Nexeo Solutions, LLC *and* Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70 of Alameda County, affiliated with The International Brotherhood of Teamsters. Case 20–CA–035519[1]

July 18, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The principal issue in this case is whether the Respondent is a "perfectly clear" successor with an obligation to bargain with the union that represented unit employees at its Fairfield, California facility before imposing initial terms and conditions of employment.[2]

The judge found that the Respondent, although a successor employer, was not a "perfectly clear" successor and, accordingly, did not violate the Act by unilaterally establishing initial terms and conditions of employment for the unit employees.[3] For the reasons set forth below, we disagree.

I. FACTS

For approximately 18 years, the Union represented a unit of warehouse employees, material handlers, and drivers at Ashland Distribution's Fairfield, California facility, which is the only facility involved in this case.[4] Pursuant to a Purchase and Sale Agreement (Purchase Agreement) dated November 5, 2010, the Respondent purchased the assets of Ashland on March 31, 2011,[5] and on April 1 began operating the business in basically unchanged form. The Respondent retained all of the unit employees at the Fairfield facility without a break in service. However, on and after April 1, it unilaterally implemented certain changes in their terms and conditions of employment, including discontinuing contributions to the union-sponsored pension fund, moving the employees to its 401(k) plan, and providing different health benefits.

[1] On April 24, 2014, the Regional Director for Region 13 granted the request of Charging Party Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union, Local No. 705, an Affiliate of the International Brotherhood of Teamsters, to withdraw the unfair labor practice charges in Cases 13-CA-046694 and 13-CA-067072 because it had entered into a non-Board settlement with the Respondent that resolved those charges. The case caption has been amended accordingly.

[2] On August 30, 2012, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs. The General Counsel and the Respondent filed answering briefs and reply briefs. The Charging Party joined the General Counsel's answering brief to the Respondent's exceptions. In addition, pursuant to *Reliant Energy,* 339 NLRB 66 (2003), the Charging Party filed two letters calling the Board's attention to recent case authority, and the Respondent filed a letter in opposition. The American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) and Service Employees International Union (SEIU) filed a joint amicus brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order, to amend his remedy, and to adopt his recommended Order as modified and set forth in full below.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Union has excepted to some of the judge's evidentiary rulings. It is well established that the Board will affirm an evidentiary ruling of an administrative law judge unless that ruling constitutes an abuse of discretion. See *Aladdin Gaming, LLC*, 345 NLRB 585, 587 (2005), petition for review denied sub nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008). After a careful review of the record, we find no abuse of discretion in any of the challenged rulings.

We have amended the judge's Conclusions of Law and remedy consistent with our findings herein. We have also modified the judge's recommended tax compensation and Social Security reporting remedy in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

We shall modify the judge's recommended Order to conform to our findings, to our amended remedy, and to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

[3] See *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). In *Burns*, the Supreme Court held that a successor is not bound by the substantive terms of a collective-bargaining agreement negotiated by the predecessor and is ordinarily free to set initial terms of employment unilaterally. However, the Court recognized an exception to this rule where "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." Id. at 294–295. The Board interprets the "perfectly clear" exception of *Burns* as requiring a successor to refrain from unilaterally changing initial terms of employment where it expresses a desire to retain its predecessor's employees without making it clear that employment will be conditioned on acceptance of new terms. *Spruce Up Corp.,* 209 NLRB 194 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975)*; Canteen Co.,* 317 NLRB 1052, 1053–1054 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997).

[4] The most recent collective-bargaining agreement between Ashland and the Union had effective dates of December 1, 2008, to November 30, 2013.

[5] All dates are in 2011 unless otherwise indicated.

The General Counsel contends that it was perfectly clear when the Respondent entered into the Purchase Agreement that the Respondent intended to retain all of Ashland's employees, and that the Respondent therefore violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union to agreement or impasse over the unit employees' initial terms and conditions of employment. The General Counsel further alleges that even assuming the Respondent was not a "perfectly clear" successor on the basis of the Purchase Agreement alone, communications to the unit employees regarding the sale rendered the Respondent a "perfectly clear" successor.

A. The Purchase Agreement

As found by the judge, the terms of the Purchase Agreement make clear as a factual matter that the Respondent planned to retain all of Ashland's employees. The Respondent committed under the terms of the Purchase Agreement to "make offers of at-will . . . employment to the Employees . . . at least thirty (30) days prior to the Closing Date" (sec. 7.5(c), "Offers of Employment"), and the Purchase Agreement expressly provides that the transaction "shall not result in the severance of employment of any employee" (sec. 7.5(f), "Severance Obligations"). Furthermore, the Agreement lists by name all of the employees of Ashland, including the unit employees at the Fairfield facility, as "Employees" to whom the Respondent was required to offer employment pursuant to section 7.5(c).[6] Finally, the Respondent committed, for a period of 18 months after the closing date, to "provide to each Transferred Employee (i) a base salary or wages no less favorable than those provided immediately prior to the Closing Date and (ii) other employee benefits, variable pay, incentive or bonus opportunities under plans, programs and arrangements that are substantially comparable in the aggregate to those provided by Ashland." (Sec. 7.5(d), "Continuation of Compensation and Benefits".)

B. The Communications Regarding the Sale

Consistent with the terms of the Purchase Agreement, beginning in early November 2010, the unit employees learned that the Respondent intended to retain Ashland employees and continue their compensation and benefits.[7] This information was widely disseminated to employees through documents posted on bulletin boards, placed in employee mailboxes, emailed, and/or posted on Ashland's company-wide intranet system known as "Firsthand." In keeping with the requirements of the Purchase Agreement, the communications were vetted among Ashland and Respondent personnel before they were disseminated to employees.[8]

One of the first such communications was a November 7, 2010, email regarding the sale from then-Ashland President Robert Craycraft titled, "Creating a New Course for Ashland Distribution."[9] In the email, Craycraft announced the pending sale and stated, in relevant part, "In total, we anticipate approximately 2,000 Ashland Distribution employees and dedicated resource group and supply chain partners will transfer to the new business. . . . I know that I want to go forward, into the future, with all of you. You are a great team, and I look forward to starting this new chapter with you."[10] The email noted that additional information regarding the sale would be provided in an "Employee Q&A" posted on Firsthand.

On November 8, Ashland posted the "Employee Q&A" referenced in the November 7 email on Firsthand

[6] Also on this list were many of Ashland's managers including, as relevant here, Robert Craycraft and Paul Fusco. (Schedule 7.5(a).)

[7] Although the communications, discussed below, were consistent with the obligations established under the Purchase Agreement, there is no evidence that the Union or the unit employees were otherwise apprised of the specific terms of the Purchase Agreement until the Union obtained a copy of the Agreement in March 2011.

[8] At Sec. 11.7, "Public Disclosure," the Purchase Agreement states that "No communication, release or announcement to the public or to employees . . . shall be issued or made by any party without the prior consent of the other party . . . provided, however, that each of the parties may make internal announcements to their respective employees that are consistent with the parties' prior public disclosures regarding the Contemplated Transactions after reasonable prior notice to and consultation with the other parties."

The Respondent and the General Counsel stipulated that certain information contained in written communications to the unit employees regarding the sale was shared between agents of Ashland and individuals hired by the Respondent to provide consulting services in connection with the transaction, while those individuals were acting in the scope of their representative capacities on behalf of the Respondent. The stipulations and documentary evidence also establish that the Respondent's consultants were actively involved in reviewing and editing Ashland's communications to its employees regarding the sale.

[9] Ashland distributed the November 7 email to the unit employees in hard copy through their mailboxes at the Fairfield facility. The parties stipulated that Ashland shared the email with the Respondent's consultants around the time it was created.

[10] This message was reiterated in another document that was posted on the bulletin board around the same time, titled, "AD NewCo elevator speech," which stated in relevant part, "All individuals currently dedicated to supporting the existing Ashland distribution business will be transferred to the new organization; approximately 2,000 employees across North America, Europe and China." The record does not reveal whether the "AD NewCo elevator speech" document was shared with the Respondent's consultants.

and on the bulletin board at Fairfield.[11] The Q&A stated in relevant part:

- "What is the overall size of the Ashland Distribution business? . . . The business comprises approximately 2,000 employees."
- "Will Ashland Distribution's current management team remain with the business? Yes, the current management team will transfer with the business."
- "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 people and various support partners will continue to work from their current locations and perform similar roles and functions."
- "Does the newly independent company anticipate any changes to compensation and/or benefits? Under the terms of the agreement, for at least 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."
- "[T]he structure of the agreement between Ashland and the newly independent company includes the transfer of assets, facilities and people."[12]

The message that the Respondent planned to retain all of Ashland's employees was reinforced in subsequent communications. In mid-November, Ashland posted a document titled, "Talking Points for Customers" on the employee bulletin board in Fairfield reaffirming that "[a]ll current AD employees are staying with the business."[13] Also in mid-November 2010, Craycraft announced a contest to name the new company and provided employees with a contest entry form that stated, "As a 'founding' employee of the new Distribution Company, we'd like to solicit your ideas for our new company name, tagline and colors."

About December 6, 2010, Ashland posted a second Q&A on Firsthand and otherwise made it available to employees at Fairfield. The Q&A began: "Following are responses to employee questions sent in to the 'Ask Bob [Craycraft] mailbox,'" and it went on to state, in relevant part:

- "How will the pending sale of Ashland Distribution affect staffing in the Resource Groups, e.g., Corporate Real Estate, Tax, Law, etc? . . . Over 2,000 employees have already been notified that they will transfer to the new company on the day after the sale closes."
- "Will employees transferred to the new distribution company retain their service time with Ashland? Yes, TPG has agreed to recognize service time."[14]

Beginning in mid-December, Ashland and the Respondent distributed a newsletter series titled, "Transition Update." Each Update began with a cover letter from Craycraft. Ashland posted the first update on Firsthand and on the employee bulletin board at the Fairfield facility about December 16, 2010. The cover letter from Craycraft began, "I am very excited about becoming a stand-alone company and hope that you are, too." An "Employee FAQs" section included the following exchange: "When will we get our new badges and business cards? The goal is to provide new ID badges for all Ashland Distribution employees by Day One. . . . The badges will identify you as employees of the new company."

On January 13, Ashland employees participated in a town hall meeting regarding the sale.[15] Employee Eric Schieber testified that Craycraft announced that he had been asked to take on the role of chief commercial officer for the Respondent and that "he was excited to be moving on with us and we should be just as excited; that jobs weren't going to be cut; that, in fact, [there was] talk

[11] The evidence establishes that the November 8 Q&A was shared with the Respondent's consultants no later than December 2, 2010.

[12] Also on November 8, 2010, then-Ashland Director of Human Resources Paul Fusco wrote Local 70 Business Agent Robert Aiello to inform him that Ashland was being sold to the Respondent. Attached was another letter, also dated November 8, addressed to "Dear Valued Customer" from Craycraft, announcing the sale and providing assurances that the transaction would be "seamless" with "[t]he same great people . . . provid[ing] the same great service." Ashland shared the contents of the "Dear Valued Customer" letter with the Respondent's consultants around the time of its creation. The record does not reveal whether Fusco's letter to Aiello was shared with the Respondent's consultants.

[13] The record does not reveal whether Ashland shared the "Talking Points for Customers" with the Respondent's consultants.

[14] During the transition, the Respondent changed its name from TPG Accolade, LLC, to Nexeo Solutions, LLC.

[15] Fairfield unit employees participated in the meeting by telephone conference.

about growing the business and actually adding more jobs."[16]

Additional Transition Updates were posted on January 14, February 11, February 28, March 11, and March 25. The February 11 update informed employees that they would soon be receiving offers of employment in the mail. It stated, among other things:

- By signing the offer letter, you will be grabbing hold of an amazing opportunity for growth. I have already signed my letter and I hope you will join me.

- We are aware that benefits and compensation will be an important consideration. So within the offer letters package, you will find important details about these topics.

C. Initial Meeting with the Union and Offer Letters to Employees

On February 16, the Respondent, represented by then-Ashland Director of Human Resources Paul Fusco, met with Union Business Agent Robert Aiello and Union President Dominic Chiovare. Fusco announced that he had accepted an offer of employment from the Respondent. He then indicated that the Respondent would be mailing offer letters to the employees the next day. He distributed a draft copy of the letter and reviewed its terms. The letter included the following information regarding initial terms and conditions of employment:

> [W]e think you should know that Nexeo Solutions has not agreed to assume any of Ashland's collective bargaining agreements. We have also chosen not to adopt, as initial terms and conditions of employment, any of the provisions contained in any current or expired collective bargaining agreement to which Ashland is a party. Among other things, what that means is that if you accept this offer, you will not, when you become a Nexeo Solutions employee, participate in the multi-employer pension plan in which you participate as an Ashland employee. Instead, you will be covered at the outset of your employment by Nexeo Solutions' 401(k) plan.

Fusco added that the employees would also be covered under a new health insurance plan that would be comparable to the plan provided by Ashland. Aiello responded that pension and healthcare were bargainable issues, and the Union intended to bargain over all terms and conditions of employment. Fusco stated that the Respondent would conditionally recognize and bargain with the Union prior to closing, if a majority of the Fairfield employees accepted offers of employment.

The Respondent mailed the offer letters on February 17. Attached to the letters was a document titled, "Your New Benefits at a Glance," which provided a description of the Respondent's health insurance, life insurance, and 401(k) plans. The Respondent required that employees accept or reject the offers within 10 days. The Respondent's hiring process entailed no further measures: employees were not required to submit a new job application or new Federal and State withholding forms, undergo interviews or testing, or serve a probationary period. There is no evidence that the Respondent sought applicants from any other source.

By February 23, all of the unit employees had accepted the offer of employment. On February 24, the Respondent extended conditional recognition to the Union. Thereafter, on March 22, 23, and 29, the Union and the Respondent participated in preclose negotiations for a potential labor agreement. However, they were not able to reach an agreement by April 1.

D. Transfer of Ownership and Unilateral Changes

On April 1, the Respondent began operating the business in basically unchanged form. All of the unit employees continued their employment without interruption. Consistent with the offer letters, however, the Respondent implemented changes in the employees' preexisting terms and conditions of employment, including ceasing contributions to the union-sponsored pension fund, moving the employees to a 401(k) plan, and providing different health and vision benefits.[17] The

[16] Ashland and the Respondent jointly prepared a "Key Messages" memo setting forth talking points for use at the town hall meeting. According to the talking points, Craycraft was to state: "In recent weeks, I've mentioned that we are working to make some decisions about our management team. . . . [T]oday's meeting is about sharing some of those decisions and introducing some new team members." Craycraft was then to announce that the Respondent had asked him to take on the role of chief commercial officer, after which he was to introduce David Bradley as the Respondent's new CEO. Bradley was to state, in relevant part: "Bob [Craycraft] remains an integral part of this leadership team" and "the Leadership Team continues to report to Bob." The talking points indicate that Bradley was also to state: "[w]e're not planning job reductions" and "the final details of the Respondent's compensation and benefits program are being worked out." Neither Craycraft nor Bradley testified at the hearing, however, and Schieber, the only witness called to testify about the town hall meeting, did not remember Bradley speaking.

