

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

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

**RESPONDENT NEXEO SOLUTION, LLC'S ANSWERING BRIEF TO  
COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS  
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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## I. INTRODUCTION

This brief answers the exceptions filed by the General Counsel<sup>1</sup> on October 18, 2012, to the decision and recommended order issued by the ALJ in these cases on August 30, 2012. The General Counsel's exceptions are directed primarily at the factual findings and legal conclusions the ALJ made in holding that the General Counsel failed to establish that Nexeo is a perfectly clear successor of Ashland Distribution Company and violated the Act by unilaterally implementing, when it commenced operations on April 1, 2011, company-sponsored retirement and healthcare plans in place of the ones in which Local 70- and Local 705-represented employees participated as Ashland employees.<sup>2</sup> Distilled to their essence, the exceptions allege that the ALJ erred in rejecting two theories under which the General Counsel contends he proved that Nexeo became a perfectly clear successor before informing the unions and employees in mid-February 2011 that it would be implementing its benefit plans. As the discussion that

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<sup>1</sup> Counsel for the Acting General Counsel are referred to herein as the "General Counsel"; Respondent Nexeo Solutions, LLC is referred as "Nexeo" or the "Company"; Nexeo's predecessor, Ashland, Inc., is referred to as "Ashland"; Charging Party Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union, Local No. 705, is referred to as "Local 705"; Charging Party Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70 of Alameda County, is referred to as "Local 70"; Administrative Law Judge William G. Kocol is referred to as the "ALJ"; and references to the ALJ's decision and recommended order are abbreviated "ALJD p. \_\_\_."

<sup>2</sup> Eight of the General Counsel's 33 exceptions relate to matters that require little attention in this brief. Four of the eight (Exception Nos. 10 and 12-14) relate to facts the ALJ misstated and ones he failed to mention concerning bargaining unit employees' healthcare benefits as Ashland and Nexeo employees. Nexeo filed similar exceptions with respect to the ALJ's misstatements (Nexeo Exception Nos. 10 and 13). None of the errors and omissions mentioned in the General Counsel's exceptions affected the ALJ's decision. From Nexeo's perspective, they are therefore of no moment. The other four exceptions (Exception Nos. 9, 26, 27 and 29) relate to the ALJ's failure to address the complaint allegation that Nexeo violated Sections 8(a)(1) and (5) by unilaterally eliminating the entitlement to daily overtime that Local 705-represented employees had as Ashland employees under Ashland's expired collective bargaining agreement with Local 705 (the "Local 705 CBA"). Nexeo addresses that claim in its brief in support of its exceptions relating to the ALJ's determination that the Company violated the Act by eliminating the daily and weekly pay guarantees and 50-hour vacation pay entitlement Local 705-represented employees had under the Local 705 CBA. The arguments Nexeo advances in demonstrating that the ALJ erred in making that determination also show that no basis exists for finding that the Company violated the Act by not following the overtime pay provision of the Local 705 CBA. Nexeo incorporates those arguments by reference here.

follows demonstrates, neither theory withstands factual or legal scrutiny.

The General Counsel's first theory, which he advances in both the Region 13 and Region 20 cases, is that select provisions of the "Agreement of Purchase and Sale" ("APS") into which Nexeo entered with Ashland on November 5, 2010 establish that the Company is a perfectly clear successor. The provisions of the APS on which the General Counsel relies are ones that obligated Nexeo to offer Ashland Distribution employees (1) comparable positions, (2) with no less favorable wages, and (3) benefits substantially comparable in the aggregate to those provided by Ashland. The ALJ rejected this theory because the "APS did not purport to set initial terms; rather it indicated a framework for a benefit package the details of which would be determined later." (ALJD p. 17). Because the APS did not deceive the employees as to the initial terms Nexeo intended to establish, the ALJ concluded that, under the test adopted by the Board in *Spruce Up Corp.*, 209 NLRB 194 (1974), *enforced per curiam*, 529 F.2d 516 (4th Cir. 1975), the APS could not form the basis for a finding that Nexeo is a perfectly clear successor.

The ALJ was correct. He could have gone even further, however, in rejecting the General Counsel's theory. The absence of evidence that Nexeo communicated the terms of the APS to the employees or their union representatives gave the ALJ a basis for dismissing the theory out of hand. Under *Spruce Up*, perfectly clear status turns upon what the successor communicates to the predecessor's employees about its hiring plans, i.e., whether it "actively or, by tacit inference, misled employees" to believe that their terms of employment were not going to change, or "failed to clearly announce its intent to establish" new terms prior to or simultaneously with its extension of job offers. 209 NLRB at 195. Here, Nexeo did not communicate any of the terms of the APS to the Local 70- and Local 705-represented employees or their union representatives prior to informing the unions, at its initial meetings with them, and

the employees, in letters offering them employment, in mid-February 2011 that it was not adopting, as initial employment terms, any of the provisions contained in any current or expired Ashland collective bargaining agreement, and that the employees would be covered under the Company's benefit plans.

The ALJ also could have buttressed his finding that the APS did not purport to set initial employment terms by adding that the provisions of the APS on which the General Counsel relies, along with other aspects of the APS, clearly gave Nexeo the right to make material, substantial and significant changes to the terms under which the employees worked for Ashland. That is a decisive fact that under *Spruce Up* precludes a finding that the provisions of the APS made Nexeo a perfectly clear successor.

The General Counsel's second theory, which only applies to the Region 20 case, is that Nexeo was responsible for a "consistent messaging stream" of information disseminated by Ashland between November 8, 2010, and January 14, 2011, that misled the Local 70-represented employees to believe Nexeo intended to retain them under essentially the same terms that Ashland employed them.<sup>3</sup> In advancing this theory, the General Counsel relies upon a novel contention that, although Ashland published the documents on which he relies, Nexeo can be held responsible for what the documents say (1) because the documents either contained information that was shared between agents of Ashland and agents of Nexeo at or around the

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<sup>3</sup> The General Counsel does not advance this theory in the Region 13 case because he has no evidence that the documents on which he relies for it were distributed to or otherwise seen by Local 705-represented employees. In the Region 13 case, the General Counsel advanced an agency-based theory below under which he contended that, in the period from November 8, 2010 to mid-February 2011, Ashland managers, acting as agents of Nexeo, made perfectly clear successor-triggering statements to Local 705-represented employees and Local 705. The theory, however, was undone by the General Counsel's failure to present evidence that the Ashland managers had actual or apparent authority to make the alleged statements as agents of Nexeo. Although he filed an exception with respect to the ALJ's failure to consider for the truth of the matter asserted conversations between Ashland managers and Local 705 officials (Exception No. 5), the General Counsel does not advance this theory in his brief or address the ALJ's evidentiary rulings.

time the documents were created, or were reviewed by agents of Nexeo before they were disseminated, or (2) because Nexeo ratified the allegedly perfectly clear successor-triggering statements contained in the documents by failing timely to disavow the statements. The fundamental flaw in the General Counsel's argument, however, is that it is missing a factually-supportable and legally-viable basis for finding that Ashland ever acted as an agent of Nexeo. That flaw is fatal to the theory. Again, because the information was not communicated by Nexeo, the information has no bearing on whether Nexeo is a perfectly clear successor.

The ALJ, however, did not find it necessary to assess whether the information Ashland disseminated to its employees about the transaction could be attributed to Nexeo. Treating the information as if Nexeo was bound by it, the ALJ rejected the General Counsel's theory on the grounds that the information did not mislead the employees. He found that "[t]he totality of the messages that were conveyed . . . were consistent with the terms of the APS and advised employees that details of the employment offers would follow." (ALJD p. 17).

The ALJ once more was right. On the day the sale was announced, November 8, 2010, Ashland issued a Q & A that said: "[e]mployees will be notified as soon as possible about whether they will transfer to the newly independent company and will receive employment offers prior to closing"; and "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." (GCX 40, 56). No information was provided to the employees that conflicted with these statements prior to mid-February 2011, when Nexeo communicated to Local 70, at its initial meeting with the union, and to the Local 70-represented employees, in the offer letters it sent them, that it was not adopting any of the provisions

contained in Ashland's collective bargaining agreement with Local 70 (the "Local 70 CBA") and that the employees would be covered under the Company's retirement and healthcare plans. On the contrary, the only message that the employees may have received that was attributable to Nexeo came in mid-January 2011 and it was to stay tuned – offers of employment spelling out Nexeo's compensation and benefit plans would be coming soon. Nexeo did nothing to become a perfectly clear successor and to lose its right to set initial terms and conditions of employment.

In summary, both theories advanced by the General Counsel fail for the same fundamental reasons. The theories are based upon information that was not communicated to the employees or the unions by Nexeo, and the information, in any event, did not mislead the employees or the unions that the employees would be retained under the same terms and conditions that they worked for Ashland. There are two other reasons the theories fail. One reason is that regardless of what was communicated to them earlier by Ashland, Nexeo timely informed the unions, at its initial meetings with them, and the employees, in their offer letters, in mid-February 2011 that the employees would be covered under the Company's retirement and healthcare plans. See *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994), *enforced*, 84 F.3d 637 (2d Cir. 1996), *cert. den.*, 519 U.S. 1109 (1997) (successor's letter to unions disavowing predecessor's representation that successor had agreed to be bound by predecessor's labor agreements with the unions put employees on notice successor would be making changes, resulting in determination that successor was not a perfectly clear successor). The other reason is that, even if the unsupportable assumption that Nexeo at some point became a perfectly clear successor were made, the evidence establishes that the Company met any bargaining obligation imposed upon it by the perfectly clear successor caveat established by the Supreme Court in *NLRB v. Burns Int'l Security Services*, 406 U.S. 272 (1972).

For these reasons, the ALJ's determination that the General Counsel failed to establish that Nexeo is a perfectly clear successor must be affirmed, and his order dismissing the allegations of the complaint tied to that claim adopted by the Board.

