeo's offer of employment), but should not start until August 2, 2011, when Messino renewed this request after the closing.

That argument should be rejected. As a perfectly clear successor, Nexeo's bargaining obligation began back in November, 2010, when it agreed that it would hire all of the bargaining unit employees. Even as a regular successor, Nexeo's bargaining obligation was in place by February 23, 2011, after all of the bargaining unit employees had accepted offers of employment at Nexeo and the Union had made a demand for recognition. The Company recognized this bargaining obligation when it entered into intense collective bargaining negotiations with Local 705 in February and March, 2011, which directly involved the health insurance plan for which Neil Messino was requesting information.

Finally, even if Nexeo's bargaining obligation did not begin until April 1, 2011, when it closed on the Ashland transaction, or even August 2, 2011, when the Union again renewed its request for this information, the Company has still not offered any reason why it continued to delay producing this requested information until October 19, 2011.

CONCLUSION

For the foregoing reasons, Charging Party Local 705, International Brotherhood of Teamsters, respectfully requests the National Labor Relations Board to deny the Exceptions filed by Respondent Nexeo Solutions, LLC, and to modify and adopt the Decision and Recommended Order issued by Administrative Law Judge Kocol as described in Charging Party's Brief in Support of Its Exceptions to the ALJ's Decision.

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

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November 29, 2012

CERTIFICATE OF SERVICE

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