[17] The only changes in health insurance benefits that are alleged to be unlawful are the exclusion by the Respondent of an "Alive and Well

Respondent made additional changes after operations began, including, on April 4, eliminating the practice of using seniority to assign driving routes and, on April 21, eliminating the practices of using seniority to allocate layoff days and of allowing drivers for whom there is no route available to work in the warehouse.[18] Further, although not alleged to be unlawful, in October 2011, the Respondent deposited a lump sum into the 401(k) accounts of employees who were projected to experience a shortfall as a result of moving from the Union-sponsored pension plan to the Respondent's 401(k) plan, in amounts ranging from $273.88 to $28,757.89.

II. DISCUSSION

A. The "Perfectly Clear" Successorship Doctrine

The Board's successorship doctrine is "founded on the premise that, where a bargaining representative has been selected by employees, a continuing obligation to deal with that representative is not subject to defeasance solely on grounds that ownership of the employing entity has changed." *Hudson River Aggregates, Inc.,* 246 NLRB 192, 197 (1979), enfd. 639 F.2d 865 (2d Cir. 1981), citing *Burns*, 406 U.S. at 279. Consistent with this view, a new employer that continues its predecessor's business in substantially unchanged form and hires employees of the predecessor as a majority of its work force is a successor with an obligation to bargain with the union that represented those employees when they were employed by the predecessor. *Burns*, 406 U.S. at 280–281; *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987).

In *Burns*, the Supreme Court held that a successor is not bound by the substantive terms of a collective-bargaining agreement negotiated by the predecessor and is ordinarily free to set initial terms of employment unilaterally. 406 U.S. at 281–295. The Court explained that the duty to bargain will not normally arise before the successor sets initial terms and conditions because it is not usually evident whether the union will retain majority status in the new work force until after the successor has hired a full complement of employees. Id. at 295. The Court recognized, however, that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit." Id. at 294–295. In those circumstances, the Court stated that a successor is required to "initially consult with the employees' bargaining representative before he fixes terms." Id.

The Board interpreted the "perfectly clear" exception of *Burns* in *Spruce Up*, 209 NLRB 194. In *Spruce Up*, the Board found that a new employer that expressed a willingness to hire its predecessor's employees while at the same time announcing that it would pay a significantly reduced commission rate was not a "perfectly clear" successor. 209 NLRB at 195. Acknowledging that "the precise meaning and application of the Court's caveat is not easy to discern," the Board reasoned that "[w]hen 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" because of the possibility that many of the employees will reject employment under the new terms, and therefore the union's majority status will not continue in the new work force. Id.[19] From this rationale, the Board fashioned the legal standard for determining whether a new employer is a "perfectly clear" successor. The Board stated that the "perfectly clear" exception and the consequent forfeiture of the right to set initial terms "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. The Board was careful to emphasize, however, that it was not "delineating at this time the precise parameters of [the "perfectly clear"] exception." Id.

In subsequent cases the Board clarified that the exception is not limited to situations where the successor fails to announce initial terms before extending a formal invitation to the predecessor's employees to accept employ-

Lab Work" benefit that Ashland had offered, pursuant to which employees could obtain an "Executive Lab Work Panel" for $22 and other lab screenings at some additional cost, and the addition of a new vision care coverage option.

[18] The changes in Ashland's seniority-based route assignment and layoff practices were not part of the initial terms that were set forth in the offer letters and, as found by the judge, the Respondent did not inform the Union or the unit employees of its intent to change those practices. In mid-May, following discussions with the Union, the Respondent restored those practices to what they had been under Ashland.

[19] Although the Court in *Burns*, and the Board in *Spruce Up*, spoke in terms of a plan to retain *all* of the employees in the unit, the Board has subsequently clarified that the relevant inquiry is whether the successor plans to retain a sufficient number of the predecessor's employees to make it evident that the union's majority status will continue. See *Galloway School Lines*, 321 NLRB 1422, 1426–1427 (1996); *Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), enfd. 540 F.2d 841 (6th Cir. 1976), cert. denied 429 U.S. 1040 (1977).

ment. Rather, the bargaining obligation attaches when a successor expresses an intent to retain the predecessor's employees without making it clear that employment will be conditioned on acceptance of new terms. *Canteen Co.,* 317 NLRB at 1053–1054.[20] To avoid "perfectly clear" successor status, a new employer must clearly announce its intent to establish a new set of conditions prior to, or simultaneously with, its expression of intent to retain the predecessor's employees. *Spruce Up,* 209 NLRB at 195; *Canteen,* 317 NLRB at 1052–1054.

B. The Judge's Decision

The judge acknowledged that in the particular facts of this case "it was perfectly clear (as a matter of fact and not as a legal conclusion) that [the Respondent] planned to retain all the employees . . . ." The judge reasoned, however, that under the Board's interpretation of the "perfectly clear" caveat in *Spruce Up*, "there must be at least a finding that a successor employer misled employees into believing their working conditions would remain the same" for the caveat to apply. The judge held that neither the Purchase Agreement nor the communications from Ashland and the Respondent misled employees about working conditions. Rather, he found that the Purchase Agreement and the "totality of the messages that were conveyed" to the unit employees indicated that more information about initial terms would be forthcoming. The judge further found that the Respondent "did, in a timely fashion, provide the employees with the specific details concerning the initial terms" in the form of the February 17 offer letters. Accordingly, the judge found that the Respondent was not a "perfectly clear" successor, and he dismissed the complaint allegations that the Respondent violated Section 8(a)(5) and (1) by unilaterally establishing initial terms and conditions of employment, including discontinuing contributions to the union-sponsored pension fund and moving the unit employees to its 401(k) plan, and providing different health benefits.

However, the judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally eliminating the practice of using seniority to assign driving routes, the practice of using seniority to allocate layoff days, and the practice of allowing drivers for whom there is no route available to work in the warehouse, because those changes were made after the bargaining obligation had already attached and were not a part of the initial terms the Respondent established.

C. Analysis and Conclusions

1. The judge misapplied Board precedent regarding the timing and clarity of a *Spruce Up* announcement

Contrary to the judge, and in agreement with the General Counsel's and Charging Party's contentions on exceptions, we find that the Purchase Agreement, together with the communications to the unit employees in early November 2010, establish that the Respondent was a "perfectly clear" successor, with an obligation to bargain with the Union before establishing or altering initial terms and conditions of employment.[21]

In reaching a contrary conclusion, the judge misapplied well-established Board precedent regarding the timing and clarity of a *Spruce Up* announcement. Most significantly, the judge's reliance on the "totality of communications" to the unit employees, including the February 17 offer letters, to find that the requirements of the "perfectly clear" caveat were not met sharply conflicts with the principle, consistently applied by the Board, that the obligation to bargain commences when a successor expresses an intent to retain its predecessor's employees without making clear that employment is conditioned on acceptance of new terms.[22]

[20] In *Canteen*, the Board found that a successor "effectively and clearly communicated . . . its plan to retain the predecessor employees" by expressing to the union its desire to have the employees serve a probationary period without mentioning any changes in employment conditions and, since as of that date it was perfectly clear that the successor planned to retain the predecessor employees, it "was not entitled to unilaterally implement new wage rates" the next day, during employment interviews. Id., citing *Fremont Ford*, 289 NLRB 1290, 1296–1297 (1988); *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 (2d Cir. 1977).

[21] We thus find it unnecessary to consider the requests of the Union and amici SEIU and AFL–CIO that the Board overrule *Spruce Up*, or the Union's arguments concerning the Respondent's obligations under the Worker Adjustment and Retraining Notification Act and the Age Discrimination in Employment Act.

[22] See, e.g., *Canteen*, 317 NLRB at 1053–1054; *Helnick Corp,* 301 NLRB 128, 128 fn. 1 (1991) (obligation to bargain over initial terms commenced when new employer informed employees that they could expect to be retained without mentioning changes in preexisting terms); *C.M.E., Inc.,* 225 NLRB 514, 514–515 (1976) (obligation to bargain over initial terms commenced when new employer informed the union that it intended to rehire the predecessor's employees without mentioning changes in preexisting terms, rather than on later dates when applications for employment were solicited or when the union and the new employer met to discuss contract revisions); *Roman Catholic Diocese of Brooklyn,* 222 NLRB at 1055 (obligation to bargain over initial terms commenced when the chairman of the new employer's board of trustees expressed an intent to retain the predecessor's employees without mentioning any changes in preexisting terms; obligation was not vitiated when promise to rehire was later disavowed and employees were specifically informed—before formal offers of employment were extended and operations began—that employment would be on new terms and that the new employer "has no intention of being bound by the terms

As the Court of Appeals for the District of Columbia Circuit recognized in *Machinists v. NLRB*, 595 F.2d 664, 674–675 (D.C. Cir. 1978), cert. denied 439 U.S. 1070 (1979), when a successor expresses a willingness to hire its predecessor's employees without mentioning changes in terms and conditions of employment, the employees will place significant reliance on that statement and may forego other employment opportunities. Hence, a duty to bargain over initial terms may properly be imposed upon a successor that displays an intent to employ its predecessor's employees, and only later makes it clear that such employment will be on different terms, on either of two grounds:

> For lack of sufficient time to rearrange their affairs, incumbents might be forced to continue in the jobs they held under the successor employer, notwithstanding notice of diminished terms, and perpetuation of the workforce and as well the representational status of the incumbent union may be assured. Even were that less plain, a bargaining obligation may be essential to protect the employees from imposition resulting from lack of prompt notice.

595 F.2d 675, fn. 49; see also *S & F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354, 359 (D.C. Cir. 2009), where the court explained that "at bottom the 'perfectly clear' exception is intended to prevent an employer from inducing possibly adverse reliance upon the part of employees it . . . lulled into not looking for other work."

The judge further erred in stating that under the Board's interpretation of the "perfectly clear" caveat in *Spruce Up*, "there must be at least a finding that a successor employer misled employees into believing their working conditions would remain the same." This interpretation is at odds with both the express language and the underlying rationale of *Spruce Up*. In *Spruce Up*, the Board held that a new employer is a "perfectly clear" successor if it "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* . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." 209 NLRB at 195 (emphasis added). If either one of those circumstances applies, continuity of the existing work force and of the union's majority status are reasonably certain, and the obligation to bargain is triggered. See, e.g., *Canteen*, 103 F.3d at 1364 (quoting *Machinists,* 595 F.2d at 674–675) (recognizing that the initial bargaining obligation may arise "even when incumbents are not affirmatively led to believe that existing terms will be continued").

and conditions of employment which prevailed" under the predecessor).

2. Application of the "perfectly clear" successor doctrine

Applying these principles to the facts of this case, it was abundantly clear from the outset that the Respondent planned to retain the unit employees. Under the terms of the November 5 Purchase Agreement, the Respondent committed itself to offer employment to all of Ashland's employees. Then, on November 7, 2010, the unit employees were informed that "Ashland Distribution employees . . . will transfer to the new business." There was no mention at that time that the Respondent intended to establish a new set of conditions. To the contrary, the November 7 email was silent regarding terms and conditions of employment, and nothing in the email portended employment under different terms. Under the Board's interpretation of the *Burns'* caveat, therefore, the Respondent became a "perfectly clear" successor, with an obligation to bargain over initial terms, as of November 7, 2010. *Spruce Up*, 209 NLRB at 195; *Canteen*, 317 NLRB at 1053–1054.

Further, although not necessary to our finding that the Respondent was a "perfectly clear" successor, we observe that this conclusion is even more evident when the November 8 Q&A is considered. That Q&A reiterated the message that all or substantially all of Ashland's employees would be retained and added that the Respondent was required, under the terms of the Purchase Agreement, "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." In *Elf Atochem North America,* 339 NLRB 796 (2003), under strikingly similar facts, the Board held that a new employer became a "perfectly clear" successor as of the date the predecessor's employees received a memo stating that the new employer "will provide employment to all of the existing workforce," will recognize their seniority, and "will provide employees with equivalent salaries and [a] comparable health, welfare and benefit package, including pension, savings plan and vacation." Id. at 796, 798. The Board affirmed the judge's finding that the language of the memo stating that wages would be "substantially equivalent" and benefits "comparable" to those provided by the predecessor was "not specific enough to clearly inform employees of the nature of the changes which Respondent intended to institute." Id. at 808. The Board therefore found that the successor's bargaining obligation attached on the date the memo was

disseminated. In so concluding, the Board affirmed the judge's finding that the successor's subsequent announcement of initial terms and conditions of employment in offer letters distributed before operations began came too late to justify the successor's refusal to bargain. Id. at 807 (explaining that a successor "has an obligation to bargain over initial terms of employment when it displays an intent to employ the predecessor's employees without making it clear to those employees that their employment will be on terms different from those in place with the predecessor employer"); *DuPont Dow Elastomers, LLC*, 332 NLRB 1071, 1074 (2000), enfd. 296 F.3d 495 (6th Cir. 2002) ("The Board has consistently found that an announcement of new terms will not justify a refusal to bargain if . . . the employer has earlier expressed an intent to retain its predecessor's employees without indicating that employment is conditioned on acceptance of new terms.").[23]

In sum, we find that the Respondent was obligated to bargain with the Union as a "perfectly clear" successor as of November 7, 2010, when the unit employees were informed that "Ashland Distribution employees . . . will transfer to the new business," which was reaffirmed on November 8, when the unit employees were informed that the Respondent's "intent is to retain Ashland employees" and that the Respondent would provide equivalent salaries and benefits comparable in the aggregate to those provided by Ashland. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by unilaterally establishing initial terms and conditions of employment for the unit employees.