## **II. STATEMENT OF FACTS**

### **A. Background**

On November 5, 2010, Nexeo, whose name at the time was TPG Accolade, LLC, entered into the APS with Ashland. In the APS, Nexeo agreed to purchase the assets Ashland Distribution Company, a global chemical distribution business with approximately 57 distribution centers in North America. (Tr. 943-44; GCX 6).<sup>4</sup> The transaction closed on March 31, 2011, and on April 1, 2011, Nexeo began operating the business (Tr. 451). Of the domestic distribution centers Nexeo acquired, employees at seven of them have union representation (Tr. 447, 951; REX 9).<sup>5</sup>

Local 70 represents a 17-employee unit of warehouse leads, drivers, drivers/material handlers, material handlers, and warehousepersons at the Company's Fairfield, California facility. (GCX 92). The effective dates of its last collective bargaining agreement with Ashland (the Local 70 CBA) were December 1, 2008 to November 30, 2013. (GCX 77). Local 705 represents a unit of approximately 32 drivers at the Company's Willow Springs, Illinois facility. (GCX 16). Its last collective bargaining agreement with Ashland (the Local 705 CBA) expired on October 31, 2010. (GCX 2).

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<sup>4</sup> References to the transcript of the hearing are abbreviated, "Tr. \_\_\_"; references to the General Counsel's exhibits are abbreviated, "GCX \_\_\_"; references to the Company's exhibits are abbreviated, "REX \_\_\_"; and references to joint exhibits are abbreviated, "JEX \_\_\_."

<sup>5</sup> The facilities are located in: Carteret, New Jersey; Fairfield, California; Louisville, Kentucky; Morrisville, New Jersey; St. Louis, Missouri; Twinsburg, Ohio; and Willow Springs, Illinois, which has two bargaining units.

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

In Section 7.5 of the APS, Nexeo agreed to make offers of at-will employment, at least 30 days prior to closing, to Ashland Distribution employees (a) effective upon closing, (b) in a position comparable to the one they held prior to closing, (c) at a rate of pay no less favorable than they were paid prior to closing, and (d) with employee benefits substantially comparable in the aggregate to those provided by Ashland “as expected to be in effect on January 1, 2011, as set forth on Schedule 7.5(d)” (GCX 6, Sec. 7.5(c) and (d)).

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

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

And most importantly, Nexeo had the right to offer retirement and healthcare benefits to the Local 70- and Local 705-represented employees that were different from those for which the labor agreements under which they worked provided. An examination of the APS leads inescapably to the conclusion that the Company had that right.

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

While reading Section 7.5(d) and Schedule 7.5(d) together establishes that the benefit plans by which Nexeo’s benefit plans were to be measured were those sponsored by Ashland, additional evidence supporting that conclusion is found in the definition of the term “Seller Benefit Plan,” which is found in Section 1.1 of the APS, and Schedule 5.19(a), which lists all “Seller Benefit Plans” (GCX 6). The Western Conference of Teamsters Pension Trust, in which

the Local 70-represented employees participated under the Local 70 CBA, and the International Brotherhood of Teamsters Local 705 Pension Fund, in which the Local 705-represented employees participated under the Local 705 CBA, are among the plans listed in Section 5.19(a). What makes that significant is that the term “Seller Benefit Plan” is not found in Section 7.5(d). Having defined the term “Seller Benefit Plan” and created a schedule listing the plans, if the parties had intended Nexeo’s benefit plans to be measured against them, they would have used the term. That they did not use the term amplifies the conclusion that the benefit plans to which reference is made in Section 7.5(d) does not include the union-sponsored plans in which the Local 70- and Local 705-represented employees participated.

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

### **C. Communications with Employees About the Transaction**

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

95. No evidence was presented in the Region 13 cases that any of the documents were distributed to or seen by any Local 705-represented employees. In the Region 20 case, the General Counsel presented testimony from several witnesses that Ashland had either distributed a number of the documents to the employees who worked at the Fairfield facility, or posted the documents on a bulletin board at the facility, i.e., GCX 40-41, 44, 47-56, and 93-95.

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

#### **D. Initial Union Meetings and the Offer Letters to Employees**

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

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

employees would be “eligible for employee benefits under plans and programs that are comparable in the aggregate to plans and programs sponsored by Ashland immediately prior to closing.” (GCX 12-13; REX 30). They then added that:

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

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

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

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

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

The meeting with Local 70 was held on February 16, 2011. Because he was unavailable that day, Hollinshead asked Ashland Human Resources Manager Paul Fusco, whom Nexeo planned to offer employment, to lead the meeting. Local 70 was represented by its President, Dominic Chiovare, and Business Agent Bob Aiello. At the meeting, Fusco:

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

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

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

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

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

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

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

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

In his letters, Messino argued that, while Nexeo was not required to assume the Local 705 CBA, the Company was obligated to recognize the union and bargain with it to agreement or impasse before it could make any changes to the employees’ terms of employment. Seemingly at odds with that position, he also said in his letter of February 23 that “[w]e have accepted the offers of employment based upon” Nexeo’s promise “to enroll the bargaining unit employees in benefit plans and programs that are comparable in the aggregate to their current Ashland plans.” In referring to plans “comparable in the aggregate” to the Ashland plans, Messino apparently meant the Local 705 plans. However, after the meeting on February 15, 2011, and based upon what the offer letter said, Messino could not have been confused that the benefit plans to which Nexeo’s plans would be comparable were ones sponsored by Ashland. In any event, Hollinshead’s email of March 2, 2011, should have cleared up any confusion Messino had. That email outlined the facts the Company maintains show that it properly exercised its right to establish initial terms of employment different from those under which the employees worked

for Ashland. (REX 17).

**E. Conditional Recognition of the Unions**

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

**F. Pre-Close Collective Bargaining Negotiations**

**1. Negotiations with Local 70**

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

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

indicated that, in that event, the employees would be enrolled in Nexeo's benefit plans, including its 401k plan, and that the employees would work under the same terms as other Nexeo employees, with no local practices carrying forward. (Tr. 997).

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

Fusco addressed Local 70's about-face at the negotiating session that day and in an email that he sent to Aiello that evening (Tr. 995; REX 38). In his email, Fusco covered many of the same points that he discussed at the informational meeting with the union in mid-February. In particular, he noted that: "Nexeo Solutions was careful in the offer letter, as [he] was in [their] meeting, to spell out that none of the Ashland labor agreements, or any of their terms, [were] being offered so as not to mislead the employees and to ensure that they [made] an informed decision on whether to accept the Company's offer"; and the offer "letter was clear that the offer of employment included coverage under company sponsored health and welfare plans and the Nexeo Solutions 401k retirement plan." Fusco then reiterated that, "absent reaching contingent agreement at close, Nexeo Solutions will move forward with the terms outlined in its offer letter to employees." He then summarized the highlights of the Company's final pre-close offer, and closed the email by expressing hope that Local 70 would present the offer for a ratification vote before the closing. (REX 38). Neither Aiello nor Chiovare responded to Fusco's email.

## **2. Negotiations with Local 705**

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

### **G. Post-Close Matters**

#### **1. Fairfield**

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

#### **2. Willow Springs**

On April 1, 2011, the Local 705-represented employees also began their employment with the Company under the terms outlined in the offer letter, which are, as was the case in Fairfield, effectively the same terms under which unrepresented operations employees of the Company at other locations work. As it said it would do in the offer letter, the Company covered the employees under its retirement and health insurance plans, instead of the Local 705 benefit

plans. (Tr. 180-190; 465-67).

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

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

### **III. ARGUMENT**

#### **A. The Perfectly Clear Successor Caveat And The Board's Longstanding Interpretation Of It**

The perfectly clear successor caveat is derived from the Supreme Court's decision in *NLRB v. Burns Int'l Security Services*, 406 U.S. 272 (1972). *Burns* established the principle that a successor which continues its predecessor's business substantially unchanged, and a majority of whose workforce consists of union-represented employees of the predecessor, inherits a duty to recognize and bargain with the employees' union representative but, absent an agreement to do so, is not obligated to accept its predecessor's labor agreement with the union. Before the

duty to recognize and bargain with a union arises, a successor is not constrained from unilaterally establishing the terms under which it offers employment to prospective employees. As the Supreme Court said in making this point:

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

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

Stating this point differently, prior to the time that its bargaining obligation attaches, a successor has the right to determine initial terms of employment. The perfectly clear caveat comes from the Supreme Court's discussion of that right in *Burns*:

Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act, 29 U.S.C. § 159(a).

406 U.S. at 294-295.

In *Spruce Up Corp.*, 209 NLRB 194, (1974), *enforced*, 529 F.2d 516 (4<sup>th</sup> Cir. 1975), the Board addressed the circumstances under which the perfectly clear caveat applies, interpreting the caveat in a way that remains the applicable legal standard today. The Board began with an

assessment of what the Court meant when it said that the caveat would apply to a successor that “plans to retain all of the employees in the unit,” saying:

When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer “plans to retain all of the employees in the unit,” as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one, as illustrated by the present facts. Many of the former employees here did not desire to be employed by the new employer under the terms set by him – a fact which will often be operative, and which any new employer must realistically anticipate. Since that is so, it is surely not “perfectly clear” to either the employer or to us that he can “plan to retain all of the employees in the unit” under such a set of facts.

209 NLRB at 195. Acknowledging that the “precise meaning and application of the Court’s caveat is not easy to discern,” the Board next identified two policy considerations that demonstrated that interpreting the caveat to apply to a successor that makes a pre-hire announcement of new terms would be contrary to the purposes of the Act and, in particular, discourage continuity in employment relationships:

[A]n employer desirous of availing himself of the *Burns* right to set initial terms would . . . have to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms, a right to which the Supreme court attaches great importance in *Burns*. And indeed, the more cautious employer would probably be well advised not to offer employment to at least some of the old work force under such a decisional precedent.

