

**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 REPLY BRIEF TO THE  
ACTING GENERAL COUNSEL'S ANSWERING BRIEF**

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## I. INTRODUCTION

None of the arguments the General Counsel<sup>1</sup> makes in his brief answering Nexeo's exceptions overcome the Company's demonstration in its earlier briefs of the errors the ALJ made. In this brief, Nexeo cements that conclusion.

## II. ARGUMENT

### A. The General Counsel Mischaracterizes And Misinterprets The APS

The General Counsel attempts to counter Nexeo's showing that the terms of the APS did not cause the Company to become a perfectly clear successor by again mischaracterizing, as he did in his brief in support of his exceptions, Nexeo's obligations under the APS. (GCAB pp. 1-6).<sup>2</sup> In its brief answering his exceptions, Nexeo contrasts the General Counsel's mischaracterization of the terms of the APS with the words the APS uses. The Company demonstrates that the actual words gave it the right to make material, substantial and significant changes to employees' terms and conditions of employment. As such, those words put anyone who read the APS on notice that changes would be forthcoming, precluding the APS from being interpreted to make Nexeo a perfectly clear successor.<sup>3</sup> (NAB pp. 30-35).

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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" or the Union; Administrative Law Judge William G. Kocol is referred to as the "ALJ"; references to the ALJ's decision and recommended order are abbreviated "ALJD p. \_\_"; the Agreement of Purchase and Sale between Ashland and Nexeo is referred to as the "APS."

<sup>2</sup> References to the General Counsel's answering brief to Nexeo's exceptions are abbreviated, "GCAB p. \_\_"; references to the General Counsel's brief in support of his exceptions are abbreviated, "GCBSE p. \_\_"; references to Nexeo's answering brief to the General Counsel's exceptions are abbreviated, "NAB p. \_\_"; and references Nexeo's brief in support of its exceptions are abbreviated, "NBSE p. \_\_."

<sup>3</sup> Nexeo's lead argument on why the General Counsel's APS-based theory fails is that it is missing the essential element of proof under *Spruce Up Corp.*, 209 NLRB 194, (1974), *enforced*, 529 F.2d 516

The General Counsel advances a number arguments that he contends show Nexeo is mistaken that Section 7.5(d) of the APS obligated it to provide benefits under plans substantially comparable in the aggregate to plans sponsored by Ashland, but not ones sponsored by union-affiliated trusts to which Ashland contributed. The arguments, however, are for naught. The reason is that Nexeo's analysis establishes that, upon measuring the terms of the APS against Board precedent on what constitutes a material, substantial and significant change, the APS gave the Company the right to make such changes, regardless of whether the General Counsel's or the Company's reading of the APS is credited. (NAB pp. 30-35).

Even if not deemed for naught, the General Counsel's attempt to discredit Nexeo's interpretation of its own agreement misses the mark. Nexeo's explanation in its earlier briefs of the import of the relevant provisions of the APS reveals the flaws in the General Counsel's interpretation. The Company has four points to add here.

First, the General Counsel again misreads the APS in arguing that Section 7.5(d) of the agreement obligated Nexeo to offer employees "benefits" substantially comparable in the aggregate to those "provided by Ashland." (GCAB p. 2) (emphasis in original). Section 7.5(d) says Nexeo will provide "employee benefits . . . under plans, programs and arrangements that are substantially comparable in the aggregate to those provided by Ashland."<sup>4</sup> The words "provided by Ashland" modify the words "plans, programs, and arrangements," not the word

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(4<sup>th</sup> Cir. 1975), that the Company communicated the terms of the APS to either the unions or the employees prior to informing them 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. (NAB pp. 26-30). Because it is undisputed that Nexeo did not communicate the terms of the APS to the unions or the employees prior to that time, the Board, thus, may reject the General Counsel's APS-based theory without even considering the legal import of those terms.

<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 \_\_\_."

“benefits.” The distinction is significant because it reinforces Nexeo’s showing that the APS obligated it to model its benefit plans after those sponsored by Ashland, not ones sponsored by union-affiliated trusts, which the Company could not duplicate in any event.

Second, there is no evidentiary support whatever for the General Counsel’s argument that Nexeo and the unions “understood that the plans bargained for by Local 705 and Local 70 were plans ‘provided by’ Ashland under Section 7.5(d)” of the APS. (GCAB p. 3). On the contrary, the terms of the APS, the Company’s offer letters and the testimony of consultant John Hollinshead establish that Section 7.5(d) did not impose, and the Company never treated it as imposing, an obligation to provide benefits substantially comparable in the aggregate to those provided under union-affiliated, multi-employer benefit plans. (GCX 12-13; REX 30; Tr. 416-437). The General Counsel’s argument is predicated upon a misguided inference that is derived from the fact that in pre-close negotiations Nexeo and the unions compared the Company’s retirement plan to the union-affiliated, multi-employer pension plans in which the employees participated as Ashland employees. He finds it telling that they did not compare Nexeo’s plan to what he refers to as Ashland’s non-union plans. The illogic of his position is manifest. Nexeo and the unions compared the Company’s retirement plan to the union-affiliated pension plans because those were the plans, not Ashland’s 401(k) plan, in which the employees participated. In short, the General Counsel confuses attempts by the Company to persuade the unions to accept its retirement plan as an indication of what the APS required – a subject that never even came up in pre-close negotiations.