Cases cited by the Respondent and our dissenting colleague do not require a different result. In *Ridgewell's, Inc.*, 334 NLRB 37, 37 (2001), enfd. 38 Fed.Appx. 29 (D.C. Cir. 2002), the new employer, during one of its first contacts with the union and before the hiring process or operations began, told the union that it would utilize the predecessor's employees only on an independent contractor basis. The Board found that the announcement was both "timely" and "substantive, putting the Union on notice that a new set of employment conditions would be in effect." In *Planned Building Services,* 318 NLRB 1049, 1049 (1995), the Board emphasized that "during its very first contact with [the predecessor's] employees, the Respondent both communicated its plan to retain [the] employees and announced that its offer to the employees was based on changed terms and conditions of employment." Id. at 1049. And, because the new employer "stated from the outset that it would be hiring the predecessor's employees pursuant to new terms," the Board held that the new employer was not a "perfectly clear" successor. Similarly, in *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994), enfd. 84 F.3d 637 (2d Cir. 1996), cert. denied 519 U.S. 1109 (1997), the Board found that the new employer was not a "perfectly clear" successor because "simultaneous with its stated intention to retain the predecessor's employees, the Respondent announced new terms and conditions of employment." Finally, in *Henry M. Hald High School Assn*., 213 NLRB 415, 415–416, 419–420 (1974), the Board found that the new employer was not a "perfectly clear" successor because the assurances given to the predecessor's employees with respect to continued employment "were accompanied by statements that the [new employer] would offer employment only on the basis of different terms and conditions" from those in force under the predecessor. In sum, in each of the cases cited by the Respondent, the new employer was found not to be a "perfectly clear" successor because it made a lawful *Spruce Up* announcement that was both *timely* and *clear*.

In contrast, in this case, as discussed above, Ashland's employees were informed on November 7, 2010, that they could expect to be retained, but the Respondent withheld notice of changes in preexisting terms and conditions until February 16, when it met with the Union. The unit employees were thus kept in the dark for more than 3 months regarding the Respondent's intent to strip them of participation in the union-sponsored pension plan and to replace their health care plan. The unconditional retention announcement coupled with the Respondent's failure to clearly announce its intent to estab-

[23] See also *Adams & Associates, Inc.,* 363 NLRB No. 193, slip op. at 3–4, fn. 11 (2016) ("The Board has consistently held . . . that a subsequent announcement of new terms, even if made before formal offers of employment are extended, or before the successor commences operations, will not vitiate the bargaining obligation that is triggered when a successor expresses an intent to retain the predecessor's employees without making it clear that their employment is conditioned on the acceptance of new terms."); *Canteen*, 317 NLRB at 1053–1054; *Starco Farmers Market,* 237 NLRB 373, 373 (1978) ("[W]here the new employer's offer of different terms was simultaneous with the expression of intent to retain the predecessor's employees, the Board has found no duty to bargain over initial employment terms. However, where the offer of different terms was subsequent to the expression of intent to retain the predecessor's employees, the Board has regarded the expression of intent as controlling and has found that the new employer was obligated to bargain with union before fixing initial terms." (internal citations omitted)); *Roman Catholic Diocese of Brooklyn*, 222 NLRB at 1055 (obligation to bargain over initial terms commenced when the chairman of the new employer's board of trustees expressed an intent to retain the predecessor's employees without mentioning any changes in preexisting terms; obligation was not vitiated when promise to retain was later disavowed and employees were specifically informed—before formal offers of employment were extended and operations began—that employment would be on new terms and that the new employer "has no intention of being bound by the terms and conditions of employment which prevailed" under the predecessor).

lish new terms and conditions of employment ensured that the Respondent was able to retain a skilled and experienced work force and avoid labor unrest during the difficult period of the transition. At the same time, however, the employees were lulled into believing that employment conditions would be comparable to those in force under the predecessor and were thus deprived of the opportunity to reshape their personal affairs or seek employment elsewhere.[24]

Moreover, the unit employees in this case were assured in the November 8 Q&A that the Respondent would provide wages "no less favorable than those provided prior to closing" and benefits at least "substantially comparable in the aggregate" to those provided by Ashland. In the words of the judge, given those assurances, "[t]here was little doubt that a majority, if not all, of the employees, would . . . accept employment." Those assurances sharply distinguish this case from those cited by the Respondent, and strongly support the conclusion that the Respondent was a "perfectly clear" successor. Imposing an initial bargaining obligation in these circumstances, where the Union's majority status in the new work force was essentially guaranteed, implements the express mandates of Sections 8(a)(5) and 9(a) of the Act and is entirely consistent with the rationale of *Burns* and *Spruce Up*. See *Burns*, 406 U.S. at 294–295 (recognizing that "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"); *Road & Rail Service*, 348 NLRB 1160, 1162 (2006) (observing that "[t]he *Spruce Up* test focuses on gauging the probability that employees of the predecessor will accept employment with the successor"), citing *Spruce Up*, 209 NLRB at 195; *Machinists*, 595 F.2d at 673 fn. 45 (holding that in applying the *Spruce Up* test "the relevant factor is the degree of likelihood that incumbents will work for the successor").

[24] See *S & F Market Street Healthcare,* 570 F.3d at 359 (holding that "at bottom the 'perfectly clear' exception is intended to prevent an employer from inducing possibly adverse reliance upon the part of employees it . . . lulled into not looking for other work"); *Machinists,* 595 F.2d 674–675 (approving the Board's imposition of a bargaining obligation on the basis that "unconditional retention-announcements engender expectations, ofttimes critical to employees, that prevailing employment arrangements will remain essentially unaltered . . . . [U]nless [the predecessor's employees] are apprised promptly of impending reductions in wages or benefits, they may well forego the reshaping of personal affairs that necessarily would have occurred but for anticipation that successor conditions will be comparable to those in force.").

3. The communications to the unit employees are attributable to the Respondent

The Respondent, joined by our dissenting colleague, contends that it is not responsible for any of the communications to the unit employees before mid-January 2011, and therefore those communications cannot be relied upon to establish that it is a "perfectly clear" successor. We find no merit in this contention.

As discussed, under section 11.7 of the Purchase Agreement, Ashland was required to obtain the Respondent's consent before releasing information regarding the sale to the public. Similarly, Ashland was permitted to release such information to employees only to the extent it was consistent with the parties' prior public disclosures and only after prior notice to and consultation with the other party. The parties stipulated, moreover, that Ashland shared the communications at issue with consultants hired by the Respondent acting in the scope of their representative capacity.[25] Further, the evidence shows that the Respondent's consultants were actively involved in reviewing, editing, and, in some cases, drafting, the communications.[26] Thus, the record establishes that the Respondent had the right to control, and in fact exercised control, over Ashland's communications to the unit employees regarding the sale. Accordingly, we conclude that Craycraft, under whose name most of the communications were issued, acted with actual authority from the Respondent.

This conclusion is reinforced by evidence demonstrating that the Respondent expressly authorized Craycraft to communicate with the unit employees on its behalf. To

[25] As discussed, the parties stipulated that Ashland shared the November 7 email with the Respondent's consultants "at or around the time[] that the document[] . . . w[as] created." The evidence establishes, moreover, that the November 8 Q&A was shared with the Respondent's consultants *no later than* December 2, 2010.

[26] See, e.g., GC Exh. 61 (email from Ashland's senior communications specialist, Linda Maney, forwarding draft December 16 newsletter to five individuals who were stipulated to be the Respondent's consultants, requesting that they "review and advise your approval and or edits" and noting that the document "will ultimately go out in an e-mail newsletter format from Bob Craycraft"); GC Exh. 59 (email from Respondent's consultant to Maney, attaching December 16 newsletter with edits by consultant); GC Exh. 60 (email from Maney to two of Respondent's consultants, with the subject line "Draft Ashland Distribution Newsletter," and stating, "THANK YOU both for all of your help—we make quite a team!!!," and responsive email from consultant referring to "*our* first draft of the Ashland Distribution Newsletter" (emphasis added) and thanking Maney "for your help today"); GC Exh. 64 (email from Maney forwarding draft "holiday message" from Craycraft to five of Respondent's consultants and requesting that they "Please advise at your earliest convenience if you're good with this or if any revisions are required"); GC Exh. 69 (email string exchanging drafts of January 14 Transition Update).

begin, Craycraft's name was included on schedule 7.5(a) as an "employee" to whom the Respondent was required to offer employment pursuant to section 7.5(c) of the Purchase Agreement. In his November 7 email announcing the sale, Craycraft implied that he would continue in his position as a manager for the Respondent, stating: "I am proud to lead this team into the future. . . . . You are a great team, and I look forward to starting this new chapter with all of you." His role in the Company was confirmed by the November 8 Q&A, which stated, "the current management team will transfer with the business." Craycraft then went on to answer questions about the Respondent's future operations, including "Does the newly independent company anticipate any layoffs as a result of the transaction?" and "Does the newly independent company anticipate any changes to compensation and/or benefits?" Contrary to the dissent, it is clear that Craycraft was communicating the Respondent's own plans regarding these matters.[27] A few days later, Craycraft announced a contest to name the new company. The wording of the attached contest entry —"*we'd* like to solicit your ideas for *our* new company name, tagline and colors" (emphasis added)— communicated to employees that Craycraft was already part of the Respondent's management team and that he was serving as a conduit of information from the Respondent. Shortly thereafter, in the December 16 edition of the Transition Update, Craycraft informed employees that "The plan is to announce the new company name by mid-January and then outline a transition plan for use of *our* new name and logo on business cards, building signage, letterhead, invoices, etc." (Emphasis added.) Craycraft then went on to inform employees that the Respondent will "provide new ID badges for *all* Ashland Distribution employees by Day One . . . identify[ing] you as employees of the new company" (emphasis added), that office space moves "will be completed within six months of the closing," and that the Respondent will provide "further instructions on accessing [business software] before Day One."[28]

The Respondent and our dissenting colleague maintain that Craycraft did not speak or purport to speak for the Respondent until the January 13 town hall meeting, when he announced that he had been asked to assume the role of chief commercial officer. However, the evidence discussed above clearly establishes that Craycraft was communicating on the Respondent's behalf well before that date. This conclusion is confirmed by the talking points for the January 13 town hall meeting and by Craycraft's remarks in the January 14 Transition Update. According to the talking points, Craycraft was to open the town hall meeting by stating "In recent weeks, I've mentioned that *we* are working to make some decisions about *our* management team. So, today's meeting is about sharing some of those decisions and introducing some new team members." Craycraft was then to introduce David Bradley as the Respondent's new CEO. Bradley, in turn, was to state "Bob [Craycraft] *remains* an integral part of this leadership team" and "the Leadership Team *continues* to report to Bob." (Emphasis added.)

The leadership team is identified in the January 14 Transition Update. Attached to the Transition Update is an organizational chart on which appears the names of approximately 40 individuals. The first name, at the top of the chart, is Craycraft's, under the title: "Steering Committee."[29] Like the previous Transition Updates, the January 14 Update begins with a message from Craycraft. The message states in relevant part, "In recent weeks, I've mentioned that we are working to make some decisions about our management team. . . . At this Thursday's Town Hall meeting . . . . [I] announced that David Bradley . . . will serve as President and CEO of our future company. . . . David will now join me as we continue to work through transition decisions with . . . the full team." The evidence thus establishes that, prior to January 13, Craycraft did not merely serve as a conduit in the transmittal of information about decisions affecting the Respondent operations; he was actually "an integral part" of the "leadership team" that was responsible for making those decisions.

In sum, based on the record as a whole, we find that the Respondent authorized Craycraft to communicate with the unit employees on its behalf starting in early November, even though he was not yet officially employed by the Respondent. See, e.g., *Advance*

[27] The questions and responses would have been phrased very differently if, as the dissent maintains, Craycraft was merely communicating Ashland's or his own expectations about the Respondent's future operations. For example, rather than "Does the newly independent company anticipate any layoffs as a result of the transaction?" . . . . "[T]he newly independent company's intent is to retain Ashland Employees," the question and response would likely have been something like, "Does *Ashland* anticipate any layoffs as a result of the transaction?" . . . "*Ashland* anticipates that the newly independent company will retain Ashland Employees."

[28] The Respondent's consultants were actively involved in drafting the December 16 newsletter. See fn. 26.

[29] The organizational chart indicates that Craycraft served on the "Steering Committee," which was responsible for providing "overall direction and guidance [and] resolv[ing] critical issues . . . for the separation . . . . [with] support from [the Respondent's consultants] TPG Capital, Deloitte or PricewaterhouseCooper."

Stretchforming International, 323 NLRB 529, 536 (1997) (predecessor's manager was an agent of successor while still employed by predecessor), enfd. in relevant part 208 F.3d 801 (9th Cir. 2000); *Lemay Caring Center,* 280 NLRB 60, 65–67 (1986) (predecessor's manager was an agent of successor when he informed employees of successor's future operational plans, in light of successor's selection of him to continue in a managerial role and its failure to repudiate his actions or to inform employees that he was not speaking on its behalf), affd. mem. sub nom. *Dasal Caring Centers v. NLRB*, 815 F.2d 711 (8th Cir. 1987); *Helnick,* 301 NLRB at 128 fn. 1, 133 (while still employed by predecessor, supervisor had actual authority to speak on successor's behalf with regard to labor relations matters). Compare *Bekins Moving & Storage Co.*, 330 NLRB 761, 761 fn. 1 (2000) (General Counsel failed to establish that predecessor's manager was an agent of the successor where there was no evidence that he had been offered and accepted any position with the successor or had been directed to contact employees on behalf of the successor).

In addition to being responsible for the communications under the doctrine of actual authority, the Respondent ratified the communications by affirming and failing to repudiate them.[30] As discussed, Craycraft communicated with the unit employees on the Respondent's behalf or at least purported to do so, and the stipulations and documentary evidence establish that the Respondent had knowledge of that fact. Nevertheless, the Respondent did not disavow the consistent message running through the communications that the Respondent planned to retain all of Ashland's employees. Instead, it repeatedly approved that message. Moreover, the Respondent benefited from the assurances of continued employment, because they helped to ensure that it was able to retain a skilled and experienced work force, avoid labor unrest, and keep the employees focused on conducting business as usual during the transition. The Respondent's failure to disavow the consistent message in the communications that it planned to retain all of Ashland's employees, its acceptance of the benefits of the communications, and its subsequent affirmative conduct constituted a "ratification" equivalent to an original authorization.[31]

Finally, there is no dispute that Craycraft and Bradley had actual authority to communicate with the unit employees at the town hall meeting on January 13. As discussed, at the town hall meeting, Craycraft confirmed that he had been offered a position as the Respondent's chief commercial officer. He went on to assure employees that no jobs would be lost in the transition. The talking points for the town hall meeting indicate that Bradley also stated that no jobs would be lost.[32] Contrary to the dissent, there was no clear announcement at that time that the Respondent intended to establish materially different terms and conditions of employment.[33] Therefore,

[30] Ratification is defined as "the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority." Restatement of the Law, Third, Agency, Sec. 4.01. If an act is ratified, it is not necessary to establish that the agent acted with actual or apparent authority. Id. comment b. Ratification may be inferred from conduct that indicates consent, including failure to repudiate an act or silence which indicates consent. Id. comment f. Knowing acceptance of the benefits of an act also ratifies the act, even if the principle manifests dissent to becoming bound by the act's legal consequences. Id. comment d.