*Id.* The Board then announced a legal standard that has stood the test of time:

We believe the caveat in *Burns*, therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer ... has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

*Id.*

By its terms, application of perfectly clear successor test adopted in *Spruce Up* turns

upon a successor's pre-hire communications with the predecessor's employees or their union. In every case in which the test has been applied, the outcome has been dictated by the nature and timing of such communications. *Spruce Up* is the lead case in which a successor was held not to be a perfectly clear successor based upon its having communicated new or different employment terms at the time it made known its intention to offer the predecessor's employees jobs. Other cases in which a similar fact pattern resulted in a holding that an employer was not a perfectly clear successor include:

- *Ridgewell's, Inc.*, 334 NLRB 37 (2001), *enforced*, 38 Fed. Appx. 29 (D.C. Cir. 2002) (successor's announcement of intent to employ predecessor's employees as independent contractors found to put the employees on notice that initial employment terms would be different, leading to holding that successor's unilateral establishment of new terms prior to commencing operations was lawful);
- *Resco Products, Inc.*, 331 NLRB 1546 (2000) (successor that informed predecessor's employees that to work for it the employees would have to waive claims for accrued vacation, and that they would, in return, receive increased pension benefits, held not to be a perfectly clear successor and to have had the right unilaterally to set initial employment terms);
- *Bekins Moving & Storage*, 330 NLRB 761 (2000) (successor that conditioned hiring of predecessor's employees on their acceptance of new employment terms held not to be a perfectly clear successor);
- *Pioneer Concrete of Arkansas, Inc.*, 327 NLRB 333 (1998) (successor that informed predecessor's employees of changes in working conditions before hiring them held not to be a perfectly clear successor);
- *Planned Building Services, Inc.*, 318 NLRB 1049 (1995) (successor that informed predecessor's employees that it would pay them the same wages as the predecessor, but that their benefits would not be the same, was not a perfectly clear successor and had the right to set initial terms of employment);
- *Banknote Corp. of America*, 315 NLRB 1041 (1994), *enforced*, 84 F.3d 637 (2d Cir. 1996) (successor's letter to predecessor's employees' union representatives informing them of intent to attempt to hire employees from predecessor's workforce, but stating it was not committing to recognize unions or be bound by the predecessor's labor agreements, found to put employees on notice successor would be making changes in employment terms, leading to holding that successor was not a perfectly clear successor and bargaining obligation did not attach until it hired the employees);

- *Boeing Co.*, 214 NLRB 541 (1974), *enforced*, 595 F.2d 664 (D.C. Cir. 1978) (successor that expressed intent from outset to hire predecessor's employees at lower wages and benefits than they received under predecessor's labor agreement held not to be a perfectly clear successor);
- *Henry M. Hald High School Assn.*, 213 NLRB 415 (1974) (successor that gave assurances to predecessor's employees that it would employ them, but added that the terms under which it would do so had not yet been established, held not be a perfectly clear successor and to have had right to later establish initial employment terms); and
- *Jerry's Finer Foods*, 210 NLRB 52 (1974) (successor that offered predecessor's employees employment on terms less advantageous than those of predecessor held not to be a perfectly clear successor).

Conversely, the Board has held perfectly clear successor status to have been established where it has found that a successor, prior to hiring its workforce, either: (1) misled the predecessor's employees or their union that it would employ the employees under the same employment terms as the predecessor; or (2) communicated an intent to retain the predecessor's employees, without mentioning it planned to establish new employment terms. Among the cases in which that result was reached are:

- *Grenada Stamping & Assembly*, 351 NLRB 1152 (2007), *enforced*, 322 Fed. Appx. 404 (5<sup>th</sup> Cir. 2009), *cert. den.*, 130 S. Ct. 493 (2009) (successor that communicated to predecessor's employees that all of them would be retained, without mentioning intent to establish any new employment terms, held to be a perfectly clear successor);
- *Rosdev Hospitality*, 349 NLRB 202 (2007) (successor that did not inform predecessor's employees, prior to hiring them, that it intended to make any changes to their employment terms held to be a perfectly clear successor and to have unlawfully changed practice followed by predecessor);
- *Morris Healthcare & Rehabilitation Center*, 348 NLRB 1360 (2006) (successor became a perfectly clear successor when it informed predecessor's employees that they had been hired but did not inform them of any changes in employment terms);
- *Elf Autochem North America*, 339 NLRB 796 (2003) (successor held to have become a perfectly clear successor when its agents informed predecessor's employees that successor would employ them, recognize their past service, pay them equivalent wages and provide them with a benefits package comparable to that of the predecessor, where the successor also later informed the employees' union

representative that it would maintain existing terms and conditions of employment, including those contained in the predecessor's labor agreement with the union);

- *Dupont Dow Elastomers*, 332 NLRB 1071 (2000), *enforced*, 296 F.3d 495 (6th Cir. 2002) (successor that informed predecessor's employees' union representatives that it intended to offer employment to all of the employees under terms that it would announce on future date did not become a perfectly clear successor at that time but became one on the date that it announced the terms);
- *Hilton Environmental*, 320 NLRB 437 (1995) (successor's course of dealing with predecessor's employees over a number of months, which included soliciting letters of intent from them indicating they would work under predecessor's contractual wage rate and later informing them it intended to hire all of them, found to establish that successor planned to retain employees without changing their terms of employment, resulting in successor's being held to be a perfectly clear successor);
- *Canteen Co.*, 317 NLRB 1052 (1995), *enforced*, 103 F.3d 1355 (7<sup>th</sup> Cir. 1996) (when before hiring employees the successor communicated to predecessor's employees' union representative that it wanted the employees to serve a probationary period, the successor communicated to the union it planned to retain the predecessor's employees, resulting in its becoming at that moment a perfectly clear successor);
- *Fremont Ford Sales*, 289 NLRB 1290 (1988) (successor's statement to predecessor's employees' union representative that it had doubts about the retention of only a few of the predecessor's employees, and assurances it gave to several of the predecessor's employees that they would be retained without changes to their working conditions, resulted in the successor's becoming a perfectly clear successor); and
- *Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), *enforced*, 540 F.2d 841 (6<sup>th</sup> Cir. 1976), *cert. den.*, 429 U.S. 1040 (1977) (successor whose owner informed employee of predecessor that he wanted all of predecessor's employees to remain on the job and that they would carry on as usual held to be a perfectly clear successor.

Although criticized for it and some courts of appeal have strongly disagreed<sup>6</sup>, the Board has found perfectly clear successor status on facts like those in these cases even where the successor subsequently, but before or at the time it extended offers of employment, made known its intent to establish new terms.

The Board, thus, has effectively held that a successor's bargaining obligation attaches

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<sup>6</sup> See, e.g., *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977); *Canteen Co.*, 317 NLRB at 1055 (Members Stephens and Cohen dissenting).

when it communicates plans to offer its predecessor's employees jobs in a way that misleads the employees or their union that there will be no changes or that fails to put them on notice that changes are forthcoming. The communication, however, must come from the successor. If a representative of the predecessor, or some other third party that is not authorized to act on behalf of the successor, is responsible for the communication, it is not binding upon the successor and therefore cannot form the basis for a perfectly clear successor finding. See *Bekins Moving & Storage*, 330 NLRB 761 (2000) (assurances given to predecessor's employees by their manager, who was later hired by successor, that successor would retain them held not to be binding upon successor and therefore insufficient to support a finding that the successor became a perfectly clear successor based upon the assurances).

**B. The ALJ Correctly Found That The General Counsel Failed To Prove His APS-Based Perfectly Clear Successor Claim**

The General Counsel advances three main arguments in support of his contention that the ALJ erred in finding that the evidence failed to establish that the terms of the APS made Nexeo a perfectly clear successor. They are that: (1) the ALJ properly found that it was perfectly clear Nexeo planned to retain the employees in both units; (2) the ALJ erroneously relied upon *Spruce Up* in finding that Nexeo is not a perfectly clear successor; and (3) the ALJ erred in failing to find that the Board's decisions in *Springfield Transit Management, Inc.*, 281 NLRB 72 (1986), and *The Denham Co.*, 206 NLRB 659 (1973) and 218 NLRB 30 (1975) establish that Nexeo is a perfectly clear successor. None of the arguments survives analysis.

**1. The ALJ's Finding That, As A Matter Of Fact, Nexeo Planned To Retain All Unit Employees Is, As A Matter Of Law, Inconsequential**

The ALJ based his finding that Nexeo planned, as a matter of fact, to retain all of the Local 70 and Local 705-represented employees upon terms of the APS that he described as obligating Nexeo "to offer the employees employment in their same position, with the same base

wages, and with a comparable benefit package.”<sup>7</sup> (ALJD p. 15). Those terms, he found, left “little doubt that a majority, if not all, of the employees, would . . . accept employment at Nexeo.” (ALJD p. 15). In his brief, the General Counsel parrots what the ALJ said, quotes the provisions of the APS on which he relies, and submits that the ALJ was right that the Company planned on retaining all the employees in both units. In doing so, however, he misses the point behind the ALJ’s finding.

The ALJ’s objective was to highlight the difference between construing the *Burns* perfectly clear successor caveat literally, and construing it as the Board did in *Spruce Up*. That is a difference that divided the majority and the dissent in *Spruce Up*. In separate dissenting opinions, Members Fanning and Penello indicated that they read *Burns* to say that perfectly clear successor status turns simply upon whether a successor expresses to the predecessor’s employees or their union an intent or plan to retain the employees, regardless of whether the successor mentions new employment terms.<sup>8</sup> Under the majority opinion in *Spruce Up*, however, what matters is whether “an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms.” 209 NLRB at 195. If the successor does so, then so long as before announcing the new terms it has not “actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of

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<sup>7</sup> Although the ALJ correctly found that Nexeo could not be deemed to be a perfectly clear successor based upon the terms of the APS, in describing the terms as he did, he materially mischaracterized them. What the APS obligated Nexeo to do was offer the employees (1) comparable positions, (2) with no less favorable wages, and (3) benefits substantially comparable in the aggregate to those provided by Ashland. The difference between how the ALJ described the terms and the actual terms is significant because, as discussed later, the words used leave no room for doubt that the APS gave Nexeo the right to make material, substantial and significant changes to the employees’ terms of employment.

