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

NEXEO SOLUTIONS, LLC

and

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

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

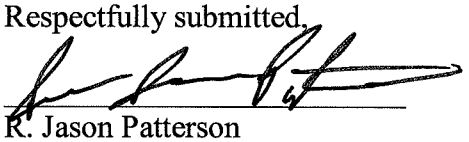
and

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

COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF TO THE ACTING GENERAL COUNSEL'S EXCEPTIONS

Dated at Chicago, Illinois, this 13th day of December 2012.

Respectfully submitted,



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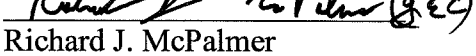

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I. INTRODUCTION

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Series 8, as amended, Counsel for the Acting General Counsel ("GC") hereby submits his Reply Brief to Respondent's Answering Brief to the GC's Exceptions to Administrative Law Judge William C. Kocol's August 30, 2012, Decision.

II. THE ALJ'S FACTUAL DETERMINATION THAT RESPONDENT INTENDED TO RETAIN ALL OF ASHLAND'S EMPLOYEES IS OF CONSEQUENCE

Respondent dismisses as "inconsequential" the ALJ's factual determination that Respondent planned to retain all the unit employees in both the Fairfield and Willow Springs facilities because it committed to do so in the P&S Agreement. Respondent's Answering Brief, at p. 23-25; see also ALJD p. 15, lines 27-30. Not so.

"The perfectly-clear successor caveat inherently demands an inquiry into the 'degree of likelihood that incumbents will work for the successor.'" *Road & Rail Services*, 348 NLRB 1160, 1162 fn.13 (2006), quoting *Machinists v. NLRB*, 595 F.2d 664, 673 fn.45 (D.C. Cir. 1978). The fact that Respondent contractually committed itself to offer employment to Ashland's workforce speaks to some greater likelihood that a majority of that workforce would eventually be hired by Respondent. See *id.* (where, inter alia, successor committed to staffing itself from the predecessor's work force, "it is not speculative to consider various factors that are reasonably likely to raise, or lower, the probability that a predecessor's employees will accept employment with a successor.") Therefore, the factual conclusion has legal import.

Moreover, having contractually committed itself to retaining Ashland's workforce, one would expect acts consistent with that commitment—including communications to the workforce encouraging them to remain through the transition. The message stream conveyed to the unit employees between November 2010 and January 2011 did exactly that. Thus, the ALJ's factual

conclusion provides further context to the communications that go to the heart of the GC's theory of perfectly clear successor liability at the Fairfield, California, location.[1]

III. THE TERMS OF THE PURCHASE AND SALE AGREEMENT SERVED TO RENDER RESPONDENT A PERFECTLY CLEAR SUCCESSOR

The GC and the Respondent have briefed the meaning of the terms of the November 5, 2012, Purchase and Sales Agreement ("P&S Agreement") at length. The GC will not re-hash the argument,[2] but maintains that the terms of the P&S Agreement rendered Respondent a perfectly clear successor.[3] The GC will, however, respond to Respondent's repeated assertion that the P&S Agreement terms were not communicated to either unit's employees. See Respondent's Answering Brief at p. 2, 26-30. On the contrary, key provisions were communicated to the Fairfield unit employees on November 8, 2010, and the P&S Agreement itself was forwarded to Local 705 on December 10, 2010. Respondent did not disavow any of the terms of the P&S Agreement the mid-February 2011 meetings with the unions.

A. Key Provisions of the P&S Agreement Were Communicated to Fairfield Unit Employees on November 8, 2010.

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[1] Indeed as Joint Exhibit 2, paragraph 5 makes clear, the November 8 Q&A was posted on Firsthand and generally made available to all of Ashland's employees. As argued here and in prior briefing, Respondent was well aware that this document, which contained terms mirroring those of the P&S Agreement, was distributed to the employees as a means of assuaging their concerns and encouraging them to remain through the transition.

[2] There are but two exceptions. First, Respondent asserts that Section 7.5(d)'s failure to reference "Seller Benefit Plans," as defined in Schedule 5.19(a), demonstrates the parties' intent to exclude union-bargained plans from those to which Respondent's health and welfare plans would be compared. See Respondent's Answering Brief, at p. 8-9. While it may be true that Section 7.5(d) does not utilize the term "Seller Benefit Plan," it refers to Schedule 7.5(d) which, in turn, is entitled "Changes to Seller Benefit Plans." GC 27 at p. 5-6. As explained in the GC's November 29, 2012, Brief in Answer to Respondent's Exceptions, at § II.A, Schedule 7.5(d) merely served to update Respondent regarding substantive changes made by Ashland to those plans included in Schedule 5.19(a). In short, Respondent's discussion of the meaning of and relationship among Section 7.5(d) and Schedules 5.19(a) and 7.5(d) is incomplete and inaccurate. Second, Respondent resorts to parole evidence in arguing that the Agreement allowed for it to enact substantial and material changes to incumbent employees' terms. See Respondent's Answering Brief, at p. 34. Such evidence should be ignored.