[31] See *Dentech Corp.*, 294 NLRB 924, 928 (1989); see also *Richlands Textile, Inc.*, 220 NLRB 615, 618–619 (1975) (respondent acquiesced in and ratified by its silence letter of state legislator threatening that the respondent would close its operation in the event of unionization).

[32] The dissent contends that the record does not establish that Craycraft separately told employees that jobs would not be cut. However, employee Eric Schieber, the only witness to testify concerning the town hall meeting, testified that *Craycraft* said, "jobs weren't going to be cut." Tr. 766:10–11; 769:20–23. Contrary to the dissent, Schieber did not recant this testimony or state that he was mistaken. Rather, when shown the talking points memo—which indicates that Bradley, rather than Craycraft, was to make the statements about jobs—Schieber testified that he did not remember Bradley speaking at all and that he "thought it was Craycraft [talking] the whole time . . . ." Tr. at 771:23–24.

[33] Quoting from the talking points memo, the dissent contends that Bradley conveyed the Respondent's intent to set initial employment terms that differed from those provided by Ashland by informing employees at the town hall meeting that the Respondent was "working hard to flesh out final plans for our new company's compensation and benefits program." We reject that argument, for two reasons. First, there is no evidence that the statement on which the dissent relies, or any statement concerning terms and conditions of employment, for that matter, was actually communicated to the unit employees at the town hall meeting. Thus, although the statement is contained in the talking points memo, no testimony or other evidence was offered to establish Bradley's participation in the town hall meeting or the content of his remarks, if any. In this regard, we disagree with our dissenting colleague's assessment of the significance of the parties' stipulation that the talking points memo "was utilized in the Employee Town Hall meeting." The stipulation does not establish that the speakers adhered to the precise language of the memo or that they addressed every talking point in the memo. Had the parties intended to stipulate that the memo was an accurate record of Craycraft and Bradley's statements at the meeting, they could have done so.

Second, even assuming, arguendo, that the statement was communicated to the unit employees exactly as written, it was too vague and inchoate to constitute a valid *Spruce Up* announcement. Notably, it did not contradict the November 8 communication assuring employees that their wages would not be reduced and that their benefits would be substantially comparable. In *Spruce Up* and its progeny, the Board held that, in order to avoid "perfectly clear" successor status, a new employer must "clearly announce its intent to establish a new set of conditions" prior to or simultaneously with its expres-

even assuming we were to accept the Respondent's argument that it was not responsible for the earlier communications, we would still find the Respondent to be a "perfectly clear" successor based on its assurances of continued employment at the January 13 town hall meeting.

4. The Respondent did not meet its bargaining obligation under *Burns*

The Respondent contends that, even assuming it was a "perfectly clear" successor, it discharged any obligation it had under *Burns* by "consulting" with the Union before imposing initial terms.[34] We find no merit in the Respondent's argument. The Supreme Court has often used the terms "consult" and "bargain" interchangeably.[35] Moreover, our decisions have consistently interpreted *Burns* as imposing a requirement that a "perfectly clear" successor bargain with the incumbent union to agreement or impasse before establishing initial terms; no reviewing court has disagreed.[36]

We also reject the Respondent's contention that the parties reached a good-faith bargaining impasse prior to April 1. "The Board has defined impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. Both parties must believe that they are at the end of their rope." *Larsdale, Inc.,* 310 NLRB 1317, 1318 (1993) (internal citations and quotation marks omitted). The burden of proving that an impasse exists falls upon the party asserting such a defense. *North Star Steel Co.,* 305 NLRB 45, 45 (1991), enfd. 974 F.2d 68 (8th Cir. 1992). In considering whether an impasse has been reached, the Board will consider the totality of the circumstances. Such analysis includes the following factors: (1) the bargaining history, (2) the good faith of the parties in negotiations, (3) the length of the negotiations, (4) the importance of the issue or issues as to which there is disagreement, and (5) the contemporaneous understanding of the parties as to the state of the negotiations. *Taft Broadcasting Co.,* 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968).

The first, third, and fifth of these factors support a conclusion that the parties had not reached a valid impasse prior to the Respondent's unilateral implementation of the terms and conditions set forth in its offer letters. The parties did not have a prior bargaining relationship and they were attempting to negotiate an initial collective-bargaining agreement. They met only three times, between March 22 and April 1. At the first meeting, each party presented a full contract proposal, but the discussion focused on the Respondent's desire to replace the Union-sponsored pension plan with a 401(k) plan. The parties discussed noneconomic issues throughout the second meeting and the first half of the third meeting. By midway through the third meeting all noneconomic issues had been tentatively agreed upon. However, the only economic issue that had been discussed up to that point was pensions. The Union then presented a revised economic proposal that included a new health and welfare plan, and the Respondent presented a new wage proposal. At some point during the meeting, the Union notified the Respondent of its position that the Respondent was a "perfectly clear" successor. The Respondent disagreed and stated that if no agreement was reached by April 1 it would implement the changes set forth in the offer of employment letter. No party declared impasse,

sion of intent to retain the predecessor's employees. 209 NLRB at 195; *Canteen*, 317 NLRB at 1053–1054. A statement that the Respondent was finalizing plans for compensation and benefits, without indicating that the Respondent had decided to change compensation and benefits, was not sufficiently clear or definite to put the 16 unit employees at issue in this case on notice that they could expect material alterations in their terms and conditions of employment.

[34] 406 U.S. at 294–295 ("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").

[35] See, e.g., *Burns*, 406 U.S. at 294 ("this case is not like a § 8(a)(5) violation where an employer unilaterally changes a condition of employment without consulting a bargaining representative"); *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 422 (1967) (noting that employer was alleged to have implemented a "premium pay plan during the term of a collective agreement, without prior consultation with the union representing its employees," in violation of Sec. 8(a)(5) and (1) of the Act); *NLRB v. Katz*, 369 U.S. 736, 737 (1962) (observing that the issue before the Court was whether "it [is] a violation of the duty 'to bargain collectively' . . . for an employer, without first consulting a union with which it is carrying on bona fide contract negotiations, to institute changes regarding matters which are subjects of mandatory bargaining. . . and which are in fact under discussion"); see also *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 509 (1960) (separate opinion of Justice Frankfurter); *NLRB v. American National Insurance. Co.*, 343 U.S. 395, 399 (1952); *NLRB v. Crompton-Highland Mills*, 337 U.S. 217, passim (1949).

[36] See, e.g., *Elf Atochem*, 339 NLRB at 796, 809–810, 814 (Board adopted judge's findings that no valid impasse was reached over the course of 16 negotiating sessions before operations began and that "perfectly clear" successor therefore violated Sec. 8(a)(5) by unilaterally implementing its final offer as initial terms and conditions of employment); *Chelsea Place*, 336 NLRB 1050, 1050, 1051 (2001) (Board found that "perfectly clear" successor violated Sec. 8(a)(5) by unilaterally establishing initial terms, where the parties discussed initial terms but never reached "a consummated agreement" authorizing their implementation); see also *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 10 (2007) (interpreting *Burns* as imposing requirement that "perfectly clear" successor "bargain" before imposing initial terms); *Chelsea Place,* 336 NLRB at 1050 (same); *DuPont*, 332 NLRB at 1074 (same).

and the parties continued to meet after April 1, indicating that neither party believed that they were at the end of their rope or that further negotiations would be futile.

The Respondent maintains that the main obstacle that prevented an agreement was each side's insistence that the other agree to the retirement plan it had proposed. However, the judge specifically discredited Ashland Director of Human Resources Fusco's testimony to that effect, finding that he was "blending his subjective feelings with what actually occurred."[37] Moreover, the record demonstrates that the parties' disagreement on the subject of pensions had not frustrated the progress of further negotiations. The parties made significant progress on non-economic issues on March 23 and 29, and they had only begun to explore other economic issues such as wages and healthcare on March 29. Thus, although the subject of pensions was important to both parties, the record does not permit a finding that they were unable to make further "progress on any aspect of the negotiations" as of the final bargaining session (March 29). See *Atlantic Queens Bus Corp.,* 362 NLRB No. 65, slip. op. at 3 (2015), citing *CalMat Co.*, 331 NLRB 1084, 1097 (2000); see also *Wayneview Care Center v. NLRB*, 664 F.3d 341, 349–350 (D.C. Cir. 2011) (recognizing that deadlock on a single issue can justify an overall finding of impasse only when there has been a complete breakdown in the entire negotiations), enforcing 356 NLRB 154 (2010). Accordingly, we find that the parties had not reached a valid impasse, and that the Respondent therefore violated Section 8(a)(5) and (1) of the Act by implementing the terms of its offer letter on April 1, and making additional unilateral changes after April 1.[38]

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70 of Alameda County, affiliated with the International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Warehouse leads, drivers, drivers/material handlers and material handlers employed by the Employer at its plant located at 2461 Crocker Circle and its leased warehouse space located at 2200 Huntington Road, Suite A in Fairfield, California; but excluding all other employees, including all sales personnel, office clerical employees, professional employees, technical employees, guards and supervisors, as defined in or under the National Labor Relations Act.

4. At all material times, the Union has been the exclusive representative of the employees in the above-described appropriate unit, for the purposes of collective bargaining with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment.

5. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by announcing and implementing unilateral changes in the unit employees' existing terms and conditions of employment on and after April 1, 2011, including health and pension benefits, the practice of using seniority to assign driving routes, the practice of using seniority to allocate layoff days, and the practice of allowing drivers for whom there is no route available to work in the warehouse. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

We amend the judge's proposed remedy to address the additional 8(a)(5) and (1) violations that we have found. Having found that the Respondent is a perfectly clear successor to Ashland and that it violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union to agreement or impasse prior to changing existing terms and conditions of employment for the unit employees, we shall require the Respondent, on request of the Union, to retroactively restore the terms and conditions of employment established by its predecessor and rescind the unilateral changes it has made. The Respondent shall also be required to make employees whole for any loss of wages or other benefits they suffered as a result of the Respondent's unilateral changes in the manner set forth in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded

[37] The Union showed flexibility on the pension issue before and after April 1. Prior to April 1, the Union proposed that the amount that Ashland had contributed to the pension fund be allocated to employees' wages instead. After April 1, the Union made a proposal premised on shielding the Respondent from pension-related liabilities.

[38] Even assuming the Respondent was an ordinary *Burns* successor and was therefore free to set initial employment terms unilaterally, we find, in agreement with the judge, that the Respondent nevertheless violated Sec. 8(a)(5) and (1) of the Act by unilaterally changing Ashland's practices of using seniority to assign driving routes and to allocate layoff days, and its practice of allowing drivers to work in the warehouse when there is no route available for them, because those changes were not part of the initial employment terms that were announced and implemented by the Respondent.

daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, we shall order the Respondent to remit all payments it owes to employee benefit funds, including any additional amounts due the funds on behalf of the unit employees in accordance with *Merryweather Optical Co.,* 240 NLRB 1213 (1979). Further, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make any required contributions, as set forth in *Kraft Plumbing & Heating,* 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.[39]

Finally, the Respondent shall be required to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

ORDER

The National Labor Relations Board orders that the Respondent, Nexeo Solutions, LLC, Fairfield, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Brotherhood of Teamsters and Auto Truck Drivers, Local 70 of Alameda County, affiliated with the International Brotherhood of Teamsters (the Union), in the following appropriate unit by changing the terms and conditions of employment of unit employees, including but not limited to health and pension benefits, the practice of using seniority to assign driving routes, the practice of using seniority to allocate layoff days, and the practice of allowing drivers for whom there is no route available to work in the warehouse, without first bargaining in good faith with the Union to agreement or to impasse. The bargaining unit is:

> Warehouse leads, drivers, drivers/material handlers and material handlers employed by the Employer at its plant located at 2461 Crocker Circle and its leased warehouse space located at 2200 Huntington Road, Suite A in Fairfield, California; but excluding all other employees, including all sales personnel, office clerical employees, professional employees, technical employees, guards and supervisors, as defined in or under the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in the bargaining unit employees' wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above.

(b) To the extent it has not already done so, on request of the Union, rescind the changes in the terms and conditions of employment for the unit employees that were unilaterally implemented on and after April 1, 2011, including the changes to unit employees' health and pension benefits, the practice of using seniority to assign driving routes, the practice of using seniority to allocate layoff days, and the practice of allowing drivers for whom there is no route available to work in the warehouse.

(c) Make the unit employees whole, with interest, for any losses sustained as a result of the unilateral changes in terms and conditions of employment in the manner set forth in the amended remedy section of this decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Fairfield, California, facility copies of the attached

[39] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's owed contributions, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

notice marked "Appendix."[40] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 18, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

Under well-established law, a legal successor to a unionized predecessor is obligated to recognize and bargain with the union that represented the predecessor's employees, but it has the right to unilaterally set different initial terms and conditions of employment. *NLRB v. Burns Security Services*, 406 U.S. 272, 294 (1972) (*Burns*); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40 (1987) (*Fall River Dyeing*). However, an exception exists where the legal successor is a "perfectly clear" successor. *Burns*, 406 U.S. at 294–295. A "perfectly clear" successor must bargain with the union before making any changes in its predecessor's terms and conditions of employment. Contrary to my colleagues, I would affirm the judge's finding that Respondent Nexeo Solutions, LLC (Nexeo or the Respondent) was *not* a "perfectly clear" successor to the predecessor, Ashland, Inc. (Ashland), whose operations Nexeo purchased. Consequently, Nexeo was a conventional legal successor, it was subject to the conventional rule that permits a successor to unilaterally set different initial employment terms and conditions, and Nexeo acted lawfully when it announced different initial terms and conditions of employment in job-offer letters that Nexeo mailed to Ashland's employees on February 17, 2011.

The majority erroneously finds that Nexeo became a "perfectly clear" successor (thereby waiving its right to set different initial employment terms) based on discussions between the predecessor, Ashland, and Ashland's employees in November 2010. In making this finding, the majority neglects to recognize that Nexeo cannot reasonably be found to have waived its right to set initial terms based on statements made by *a different party*—Ashland, the predecessor—about Ashland's employees' potential employment prospects. As explained below, Ashland did not speak for Nexeo and did not purport to speak for Nexeo, and none of Ashland's statements constituted an invitation by Nexeo to Ashland's employees to accept employment. Additionally, I believe the majority's findings are not supported by the terms of a Purchase and Sale Agreement between Nexeo and Ashland, especially given that the agreement permitted Nexeo to change employee benefits, Nexeo announced its intent to implement new terms and conditions of employment on February 17, 2011 (at the same time Nexeo made offers of employment to Ashland's employees), and the agreement's terms were only subsequently available to the Union and unit employees.