Third, the General Counsel falls well short of the mark in arguing that Schedules 5.19(a) and 7.5(d) of the APS, along with the APS’ definition of the term “Seller Benefit Plan,” provide support for his contention that the reference in Section 7.5(d) to plans provided by Ashland

includes union-affiliated, multi-employer benefit plans to which Ashland contributed. His argument is undone this time by not only what the APS says but by what it does not say. The Ashland plans to which reference is made in Section 7.5(d) are those “provided by Ashland . . . as expected to be in effect on January 1, 2011, as set forth on Schedule 7.5(d).” (GCX 6). Schedule 7.5(d) only lists plans sponsored by Ashland. (GCX 27). That the schedule is captioned “Changes to Seller Benefit Plans” does not signify, contrary to the General Counsel’s argument, that the schedule serves as an update to Schedule 5.19(a), which, in turn, means the plans to which reference is made in Section 7.5(d) are all those listed in Schedule 5.19(a), as modified by Schedule 7.5(d). The drafters of the APS have to be given more credit than that. If Nexeo and Ashland intended for the plans to which reference is made in Section 7.5(d) to include those falling within the scope of the definition of the term “Seller Benefit Plan” and listed on Schedule 5.19(a), they would have said so. That they did not means Section 7.5(d) does not include all those plans.

Lastly, the General Counsel misses the point behind Nexeo’s contention that Section 7.5(s) of the APS is relevant to an assessment of the Company’s obligations under the APS. Section 7.5(s) provides 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...” This provision precludes a non-party from asserting a third-party beneficiary claim based upon an allegation that the APS confers a right upon the non-party. As such, it bars a non-party from pursuing a claim based upon an interpretation of the APS that conflicts with the parties’ intent. And that is the point. The General Counsel’s APS-based claim is predicated upon an interpretation of the APS that conflicts with Nexeo’s and Ashland’s intent, contrary to

the spirit, if not the letter, of Section 7.5(s). The Board should therefore reject his interpretation. *Cf. United Steelworkers v. Rawson*, 495 U.S. 362, 374 (1990); *Unova, Inc. v. Acer Inc.*, 363 F.3d 1278, 1281-1282 (Fed. Cir. 2004); *Resolution Trust Corp. v. Kemp*, 951 F.2d 657, 662-663 (5th Cir. 1992).

**B. Nexeo Lawfully Implemented The Initial Employment Terms It Established**

The General Counsel devotes most of his brief to responding to the arguments Nexeo makes in support of its contention that the ALJ erred in finding that the Company unlawfully implemented its employment policies in place of, in Willow Springs, terms of the Local 705 CBA and, in Fairfield, Ashland practices. None of his contentions, however, overcome Nexeo's showing that, as an ordinary successor that had exercised its right to set initial terms and conditions of employment, the Company (a) provided the unions with notice of and an opportunity to bargain over those terms, and (b) lawfully implemented the terms upon commencing operations.

Despite the attention that he gives to responding to Nexeo's arguments, the General Counsel does not confront three of the most important points the Company makes in demonstrating that the ALJ erred. The first point he avoids involves the effect that the initial employment terms the Company announced in its offer letter had on the status quo from which it would bargain with the unions. Nexeo's position is that the terms in the letter established the status quo. The Company bases its position on the Supreme Court's determination in *NLRB v. Burns Int'l Security Services*, 406 U.S. 272, 294 (1972) that the initial employment terms unilaterally established by Burns could not be said to have changed any pre-existing terms because Burns had no prior relationship with the bargaining unit and, prior to commencing operations, no outstanding employment terms from which a change could be inferred. The General Counsel not only fails to discuss this aspect of *Burns*, he does not address the

significance of *Burns* at all.

The second point that the General Counsel fails to address involves the new status quo that the offer letter created. Nexeo's position is that, because the offer letters expressly stated that the Company was not adopting as initial employment terms any of the provisions contained in any current or expired Ashland labor agreement, the status quo from which the Company bargained with the unions did not include, in Fairfield, any of the terms contained in the Local 70 CBA and, in Willow Springs, any of the terms contained in the Local 705 CBA. The Company contends that the status quo was made up instead of the employment policies by which Nexeo indicated in the offer letter employees would be covered, excluding any practices that were inconsistent with its policies. The General Counsel largely ignores the terms outlined in the offer letter and proceeds as if they do not exist in constructing his arguments, effectively conveying that he has no answer to Nexeo's argument that they established a new status quo.