[3] Respondent's assertion that, by February 15, 2012, Local 705 representative Neil Messino could not have been confused as to which benefit plans would be used for comparison purposes (Respondent Answering Brief, at p. 13) is patently false. As set forth fully in the GC's Brief in Support of Exceptions, § II.B.5, Local 705 and Respondent spent much of their time at the bargaining table analyzing the differences between the Local 705 Pension plan and Respondent's 401(k) plan. In these meetings, the parties never compared the terms of Respondent's 401(k) plans with Ashland's non-union plans. See *id.*

As detailed in prior briefing, the November 8 Q&A essentially quoted from key provisions of the P&S Agreement to convey the message that employees could expect employment offers from Respondent under substantially comparable terms and conditions of employment. Specifically, the Q&A included:

> Does the newly independent company anticipate any changes to compensation and/or benefits? Under the terms of the agreement, for at least the 18 months following closing, the newly independent company is required to provide, to each transferred employee, base salary and wages that are no less favorable than those provided prior to closing; and other employee benefits that are substantially comparable in the aggregate to compensation and benefits as of January 1, 2011. GC 40 at ¶ 20; GC 56 at p. 6. Compare GC 6 (P&S Agreement), at § 7.5(d).

Thus, although the entirety of the P&S Agreement was not provided to the Fairfield unit employees or to Local 70 until sometime later, the terms defining Respondent's obligation with regard to its initial hiring terms were communicated on November 8.

Respondent argues that it cannot be held responsible for statements made in the November 8 Q&A. However, for the reasons set forth in the GC's Brief in Support of Exceptions, at § III.B.1, and for the additional reasons outlined in Section IV, below, Respondent can be held accountable for the communication. In short, under the "totality of circumstances" analysis adopted by the Board in *The Denham Co.*, 206 NLRB 659 (1973) and 218 NLRB 30 (1975), and *Springfield Transit Management*, 281 NLRB 72 (1986), the terms of the P&S Agreement, in combination with the selective dissemination of certain portions thereof to the Fairfield unit employees, rendered Respondent a perfectly clear successor on November 8. See, e.g., *Road & Rail Services*, 348 NLRB at 1162 fn.13; *Elf Atochem North America, Inc.*, 339 NLRB 796, 796, 808 (2003).

B. <u>The P&S Agreement Was Forwarded to Local 705 on December 10, 2010, Followed by a Schedule to the Agreement on December 15, 2010.</u>

Respondent is mistaken in its contention that it did not become a perfectly clear successor by the terms of the P&S Agreement because it did not communicate the terms of the agreement to Local 705. To the contrary, Respondent was aware that Local 705 reviewed the terms of the agreement because then-Ashland Director of Human Resources Paul Fusco forwarded the Agreement to Local 705 on December 10. Moreover, the P&S Agreement was filed as a public document. Despite knowing the Agreement was public and thereafter having forwarded it to Local 705, Respondent did nothing to clarify the terms of the Agreement until the mid-February 2011 meeting with Local 705.

On November 10, 2010, the parties filed the P&S Agreement with the U.S. Securities and Exchange Commission. See GC 6 at p. 1. As a result, the Agreement became a matter of public record. On December 10, 2010, and in response to repeated requests, Paul Fusco forwarded the P&S Agreement to Local 705 Representative Neil Messino. GC 5; Tr. 98-100. Three days later, on December 13, Fusco informed Messino that he and Ashland Regional Logistics Manager Pat Cassidy had already been hired by Respondent. Tr. 112-113. On December 15, Fusco—now an admitted agent of Respondent—forwarded a schedule attachment to the P&S Agreement previously requested by Messino. GC 7; Tr. 114-115.[4]

As Judge Kocol correctly found, Local 705 accurately shared the assurances contained in the P&S Agreement with the unit employees.[5] ALJD at p. 5. Accordingly, Respondent cannot argue that it did not communicate the terms of the P&S Agreement with the Local 705 employees. Indeed, even assuming that Fusco's actions as of December 10-15 are found not

[4] The fact that Fusco sent a schedule of the P&S Agreement on behalf of Respondent is further evidenced by the fact that another Ashland manager took over Fusco's role of bargaining on behalf of Ashland on December 29, 2010, two days after Messino requested a position as to whether Fusco still had authority to bargain on behalf of Ashland. Fusco also indicated he was "waiting for instruction from the new company." GC 8; GC 9; Tr. 115-121.