Finally, I disagree with my colleagues' alternative finding that Nexeo forfeited its right to set initial terms by stating to Ashland's employees, at a January 2011 town hall meeting, "We're not planning job reductions." At the very same meeting, Nexeo also informed Ashland's employees that it was still working on developing a compensation-and-benefits package—a statement that conveyed that Nexeo's employment terms would be different from Ashland's. Moreover, I believe a statement about whether "job reductions" are planned cannot be reasonably interpreted as an offer of employment without

[40] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

any changes in wages, benefits, or other terms and conditions of employment.

Consistent with its rights as a conventional successor employer, Nexeo extended job offers to Ashland's employees on February 17, 2011, and at the same time Nexeo lawfully informed those employees of its intent to implement new terms and conditions of employment. Because Nexeo did not forfeit its right to establish its own initial employment terms and conditions, it lawfully implemented its own initial employment terms without bargaining. Accordingly, I respectfully dissent from my colleagues' finding to the contrary.[1]

Relevant Facts

The relevant facts, which are more exhaustively described in the judge's decision, may be summarized as follows.

On November 5, 2010, Nexeo and Ashland entered into a Purchase and Sale Agreement (Purchase Agreement) providing for the transfer of a portion of Ashland's assets and business, including a facility in Fairfield, California, to Nexeo.[2] The close of the sale and the transfer of the business were to occur several months later. As set forth in the provisions quoted below, the Purchase Agreement required Nexeo to make offers of employment to Ashland's employees, while permitting Nexeo to offer *different benefits* than did Ashland so long as the benefits were "substantially comparable in the aggregate":

> Section 7.5(b)(i): Continuation of Employment.
>
> Where applicable Law does not provide for the transfer of employment of any Employee upon the consummation of the transactions contemplated hereby, Buyer shall, or shall cause a Buyer Corporation to, make offers of at-will (to the extent permitted by applicable Law) employment . . . to be effective as of the Closing . . . to all such Employees.
>
> Section 7.5(c): Offers of Employment.
>
> Buyer shall . . . make offers of at-will . . . employment to the Employees . . . at least thirty (30) days prior to the Closing Date (or such longer period required by applicable Law or the terms of any Union Contract), with such employment to be effective as of the Closing . . . . Any such offer of employment shall be for a position that is comparable to the type of position held by such Employee immediately prior to the Closing Date and shall be made on terms and conditions sufficient to avoid statutory, contractual, common law or other severance obligations . . . .
>
> Section 7.5(d): Continuation of Compensation and Benefits.
>
> For a period of eighteen (18) months immediately after the Closing Date . . . Buyer shall (or shall cause the Buyer Corporations to) provide to each Transferred Employee (i) a base salary or wages no less favorable than those provided immediately prior to the Closing Date and (ii) other employee benefits, variable pay, incentive or bonus opportunities under plans, programs and arrangements *that are substantially comparable in the aggregate* to those provided by Ashland or the applicable Asset Selling Corporation as expected to be in effect on January 1, 2011. . . .

Two days later, on November 7, 2010, Ashland's president, Robert Craycraft, sent an internal email to Ashland's employees. In his email, Craycraft referenced a recently issued press release that had announced the sale and expressed his excitement for the future of the enterprise. Regarding employees' understandable concern about job security, Craycraft wrote:

> With this announcement [of the sale], I realize you will have many questions. I will make every effort to get information out to everyone impacted by this change as quickly as possible. In total, we anticipate approximately 2,000 Ashland Distribution employees and dedicated resource group and supply chain partners will transfer to the new business.

Craycraft was not employed by the Respondent when he wrote this email; Nexeo did not hire him until months later. In addition, there is no evidence that Nexeo authorized Craycraft to speak for it in the November 7 email. More specifically, there is no evidence that Craycraft was authorized to speak for Nexeo regarding the latter's prospective terms and conditions of employment applicable to Ashland employees who might accept employment offers extended by Nexeo. In addition,

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[1] I agree with my colleagues that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally eliminating the practice of using seniority to assign driving routes and to allocate layoff days, and the practice of allowing drivers for whom there is no route available to work in the warehouse. Those changes were made after the Respondent commenced operations on April 1, 2011, and they were not a part of the initial terms that the Respondent lawfully established.

[2] To be precise, the Purchase Agreement was entered into by and between Ashland and TPG Accolade, LLC. By the time the successor commenced operations on April 1, 2011, it had been renamed Nexeo Solutions, LLC. For the sake of convenience, I will refer to the successor employer as "Nexeo" throughout the entire process from Purchase Agreement to commencement of operations.

there is no evidence that Nexeo held Craycraft out in such a manner as to create a reasonable belief among Ashland's employees that Craycraft spoke for Nexeo. Moreover, nothing in Craycraft's email reasonably suggests that Craycraft purported to speak for Nexeo. The email bore the "Ashland" logo, identified Craycraft as Ashland's president, and was entitled "Charting a New Course for Ashland Distribution."[3]

The next day, on November 8, 2010, Ashland posted an "Employee Q&A" memo on its intranet and on a bulletin board in the Fairfield facility. Ashland did not share this Q&A memo with Nexeo before posting it. Indeed, Ashland did not furnish a copy of the Q&A memo to the Respondent until December 2, 2010. Thus, it is clear that Nexeo did not authorize Ashland to speak on its behalf in the November 8 Q&A memo and did not pre-approve its posting. As with the November 7 email, the November 8 Q&A memo does not purport to speak for Nexeo. It bears a large "Ashland" logo in the header, uses the pronoun "we" to refer to Ashland only (e.g., "Why are we selling Ashland Distribution now?"), and identifies the yet-to-be-named successor as an "independent" company. Regarding employees' job opportunities with the independent company and the possible terms and conditions of employment it would offer, Ashland wrote:

> 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 people and various support partners will continue to work from their current locations and perform similar roles and functions.
>
> . . .
>
> 20. Does the newly independent company anticipate any changes to compensation and/or benefits?
>
> Under the terms of the agreement, for at least the 18 months following closing, the newly independent company is required to provide, to each transferred employee, base salary and wages that are no less favorable than those provided prior to closing; and other employee benefits that are substantially comparable in the aggregate to compensation and benefits as of January 1, 2011.

Once again, the message here was Ashland's, not the Respondent's. Nexeo did not authorize Ashland to speak on its behalf—indeed, Nexeo was unaware of the memo until nearly a month after Ashland posted it—and Nexeo did not hold out Ashland or any of its agents in a manner that would have created a reasonable belief among Ashland's employees that Ashland was speaking for Nexeo.[4]

Record evidence indicates that, on January 13, 2011, a town hall meeting was held with Ashland's employees to discuss "some decisions about our management team." The judge did not make factual findings about the meeting, and what little testimony there was regarding the meeting is extremely vague. The only witness to describe the January 13, 2011 meeting was employee Eric Schieber, who testified that he did "not recall exact words" but he "recall[ed] the vibe maybe a couple of things he [Craycraft] said."[5] However, the record contains a "key messages" memo, and the parties stipulated that the memo was utilized during the town hall meet-

[3] Craycraft repeatedly used the pronoun "we" in his email, but in doing so he refers to Ashland personnel, not to Ashland and Nexeo: "While taking this step means that *we* will leave Ashland, it charts our course for an exciting new direction"; "*We've* been part of Ashland for more than 40 years and have made many contributions in helping to transform Ashland"; "*We* should take pride in that"; "*We* have worked so hard to improve our financial performance . . . ." GC Exh. 48 (emphasis added).

Craycraft's stated expectations on behalf of Ashland—that "we anticipate approximately 2,000 Ashland Distribution employees and dedicated resource group and supply chain partners will transfer to the new business"—were consistent with the terms of the Purchase Agreement, quoted above, which required Nexeo to make offers of employment to Ashland personnel. It is worth noting, however, that the record fails to establish that Ashland shared Craycraft's November 7 email with Nexeo before sending it to Ashland's employees. The parties stipulated that Ashland shared the November 7 email with Nexeo "[a]t or around the time[]" it was created, which leaves open the possibility that the email was shared with Nexeo after it was sent. But even assuming that Nexeo received the email beforehand, Nexeo had no cause to object to or clarify Ashland's email since it is clear from the email that Craycraft did not speak for Nexeo.

[4] In its decision, the majority cites several other communications by Ashland to Ashland's employees. The majority does not contend that those communications constitute an invitation by Nexeo to Ashland's employees to accept employment, unaccompanied by an announcement of an intent to implement new and different employment terms. I agree that those communications did not render Nexeo a "perfectly clear" successor.

[5] Regarding his memory of what was said during the January 13 meeting, employee Schieber testified as follows:

> *I do not recall exact words*. I recall the vibe, maybe a couple things that he [Bob Craycraft] said. It's the same thing as the – as any handouts that are handed out around here. *You pay attention to what you want to hear* and the rest of it seems like somebody who's a little more important then [sic] you babbling. So it was a vibe of get excited and non-excited. I remember him definitely saying that he was moving on with the new company as well as the rest of the employees. And he wanted us to be as excited as him.

Tr. at 771 (emphasis added).

ing.[6] According to that memo, the speakers were Ashland President Craycraft and David Bradley, Nexeo's incoming CEO. Craycraft informed employees that the Respondent had asked him to serve as its chief commercial officer after the sale closed, a role in which he would focus on identifying growth opportunities for the business. Craycraft then introduced Bradley to employees as the Respondent's new CEO. Bradley said that he was pleased to be there and that he was excited about the growth potential for the business. He then spoke a bit about his industry experience and personal life. Returning to the subject of growth, Bradley explained that many of Ashland's customers had indicated that "they want *more* of what this business has to offer" and that some would like the Company to take them into key markets like China and Brazil. Bradley explained that Craycraft would remain as an integral part of the leadership team and that until the sale of the business to Nexeo was closed, the leadership team would still report to Craycraft and that he, Bradley, would be onsite managing the transition. Bradley then conveyed his recognition that employees would want to know how the sale would affect their jobs, compensation, and benefits. According to the "talking points" memo, Bradley said:

- While we are announcing today some changes within the management team, we do not anticipate major changes in the rest of the organization.
    - We're committed to growing the business.
    - We're not planning job reductions. In fact, to the contrary, we know there will be certain areas where we need to add more people.
- We are working hard to flesh out final plans for our new company's compensation and benefits program.
    - Our goal remains to establish a total compensation package that is compelling and competitive.
    - *We all want resolution on these plans as fast as possible*.[7]

Thus, by his remarks, Bradley put Ashland's employees on notice that Nexeo was still developing its "compensation and benefits program," which means Ashland's employees were on notice that Nexeo's "compensation and benefits program" would differ from Ashland's.[8]

[6] GC Exh. 44 (talking points memo dated January 14, 2011); Jt. Exh. 1 at ¶ 3(stipulation). Because the parties stipulated that the "key messages" memo was utilized at the town hall meeting, I believe my colleagues are incorrect when they assert, in reference to the memo, that "there is no evidence that the statement . . . concerning terms and conditions of employment . . . was actually communicated to the unit employees at the Town Hall meeting" because, "although the statement is contained in the talking points memo, no testimony or other evidence was offered to establish Bradley's participation in the Town Hall meeting or the content of his remarks, if any." To state the obvious, a stipulation about factual events constitutes admitted "evidence" that may not properly be disregarded or recharacterized by the Board. In fact, given that employee Schieber's testimony regarding the meeting was so vague—he conceded that he did "not recall exact words"—I believe the "key messages" memo, which the parties stipulated was utilized at the meeting, is the most reliable evidence regarding who spoke at the meeting and what was said.

[7] GC Ex. 44 (emphasis added).

[8] Contrary to the majority, the record does not establish that *Craycraft* separately made a statement to Ashland's employees that no jobs would be lost. Employee Schieber testified that someone made that statement at the town hall meeting, but he did not identify the speaker. After being shown GC Exh. 67, which indicates that both Craycraft and Bradley spoke and that *Bradley* said that job reductions were not planned, Schieber admitted that he had not remembered that both Craycraft and Bradley had spoken, that he "didn't catch the switchover between the two men," and that he had mistakenly "thought it was Craycraft the whole time to tell the god's honest truth." Tr. at 771. Even assuming arguendo that Schieber's testimony could be reasonably interpreted to mean that Craycraft separately told Ashland's employees that there were no planned job reductions, Bradley's statement at the same meeting simultaneously informed employees that Nexeo was finalizing a new set of terms and conditions of employment.

The majority concludes that "the talking points for the Town Hall meeting establish that Craycraft was communicating on the Respondent's behalf well before that date [January 13, 2011]." By "well before," the majority means early November 2010. The majority bases this conclusion on statements in the "key messages" memo that "Craycraft *remains* an integral part of this leadership team" and that "the Leadership Team *continues* to report to Bob [Craycraft]" (emphasis added). I believe these statements are transparently insufficient to support a reasonable inference that Nexeo bestowed actual authority on Craycraft back in early November to speak for it and to invite Ashland's employees to accept employment with Nexeo. I also believe that my colleagues' willingness to draw this inference based on this evidence is inconsistent with a proper understanding of the policies at issue here, which, if anything, should make the Board reluctant to find "perfectly clear" successorship. See *S&F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354, 359 (D.C. Cir. 2009) ("The 'perfectly clear' exception is and must remain a narrow one because it conflicts with the 'congressional policy manifest in the Act . . . to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities.'") (quoting *Burns*, 406 U.S. at 288).

Further, as indicated in fn. 6 supra, I disagree with the majority's suggestion that the evidence is insufficient to establish that Bradley informed employees at the January 13 town hall meeting that Nexeo was working on a different set of terms and conditions of employment. Again, the parties *stipulated* that GC Exh. 44, the "key messages" memo, was utilized during that meeting. I believe this stipulation is a sufficient basis to conclude that Bradley made the statement—and to the extent, if any, that doubts remain on that score, they should be

On February 16, 2011, an initial meeting was held between Nexeo and the Union. Nexeo informed the Union that it would mail offer letters to Ashland's employees the following day, and it furnished the Union with a draft offer letter. Then, as it said it would, Nexeo mailed the offer letters the following day, February 17. The letters informed Ashland's employees that Nexeo would not adopt its predecessor's collective-bargaining agreements and announced that Nexeo would set new terms and conditions of employment, including different retirement and health insurance benefits. As recounted in the majority opinion, all of Ashland's employees accepted the Respondent's offers of employment by February 23. On that date, the Union sent Nexeo a message demanding recognition. Thereafter, Nexeo and the Union met on several occasions and commenced negotiations for a collective-bargaining agreement, but Nexeo also explained to the Union why it believed it could implement initial terms and conditions of employment unilaterally. On April 1, and consistent with the offer letters, the Respondent instituted its initial terms and conditions of employment, including a 401(k) retirement savings plan in place of the union-sponsored pension plan as well as different health insurance and vision benefits.

