

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

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

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

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

Preliminary Statement

Charging Party Local 705, International Brotherhood of Teamsters (“the Union” or “Local 705”), submits this Reply Brief in reply to the Answering Brief filed by Respondent Nexeo Solutions, LLC (“the Company” or “Nexeo”), in answer to the Exceptions filed by the Union to the Decision and Recommended Order of Administrative Law Judge William G. Kocol, issued on August 30, 2012.

1. The Company's Claim That Its Bargaining Obligation Did Not Attach on November 5, 2010, When It Announced Its Intent to Retain All of the Unit Employees, Should Be Rejected

Under controlling Supreme Court and NLRB decisions, it is clear that Nexeo's bargaining obligation to Local 705 attached on November 5, 2010, when Nexeo signed the Agreement of Purchase and Sale ("APS") with Ashland, and thereby contractually agreed to offer employment to all of the Willow Springs bargaining unit employees, by name (Tr. 36, 575; Schedule 7.5(a) of the APS),¹ to comparable positions (G.C.Exh. 6, pp. 55, 56 (Sections 7.5(a) and 7.5(c) of the APS); with wages "no less favorable" than their Ashland wages and with "other employee benefits" under plans "that are substantially comparable in the aggregate to those provided by Ashland" (G.C.Exh. 6, p. 57 (Section 7.5(d) of the APS); and to recognize Local 705 as the employees' bargaining representative (G.C.Exh. 6, p. 60 Section 10(o) of the APS).

Nexeo first argues in its Answering Brief (Resp.Ans.Br. p. 2) that it did not state in the APS that it intended to hire all of Ashland Distribution's bargaining unit employees. That argument was properly rejected by Administrative Law Judge Kocol (ALJD, p. 15, lines 27-30)² and his conclusion

¹ Pages of Nexeo's Answering Brief are referred to as "Resp.Ans.Br. p. X." Pages of Local 705's primary Brief and Answering Brief are referred to as "Local 705 Br. p. X" and "Local 705 Ans.Br. p. X." Pages of the Decision of the Administrative Law Judge are referred to as "ALJD, p. X, Line Y." The Acting General Counsel's exhibits in the NLRB hearing are referred to as "G.C.Exh. X;" exhibits of Respondent Nexeo Solutions, LLC are referred to as "Resp.Exh. X;" exhibits of Charging Party Local 705, International Brotherhood of Teamsters, are referred to as "C.P.Exh. X;" and Joint Exhibits are referred to as "Jt.Exh. X." Pages of the transcript of the hearing before Administrative Law Judge Kocol are referred to as "Tr. X."

² ALJ Kocol found (ALJD, p. 15, lines 27-30):

First I agree with the General Counsel that it was perfectly clear (as a matter of fact and not as a legal conclusion) that Nexeo planned to retain all the employees in both units. Nexeo committed itself to do so in the APS; that document repeatedly

(continued...)

was overwhelmingly supported by the language of the APS, described above.

Nexeo next argues that neither Nexeo nor Ashland stated that Nexeo intended to hire all of Ashland Distribution's bargaining unit employees (Resp.Ans.Br. pp. 2-3). That claim is also contrary to the undisputed record. Among other things, on November 8, 2010 – the date the sale of Ashland Distribution was made public – Ashland Distribution issued a document to all of its employees, entitled “Questions and Answers for Employees” (Tr. 58-59; G.C.Exh. 40, also in the record as G.C.Exh. 56). That document states, among other things (G.C.Exh. 40/56, emphasis added):

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

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

Contrary to Nexeo's next argument (Resp.Ans.Br. pp. 2-3), this statement is attributable to Nexeo. The parties stipulated that G.C. Exhibit 40/56 was reviewed by agents of Nexeo before it was made available to Ashland employees on or about November 8, 2010 (Jt.Exh. 2, ¶¶1-5). In addition, although the Company now argues that there is no evidence that unit employees ever saw this communication (Resp.Ans.Br. p. 3), counsel for Nexeo agreed at the hearing that this “Q&A” document was posted by Ashland (Tr. 59). Based on that agreement, ALJ Kocol stated on the record that G.C. Exhibit 40 “certainly told the employees what you [the General Counsel] say it told the employees in terms of what you just read, those two paragraphs. There's no question about it” (Tr. 61). Counsel for Nexeo did not respond or offer any rebuttal evidence, and cannot now claim there

²(...continued)

indicated that Nexeo as to make offers of employment to “all” employees.

was no evidence that the employees were aware of this posting.

This was not the only announcement to the unit employees of Nexeo's intention to retain all of the bargaining unit employees.

- On November 7, 2010, Ashland Distribution President Robert e-mailed a letter to all employees saying, "In total, we anticipate approximately 2,000 Ashland Distribution employees and dedicated resource group and supply chain parties will transfer to the new business" (G.C.Exh. 48).³

- November 8, 2010, Craycraft distributed a letter to "Dear Valued Customers" (G.C.Exh. 46). The letter stated, in pertinent part (G.C.Exh. 46, emphasis added):

Our goal is to ensure a seamless transition to Ashland Distribution operating as an independent distribution business. The same great people will provide the same great service....