<sup>8</sup> Then Chairman Gould expressed the same opinion in his dissent in *Canteen Co.*, 317 NLRB 1052, 1055, *enforced*, 103 F.3d 1355 (7th Cir. 1997).

employment,” it cannot “fairly be said that the new employer ‘plans to retain all of the employees in the unit,’ as that phrase was intended by the Supreme Court.” *Id.*

The ALJ drew the distinction between “the language used by the Supreme Court in *Burns*” and “the gloss put on that language by the Board in *Spruce Up*” because he was of the view that the General Counsel predicated his APS-based theory on the actual language of *Burns*. That he construed the General Counsel’s theory that way is shown by his statement that the theory “largely ignores the Board’s decision in *Spruce Up*.” (ALJD p. 15). Bound to follow *Spruce Up*, the ALJ said that “it is for the Board to decide if it wishes to modify *Spruce Up* in light of the facts of this case, or whether to revisit that case entirely.” (ALJD p. 17). The ALJ, however, misconstrued the General Counsel’s theory.

In his brief, the General Counsel does not ask the Board to modify or overrule *Spruce Up*. On the contrary, he relies upon the test from *Spruce Up* to argue that the terms of the APS “misled Local 705, Local 70 and the unit employees to believe that they would be retained under similar terms and conditions as they had experienced under Ashland.”<sup>9</sup> (General Counsel’s Brief p. 48). Under the General Counsel’s theory, thus, the question is not whether Nexeo actually planned to retain the employees from both units; rather, it is whether, the terms of the APS misled the unions and employees in a legally sufficient way under *Spruce Up* to make Nexeo a perfectly clear successor. The ALJ’s finding that, as a matter of fact, Nexeo planned to retain the employees is therefore, as a matter of law, inconsequential.

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<sup>9</sup> If the General Counsel were asking the Board to revisit *Spruce Up*, it would not matter if the unions or employees were “misled” in any way because it would not make a difference if the commitment to offer the employees jobs provided for different employment terms. The General Counsel does not argue that Nexeo’s obligation under the APS to offer the employees jobs, standing alone, made it a perfectly clear successor. If the Board, nonetheless, chooses to address that issue, Nexeo requests that it be provided with an opportunity to brief it.

**2. Nexeo Cannot Be Deemed To Be A Perfectly Clear Successor Based Upon The Terms Of The APS Because It Did Not Communicate The Terms To The Unions Or The Employees**

In arguing that the ALJ properly found that Nexeo planned to retain the employees in both units, the General Counsel contends, although it does not seem to fit, that the ALJ also correctly found that the unions and employees had knowledge of the terms of the APS. The finding on which he relies is the ALJ's statement that "both Local 70 and Local 705 became aware of the terms of the APS as they related to worker retention and compensation issues; both accurately communicated to their members that Nexeo planned to retain all the employees under a benefit scheme that would be comparable in the aggregate." (General Counsel's Brief p. 44). Continuing on a path that deviates from his main argument, the General Counsel goes on to say that Local 70 and the Local 70-represented employees learned of the terms of the APS from documents distributed by Ashland, and that Local 705 representative Messino received a copy of the APS from then-Ashland human resources manager Fusco, and shared the relevant terms with the Local 705-represented employees.

In advancing his first argument, the General Counsel does not connect these points to any matter that he contends is relevant to a determination whether the terms of the APS made Nexeo a perfectly clear successor. The apparent explanation for his making the points, however, appears in his second argument. The General Counsel's second argument is that, while the ALJ properly found that the fact pattern here is different from the fact pattern in *Spruce Up*, he erroneously relied upon *Spruce Up* in finding that Nexeo is not a perfectly clear successor. Again, the General Counsel does not argue that the ALJ erred in looking to the test adopted in *Spruce Up*. His argument is that "the ALJ ignored his own findings of fact regarding the terms of the [APS] itself, which misled Local 705 and Local 70, and the unit employees to believe that they would be retained under similar terms and conditions as they had experienced under

Ashland.” (General Counsel’s Brief p. 48).

The attention the General Counsel gives to what the unions and employees knew about the APS, thus, is intended to make his theory that the terms of the APS caused Nexeo to become a perfectly clear successor work under *Spruce Up*. The theory, however, cannot work under *Spruce Up* because under the test adopted there, and as it has been applied since its adoption, perfectly clear successor status turns upon what the successor, not someone else, communicates to the predecessor’s employees or their union representative about the successor’s hiring plans. (See cases cited at pp. 20-22). Here, it is undisputed that Nexeo did not communicate any of terms of the APS to the unions or employees prior to informing the unions, at its initial meetings with them, and the employees, in their offers of employment, in mid-February 2011 of its determination to cover the employees under its retirement and healthcare plans instead of the plans in which they participated as Ashland employees. (GCX 5, 82; REX 11).

The ALJ did not address this shortcoming in the General Counsel’s proof.<sup>10</sup> The General Counsel does not address the defect either. Without explaining why, he just says in his brief that it is “important” that the ALJ found that Local 70 and Local 705 became aware of the terms of the APS and accurately communicated them to their members. (General Counsel’s Brief p. 44). What he says after that, however, shows that what the unions and employees knew about the APS did not come from Nexeo, completely undermining his theory.

Tacitly acknowledging that the finding of the ALJ on which he relies was erroneous in part, the General Counsel does not submit that Local 70 was made aware of the terms of the APS before its mid-February 2011 meeting with Nexeo – it is undisputed that Local 70 was not

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<sup>10</sup> While it is unclear why the ALJ did not address this issue, he presumably determined that it was unnecessary to do so either because he interpreted the General Counsel’s theory to be that the terms of the APS, standing alone, made Nexeo a perfectly clear successor, or based upon his finding that the terms of the APS were not misleading.

provided a link to the APS until March 11, 2011. (GCX 82). Instead, the General Counsel submits that the Local 70-represented employees learned about the “relevant terms” of the APS “through a series of documents that were distributed by Ashland.” (General Counsel’s Brief p. 44). He does not, however, at least in support of his APS-based theory, argue that Nexeo was behind the documents’ distribution. Besides that fatal defect, the documents could not, in any event, provide a basis under *Spruce Up* for a finding that the APS made Nexeo a perfectly clear successor. Whether the documents support a finding that Nexeo is a perfectly clear successor turns upon (a) whether Nexeo can be held responsible for the messages that they conveyed and (b) whether those messages, not what the APS says, support a perfectly clear successor finding. Those are the issues raised by the General Counsel’s messaging stream-based theory in Fairfield. The documents provide no support to the General Counsel’s APS-based theory.

It is undisputed that Nexeo did not communicate any of the terms of the APS to Local 705 prior to its mid-February 2011 meeting with the union. As the General Counsel recounts, then Ashland human resources representative Fusco emailed Local 705 representative Messino a link to the APS on December 10, 2010, and Messino reviewed the terms of the APS with the Local 705-represented employees over the course of the next several weeks. The General Counsel does not contend that, when he emailed Messino the link to the APS, Fusco was acting as an agent of Nexeo. He notes only that three days after sending Messino the link, Fusco informed Messino that he had been hired by Nexeo (ignoring the undisputed documentary evidence that the Company did not offer Fusco employment until mid-February 2011). (REX 8) All that matters under *Spruce Up*, however, is that Nexeo did not communicate any of the terms of the APS to Local 705. The General Counsel’s APS-based theory fails for that simple and

straightforward reason.<sup>11</sup>

In summary, the General Counsel's APS-based theory does not survive scrutiny because Nexeo did not communicate any of the terms of the APS to the unions or the employees. As all the cases in which the *Spruce Up* test has been applied reflect, perfectly clear successor status turns upon the nature and timing of the successor's communications with the predecessor's employees or their union regarding its hiring plans. Here, Nexeo followed to the letter the

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<sup>11</sup> The General Counsel mischaracterizes the record at several points in discussing the information that was communicated to employees regarding the terms of the sale. Although they do not relate to the decisive fact that Nexeo was not responsible for the communications, the mischaracterizations are relevant because they show that caution should be exercised in assessing the General Counsel's contentions. Two examples are illustrative of others that appear in his brief.

The first example is his statement that "Ashland posted a notice on Firsthand, its inter-company (sic) portal, informing all unit employees that . . . there would be no changes to employees' benefits and wages." (General Counsel's Brief pp. 44-45). There are two problems with this statement: (1) no evidence was presented that any Local 705-represented employees had access to Firsthand, or ever saw this particular notice (the Q & A posted on November 8, 2010) or any other documents relating to the transaction; and (2) the notice stated that base wages would be "no less favorable than those provided prior to closing," and employee benefits would be "substantially comparable in the aggregate to compensation and benefits as of January 1, 2011." (GCX 40 and 56).