[5] Moreover, a successor's communications with employees' bargaining representative are deemed to be communications to the employees. See *Elf Atochem North America, Inc.*, 339 NLRB 796, 796 fn.3 (2003).

attributable to Respondent, the very nature of the P&S Agreement— a public statement drafted and executed by Respondent placed in a public forum—renders it a statement or act attributable to Respondent. Employee review of the P&S Agreement was surely a foreseeable consequence of placing the document in a public forum. In short, by Fusco's acts and by the filing of the document with the SEC, Respondent made the P&S Agreement directly available to the Local 705 employees.

Moreover, Respondent did not provide any clarification or comment on the terms of the P&S Agreement until its mid-February 2011 meeting with Local 705—despite the fact that Respondent was aware of the terms it drafted in the P&S Agreement and that Local 705 was in possession of the Agreement. By this and other conduct, and as Judge Kocol concluded, Respondent "expressed its clear intention to staff its facilities with the predecessor's employees and to bargain with the employees' designated representative, thereby securing a skilled and experienced workforce and avoiding the uncertainty of attempting to recruit new employees based unilaterally established terms". ALJD p.15-16 (emphasis added) (quoting *Road & Rail Services*., 348 NLRB 1160, 1160 (2006)).

Judge Kocol's decision was based on his analysis of the clear terms of the P&S Agreement.[6] Indeed, if Judge Kocol found that there was no communication of the P&S Agreement and the terms therein to Local 705, his analysis of those terms would not have been necessary. In short, the ALJD and the record evidence make clear that the terms of the P&S Agreement were, in fact, forwarded to Local 705; that employees were made aware of the key terms;[7] and that Respondent did not bother to "clarify" its obligations under the Agreement until

[6] The General Counsel maintains that the terms of the P&S Agreement that Respondent made available were misleading in comparison to the terms Respondent unilaterally implemented.

[7] Upon receiving the P&S Agreement from Fusco, Union Representative, Neil Messino, held three meetings with Local 705 represented employees in which he highlighted the provisions that ensured that the employees would all

mid-February. For the reasons briefed elsewhere, the terms rendered Respondent a perfectly clear successor. See *The Denham Co.*, 206 NLRB 659 (1973) and 218 NLRB 30 (1975); *Springfield Transit Management*, 281 NLRB 72 (1986).

IV. COMMUNICATIONS TO THE FAIRFIELD UNIT EMPLOYEES BETWEEN NOVEMBER 2010 AND JANUARY 2011 ARE ATTRIBUTABLE TO RESPONDENT AND RENDERED IT A PERFECTLY CLEAR SUCCESSOR

The content of the transition-related communications issued to the Fairfield unit employees between November 2010 and January 2011, and the legal import thereof, has been exhaustively briefed by the GC. GC's Brief in Support of Exceptions, at §§ II.C.2 & .3, III.B.2 & .3. Likewise, the GC has demonstrated why these communications are properly attributable to Respondent. *Id.* at § III.B.1. Without repeating these arguments, which are incorporated by reference here, the GC will respond to certain points raised in Respondent's Answering Brief.

- Respondent asserts that "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." Respondent's Answering Brief, at p. 37. As maintained in his Brief in Support of Exceptions, p. 55, the GC reads the ALJD as implicitly reaffirming the decision during the hearing, and over Respondent's objections, to allow all but one of the documents into evidence.

- Respondent rests much of its agency-related argument on the concept of apparent authority. Respondent's Answering Brief, at p. 38-41. The facts and stipulations admitted into the record, however, demonstrate that the pertinent communications were reviewed and

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be retained with benefits substantially comparable in the aggregate to their existing benefits. Tr. 106-110, 246-47, 304-309, 366-68. Moreover, and despite Respondent's protestations to the contrary (see Respondent's Answering Brief at p. 29 fn.11), the record suggests that Willow Springs employees had access to the November 8, 2010, Q&A that detailed key terms of the Agreement. See GC 40, 56. In this regard, Joint Exhibit 2 at paragraph 5 states that the Q&A was "posted on Firsthand and otherwise made available to Ashland employees...." There is likewise no evidence in the record suggesting that only employees at the Fairfield facility had access to the document.