As the foregoing recitation of facts demonstrates, employees were not lulled into a false sense that employment conditions would remain the same or denied a chance to consider their employment options. Nearly 5 months before the Respondent assumed operations, employees learned (from the predecessor employer, Ashland) that the Respondent was free to offer a different mix of benefits. Nearly 3 months before the changeover, when the Respondent spoke to employees for the first time at the town hall meeting, Nexeo clearly informed Ashland's employees that it was "working hard to flesh out final plans for our new company's compensation and benefits program," thus conveying its intent to set initial employment terms that differed from those provided by Ashland. Finally, approximately 6 weeks before taking over operations, the Respondent furnished offer letters to the employees that announced its intent to implement employee benefits "comparable in the aggregate to" but not the same as Ashland's.

Discussion

A. Applicable Principles

Under *Burns*, supra, an employer becomes a legal successor when it continues the operations of a unionized predecessor in substantially unchanged form and hires as a majority of its workforce the predecessor's union-represented employees. Under these circumstances, the successor must recognize, on request, and bargain in good faith with the unit employees' incumbent bargaining representative.[9] However, although a legal successor has a duty to recognize and bargain in good faith with an incumbent union, it is well established that a successor "'is ordinarily free to set initial terms on which it will hire the employees of a predecessor.'" *Fall River Dyeing*, supra, 482 U.S. at 40 (quoting *Burns*, 406 U.S. at 294); see also *Machinists v. NLRB*, 595 F.2d 664, 673 (D.C. Cir. 1978) ("The *Burns* Court accorded much importance to a successor employer's freedom to alter[,] even remake the acquired enterprise. Certainly that includes the ability ordinarily to set initial employment terms and conditions without preliminary bargaining with an incumbent union.") (fns. omitted). In *Burns*, the Supreme Court explained the policy considerations that support recognizing a successor's right to set its own initial employment terms as well as the undesirable consequences that would flow from imposing the predecessor's employment terms on the successor:

> [H]olding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage

resolved against the General Counsel as the proponent of the narrow "perfectly clear" exception. See id.

[9] Under the Board's "successor bar" doctrine, a *Burns* successor must recognize and bargain with its employees' incumbent union for a "reasonable" period of time, even if the union no longer has the support of a majority of the employees in the bargaining unit. This means that the union enjoys an insulated period during which its majority status cannot be challenged, even if it no longer enjoys majority status. See *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011). Moreover, the Board in *UGL-UNICCO* defined the duration of the "reasonable" insulated period in such a way that, in many cases, employees are barred from challenging the union's majority status for more than a year, which is longer than the insulated period enjoyed by a newly certified union following a Board-conducted election. I disagree with *UGL-UNICCO* and would adhere instead to the standard the Board adopted in *MV Transportation*, 337 NLRB 770, 770 (2002), which was that "an incumbent union in a successorship situation is entitled to—and only to—a *rebuttable* presumption of continuing majority status." But if the Board applies a successor bar, it should at least change the rules that govern its duration. For a full discussion of these issues, see *FJC Security Services*, 360 NLRB No. 115, slip op. at 1–4 (2014) (Member Miscimarra, concurring).

> and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.

406 U.S. at 287–288.

In *Burns*, the Supreme Court also described exceptional circumstances under which the general rule permitting successors to unilaterally set initial employment terms would not apply and a successor would be required to first "consult with" the incumbent union. "Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor," the Court wrote, "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." Id. at 294–295 (emphasis added).

Subsequently, in *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), the Board clarified the circumstances under which this "perfectly clear" exception would apply. In *Spruce Up*, a successor employer, prior to acquiring the predecessor's enterprise, expressed to the predecessor's employees' incumbent union his general willingness to hire the predecessor's workforce, at the same time indicating that he planned to pay lower commissions. The Board rejected the General Counsel's contention that the employer was a "perfectly clear" successor. The Board explained that 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," when he announces new employment terms prior to or simultaneously with his invitation to the predecessor's workforce to accept employment under those terms. Id. at 195 (quoting *Burns*, 406 U.S. at 295). This is because when the successor employer states its intent to implement different terms and conditions of employment, "[t]he possibility that the old employees may not enter into an employment relationship with the new employer is a real one." Id. In finding that the employer in *Spruce Up* acted lawfully in establishing his own initial terms without consulting with the union, the Board explained that the "perfectly clear" exception is "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 "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*." 209 NLRB at 195 (emphasis added); accord: *Ridgewell's, Inc*., 334 NLRB 37 (2001), enfd. 38 Fed.Appx. 29 (D.C. Cir. 2002).[10]

The Board in *Spruce Up* expressed a concern that a more expansive interpretation of the "perfectly clear" exception to the general rule of *Burns*—i.e., that a legal successor *may* set initial employment terms unilaterally—might prompt a putative successor employer "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*." *Spruce Up*, 209 NLRB at 195. The Board indicated that it did not wish to discourage continuity in employment relationships, and therefore it refrained from taking a broader view of the "perfectly clear" exception.

Analysis

In the instant case, the General Counsel alleges that Nexeo violated Section 8(a)(5) of the Act when it implemented its initial employment terms, and the implementation of those initial employment terms violated Section 8(a)(5) only if Nexeo was a "perfectly clear" *Burns* successor. Accordingly, the General Counsel appropriately bears the burden of proving the applicability

[10] In articulating the *Spruce Up* standard, the Board cited with approval *Howard Johnson Co.*, 198 NLRB 763 (1972), and *Good Foods Manufacturing & Processing Corp.*, 200 NLRB 623 (1972), "where the successor employers, without prior warning, unilaterally changed the terms and conditions of employment prevailing under the predecessor after already having *committed themselves* to hire almost all of the old unit employees with no notice that they would be expected to work under new and different terms." *Spruce Up*, 209 NLRB at 195 fn. 7 (emphasis added).

Significantly, *Spruce Up* does not mandate that an employer announce its intent to establish new employment terms in any particular form to any specific number or percentage of its predecessor's unit employees. All that is required is a communication that "portend[s] employment under different terms and conditions." *Ridgewell's*, 334 NLRB at 37; see *S&F Market Street Healthcare*, 570 F.3d at 359 ("The 'perfectly clear' exception is and must remain a narrow one because it conflicts with the 'congressional policy manifest in the Act . . . to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities.' . . . [A]t bottom the 'perfectly clear' exception is intended to prevent an employer from inducing possibly adverse reliance upon the part of employees it misled or lulled into not looking for other work.") (quoting *Burns*, 406 U.S. at 288).

of the "perfectly clear" exception. In my view, he has not satisfied his burden in this case.

As explained above, a successor employer comes within the "perfectly clear" exception and forfeits its *Burns* right to unilaterally establish initial terms and conditions of employment only where it has either actively or inferentially "misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment," or where it has "failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce Up*, 209 NLRB at 195.

The Respondent never invited Ashland's employees to accept employment without clearly announcing its intent to set new employment terms.[11] Finding to the contrary, the majority relies on "the Purchase Agreement, together with the communications to the unit employees in early November 2010"—i.e., Ashland's November 7 email and November 8 Q&A memo. For the following reasons, I disagree with my colleagues' finding that Nexeo was a "perfectly clear" successor.

First, Ashland's November 7 email and November 8 Q&A memo do not constitute invitations by the Respondent to Ashland's employees to accept employment. *Spruce Up* requires an invitation *by the successor employer*, not a statement by some other party, such as the predecessor employer, about that party's own expectations. As described above, the November 7 email and the November 8 Q&A memo were communications drafted by Ashland, and nothing in them purports to speak for the Respondent. I disagree with the majority's suggestion that the Respondent designated Ashland as its agent for the purpose of making employment offers in those two communications merely because the Purchase Agreement contemplates that the parties will consult and consent before communicating regarding the sale. As the record demonstrates, Ashland disregarded that contractual provision. Ashland did not share the November 8 Q&A memo with the Respondent until nearly a month after posting it, and the record fails to show that the Respondent had prior knowledge of Ashland's November 7 email, either.[12] Even assuming arguendo that Nexeo received both documents before they were disseminated to Ashland's employees (which the record does not establish), there is no evidence that Nexeo gave any Ashland official actual authority to communicate with Ashland's employees on Nexeo's behalf, nor is there any evidence in the record that Nexeo held out any Ashland official to Ashland's employees in a manner that would have created a reasonable belief among Ashland's employees that the official was speaking on Nexeo's behalf.[13] Certainly, the Respondent did not designate Ashland as its agent by failing to object to *Ashland's* communications to *Ashland's* own employees regarding *Ashland's* understanding of the situation, and those communications did not constitute an invitation by Nexeo to accept employment.

Second, there is no support for the majority's finding that Nexeo "ratified [Ashland's November 7 and 8] communications by affirming and failing to repudiate them." My colleagues cite Restatement of the Law, Third, Agency, Section 4.01, which defines ratification as "the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority." However, under Section 4.01(3) of the Restatement, "[r]atification does not occur unless . . . the act is ratifiable as stated in §4.03." In turn, Section 4.03 provides that "[a] person may ratify an act if the actor acted or purported to act as an agent on the person's

[11] The majority does not disturb the judge's finding that, under the first prong of *Spruce Up*, the Respondent did not mislead employees into believing they would all be retained without change in their wages, hours, or conditions of employment. I agree with the judge on this point.

[12] Unlike the majority, I would not infer that the Respondent had prior knowledge of Ashland's November 7 email from the fact that, in December 2010 and January 2011, Ashland shared *other* communications with the Respondent before sending them to employees and the Respondent's agents edited some of those later communications. The parties' stipulation regarding Ashland's November 7 email—namely, that Ashland furnished the email to Nexeo "[a]t or around the time[]" it was created—renders any such inference unjustified, since "around the time" could mean *after* November 7. Additionally, the fact that Craycraft's name (along with the names of all other Ashland employees) appears on schedule 7.5(a) of the Purchase Agreement as someone to whom the Respondent was obligated to *offer* employment does not establish that the Respondent authorized Craycraft (or any of the hundreds of others on the list) to invite individuals in November 2010 to *accept* employment. Similarly, the fact that Craycraft in late 2010 announced a contest for naming the new company does not establish that the Respondent authorized him to make offers of employment in early November 2010. Neither do statements in the "key messages" memo utilized at the January 13, 2011 meeting that "Craycraft *remains* an integral part of this leadership team" and that "the Leadership Team *continues* to report to Bob [Craycraft]" (emphasis added). See fn. 8, supra.

[13] See, e.g., *Pan-Oston Co.*, 336 NLRB 305, 305–306 (2001) ("Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question."). Only the principal can make someone its agent; purported agents cannot endow themselves with apparent authority through their own conduct. Thus, even if Craycraft or another Ashland official had claimed to speak for Nexeo, his or her statements would not have bound Nexeo unless Nexeo ratified them. In fact, as shown above, neither Craycraft nor any other Ashland official ever purported to speak for Nexeo on November 7 or 8.

behalf." *Comment b* to that section explains that "[w]hen an actor is not an agent and does not purport to be one, the agency-law doctrine of ratification is not a basis on which another person may become subject to the legal consequences of the actor's conduct." Neither circumstance that would make Ashland's November 7 and 8 communications amenable to ratification by Nexeo existed here. First, Ashland did not act as Nexeo's agent when it circulated those communications to its own employees. As explained above, Craycraft was not employed by the Respondent until months later, and there is no evidence that Nexeo authorized Craycraft or anyone else at Ashland to speak on its behalf in those communications. In fact, the record does not establish that Ashland even shared the November 7 email with Nexeo before sending it, and the record affirmatively establishes that Nexeo was unaware of the November 8 Q&A memo until early December. Second, Ashland did not purport to act as the Respondent's agent in either communication. Hence, Ashland's early November 2010 communications do not constitute ratifiable acts. And in any event, nothing in either communication constitutes an "invit[ation] . . . to accept employment" within the meaning of *Spruce Up*. 209 NLRB at 195.

Third, I disagree with the majority's claim that, at the January 13, 2011 town hall meeting, the Respondent invited employees to accept employment without conveying its intent to establish new terms. My colleagues rely on CEO Bradley's statement to employees that "[w]e're not planning job reductions." However, immediately after making that statement, Bradley told employees that "[w]e are working hard to flesh out final plans for our new company's compensation and benefits program" and that he hoped to have final resolution of that package in the near future. Thus, Bradley clearly informed Ashland's employees of the Respondent's "intent to establish a new set of conditions." *Spruce Up*, 209 NLRB at 195; see also *Planned Building Services,* 318 NLRB 1049, 1061 (1995) (successor adequately conveyed that it would offer different terms and conditions by informing employees that "only their wages would remain the same, and that as to their other benefits, everything started fresh when [it] was to take over the following day"). Moreover, as noted previously, I believe a statement about whether there are planned "job reductions" cannot be reasonably interpreted as an offer of employment without any changes in wages, benefits or other terms and conditions of employment. In my view, the preponderance of the evidence fails to support my colleagues' finding that Ashland's employees walked away from the town hall meeting reasonably thinking that the Respondent intended to retain them on the same terms and conditions they currently worked under with Ashland.[14]

Finally, the terms of the Purchase Agreement do not support a finding that Nexeo was Ashland's perfectly clear successor. The Purchase Agreement left the Respondent free to implement benefits and benefit plans that differed from Ashland's so long as they were "substantially comparable in the aggregate to those provided by Ashland."[15] Thus, the Purchase Agreement clearly allowed for Nexeo to implement different initial terms and conditions, as it did when it substituted a 401(k) plan for a union-sponsored pension plan and altered health insurance benefits, consistent with the terms of the Purchase Agreement. As *Spruce Up* instructs, it cannot fairly be said that a new employer plans to retain all of the employees in the unit where it announces an intent to implement new employment terms prior to or simultaneously with its invitation to the previous workforce to accept employment. The possibility was real that some Ashland employees would seek employment elsewhere rather than accepting a different mix of benefits (and the possibility of completely different working conditions after 18 months). Moreover, and dispositively, it is undisputed that the Respondent did not furnish the Purchase Agreement to the Union or employees until March 2011, *after* it had clearly announced different initial terms and conditions in its February 17 offer letters to Ashland's employees. Hence, the Purchase Agreement itself cannot properly be viewed as an "invit[ation] . . . to accept employment" within the meaning of *Spruce Up*. 209 NLRB at 195.

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[14] The majority suggests Bradley's statement that "[w]e are working hard to flesh out final plans for our new company's compensation and benefits program" was insufficiently clear or definite to put Ashland's employees on notice that Nexeo's employment terms would differ from Ashland's. I disagree. If Nexeo were simply adopting Ashland's existing compensation and benefits package without change, there would be no "final plans" for Nexeo's "compensation and benefits program" to "flesh out," nor would there be any necessity to "work[] hard" to finish putting together that "compensation and benefits program." Again, under *Spruce Up*, if there is a communication that "portend[s] employment under different terms and conditions," the employer cannot be deemed a "perfectly clear" successor. *Ridgewell's*, 334 NLRB at 37. Bradley's statement portended employment under different terms and conditions.