The second example is the General Counsel's later statements that documents were provided to employees between November 5, 2010, and February 15, 2011, that misled them to believe that Nexeo would retain them with no changes to their wages and benefits and that the misrepresentations culminated on February 11, 2010, when Willow Springs Manager Tony Kuk allegedly told Local 705 stewards Michael Jordan and George Sterba that he had been hired by Nexeo and that all of the Local 705-represented employees would likewise be retained under the same terms and conditions that they worked for Ashland. (General Counsel's Brief p. 48). These statements misguidedly conflate the General Counsel's messaging stream-based theory in Fairfield with his now abandoned agency-based theory in Willow Springs. Again, there is no evidence that any of the Local 705-represented employees saw any of the documents that Ashland issued concerning the transaction. The Local 70-represented employees in Fairfield, meanwhile, could not have been effected by something Willow Springs manager Kuk allegedly said. With respect to what Kuk allegedly said, the ALJ discredited Jordan's and Sterba's testimony, finding that "Local 705 had a copy of the APS and knew of its content but thereafter seemed to repeatedly question Ashland Managers in an effort to get them to say something slightly different." (ALJD pp. 5-6). The ALJ could have added that Messino instructed Jordan and Sterba to attempt to set-up Kuk by asking him "pointed questions" about the transaction and that notes they took of their conversation on February 11, 2011 conflicted with their testimony. (Tr. 348-351). He might have also added that earlier that same day, Messino was told by Ashland human resources manager Kevin Meyers that, at the meeting it had scheduled with Local 705 on February 15, 2011, Nexeo was going to inform the union that it had determined to change the employees terms and conditions of employment, including their benefits, and he was not going to like it. (Tr. 123-126). Lastly, the ALJ could have pointed out that the documentary evidence showed that Kuk, like other Ashland employees, did not receive an offer of employment until February 17, 2011. (REX 8).

prescription provided by *Spruce Up* and its progeny to avoid becoming a perfectly clear successor, informing the unions and the employees in its first communication with them that it was establishing terms of employment that differed from those under which the employees worked for Ashland. Neither the unions nor the employees were confused or misled.<sup>12</sup>

**3. Nexeo Cannot Be Deemed To Be A Perfectly Clear Successor Based Upon The Terms Of The APS Because Those Terms Gave The Company The Right To Make Material, Substantial And Significant Changes To Employees' Terms And Conditions Of Employment**

In rejecting the General Counsel's APS-based theory, the ALJ determined that the APS did not mislead the employees to believe that as Nexeo employees their terms of employment would remain the same as they had been as Ashland employees. As he explained, "[t]he APS did not purport to set initial terms of employment; rather, it indicated a framework for a benefit package the details of which would be determined later." (ALJD p. 17). In support of his argument that the ALJ erred in coming to that conclusion, the General Counsel points again to the ALJ's finding that, in the APS, Nexeo "promised to 'offer employment to all the unit employees in their same position, with the same base wages, and with a comparable benefit package.'" (General Counsel's Brief p. 49, quoting ALJD p. 15). He says that, to put that finding another way, "unit employees were promised that they would maintain their current job, with [] all its attendant duties and rights, at the same rate of pay they had received from Ashland." Citing *Elf Atochem North America, Inc.*, 339 NLRB 796 (2003), he then submits that "the promise to provide benefits . . . 'substantially comparable in the aggregate to those

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<sup>12</sup> That Local 705 and the Local 705-represented employees understood that materially different employment terms were going to be put in place is best shown by how the employees, with the union's guidance, responded to the offer letters – initially striking out or adding language to show that they did not agree to the Company's covering them under its benefit plans. What they did is a perfect illustration of the point the Board made in *Spruce Up* that a successor that offers its predecessor's employees jobs under new employment terms cannot be said to plan to retain all the employees because of the very real possibility that the employees may not accept the new terms. 209 NLRB at 195.

provided by Ashland' was not legally sufficient to put unit employees on notice that [Nexeo] intended to implement new or substantially different benefits." (General Counsel's Brief p. 49). There are two fundamental flaws in the General Counsel's analysis. It mischaracterizes the terms of the APS, and misinterprets the law.

Contrary to what the ALJ said, the APS did not obligate Nexeo to offer Ashland employees the "same position," or the "same base wages," or a "comparable benefit package." And contrary to the other way the General Counsel puts it, Nexeo did not promise in the APS that employees would "maintain their current job, with all its attendant duties and rights, at the same rate of pay they had received from Ashland." What the APS obligated Nexeo to do was (1) make offers of "at-will employment" to the employees, (2) in a position "comparable to the type of position" the employees held with Ashland, (3) with "no less favorable wages" than Ashland paid them, and (4) benefits under plans "substantially comparable in the aggregate" to those provided by Ashland. (GCX 6, Sec. 7.5(b)-(d)). The actual words Nexeo and Ashland used in these provisions of the APS make a difference. Under any reasonable construction of the provisions, they gave Nexeo the right to make material, substantial, and significant changes to the terms under which the employees worked for Ashland, putting anyone who read them on notice of that right, foretelling that changes would be forthcoming, and distinguishing this case from *Elf Atochem*.<sup>13</sup>

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<sup>13</sup> *Elf Atochem* is distinguishable from this case on a number of grounds. There, unlike here, the successor was responsible for communicating the information to the predecessor's employees that resulted in its being found to be a perfectly clear successor. 339 NLRB at 808. The promise made there by the successor, to provide employees a "comparable health, welfare and benefits package," is also different from one to provide benefits under plans that are substantially comparable in the aggregate to those provided by the predecessor, as Nexeo committed in the APS to do. *Id.* The main difference is that the right to provide benefits under plans that are substantially comparable in the aggregate conveys the message that the benefits may be worth about the same but entirely different. As Schedule 7.5(d) of the APS reflects, Nexeo's commitment was actually to provide benefits under plans that were substantially comparable in the aggregate to those sponsored by Ashland, meaning that it was under no obligation to

To illustrate this point, it is well-established that doing the things the APS gave Nexeo the right to do would, in an established relationship, result in material, substantial, and significant changes over which bargaining would be required. Converting the employees from a for-cause to an at-will employment relationship would constitute such a change. See *S & F Market Street Healthcare v. NLRB*, 570 F.3d 354, 360-61 (D.C. Cir. 2008) (successor's announcement that employment with it would be at-will communicated to predecessor's employees a significant change that precluded the successor from being found to be a perfectly clear successor). Offering employees a comparable but different position from the one they held as Ashland employees would as well. See *HTH Corp.*, 356 NLRB No. 182, p. 4 (2011) (employer's unilaterally reassigning employees to different positions held to be unlawful); *The Bohemian Club*, 351 NLRB 1065, 1066 (2007) (unilaterally assigning additional duties to employees held to violate the Act). As would paying the employees a higher hourly rate or in a different way than Ashland did. See *Carrier Corp.*, 319 NLRB 184, 193 (1995) (bargaining required over improvements in terms of employment); *Wightman Center*, 301 NLRB 573, 575 (1991) (unilateral wage increase violated Act). Providing the employees with benefits substantially comparable in the aggregate to, but not the same as, those Ashland provided them would also result in material, substantial and significant changes over which an employer in an established relationship would be required to bargain. See *Caterpillar, Inc.*, 355 NLRB No. 91, p. 3 (2010), *enforced per curiam*, 2011 U.S. App. LEXIS 11163 (D.C. Cir. 2011) (unilateral implementation of generic drug program held to be subject to bargaining obligation); *Goya Foods of Florida*, 352

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provide benefits mirroring those provided by the union-sponsored multi-employer plans in which the Local 70- and Local 705-represented employees participated. (GCX 27). Lastly, in *Elf Atochem* the successor, over the course of many months, misled the union that nothing was going to change by affirmatively representing that it would keep the predecessor's labor agreements and other terms and conditions of employment in place pending negotiation of a replacement contract. 339 NLRB at 808. Here, in contrast, Nexeo informed the union and employees of the new employment terms it had established the first time it communicated with them.

NLRB 884, 885-886, 890 (2008), *reaffirmed in relevant part*, 356 NLRB No. 184 (2011) (rejecting argument that unilaterally implemented health plans were equivalent to former plans, and holding implementation of plans caused change over which bargaining was required).

Inasmuch as an employer in an established relationship would be obligated to bargain over changes of this nature, it follows that provisions in a purchase agreement giving the purchaser the right to make such changes would not mislead employees that they would all be retained without material, substantial and significant changes to their employment terms. To find otherwise could not be reconciled with the foregoing cases. Nor could it be reconciled with Board precedent holding that, to avoid becoming a perfectly clear successor, a successor need not spell out the initial employment terms it plans to establish; rather, it need only indicate new terms are in the offing. See *Ridgewell's, Inc.*, 334 NLRB at 37-38; *Dupont Dow Elastomers*, 332 NLRB at 1074-1075; *Resco Products*, 331 NLRB at 1549-1550; *Planned Building Services*, 318 NLRB at 1049; *Banknote Corp. of America*, 315 NLRB at 1043; *Henry M. Hald High School*, 213 NLRB at 415.

The General Counsel's argument is also flawed because it only considers isolated provisions of the APS. To assess whether the terms of the APS made Nexeo a perfectly clear successor, all of the terms have to be considered. The following provisions of the APS, like the foregoing ones, reflect that Nexeo had the right to make material, substantial and significant changes to the employees' terms of employment. They also put anyone reviewing them on notice that Nexeo was not obligated and did not intend to participate in any union-sponsored multi-employer benefit plans.

- The definition of the term "Employee Benefit Plan, found in Section 1.1, states, "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.

- Section 2.2(e) expressly excludes from the definition of the term “Conveyed Assets” “Union Contracts to the extent not prohibited by law.”
- Schedule 7.5(d), which lists the Ashland plans to which Nexeo’s plans were to be substantially comparable in the aggregate, lists only Ashland-sponsored plans.<sup>14</sup>
- Section 7.5(g) imposes upon Ashland responsibility for, among other things, all employee-benefit related liabilities, including the payment of any “withdrawal liabilities” under multi-employer pension plans in which Ashland participated, including the Local 705 plans.