The third point that the General Counsel bypasses involves the significance of the pre-close collective bargaining negotiations that the Company had with the unions. The Company's position is that the unions had ample opportunity at the negotiating sessions to bargain over the employees' initial employment terms. The General Counsel, however, chooses not to discuss that. Instead, he faults the Company for not providing the unions with notice of the specific terms it was adopting that differed from those under which the employees worked for Ashland. His position is both factually and legally flawed.

From a factual perspective, the seniority-based dispatch and layoff practices in issue in Fairfield were linked to terms contained in the Local 70 CBA, and the vacation, guaranteed pay and overtime provisions in issue in Willow Springs were contained in the Local 705 CBA. As such, they were not included among the terms outlined in the offer letter – they were erased

without ever having become a Nexeo term. The unions knew that. They also knew that Nexeo policies were slated to be the substitute. Nexeo made each union aware in negotiations that, if a complete collective bargaining agreement were not reached before the closing, the Company was going to implement the terms contained in the offer letter, i.e., Nexeo benefit plans and employment policies. Human Resources Manager Paul Fusco informed Local 70 Representatives Dominic Chiovare and Bob Aiello of that verbally during negotiations and in writing after the parties' bargaining session on March 29, 2011. (Tr. 997; REX 38). Nexeo Consultant John Hollinshead informed Local 705 Representative Messino and the Local 705 bargaining team of that at each bargaining session. (Tr. 468-469). In negotiations with Local 705, the Company also proposed replacing various terms contained in the Local 705 CBA with Nexeo policies, and rejected an offer from Local 705 to allow it to implement contract proposals on which a tentative agreement had been reached. (GCX 20; Tr. 545-546). Those actions left no room for Local 705 to doubt that, if a complete agreement were not reached, Nexeo policies would go into effect. Both unions, thus, were on notice that, if they failed to reach an agreement with the Company, Nexeo policies would go into effect when the Company commenced operations. In these circumstances, to the extent that the unions did not know what the policies said, it was incumbent upon them to ask.

From a legal perspective, the General Counsel's position does not survive scrutiny under the aspect of the Supreme Court's decision in *Burns* discussed earlier. To argue, as the General Counsel does, that Nexeo unlawfully changed the employees' Ashland-based terms of employment by failing to provide the unions with notice of and an opportunity to bargain over the precise terms it implemented is to ignore that the offer letter expressly provided that the Company was not adopting the Ashland-based terms. As *Burns* instructs, because the Company

did not adopt those terms, it could not have unlawfully changed them by implementing different ones. That fact distinguishes this case from the cases that the General Counsel cites in support of his position. In each of the cases he cites, the successor had not made it known prior to commencing operations that it was not adopting the employment terms that it was found to have unlawfully changed. Two other significant facts also distinguish this case from the ones on which the General Counsel relies. One is that, unlike here, the successor in the cases he cites unilaterally implemented the new terms after it had taken over the business, in some instances well after it had done so. The other is that in none of the cases cited by the General Counsel did the successor engage in negotiations with the union before commencing operations. The cases on which the General Counsel relies, thus, are inapposite and fail to overcome the Company's showing that under the teachings of *Burns*, the Company did not unilaterally change any pre-existing policies but instead lawfully implemented the initial terms that it established.

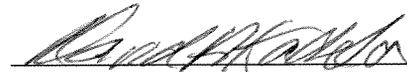
**C. Nexeo Timely Responded To Local 705's Information Requests**

The General Counsel does not present any arguments that effectively counter Nexeo's showing that the ALJ erred in finding that the Company failed timely to provide Local 705 with copies of the plan document for its 401(k) plan and the summary plan description for its health insurance plan. He merely repeats the facts surrounding Local 705's requests for the documents and the Company's responses to the requests, which are not in dispute, and argues that the ALJ correctly found that the documents were relevant, subject to disclosure, and untimely provided. His conclusory analysis falls short. As Nexeo demonstrates in its brief in support of its exceptions, the facts show that the Company produced both documents within a little over two months from the date Local 705's request for them should be measured and, under the circumstances presented, the delay, to the extent it can be construed as such, was not unreasonable.

### III. CONCLUSION

For all of the foregoing reasons and the reasons set forth in its exceptions and its brief in support of its exceptions, Nexeo respectfully requests that the Board reverse each finding the ALJ made that the Company violated the Act, and issue an order dismissing the complaints in their entirety.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of December 2012, I served the foregoing Brief upon the following via email:

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