[15] In addition, the Purchase Agreement left Nexeo free to radically change compensation and benefits after 18 months. Of course, Nexeo's contractual right to do so under the terms of the Purchase Agreement was potentially subject to other legal duties, such as the duty to bargain with the Union (or another union if employees decided to select a different representative) or to adhere to the terms of an existing collective-bargaining agreement absent the consent of the bargaining representative.

For these reasons, I would find that the General Counsel failed to satisfy his burden of proving that the Respondent was a perfectly clear successor to Ashland under the doctrine of *Spruce Up*.

The new affirmative duty created by my colleagues is especially unfortunate because it will predictably have consequences— however unintended they may be—that will generate greater uncertainty for, and impose greater hardship on, employees and unions involved in a sale, transfer or other conveyance of operations. Nothing in the NLRA requires successor employers to monitor and renounce, amend, or ratify their *predecessors'* communications to guard against any favorable comment by the predecessor regarding the potential continued employment prospects of the predecessor's employees, where the predecessor fails to simultaneously mention the successor's intention to alter various employment terms and conditions. Moreover, this new obligation is completely ungrounded in the law of agency and runs counter to the policies underlying *Burns* and *Spruce Up*. Unions and employers alike have an interest in preserving these policies[16] because they include protecting a successor's right to remake a potentially moribund business, promoting the free transfer of capital, and permitting incumbent employees to receive an early appraisal of their retention prospects.[17] Additionally, my colleagues disregard the distinction between predecessor and successor obligations reflected in the Board's own cases, which impose effects-bargaining obligations on the *predecessor* involved in a sale or transfer, see *Riedel International d/b/a Willamette Tug & Barge Co.*, 300 NLRB 282 (1990); *Compact Video Services*, 319 NLRB 131 (1995), enfd. 121 F.3d 478 (9th Cir. 1997), which are separate and distinct from the bargaining and other *successor* obligations that may be inherited by the purchaser. *Burns*, supra; *Fall River Dyeing*, supra.

It is also likely, as a result of my colleagues' decision, that many potential successor employers will negotiate strict limitations on a predecessor's ability to convey *any* information to its employees regarding their potential employment with the successor. Nothing in the NLRA requires purchasers to disclose their employment plans to the seller, and—in view of my colleagues' decision—purchasers would be well advised to prohibit sellers from communicating anything to their employees and unions regarding the purchaser's employment-related plans. The far better outcome, in my view, is to continue the allocation of responsibilities that has been well established in this area for decades: sellers convey whatever information they can share with the union or employees in advance of the sale as necessary to fulfill (or otherwise consistent with) their effects-bargaining obligations, and purchasers are bound by their own statements made when extending their own offers of employment or in their own sale-related dealings with the union or employees.

For these reasons, as to the above issues, I respectfully dissent.

Dated, Washington, D.C. July 18, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with the Brotherhood of Teamsters and Auto Truck Drivers, Local 70 of Alameda County, affiliated with the International Brotherhood of Teamsters (the Union) in the following appropriate unit by unilaterally changing your terms and conditions of employment, including but not limited to health and pension benefits, the practice of using seniority to assign driving routes, the practice of using seniority to allocate layoff days, and the practice of allowing drivers for whom there is no route available to work in the warehouse, without negotiating in good faith with the Union to agreement or to impasse. The bargaining unit is:

Warehouse leads, drivers, drivers/material handlers and material handlers employed by the Employer at its

[16] See *Burns*, 406 U.S. at 287–288.

[17] See *Machinists v. NLRB*, 595 F.2d at 674.

plant located at 2461 Crocker Circle and its leased warehouse space located at 2200 Huntington Road, Suite A in Fairfield, California; but excluding all other employees, including all sales personnel, office clerical employees, professional employees, technical employees, guards and supervisors, as defined in or under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of your employment, notify, and on request, bargain with the Union as your exclusive collective-bargaining representative.

WE WILL, to the extent we have not already done so, on request of the Union, rescind the changes in the terms and conditions of employment for the unit employees that we unilaterally implemented on and after April 1, 2011, including the changes to our unit employees' health and pension benefits, the practice of using seniority to assign driving routes, the practice of using seniority to allocate layoff days, and the practice of allowing drivers for whom there is no route available to work in the warehouse.

WE WILL make our unit employees whole for any losses they sustained due to the unlawfully imposed changes to their health and pension benefits, the practice of using seniority to assign driving routes, the practice of using seniority to allocate unpaid layoff days, and the practice of allowing drivers for whom there is no route available to work in the warehouse, with interest.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

NEXEO SOLUTIONS, LLC

The Board's decision can be found at https://www.nlrb.gov/case/20–CA–035519 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

J. Edward Castillo, R. Jason Patterson, and *Richard J. McPalmer Esqs.,* for the General Counsel.

David A. Kadela and *Adam C. Wit, Esqs. (Littler Mendelson, P.C.),* of Columbus, Ohio, for the Respondent.

Thomas D. Allison and Jason McCaughy, Esqs. (Allison, Slutsky & Kennedy, P.C.), of Chicago, Illinois, for Charging Party Local 705.

David A. Rosenfeld, Esq. (Wineberg, Roger, and Rosenfeld), of Alameda, California, for Charging Party Local 70.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case presents a close issue of whether Nexeo Solutions, LLC (Nexeo) is a "perfectly clear" successor employer to Ashland, Inc (Ashland) under *NLRB v. Burns Security Services,* 406 U.S. 272 (1972). The synopsis is: On November 5, 2010, Nexeo and Ashland entered into an agreement whereby Ashland agreed to sell its distribution centers to Nexeo; that deal closed on March 31, 2011 and Nexeo takes over. That agreement required Nexeo to offer employment to all Nexeo employees in the same position, same base wage rate, and benefits comparable in the aggregate to Ashland's. These details became well known. On February 17, 2011, Nexeo informs Ashland's union-represented employees of the details of their initial terms of employment with Nexeo. All the employees accept the offers and seamlessly transition from Ashland to Nexeo on April 1. Did Nexeo violate Section 8(a)(5) by unilaterally setting the initial employment terms on February 17 and implementing them on April 1?

Cases 13–CA–46694 and 13–CA–062072 were tried in Chicago, Illinois, on April 2–4, 2012. The Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union, Local No. 705, an affiliate of the International Brotherhood of Teamsters (Local 705) filed the charges in those cases on April 7 and August 3, 2011, respectively[1] and the General Counsel issued the consolidated complaint on November 30, 2011. That complaint as amended alleges that Nexeo, as a "perfectly clear" successor employer to Ashland, violated Section 8(a)(5) by unilaterally implementing changes in initial terms and conditions of employment of employees and by delaying giving Local 705 certain information that Local 705 had requested. Nexeo filed a timely answer that admitted the allegations in the complaint concerning the filing and service of the charges, interstate commerce and jurisdiction, that it is a successor (but

[1] All dates are in 2011 unless otherwise indicated.

denied that is a perfectly clear successor) to Ashland, Inc. (Ashland), labor organization status, agency and supervisory status, appropriate unit and that Local 705 is the 9(a) representative of that unit of employees. Nexeo admitted that it made some, but not all, of the changes in working conditions; it denies it made those changes without first bargaining with Local 705. Finally, Nexeo denies that it unlawfully delayed giving information to Local 705.[2]

Case 20–CA–35519 was tried in San Francisco, California, on May 7 and 8, 2012. The Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70 of Alameda County, affiliated with the International Brotherhood of Teamsters (Local 70) filed the charge on April 11 and the complaint issued on November 30. That complaint as amended alleges that Nexeo violated Section 8(a)(5) by making certain changes in working conditions of employees on April 1 and making other changes on April 4. Nexeo filed a timely answer that admitted the allegations in the complaint concerning the filing and service of the charge, interstate commerce and jurisdiction, Local 70's labor organization status, appropriate unit, and Local 70's 9(a) status; Nexeo also admitted that it is a successor employer to Ashland. Nexeo denied it had made certain changes and admitted that it made others; it denied it had violated the Act.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Nexeo, Local 705, and Local 70, I make the following.

FINDINGS OF FACT

I. JURISDICTION

Nexeo a corporation, has been engaged in the business of connecting producers and customers of chemicals, plastics, composites and environmental services; it has many facilities, including facilities in Willow Springs, Illinois, and Fairfield, California, where, based on a projection, it will annually purchase and receive at those facilities goods valued in excess of $50,000 directly from outside those States. Nexeo admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 705 and Local 70 are each a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Purchase and Sale

On November 5, 2010, Nexeo[4] agreed to purchase certain assets from Ashland, including the distribution centers in Fairfield, California, and Willow Springs, Illinois, for nearly $1 billion. Local 705 had represented a unit of employees[5] at Ashland's distribution center in Willow Springs for about 20 years; at the time of the hearing there were about 32 employees in that unit. Local 70 had represented a unit of employees[6] at Ashland's distribution center located in Fairmont for about 18 years; at the time of the hearing there were about 20 employees in this unit.

In the agreement of purchase and sale (APS) Nexeo promised as follows:

> Section 7.5(b)(i): Continuation of Employment
> Where applicable Law does not provide for the transfer of employment of any Employee . . . Buyer shall . . . make offers of at-will . . . employment . . . to be effective as of the Closing . . . to all such Employees.
>
> Section 7.5(c): Offers of Employment.
> Buyer shall . . . make offers of at-will . . . employment to the Employees . . . at least thirty (30) days prior to the Closing Date (or such longer period as required by . . . the terms of any Union Contract), with such employment to be effective as of the Closing . . . Any such offer of employment shall be for a position that is comparable to the type of position held by such Employee immediately prior to the Closing Date and shall be on terms and conditions sufficient to avoid statutory, contractual, common law or other severance obligations . . .
>
> Section 7.5(d): Continuation of Compensation and Benefits
> For a period of eighteen (18) months after the Closing Date . . . Buyer shall . . . provide to each Transferred Employee (i) a base salary or wages no less favorable than those provided immediately prior to the Closing Date and (ii) other employee benefits, variable pay, incentive or bonus opportunities under plans, programs, and arrangements that are substantially comparable in the aggregate to those provided by Ashland . . . as expected to be in effect as of on January 1, 2011 . . . .
>
> Section 7.5(f): Severance Obligations
> Ashland and Buyer intend that the transactions contemplated by this Agreement shall not result in the severance of employment of any Employee prior to or upon the consummation of the transaction contemplated hereby and that the Employees shall have continuous and uninterrupted employment immediately before and immediately after the Closing Date, and Ashland and Buyer shall comply with any requirements under existing law to ensure the same.

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[2] The General Counsel sought injunctive relief under Sec. 10(j). On June 28, 2012, U.S. District Court Judge John W. Darrah denied the request.

[3] The General Counsel's unopposed motion, dated June 26, 2012, to correct the record by substituting accurate versions of GC Exhs. 48, 51, and 52 is granted. The documents attached to that motion are received into evidence and replace those earlier entered into the record.

Likewise, Local 70's unopposed motion to correct the transcript is granted. L. 9 of p. 1030 of the transcript is corrected to read as follows "Q And prior to that meeting had you learned from any source that"

[4] Its name at the time was TPG Accolade, LLC, but it later transitioned into Nexeo.

[5] That unit is: Drivers employed by Ashland at its facility located in Willow Springs, IL, but excluding all guards and supervisors as defined in the Act.

[6] That unit is:

Warehouse leads, drivers, drivers/material handlers and material handlers employed by the Employer at its plant located at 2461 Crocker Circle and its leased warehouse space located at 2200 Huntington Road, Suite A in Fairfield, California; but excluding all other employees, including all sales personnel, office clerical employees, professional employees, technical employees, guards and supervisors, as defined in or under the National Labor Relations Act.

> Section 7.5(n): Employee Consultations
> Buyer . . . shall fully comply with all of its . . . obligations (however arising) to inform and consult with, and in respect of, the Employees of the Business, whether the obligation arises under a Union Contract or applicable law. To the extent such communications occur in writing, Buyer . . . will provide a copy to Ashland at the time said communications occur and will provide Ashland any written responses to said communications after the time they are received.
>
> Section 7.5(o): Union Contracts
> From and after the Closing, Buyer shall … recognize any collective bargaining units representing the Transferred Employees that are recognized as of immediately prior to the Closing.
>
> Section 11.7 Public Disclosure
> No communication, release, or announcement to the public or to employees . . . shall be issued or made by any party without the prior consent of the other party . . . ; provided, however, that each of the parties may make internal announcements to their respective employees that are consistent with the parties' prior public disclosures concerning the Contemplated Transactions. . . .

A schedule attached to the APS listed the names of all the employees in each unit; Nexeo was obligated to retain those employees.

Ashland then announced the sale to the public and to its employees. It also provided its employees with details concerning their future employment with Nexeo in a manner consistent with the terms of the APS described above. For example, Ashland posted questions and answers about the sale that included the following:

> Does [Nexeo] anticipate any layoffs as a result of the transaction**?** Broadly speaking, [Nexeo's] intent is to retain Ashland's employees. Ashland Distribution people . . . will continue to work from their current locations and perform similar roles and functions.
>
> Will Ashland Distribution's current management team remain with the business?
>
> Yes . . . .
>
> Does [Nexeo] anticipate any changes to compensation and/or benefits? Under the terms of the agreement, for at least 18 months following closing, [Nexeo] 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 comparable in the aggregate to compensation and benefits as of January 1, 2011.

Many other documents from Ashland that were shared with Nexeo made similar assurances to the future Nexeo employees. Those documents reveal that Nexeo made every effort consistent with the APS to retain the existing work forces as part of the transition from Ashland. On the other hand, however, the employees and the Unions were never misled into believing that their benefits would be *identical* as opposed to *comparable in the aggregate* to the ones they enjoyed at Ashland. Rather, the communications made clear that the benefits would be different and the employees would be informed of them as soon as they were developed. Indeed, both Local 70 and Local705 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.

During the hearing I sustained hearsay objections to statements made by Ashland managers concerning the sale during times at which it was clear that those managers were not yet agents of Nexeo. In its brief Local 705 asks me to reconsider those rulings. I deny that request. In particular, I do not consider for the truth of the matter asserted any conversations between Local 705 officials and Ashland managers concerning the consequences of the sale. In addition to the hearsay nature of those conversations, 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. In any event, as the General Counsel's brief discloses in detail, the written communications made by Ashland concerning the sale closely track the communications made by Nexeo itself.[7]

On March 31 Nexeo and Ashland closed the deal and, on April 1,Nexeo began operating the facilities it had purchased. As explained below, Nexeo offered employment to all unit employees at both facilities involved in this case and operated those facilities largely with former Ashland managers and supervisors. Their employment continued essentially uninterrupted from Ashland to Nexeo.