Finally, the General Counsel’s argument conflicts not only with the terms of the APS but with Nexeo’s and Ashland’s intent. It is undisputed that Nexeo and Ashland were in agreement that the Company had the right to establish new employment terms for Ashland’s union-represented employees. As reflected in John Hollinshead’s testimony, Ashland representatives reviewed and approved of the offer letters advising the union-represented employees that they would be covered under Nexeo’s retirement and healthcare plans and not any union-sponsored multi-employer plans. (Tr. 417-37) Nexeo and Ashland also included a provision in Section 7.5 to guard against third parties claiming any rights or seeking any remedy under the APS. Section 7.5(s), entitled “No Third Party Beneficiaries,” provided that the provisions of “Section 7.5 are solely for the benefit of the respective parties to this Agreement and nothing in this Section 7.5, express or implied, shall confer upon any Employee or legal representative or beneficiary thereof, any rights or remedies....” No authority exists giving the Board the right or power to trump this provision of the APS and reinterpret the APS in a way that materially differs from the parties’ intent and the APS’s plain language.

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<sup>14</sup> The General Counsel’s contention that the reference to plans “provided by Ashland” in Section 7.5(d) includes union-sponsored multi-employer plans misses the mark entirely. First, it ignores Section 7.5(d)’s reference to Schedule 7.5(d) and what the schedule states. Second, there is no basis for reading the obligation to provide employee benefits “substantially comparable in the aggregate” to mean ones comparable to those provided to bargaining unit employees, as opposed to Ashland employees generally. Third, reading Section 7.5(d) in light of the provision indicating Nexeo was not assuming or adopting Ashland’s labor agreements, along with the provision imposing withdrawal liability on Ashland, shows that the benefit plans to which reference is made do not include union-sponsored multi-employer plans.

**4. The Board's Decisions In *Springfield Transit Management* And *The Denham Co.* Provide No Basis For A Finding That The Terms Of The APS Made Nexeo A Perfectly Clear Successor**

The final argument the General Counsel makes in support of his APS-based theory is that the Board's decisions in *Springfield Transit Management* and *The Denham Co.* support a finding that the terms of the APS made Nexeo a perfectly clear successor. He contends that these cases stand for the proposition that terms of a successor's contract with a third party obligating the successor to offer jobs to its predecessor's employees can, standing alone, make the successor a perfectly clear successor. The ALJ correctly rejected that argument, effectively finding that, to the extent the cases could be interpreted to stand for that proposition, they were outliers that could not be reconciled with the well-established test adopted by the Board in *Spruce Up*. The cases are otherwise easily distinguished from this one, mainly because, unlike here, the third party agreements did not give the successor the right to make material, substantial and significant changes to the employees' terms and conditions of employment.

*Springfield Transit*, a case that tellingly has never been cited in a Board decision, is what can be described as a one-off case. Although the administrative law judge in that case made reference to the perfectly clear exception in his decision, the exception does not fit the case. The decision turned upon the judge's determination that a contract between the successor and the public transit authority whose bus lines it had been retained to operate obligated the successor, in accordance with the requirements of the Urban Mass Transportation Act, to assume its predecessor's labor agreements. There was no need for the judge to interpret what the contract required – with the requirements of a federal statute behind its terms, the contract expressly required the successor to “assume all labor and other employee contractual obligations, including

but not limited to, collective bargaining agreements” of the predecessor.” 281 NLRB at 78.<sup>15</sup> What distinguishes this case from *Springfield Transit*, thus, is that here no federal statute dictated the terms of the APS and, more importantly, the APS expressly provided that Nexeo was not adopting or assuming any of Ashland’s labor agreements.

The *Denham* decisions are inapposite because the successor did not have any pre-hire contact with the predecessor’s employees. The first time it communicated with the employees was on the day it assumed control of the business. While the successor had agreed with the predecessor to retain the employees for a minimum of 30 days, that commitment cannot fairly be described as what led the Board to find perfectly clear successor status. The decisions turned upon, to use the Board’s words, the “totality of circumstances surrounding the transfer of ownership from [the predecessor] to [the successor],” which the Board found reflected “an intent by [the successor] to retain all the incumbent employees in the unit.” 218 NLRB at 31.

If the terms of the agreement in *Denham* were enough to support a perfectly clear successor finding, the Board presumably would have said so. Instead, it treated the successor’s commitment to retain the successor’s employees for 30 days as but one of several data points on which it relied.<sup>16</sup> The *Denham* decisions also do not disclose whether the successor had the right

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<sup>15</sup> The successor’s explicit obligation to assume the predecessor’s collective bargaining agreements indicates that the case is properly viewed as one involving contract adoption principles. Indeed, it appears that the judge would have treated it as such if the labor agreement in effect at the time the successor commenced operations had been in effect at the time of the hearing. Because the agreement had expired, he concluded that there was no need to decide the issue. 281 NLRB at 78, n.13.

<sup>16</sup> Looking back to the original decision in the case, which is reported at 187 NLRB 434 (1970), provides insight into the real significance of the successor’s commitment to retain the employees for 30 days. The administrative law judge’s decision reveals that the employees were apprised of the commitment at a meeting called and attended by the successor’s owner on the afternoon of the day that the successor took over the business. During the meeting, the predecessor distributed a leaflet to the employees that mentioned the commitment. What is perhaps most telling is that the decision reveals that: (1) the leaflet informed the employees that the successor had taken over the business effective that same day, meaning the employees were already working for the successor; and (2) the successor did not inform the employees of any changes to their terms and conditions of employment until a meeting later that same day, after its bargaining obligation would have attached. 187 NLRB at 439. Here, in contrast, Nexeo

under the agreement, as Nexeo did under the APS, to establish employment terms different than those of the predecessor. Thus, another critical distinction between those cases and this one is that here the Company had the right, and exercised it, to make very real and material changes to the employees' terms and conditions of employment.

For all of the foregoing reasons, the General Counsel's APS-based theory must be rejected.

**C. The ALJ Correctly Found That The General Counsel Failed To Prove His Messaging Stream-Based Perfectly Clear Successor Claim**

As he did in evaluating the General Counsel's APS-based theory, the ALJ skipped over the question whether the General Counsel proved that Nexeo was responsible for the statements contained in the documents on which the General Counsel bases his messaging stream theory. The ALJ began and ended his analysis with the question whether the documents misled the employees into believing that they would be retained without any changes to their terms and conditions of employment. He found that the documents were not misleading, concluding instead that the "totality of messages that were conveyed to the employees" and [the unions] were consistent with the terms of the APS and advised employees that details of the employment offers would follow." (ALJD p. 17). On that basis, he rejected the General Counsel's theory. In contending that the ALJ erred, the General Counsel presents six arguments. Only two of them, the ones involving the pivotal issues under *Spruce Up*, call for an answer. They are his contentions that the ALJ erred in failing to attribute to Nexeo, on an agency-related basis, statements made in transition-related documents issued by Ashland between November 2010 and January 2011, and in failing to find that statements contained in those and other documents issued in that period misled the employees in a way that resulted in Nexeo's becoming a

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advised the unions and the employees of the initial employment terms it had set in its first communication with them in mid-February 2011, six weeks before it acquired the business.

perfectly clear successor. Both contentions are meritless.

**1. Statements Made By Ashland In The Documents It Issued Between November 2010 and January 2011 Cannot Be Attributed To Nexeo On Any Agency-Related Basis**

The agency-related aspect of the General Counsel's messaging stream-based theory includes documents issued by Ashland prior to January 14, 2011. January 14, 2011, is the dividing line because, at a town hall meeting conducted on January 13, 2011, then Ashland Distribution President Bob Craycraft announced to employees for the first time that he had accepted an offer from Nexeo to serve as the Company's Chief Commercial Officer, and introduced to the employees David Bradley, whom he indicated had been retained to serve as the Company's President and CEO.<sup>17</sup> Prior to that date, no one from Nexeo had communicated with the employees, verbally or in writing.

The General Counsel offers two agency-based grounds for linking the documents issued by Ashland prior to January 14, 2011, to Nexeo. His first argument is that the stipulations into which Nexeo entered with him on the authenticity of the documents demonstrate that Ashland had authority to issue the documents on behalf of Nexeo. His second argument is that Nexeo ratified the perfectly clear successor-triggering statements contained in the documents by failing timely to disavow the statements. Neither argument finds support in the facts or the law.

**a. Ashland Did Not Have Actual Or Apparent Authority To Issue The Documents As An Agent Of Nexeo**

An agent acts with actual authority when "the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." Restatement 3d, Agency § 2.01; *see also, Local 9431, Communications Workers of America,*

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<sup>17</sup> The town hall talking points, which are found in GCX 44, look like the script prepared for Bradley and Craycraft to use at a town hall meeting. There is no evidence that they were distributed to, or seen by, any Local 70-represented employees.

*AFL-CIO*, 304 NLRB 446 (1991) (quoting the Restatement of Agency). Apparent authority, on the other hand, “is created through a manifestation by a principal to a third party that supplies a reasonable basis for the latter to believe the principal has authorized the alleged agent to do the acts in question.” *D.G. Real Estate, Inc.*, 312 NLRB 999 (1993). Two conditions must be satisfied before apparent authority may be found: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. *Id.* In order to establish apparent authority, “either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief.” *Service Employees Local 87 (West Bay Maintenance)* 291 NLRB 82 (1988) (citing Restatement 2d, Agency, §27 (1958, Comment a). “Apparent authority is present only when a third party's belief is traceable to manifestations of the principal.” Restatement 3d, Agency, § 3.03 (2006, Comment b)(emphasis added).

The General Counsel does not have any evidence that fits within these principles. The stipulations into which Nexeo entered with him do not provide the proof he needs. In the stipulations, Nexeo only agreed that, with respect to GCX 44-55, the information contained in the exhibits was shared with consultants of Nexeo acting in the course and scope of their representative capacities, and that, with respect to GCX 56-76, Nexeo consultants participated in information exchanges concerning the exhibits in the course and scope of their representative capacities. The mere fact that Nexeo consultants were shown, or otherwise made aware of, documents published by Ashland cannot be construed as a manifestation that Nexeo authorized Ashland to act on its behalf. That Nexeo was aware of various communications between Ashland and its employees, and commented on some of them, does nothing to support, let alone

establish, that Ashland had actual authority to act on Nexeo's behalf. The stipulations, thus, do not support a finding that Ashland published the documents on behalf of or as an agent of Nexeo.