- Four days later, on November 12, 2010, Ashland Distribution issued "Talking Points for Customers" stating, among other things (G.C.Exh. 94, p. 2, emphasis added):

What is not changing:

- ▶ All current AD [Ashland Distribution] employees are staying with the business
- ▶ Our operating systems and processes
- ▶ Our committed to support your business
- ▶ Delivering reliable supply to our customers
- ▶ Our commitment to safety and high business standards and ethics

- In mid-November, 2010, a notice was posted on the employee bulletin boards stating (Tr. 734-735; G.C.Exh. 93, emphasis added):

All individuals currently dedicated to supporting the existing Ashland distribution business will be transferred to the new organization; approximately 2,000 employees

³ The parties stipulated that the information contained in G.C.Exhs. 46 and 48 was shared between agents of Ashland and consultants of Nexeo acting in the course and scope of their representative capacities on behalf of Nexeo (Jt.Exh. 1, ¶ 2, 5, 7).

across North America, Europe and China.⁴

Finally, Nexeo asserts, without any reference to the record, that, “the APS gave Nexeo the right to make material, substantial and significant changes to the employees terms and conditions of employment.” (Resp.Ans.Br. p. 4). That is also not true. Nothing in the APS put the employees on notice that Nexeo intended “to make material, substantial and significant changes” to the terms and conditions of their employment. In fact, with respect to the major unilateral changes challenged in this proceeding – the slashing of the employees’ retirement and health insurance plans – the APS expressly stated that the employees would continue to receive these benefits under plans “that are substantially comparable in the aggregate to those provided by Ashland” (G.C.Exh. 6, p. 57 (Section 7.5(d) of the APS).

II. The Company’s Reliance on Spruce Up Should Be Rejected

In its primary Brief to the Board (Local 705 Br. pp. 43-45), Local 705 explained in detail why Nexeo was a “perfectly clear” successor to Ashland Distribution under the Supreme Court’s controlling decision in NLRB v. Burns Security Services, 406 U.S. 272, 294-295 (1972), and under the Board’s consistent application of the holding of Burns in such cases as Elf Atochem North America, Inc., 339 NLRB 796, 807 (2003); DuPont Dow Elastomers, LLC, 332 NLRB 1071, 1074 (2000), enfd. 296 F.3d 495 (6th Cir. 2002); Canteen Company, 317 NLRB 1052, 1054 (1995), enforced, 103 F.3d 1355 (7th Cir. 1997); Helnick Corp., 301 NLRB 128, 128, n. 1 (1991); Fremont Ford, 289 NLRB 1290, 1296 (1988); Starco Farmers Market, 237 NLRB 373, 373 (1978); and

⁴ In addition to these Nexeo approved statements, the bargaining unit employees were also aware of Nexeo’s contractual promise to offer all of them employment as a result of Union representative Neil Messino’s meetings with the employees on December 13 and 19, 2010, and January 4, 2011, to discuss the APS (Tr. 106-110, 247-248, 304-309, 366-368).

C.M.E., Inc., 225 NLRB 514, 514-515 (1976). In its primary Brief, Local 705 also explained why the facts and the holding in Spruce Up Corporation, 209 NLRB 194 (1974), enforced, 529 F.2d 516 (4th Cir. 1974), also support a finding that Nexeo was a “perfectly clear successor” to Ashland Distribution (Local 705 Br. pp. 45-52).

At pages 6-7 of its Answering Brief, Nexeo cites six post-Spruce-Up decisions of the Board for the proposition that “a successor’s bargaining obligation attaches when it communicates plans to offer the 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.” (Resp. Ans. Br. P. 6). None of the Board decisions cited by Nexeo supports its claim that the various opinions in Spruce Up altered the clear language of the Supreme Court’s decision in Burns. Each of the Board cases cited by Nexeo applies the “perfectly clear” doctrine in complete accordance with its formulation by the Supreme Court in Burns. None of them supports the Company’s arguments.

Addressing each of the six cases on which Nexeo relies in its Answering Brief:

- In Ridgewell’s, Inc., 334 NLRB 37 (2001), enforced, 38 Fed.Appx. 29 (D.C.Cir. 2002), the respondent purchaser announced at the outset its intention to change terms and conditions, even before it finalized its contract to purchase the seller’s business. Because the changes were announced before the purchaser announced its intention to keep all of the predecessor’s employees, the purchaser was found to have been a “successor,” but not a “perfectly clear successor.” In the present case, Nexeo stated in the APS that it would offer employment to all of the predecessor’s employees with benefits substantially comparable in the aggregate to those under the existing benefit plans, and did not announce that it planned to drastically reduce those benefits until months later.
- In Dupont Dow Elastomers LLC, 332 NLRB 1071 (2000), enforced, 296 F.3d 495

(D.C.Cir. 2002), the Board found that the purchaser was a “perfectly clear successor.” In doing so, the Board articulated the holding of Spruce Up precisely as the Acting General Counsel and the Unions interpret that decision in the present case (332 NLRB at 1073):

Applying those principles in Spruce Up, the Board found that the new employer did not have a perfectly clear plan to retain all of its predecessor’s employees because it announced that it would offer less favorable commission rates simultaneously with its expression of intent to retain the employees.