approved by agents of Respondent, in the course and scope of their duties, who thus had actual authority to do so.[8] If not deemed Respondent's statements via the agents' actual authority, Respondent certainly ratified the communications it reviewed and approved. That *Dean Industries, Inc.*, 162 NLRB 1078 (1967), and *Southern Pride Catfish*, 331 NLRB 618 (2000), occurred in the context of Section 8(a)(1) allegations does not undermine the agency principles upon which those decisions are based.[9]

- Nor did Respondent timely and effectively disavow the communications. In this regard, *Banknote Corporation*, 315 NLRB 1041 (1994), must be distinguished. There, the successor's disavowal of a predecessor's assertion that the successor would recognize the union and adopt the CBA was accomplished within approximately three weeks. It was furthermore accomplished in writing, to the union, explicitly stating that "the [predecessor's] official was not an agent of [the successor] and had no authority to make such a commitment on behalf of [the successor]." *Id.* at 1041. Here, there is no evidence of an explicit disavowal. Further, Respondent's implicit disavowal of the prior-issued communications came months after their start and after repeated and knowing reiterations of the same messages. For the reasons set forth here and in GC's

[8] It cannot be gainsaid that the P&S Agreement itself required the parties to exchange and approve communications relating to the transition. See GC 6, at § 11.7. That Respondent received a legal opinion from outside counsel that the provision did not restrict the parties' rights to communicate with their employees does not serve somehow to redefine the provision—and certainly has no bearing on what actually occurred. The documents and stipulations entered in the record demonstrate that Respondent took the plain meaning of Section 11.7 to heart.

[9] At page 38, footnote 17, of its Answering Brief, Respondent makes the point that there is no evidence that GC Exhibit 44—the script utilized by Respondent CCO Bob Craycraft and CEO David Bradley in a transition-related town hall meeting (see Joint 1 at ¶¶ 2, 3)—was distributed to employees. True. However, the record contains testimony from employee Eric Schieber, who attended the meeting by phone with other employees. Schieber's testimony demonstrates that the messages communicated by Craycraft and Bradley tracked those in the script. See Tr. 764-72; see also GC's Brief in Support of Exceptions, at p. 31-32, 70-71. Moreover, the very same messages were reiterated in a Transition Update distributed to employees on January 14. See *id.*; see also GC 50. In fact, evidence regarding the transition-related communications issued on January 13 and 14 demonstrate Respondent's agents embracing the messages issued prior. Moreover, the communications—clearly attributable to Respondent via either an actual or apparent authority analysis—provide a strong alternative for fixing Respondent's perfectly clear bargaining obligation.

Brief in Support of Exceptions, p. 59-60, Respondent failed to timely and effectively disavow the transition-related communications issued from November 2010 through January 2011.

- Focusing on the November 8 Q&A, Respondent argues that employees could not have been misled regarding their hiring terms. Respondent's Answering Brief, at p. 42-44. First, while Respondent is correct that the document contained a statement that employees would "be notified as soon as possible" regarding the receipt of employment offers, it immediately thereafter contained the statement: "Broadly speaking, the newly independent company's intent is to retain Ashland employees. Ashland Distribution people and various support partners will continue to work from their current locations and perform similar roles and functions." GC 40 at ¶ 16; GC 56 at p. 5. Second, the Q&A's assertions that Respondent would offer "wages that are no less favorable" and "benefits substantially comparable in the aggregate" to those offered by Ashland were legally insufficient to put the employees on notice of material and substantial changes to their hiring terms. Thus, there could be no doubt at that time that a majority of the unit employees would likely accept employment. See *Elf Atochem North America, Inc.*, 339 NLRB at 796, 808; *Road & Rail Services*, 348 NLRB at 1162 fn.13.

- Respondent's attempts to distinguish *Elf Atochem* fail. See Respondent's Answering Brief, at p. 21-22, 31 fn.13. First, contrary to Respondent's description, the Board explicitly agreed with the ALJ's determination that the respondent-successor "was obligated to bargain with the Union as a 'perfectly clear' successor as of January 27, 1998, when it informed employees that it would provide employment to employees dedicated to the AtoHaas business, that their seniority would be recognized, and that they would receive equivalent salaries and comparable benefits." 339 NLRB at 796. The Board then made a <u>second</u> determination that Respondent would have become a perfectly clear successor some two months later when it

notified the union that it would maintain the terms of the CBA. *Id.* Thus, the finding as to the earlier bargaining obligation had nothing to do with the successor's adoption of the CBA's terms, and the fact pattern of *Elf Atochem* is much closer to the instant case than Respondent admits. Second, the *Elf Atochem* successor's description of its obligation to provide "comparable" benefits cannot meaningfully be distinguished from Respondent's "comparable in the aggregate" language. Because the task, at bottom, is estimating the likelihood that a majority of the incumbent employees will accept employment with the successor (*Road & Rail Services*, 348 NLRB at 1162 fn.13), cases such as *Elf Atochem* and *Rosdev Hospitality*, 349 NLRB 202, 203, 207 (2007), show that the onus is on the successor to communicate changes (or an intent to make changes) clearly enough to put that likelihood in doubt. The language used by Respondent, like that used in *Elf Atochem*, does not meet this test.