There otherwise is no evidence that Ashland had or needed actual authority from Nexeo to publish the documents or that Nexeo manifested the assent necessary to conclude that Ashland had apparent authority to publish them on the Company's behalf. To the extent that the General Counsel argues that the requisite actual or apparent authority can be found or inferred from the language contained in Section 11.7 of the APS, he is mistaken. Nexeo received a legal opinion from its outside counsel that Section 11.7 did not restrict the parties' right to communicate with the employees and that is how the Company operated (REX 425-27; REX 6). The most that can be said about Nexeo's involvement in the publication of these documents, thus, is that the Company was aware of the information contained in them, and reviewed and had comments on some of them. No evidence exists, however, that Nexeo had the right to interfere with, or stand in the way of, Ashland's publication of the documents. Because they are, on their face, Ashland documents, and no evidence exists that the Company either authorized Ashland to issue the documents or caused employees to believe that it was Nexeo actually speaking through the documents, Nexeo is not bound by anything the documents said.

**b. Nexeo Did Not Ratify Any Of The Statements Contained In The Documents**

The General Counsel's ratification theory is that, after Nexeo became aware of the allegedly perfectly clear successor-triggering statements contained in the documents issued by Ashland, it ratified them by failing timely to disavow them. It is a theory without any legal backing. The fundamental flaw in it is that, under the provisions of the Restatement of the Law, Third, Agency, Nexeo cannot be found to have ratified any statements contained in the documents because: (1) Ashland did not act or purport to act as an agent of Nexeo in publishing

the documents (§ 4.03); (2) Nexeo never manifested assent that Ashland's publication of the documents would affect its legal relations or engaged in any conduct that would justify a reasonable assumption that it consented to the documents' publication having such an effect (§ 4.01); and (3) Nexeo never made a manifestation that it had ratified Ashland's publication of the documents, let alone one that induced any employees to make a detrimental change in their position (§ 4.08).

Lacking any conventional basis for his ratification theory, the General Counsel seeks to find support for it in two cases, *Dean Industries, Inc.*, 162 NLRB 1078 (1967) and *Southern Pride Catfish*, 331 NLRB 618 (2000). Neither case lends support to his theory. They are Section 8(a)(1)-based unfair labor practice cases in which the Board held that an employer, to avoid being held liable for conduct in which a third party engaged, with its knowledge and apparent approval, that would have constituted an unfair labor practice if committed by the employer, had a duty to disavow the conduct. In *Dean Industries*, the trial examiner, whose decision the Board adopted, explained that this determination reflected a narrow exception to the rule that an employer is not responsible for the acts of third parties that are not its agent:

[B]efore an employer may be found to have engaged in unfair labor practices by reason of activities on the part of persons not in its employ or management and whom it did not clothe with the apparent authority to act for it, at the minimum, the employer must have acquired knowledge of the activities for which it is sought to be charged and the circumstances must be such as to place the employer under an obligation to disavow activities."

162 NLRB at 1093. Neither *Dean Industries* nor *Southern Pride Catfish* has ever been applied in a case like this one, where the third-party conduct in issue is not, in and of itself, violative of the Act.

Here, none of the elements is present that would support a finding Nexeo ratified any legally-significant written statements made by Ashland about Nexeo's hiring plans prior to its

initial meeting with Local 70 on February 16, 2011. Again, no evidence exists that Ashland published the documents while acting or purporting to act on Nexeo's behalf. See Restatement 3d, Agency, § 4.03 ("A person may ratify an act if the actor acted or purported to act as an agent on the person's behalf.") ("When an actor is not an agent and does not purport to be one, the agency-law doctrine is not a basis on which another person may become subject to the legal consequences of the actor's conduct"). Neither the documents nor the stipulations support such a finding, as Ashland plainly had a legitimate interest in communicating with its employees about the sale of the business and in working with them during the transition period.

Finally, even assuming the statements on which the General Counsel relies were of the type that would have perfectly clear successor-triggering qualities and were made in circumstances under which they would be susceptible to ratification, the General Counsel's theory would still fail. The reason is that Nexeo necessarily disavowed any such statements at its meeting with Local 70 on February 16, 2011, and in the offer letters it mailed to the employees on February 17, 2011. It is undisputed that no representative from Nexeo had communicated with the unions or employees prior to that time and that at the meetings and in the offer letter the Company described in detail the initial terms and conditions under which it was offering the employees jobs, clearly dispelling any preconceived notions the unions or employees may have had based upon things Ashland may have communicated to them. See *Banknote Corporation*, 315 NLRB at 1043 (1994).

**2. Statements Made By Ashland In The Documents It Issued Between November 2010 and January 2011 Did Not Mislead Employees To Believe That Nexeo Was Not Going To Make Any Changes To Their Terms And Conditions Of Employment**

The General Counsel goes to great lengths in his brief describing the various statements contained in the documents issued by Ashland that he contends misled employees to believe

Nexeo was not planning to make any material changes to their terms and conditions of employment. It is not necessary for Nexeo to follow suit to demonstrate that, even if they could be attributed to it, the documents did not contain any statements that could have misled the employees to believe things were not going to change. To conclude that the employees were not misled, the Board need only look to the first document Ashland issued, a Q & A about the terms of the sale that it posted on its intranet on November 8, 2010. (GCX 40, 56).

The decisive portions of the Q & A informed employees that: “[they] will be notified as soon as possible about whether they will transfer to the newly independent company and will receive employment offers prior to closing”; and “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.” (Id.). This already-seen information comes from the terms of the APS on which the General Counsel bases his APS-based theory and on which the ALJ relied in rejecting that theory. They are also the terms on which Nexeo bases its argument that the General Counsel’s APS-based theory does not withstand scrutiny. Because the information contained in the Q & A mirrors what the APS says, that argument applies equally well here to show that the General Counsel’s messaging stream-based theory also fails.

To rephrase the argument to apply to the Q & A, in advising the employees that Nexeo was required to provide them no less favorable wages, and benefits substantially comparable in the aggregate, Ashland put the employees on notice that Nexeo had the right to make material, substantial and significant changes to their terms and conditions of employment. Again, that changes of this nature are material, substantial and significant is established by the case law

holding that, in an established relationship, an employer is required to bargain over them. See *Carrier Corp.*, 319 NLRB at 193 (improvements in terms of employment); *Wightman Center*, 301 NLRB at 575 (unilateral wage increase); *Caterpillar, Inc.*, 355 NLRB No. 91 at p. 3 (unilateral implementation of generic drug program); *Goya Foods of Florida*, 352 NLRB at 885-886, 890 (unilateral implementation of equivalent health plans). As such, this information necessarily sufficed to signal to employees that changes were in the offing. The employees were also alerted that more information was to follow by the statements in the Q & A that employees would be notified as soon as possible whether they would transfer to the Company and that they would receive offers of employment prior to close. As the ALJ found, these same messages were repeated later in other documents issued to the employees by Ashland. And no information was communicated to the employees that contradicted them. In these circumstances, the conclusion is inescapable that the ALJ correctly found that the employees were not misled to believe that Nexeo was going to retain them under the same terms and conditions under which they worked for Ashland. See *Ridgewell's, Inc.*, 334 NLRB at 37-38; *Dupont Dow Elastomers*, 332 NLRB at 1074-1075; *Resco Products*, 331 NLRB at 1549-1550; *Planned Building Services*, 318 NLRB at 1049; *Banknote Corp. of America*, 315 NLRB at 1043; *Henry M. Hald High School*, 213 NLRB at 415.

**3. Information Contained In The Documents Attributable To Nexeo Did Not Mislead Employees To Believe That The Company Was Not Going To Make Any Changes To Their Terms And Conditions Of Employment**

Between January 14, 2011, and Nexeo's initial meeting with Local 70 on February 16, 2011, three transition updates were issued in which statements from David Bradley and Bob Craycraft appear. The updates were issued on January 14, 2011, January 28, 2011, and February 11, 2011. (GCX 50-52. None of them contain any statements that have what could be described

as perfectly clear successor-triggering qualities. On the contrary, Bradley and Craycraft made it clear Nexeo intended to make changes to the employees terms and conditions of employment.

That Nexeo had that intention can be discerned from:

- The statements in the January 14 update by Craycraft that: “We also need to provide final details of our compensation and benefits plan as soon as possible”; and “We want a competitive plan that helps us retain current and attract future employees.”
- The statement in the January 28 update by Craycraft that “I know it can be tough to wait for information, especially about compensation and benefits but we are working hard right now to complete the design of our new plans so we can tell you more about the exciting opportunities for us at Nexeo Solutions soon.”
- The statements by Bradley in the February 11 update that: “I am tremendously excited that in the coming days you will be receiving an official offer of join Nexeo Solutions”; and “Each of you will need to read this letter carefully and think about what it means to join this company.”
- The statements by Craycraft in the February 11 update that: “We are approaching a major milestone,” and “in the coming days employees will be officially asked to join the new company, Nexeo Solutions, LLC”; “The letter from Nexeo Solutions will give you useful information about the new company,” “I urge you to review it carefully”; “We are aware that benefits and compensation will be an important consideration”; and “So within the offer letter package, you will find important details about these topics.”

(GCX 50-52). Under the authorities discussed previously, these statements show that Nexeo did not mislead employees to believe nothing was going to change and establish that it maintained its right unilaterally to establish the employees’ initial terms of employment. See *Ridgewell’s, Inc.*, 334 NLRB at 37-38; *Dupont Dow Elastomers*, 332 NLRB at 1074-1075; *Resco Products*, 331 NLRB at 1549-1550; *Planned Building Services*, 318 NLRB at 1049; *Banknote Corp. of America*, 315 NLRB at 1043; *Henry M. Hald High School*, 213 NLRB at 415.