The Board further stated in Dupont Dow that a successor cannot unilaterally implement initial terms of employment “if, as in this case, the employer has earlier expressed an intent to retain its predecessor’s employees without indicating that employment is conditioned on acceptance of new terms.” 332 NLRB at 1074.⁵

Significantly, the Board in Dupont Dow expressly rejects the interpretation of Spruce Up now argued by Nexeo. The Board in Dupont Dow characterizes this interpretation – which would require a finding that the successor somehow misled the employees – as a uniquely Sixth Circuit interpretation and “more restrictive” than warranted by the decisions in Burns and Spruce Up. See 332 NLRB at 1073 and 1074.

Resco Products, Inc., 331 NLRB 1546 (2000), is not a “perfectly clear” case. The purchaser in Resco told the employees that he was going to make specific changes to the predecessor’s pension and vacation policies, at the same time he first announced that he was offering employment to all of the predecessor’s employees. 331 NLRB at 1549-1550. The Board held, “Consistent with the

⁵ In support of this statement, which should be determinative of the outcome of the present case, the Board cites Canteen Company, 317 NLRB 1052 (1995), enforced, 103 F.3d 1355 (7th Cir. 1997); Fremont Ford, 289 NLRB 1290 (1988); and Roman Catholic Diocese of Brooklyn, 222 NLRB 1052 (1976), enf. denied in relevant part sub nom. Nazareth Regional High School v. NLRB, 549 F.2d 873 (2nd Cir. 1977), each of which supports the Acting General Counsel’s and Local 705’s understanding of the “perfectly clear” doctrine.

Court's statement [in Burns], the Board holds that, when a successor announces new terms before, or when it extends employment to the predecessor's employees, it is not "perfectly clear" that the successor intends to employ all of the unit employees, since some or even most of them may choose not to work under the new terms." 331 NLRB at 1549. In the present case, Nexeo announced its intention to offer employment to all of the unit employees months before it announced its intention to substantially reduce their pension and medical plans.

The same scenario occurred in Planned Building Services, Inc., 318 NLRB 1049 (1995), where the successor employer announced the changes on the same day that it announced its intention to hire all of the predecessor's employees (318 NLRB at 1049), and in Banknote Corp. of America, 315 NLRB 1041 (1994), enforced, 84 F.3d 637 (2d Cir. 1996), where "simultaneous with its stated intention to retain the predecessor's employees, the respondent announced new terms and conditions of employment." 315 NLRB at 1043.

Finally, Henry M. Hald High School Assn., 213 NLRB 415 (1974), is a transition case. The administrative law judge's decision in Hald was issued before the Board's decision in Spruce Up, supra, and relied primarily on the Supreme Court's decision in Burns. The Board's decision in Hald, issued after its decision in Spruce Up, found that the successor was not a "perfectly clear successor," because the assurances given to the employees with respect to employment by the successor "were accompanied by statements that the Sisters would offer employment only on the basis of different terms and conditions of employment from those previously offered by Hald." 213 NLRB at 415.

Charging Party has not found a single Board case which supports the proposition argued by Nexeo in this case. Nexeo's argument is clearly contrary to the Supreme Court's holding in Burns. It is not supported by the facts and holding in Spruce Up, where, unlike the present case, the

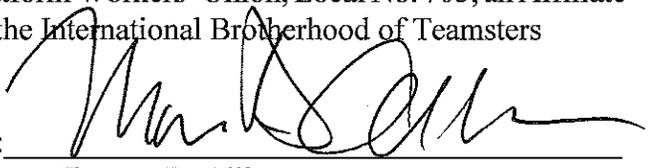
successor announced its intention to hire the predecessor's employees at the same time it announced that the employees would be working under different terms and conditions of employment. Nexeo's argument is expressly rejected by the Board in the decisions cited at pages 43-45 of Local 705's primary brief. And Nexeo's argument is not supported by any of the six Board decisions that it cites at pages 6-7 of its Answering Brief. Nexeo's argument – that it did not become a “perfectly clear successor” when it unambiguously stated its intention to offer employment to all of Ashland Distribution's employees with benefit plans that would be substantially comparable in the aggregate to the plans in effect at Ashland – is directly contrary to Burns and has no support in Board case law.

CONCLUSION

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

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

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the foregoing Reply Brief of Local 705 in Reply to the Answering Brief Filed by Respondent Nexeo Solutions, LLC, on the following parties of record by e-mail on December 13, 2012:

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