- Respondent cites to several communications post-dating January 14 to argue that the ALJ was correct in concluding that Respondent never misled the employees regarding their employment terms. A fair reading of these documents reveals a vague and mixed message at best. See GC 51, 52.[10] At any rate, Respondent was a perfectly clear successor at the Fairfield facility by no later than January 14. Inasmuch as its post-January 14 communications made its intentions clearer, they did not suffice to erase the earlier-attached perfectly clear bargaining obligation. See, e.g., *Canteen Co.*, 317 NLRB 1052, 1052-54 (1995), enf'd 103 F.3d 1355 (7th Cir. 1997). For the same reason, the mid-February meetings between the unions and Respondent did not serve to remove Respondent's perfectly clear bargaining obligation. *Id.*

- From a single sentence in *NLRB v. Burns Intern. Sec. Services, Inc.*, 406 U.S. 272, 294-95 (1972), Respondent extrapolates that, even as a perfectly clear successor, it had only some

[10] Certainly, the communications were not clear enough to constitute an effective disavowal of the pre-January 14 communications. See *Banknote Corporation*, 315 NLRB at 1041.

lesser duty to "consult" with the unions before implementing terms. Respondent admits that the Board has never "parsed" this sentence. Respondent's Answering Brief, at p. 47. In fact, the case law makes clear that, once a perfectly clear obligation attaches, the successor must bargain to agreement or good faith impasse before instituting initial terms differing from those in effect under the predecessor. See, e.g., *Planned Building Services, Inc.*, 347 NLRB 670, 674-75 (2006) (describing the perfectly clear successor's bargaining obligation as requiring "agreement" or "bargaining impasse"); see also *Rosdev Hospitality*, 349 NLRB at 203 (stating that a perfectly clear successor "may not unilaterally change the terms and conditions of employment . . ."); *Elf Atochem North America, Inc.*, 339 NLRB at 809-10 (impasse defense entertained).[11]

- Respondent avers that impasse existed with both unions prior to the April 1 transition. The issue has been fully briefed. See GC's Brief in Support of Exceptions, at § III.B.6 & p. 20 fn.24. The GC wishes to point out, however, that Respondent's assertion that the main obstacle to bargaining with Local 70 was the parties' insistence on different retirement plans was explicitly rejected by the ALJ (ALJD at p. 14 fn.11), in keeping with the record evidence. See GC's Brief in Answer to Respondent's Exceptions, at p. 13. In addition, Respondent admitted on the record that it had yet to reach a lawful impasse with Local 705. Tr. 176, 327.[12]

III. CONCLUSION

For the reasons set forth in the GC's prior briefing, and for the additional reasons articulated here, the GC respectfully requests that its exceptions to the ALJ's decision be GRANTED; that Respondent's exceptions be DENIED; and that a full remedy to Respondent's unfair labor practices be ordered forthwith.

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[11] *TNT Logistics North America*, 2006 NLRB Lexis 30, 2006 WL 279374, (Feb. 1, 2006), is of no precedential value. In any event, ALJ Wacknov concluded in *TNT* that the respondent-successor was not a perfectly clear successor and, despite some bargaining with the union, never relinquished its right under *Spruce-Up* and its progeny to unilaterally implement initial terms. As such, the case is inapposite.

[12] Respondent's citation to *Planned Building Services*, 347 NLRB 670, 675 (2006), is inapposite, as the application of the holding in that case goes to remedy and the compliance stage of litigation.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Counsel for the General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge have been filed electronically with the Office of the Executive Secretary of the National Labor Relations Board on this 13th day of December 2012, and true and correct copies have been served on the parties in the manner indicated below on that same date.

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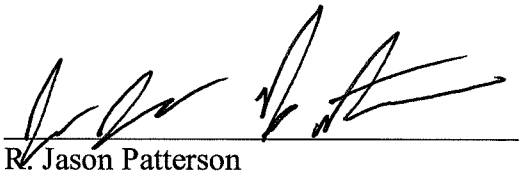

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