For all of the foregoing reasons, the General Counsel’s messaging stream-based theory must be rejected.<sup>18</sup>

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<sup>18</sup> The General Counsel devotes considerable space in his brief to arguing that the ALJ was off-base in considering whether the benefit package implemented by Nexeo was, in fact, “comparable in the

**D. Nexeo Timely Notified The Unions And Employees That It Had Determined To Cover The Employees Under Its Retirement And Healthcare Plans**

The General Counsel argues that the ALJ erred in finding that Nexeo timely communicated to the unions and employees the specific details of the initial terms it had established, citing cases holding that there is no escape from perfectly clear status once it is established. As demonstrated above, however, Nexeo never became a perfectly clear successor before it informed the unions, at its initial meetings with them, and the employees, in their offer letters, in mid-February 2011 that the employees would be covered under the Company's retirement and healthcare plans. The ALJ, thus, was correct. He tied his determination, however, to his finding that it was not misleading to communicate before mid-February that Nexeo benefits would be substantially comparable in the aggregate to those of Ashland. (ALJD p. 17). Whether or not that message was misleading, in fact, did not make a difference because, regardless of whether it could somehow be construed that way, the message came from Ashland. In communicating the initial terms it had established to the unions and employees in mid-February, Nexeo disabused the employees and unions of any misunderstanding they had and gave the employees ample time to make an informed decision whether they wanted to work under the terms offered by Nexeo. See *Banknote Corp. of America*, 315 NLRB at 1043 (1994)

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aggregate" to the one by which the employees were covered as Ashland employees. His argument is that the question in this case is not whether the benefits provided by Nexeo are, in fact, comparable to those that were provided by Ashland, but whether the obligation to provide benefits comparable in the aggregate to those of Ashland communicated to employees that Nexeo had the right to implement new employment terms. Nexeo does not disagree; that said, the ALJ's assessment of the issue had no bearing on his decision. The General Counsel also argues that all of the changes implemented in Fairfield and Willow Springs were material, substantial and significant and, as such, Nexeo had a duty, as a perfectly clear successor, to bargain over them. The space is wasted, however, because Nexeo has not argued that, if it were a perfectly clear successor, the changes would not be properly classified as mandatory subjects of bargaining. Its position is that it had no duty to bargain over the changes because it is not a perfectly clear successor. In arguing that the changes implicated mandatory subjects of bargaining, especially the changes in Fairfield to Ashland's healthcare plan, the General Counsel provides support to Nexeo's contention that its right to adopt plans substantially comparable in the aggregate to those of Ashland gave it the right to effect material, substantial and significant changes, and therefore put employees on notice changes were forthcoming.

(successor's letter disavowing predecessor's representation that successor had agreed to be bound by predecessor's labor agreements put employees on notice successor would be making changes); *cf.*, *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 881-882 (2d Cir. 1977) (expression of intention to rehire predecessor's employees, without mentioning changes in terms of employment, held not to result in successor's becoming a perfectly clear successor where new employment terms sent to predecessor's employees before their being hired).

**E. Nexeo Satisfied Any Obligation It Had To Consult With The Unions Before Setting Initial Employment Terms**

Even if it is assumed that Nexeo at some point became a perfectly clear successor, the evidence establishes that the Company met any bargaining obligation imposed upon it by the words the Supreme Court used in *Burns* in establishing the perfectly clear caveat. The words the Court used were that “there will be instances in which . . . it will be appropriate to have [the new employer] initially *consult* with the employees’ bargaining representative before he fixes terms.” 406 U.S. at 294-295 (emphasis added). In using the word “consult,” the Court did not mean “bargain to an agreement or impasse.” The meaning of the word “consult” is found in what the Court said just after it articulated the perfectly clear caveat: “If the union had made a request to bargain after *Burns* had completed its hiring and if *Burns* had negotiated in good faith and had made offers to the union which the union rejected, *Burns* could have unilaterally initiated such proposals as the opening terms and conditions of employment. . . .” 406 U.S. at 295.

The Board has never parsed this sentence in a case like this.<sup>19</sup> The sentence, however, describes, exactly what happened here. Nexeo bargained in good faith with both Local 70 and Local 705 prior to closing, made offers to the unions which the unions rejected, and implemented its proposals when it commenced operations. Accordingly, even if the Board were somehow to

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<sup>19</sup> Member Fanning considered at some length what the sentence means in his dissent in *Spruce Up*, interpreting it in essentially the same way Nexeo does. 209 NLRB at 206.

find that Nexeo at some point became a perfectly clear successor, the General Counsel's claims would still have to be dismissed because the Company satisfied its duty to "consult" with the unions before implementing its retirement and healthcare plans.

*Burns* cannot be interpreted as saying that a successor that has announced initial terms of employment forfeits its right to implement those terms if, after its bargaining obligation attaches but before commencing operations, it enters into what turn out to be unsuccessful pre-close negotiations with the predecessor's employees' union representative. Even if such a reading were conceivable, it would not follow that the successor would become obligated to open for business under the employment terms that its predecessor had in place. That is made clear by the Supreme Court's finding in *Burns* that, in implementing the employment terms it offered the predecessor's employees, *Burns* could not be deemed to have unilaterally changed any of their terms of employment because it did not have a prior relationship with the employees. 406 U.S. at 294. Here, having communicated to the unions and employees from the outset that it was not adopting the terms contained in any current or expired Ashland collective bargaining agreement, Nexeo cannot be deemed to have submitted to those terms by operation of law. *Burns* does not permit that.

The Company has found one case, *TNT Logistics North America*, 2006 NLRB LEXIS 30 (Feb. 1, 2006), in which the General Counsel argued that, after announcing its intent unilaterally to establish initial terms of employment, a successor relinquished its right to implement them, and became obligated to adhere to the employment terms its predecessor had in place, by engaging in negotiations with the predecessor's employees' union representative before commencing operations. The administrative law judge rejected the General Counsel's contention, stating that:

The fundamental difficulty with this theory is that the Respondent never relinquished its rights under *Burns and Spruce Up*. The Respondent's May 11 letter advises the Union that it intended to both unilaterally establish initial terms and conditions of employment *and*, in addition, to bargain with the Union in the event the Union became the employees' collective bargaining representative. These two statements are not mutually exclusive. At no point did the Respondent agree that initial terms and conditions of employment would be established only through bargaining. While both parties were hopeful that this would be the case, the Respondent simply made no such commitment and, absent such a commitment, thereby reserved the right to unilaterally set initial terms and conditions of employment in the event that collective bargaining did not culminate in a collective bargaining agreement prior to start-up. The relinquishment of important rights may not be inferred, as the General Counsel and Union contend herein, but must be clear and unequivocal.

2006 NLRB LEXIS 30 at \*27-28 (emphasis in original). Essentially the same thing could be said here, but more firmly. Nexeo notified the employees and unions that it was establishing new employment terms, as well as that it was prepared to begin negotiations with the unions after a majority of the employees accepted its offer of employment. Once negotiations began, the Company maintained that failure to reach agreement would mean the employment terms outlined in its offer letter would go into effect upon its commencing operations.

Finally, the most logical construction of what the Court said in *Burns* is that a successor that sets new terms of employment establishes the status quo from which the parties bargain, whether bargaining commences before the successor begins operations or afterwards. When a successor and union commence negotiations after the successor begins operations, it is well settled that the initial terms set by the successor establish the status quo from which bargaining proceeds. The same principle should necessarily apply to negotiations that begin after a successor's bargaining obligation attaches but before it begins operations. There is no reason not to apply the principle in that situation and a very strong policy reason to adhere to it. If the law were that a successor that sets initial terms of employment forfeits its right to implement them if it engages in pre-close negotiations but does not bargain to an impasse, it would necessarily lead

successors to steer clear of such negotiations. That would plainly be contrary to the central purpose of the Act – “encouraging the practice and procedure of collective bargaining.” The pre-close negotiations in which Nexeo engaged resulted in agreements in six of eight bargaining units the Company inherited, validating the approach that the Company adopted.

That the Company also bargained in good faith for complete collective bargaining agreements with Local 70 and Local 705 prior to the closing, albeit unsuccessfully, is not in dispute. It would be entirely inconsistent with the policy considerations underpinning, and the meaning of the language used in, *Burns* to interpret the law to be that, if the parties were not at impasse before the closing, the Company was obligated to adhere to the Ashland status quo and to terms that it never intended to adopt, instead of terms that the APS gave it the right to adopt and that were important factors in its decision to buy the business. That is not what the Company bargained for. Nonetheless, hindsight reflects that the Company was, in fact, at impasse in its negotiations with Local 70 and Local 705 prior to the closing.<sup>20</sup> Accordingly, whether because it satisfied its *Burns* obligation to consult with the unions or because it was at a good faith impasse in bargaining with them, Nexeo had the right to implement the employment terms outlined in its offer letters, including its benefit plans. For this additional reason, the General Counsel’s perfectly clear successor-based claims must be dismissed.

#### **IV. CONCLUSION**

For all of the foregoing reasons, Nexeo respectfully requests that the Board adopt the ALJ’s findings that the General Counsel failed to prove, and the ALJ’s recommended order dismissing the paragraphs of the complaint alleging, that Nexeo is a perfectly clear successor and

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<sup>20</sup> If it is found that the parties were not at impasse prior to closing, the evidence is overwhelming that, if Nexeo had maintained Ashland’s employment terms pending negotiations, the parties would have reached an impasse in bargaining shortly after closing, resulting in implementation of the Company’s benefit plans and cutting off any liability the Company could be found to have. See *Planned Building Services*, 347 NLRB 670, 675 (2006).

violated the Act by unilaterally implementing its retirement and healthcare plans in place of the plans in which the Local 70- and Local 705-represented employees participated as Ashland employees.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

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