B. Willow Springs, Illinois

The complaint alleges that on April 1 Nexeo violated Section 8(a)(5) by:

- No longer providing coverage of the unit employees under Local 705's pension plan but instead placing them under Nexeo's retirement plan.
- No longer covering employees under Local 705's health and welfare fund but instead placing them in Nexeo's health insurance plan.
- Eliminating the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked.
- Reducing employees' vacation pay from 50 hours to 40 hours for each week of vacation taken.

The complaint also alleges that Nexeo violated Section 8(a)(5)

[7] The General Counsel and Local 70 both would have liked me to have continued with the hearing in the case. I denied the General Counsel's request because the additional evidence he sought to offer was either covered by my hearsay rulings or was duplicative of information already in the large record in this case. Local 70 complained when I cut off its effort to prolong this case so it could go on a fishing expedition for subpoenaed documents. I affirm both rulings. As the General Counsel has admitted in various filings and on the record, both Ashland and Nexeo have turned over many bankers boxes of subpoenaed materials.

by delaying giving Local 705 the following information:

- Summary plan description for Nexeo's health insurance plan covering unit employees.
- Summary plan description for Nexeo's 401(k) plan covering unit employees.
- Plan document for the 401(k) plan covering unit employees.

The unit employees had been covered by collective-bargaining agreements that provided for a multiemployer International Brotherhood of Teamsters Local 705 Pension Fund. Under that plan employees could collect $2500 per month after 25 years of participation in the fund, regardless of age. The employees could continue to work after 25 years and thereby collect an additional $100 per month for each additional year.

On February 15 Nexeo met with Local 705. Present at the meeting for Nexeo were John Hollinshead, labor relations consultant, and Brian Brockson, Nexeo's vice president of operations and formerly Ashland's logistics director. Neil Messino, contract administrator, Rick Rowe, business agent, and Tom Allison, attorney, were present for Local 705. Hollinshead informed Local 705 that Nexeo intended to send offers of employment to all the employees in the next few days and that the offers would set initial terms of employment for those employees. Hollinshead explained that Nexeo had problems with Local 705's pension plan; he described that plan as having a withdrawal liability of about $9 million. Local 705 disputed that assertion. Hollinshead said that Nexeo would place the employees in its 401(k) retirement plan instead of the Local 705 pension plan. Nexeo's plan, unlike the Local 705 plan, required employee contributions. Hollinshead pointed to a study that it had commissioned to compare the two plans. According to that study only 4 of the 32 unit employees would suffer as a result of the conversion; Hollinshead then explained that Nexeo would pay those four employees the amount of money it thought represented the shortfall that would result from the change. Local 705 challenged that assertion, contending among other things that Nexeo only calculated the time the employees had spent with Ashland as opposed to the time each employee had been covered by the Local 705 plan and that Nexeo contemplated that the employees under its plan would invest the money and earn a 7.5 percent-annual rate of return as they continued to work until age 65. Hollinshead said that Nexeo also wanted the unit employees to be covered by Nexeo's health plan instead of Local 705's plan, but that issue would not be a "deal breaker." Local 705 asked for Nexeo's summary plan documents for its 401(k) and health insurance plans, and Hollinshead agreed to provide them. Hollinshead gave Local 705 a copy of the letter it planned to send to the employees. Hollinshead said that Nexeo would recognize Local 705 as soon as a majority of employees had accepted the offer of employment. After a caucus, Local 705 indicated that it did not agree that Nexeo could make the changes in the terms and conditions of employment of the unit employees.

That same day Messino sent Hollinshead the following message:

> I am following up our meeting today concerning Nexeo Solutions' purchase of Ashland Distribution. We appreciate the fact that Nexeo intends to retain all of the current bargaining unit employees and recognize Local 705 as their bargaining agent. As we advised you, Local 705, IBT, does not believe that Nexeo can unilaterally eliminate the employees' pension and health insurance plans, and we will take whatever action is necessary to support that position. In that regard, we told you that the employees' acceptance of employment from Nexeo is without prejudice to our position, and does not constitute a waiver by the Union or the employees of our position that these terms cannot be unilaterally changed. You stated that the Company understands that.
>
> At the same time, we recognize that pensions and health insurance are mandatory bargaining subjects, and we are prepared to discuss a new contract with Nexeo, including Nexeo's desire to move these employees from the Local 705 pension plan into Nexeo defines contribution plans while making employees whole for whatever losses they suffer as a result of that move. We are prepared to begin these negotiations as soon as possible, in the hope that agreement on the new contract could be reached before the Company's current March 31, 2011, closing date.
>
> In that connection, we have requested (1) summary plan description of the current health insurance plans, including retiree insurance, covering bargaining unit employees; (2) summary plan descriptions of the pension plans into which the Company wished to move bargaining unit employees; and (3) the Company's analyses of the impact on bargaining unit employees of their movement from the Local 705 plans into the Company's proposed plans and the assumptions used by the Company in making these analyses. We need this information in order to bargain about the Company's proposals.

On February 17 Nexeo sent the offers of employment to the employees. The letters read as follows:

> Re: Contingent Offer of Employment
>
> Dear [Name]:
>
> On behalf of Nexeo Solutions, LLC ("Nexeo Solutions"), it is my pleasure to extend the following offer of employment to you. This offer is contingent upon the successful closing of Nexeo Solutions' purchase of the assets of Ashland Distribution, your remaining employed by Ashland until the closing and your completing our new hire paperwork, It is made under the terms and conditions that follow.
>
> Our goal is to make the transition as smooth as possible. Toward that end, if you accept this offer:
>
> - Your employment with Nexeo Solutions will begin as soon as the sale closes;
> - Your position will be the same as your position with Ashland immediately prior to closing;
> - Your base rate of pay will be the same as your base rate of pay with Ashland immediately prior to closing;
> - You will 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;
> - You will be provided more detailed information on

the steps that will be taken to enroll you in employee benefits prior to close; and

- Nexeo Solutions will credit your service with Ashland for benefit-related purposes, to the extent such service was recognized under comparable benefit plans and programs sponsored by Ashland.
- Nexeo Solutions benefit plans are structured to be similar to those that Ashland providesgenerally to its employees. A summary of those plans is attached to this letter for your review.

Ashland employment policies will terminate when the sale closes. To the extent reasonably possible under our structure, Nexeo Solutions employment policies will generally mirror those policies. We are not, however, adopting any existing practices that are inconsistent with the express terms of our policies. If you wish to review the policies that we have prepared to date, you can obtain them by contacting the HR Service Center. Once an internal website is established, we will post our policies there.

We are aware that you have union representation as an employee of Ashland. As we discussed with your business agent earlier this week, before Nexeo Solutions can recognize the union as your representative, there is a technical legal requirement that has to be satisfied. The requirement is that a majority of our employees in the unit in which you work come from the current Ashland bargaining unit. Accordingly, once we know that a majority of employees from the Ashland bargaining unit has accepted our offer, we will be able to immediately recognize the union as your representative. Once recognition is secured, Nexeo Solutions will also be able to begin contract negotiations with the union.

In extending this offer to you, we think you should know that Nexeo Solutions has not agreed to assume any of Ashland's collective bargaining agreements. We have also chosen not to adopt, as initial terms and conditions of employment, any of the provisions contained in any current or expired collective bargaining agreement to which Ashland is a party. Among other things, what that means is that if you accept this offer, you will not, when you become a Nexeo Solutions employee, participate in either the multi-employer pension plan or the multi-employer health and welfare plan in which you participate as an Ashland employee. Instead, you will be covered at the outset of your employment by Nexeo Solutions' 401 (k) and group health plans.

To accept this offer, it is necessary for you to sign the original copy of this letter and return it to us in the enclosed envelope. While it is our hope that you respond as soon as possible, we will hold this offer open to you for 10 days from the date of this letter.

We hope that you and all of your coworkers accept our offer of employment. We look forward to your bringing your skills and experience to our team, and beginning what we hope will be a long and rewarding relationship.

Very truly yours,
David Bradley
CEO Nexeo Solutions, LLC

I accept this contingent offer of employment under the terms and conditions set forth above.

Signature Date

Attached was the following[8]:

Your New Benefits at a Glance

. At Nexeo Solutions, LLC, we remain committed to providing the coverage and support necessary to protect the health and overall well-being of our employees and their families,

Medical Coverage

- Anthem HSA 1500 with optional Health Savings Account (HSA)
- HSA- lf you enroll in the HSA 1500 medical plan, you can establish an HSA and contribute pre-tax pay to build savings for future health care costs, including retiree health care costs
- Healthy Rewards - Nexeo Solutions adds to your HSA If you participate in the Healthy Rewards program. You can earn up to $850 in Healthy Rewards from Nexeo Solutions (up to $1,700 for you and your covered spouse or domestic partner) when you complete certain requirements (Note: You will be eligible to receive Healthy Rewards to the extent you have not already earned them at Ashland)

Flexible Spending Accounts (FSA)

- Health Care FSA
- DependentCare FSA (day care for your d dependents while you work)

Dental Coverage

- Basic Dental Plan
- Enhanced Dental Plan

Vision Coverage

- EyeMed Vision Cost-Assistance Plan

Life Insurance

- The company provides coverage for you of in the amount of two times pay ($500,000 maximum)
- Buy supplemental coverage for you up to eight times pay ($1,200,000 maximum)
- Buy coverage for your spouse or domestic partner up to $100,000
- Buy coverage for your child(ren) up to $10,000

Basic and Voluntary Accidental Death

[8] A slightly different version was sent to employees with more than 10 years service.

&Dismemberment (AD&D) Insurance
- The company provides coverage for you in the amount of two times pay ($500,000 maximum)
- Buy additional coverage up to $500,000 (maximum of 10 times pay)
- Buy coverage for you and your family
Long-Term Disability (LTD) coverage
- The company covers you for 50% of pay
- Buy supplemental LTD coverage to cover an additional 10%
Vacation pay
- The vacation policy will be identical to the current Ashland policy
- Buy or sell up to 5 vacation days
- Initial Nexeo Solutions account balances will match what you had at Ashland*
Sick pay
- The sick pay policy will be identical to the current Ashland policy Initial Nexeo Solutions account balances will match what you had at Ashland*
Holidays
- The holiday policy will be identical to the current Ashland policy.
- InitialNexeo Solutions floating holiday account balances will match what you had at Ashland* "
Adoption Assistance Program
- Nexeo Solutions will provide the same level of benefit as Ashland's current adoption assistance program
Additional benefit options
- Auto and home Insurance will be available
Retirement
- Matching contributions of $1 for each $1 you contribute to the Employee Savings Planup to 4% of pay- company contributions begin after one year of service**
- Company Performance Contribution up to 4%of pay annually
Company Contribution to the Employee Savings Plan based on age as of the first day of the plan year:

Age each year	Contribution
<45 years	5.0%
45- 54 years	10.0%
55+ years	15.0%

If you have questions about your benefits or need additional information, don't hesitate to contact the HR Service Center at . . . .
This is a summary of the benefits currently offered by Nexeo Solutions. You will be eligible to participate in these benefits on the first day of your employment.
:< Initial Nexeo Solutions account balances will match what you had at Ashland at the time your employment with Ashland ends.
* · ~ Nex eo Solutions will credit your service with Ashland for this program.

All of the employees signed and returned the letters to Nexeo. However, upon advice of Local 705, they added the words "under protest" next to their signatures. Later, after discussions between Local 705 and Nexeo, the employees again signed the letters, this time without adding anything more to them.

On February 23 Local 705 sent Nexeo a message demanding recognition, reiterating its position that Nexeo could not unilaterally eliminate the Local 705 pension and health insurance plans. Local 705 also again requested that the summary plan documents be provided prior to their next meeting, then set for March 23. On March 2 Nexeo replied with a detailed description of why it felt it could unilaterally implement initial terms and conditions of employment. The reply also stated, "This explanation also captures the reason why we have not responded to the information requests contained in your letter." On March 7 Local 705 replied with its position and again requested the information. On March 12 Hollinshead informed Messino:

> I know you have requested and I am pushing to have a draft SPD on the new 401(k) plan fairly soon. Our challenge is this is a brand new plan with very unique matching components and is not one we can just replicate similar to Ashland. I have mentioned before that we had PwC (PricewaterhouseCoopers, LLP) prepare some estimates on how the employees might fare switching from [Local 705's plan] to our 401(k) plan. To that end I am enclosing what is referenced as 705 Heatmaps for your review.

The parties met on March 23; at that time Nexeo had not yet given Local 705 the information it had requested concerning the 401(k) and health insurance plans. Present at this meeting for Local 705, among others, were Allison and Messino. Present for Nexeo were Hollinshead, Brockson, David Kadela, attorney, and Tony Kuk, Nexeo's and formerly Ashland's plant manager. Local 705 gave Nexeo a written analysis of what the employees lose if they were switched to Nexeo's retirement plan. Local 705 also explained how employees could lose retiree health insurance coverage. In response Nexeo again reassured Local 705 that it would make employees whole for any loss by writing them a check for the shortfall and place the money in the 401(k) fund for the employee. Nexeo expressed concerns about potential withdrawal liabilities if it accepted the Local 705 pension plan but Local 705 argued that under the terms of the purchase agreement Ashland was obligated to bear those costs. At this meeting the parties also exchanged initial contract proposals; each used the old Local 705—Ashland contract as a template. Significantly, neither party proposed any changes to those provisions concerning overtime pay, daily and weekly guarantees of pay, and vacation pay concerning employees receiving 50 hours of pay for each taken vacation week. The parties agreed to review the proposed contracts, talk

by conference call on March 28 and then meet again on March 31.

Prior to the conference call Nexeo sent Local 705 a revised estimate concerning how the employees would fare under its retirement plan as opposed to Local 705's plan. Later Nexeo sent Local 705 a revised contract proposal. The revised proposal, among other things, gave Local 705 two options to choose from:

> (a) Option 1: Nexeo Benefit Plans and Policies
> (b) Option 2: Nexeo healthcare (medical, dental, vision and flexible spending) and Retirement Plans, and existing vacation, sick pay, funeral leave and jury duty entitlements, as provided in the Union's expired collective bargaining agreement with Ashland.

On March 28 Nexeo and Local 705 had the planned conference call. They reviewed the proposals and reached some tentative agreements, mostly in provisions for which neither party had suggested changes. They did not review pension or health insurance, leaving that for their meeting on March 31. After the conference call Hollinshead called Messino. During the course of that conversation Hollinshead raised the retirement issue and said that he was no longer authorized to state that Nexeo would make the employees whole for any losses they would suffer by converting to Nexeo's plan but that he could do something to get the number "closer."

The parties met again on March 31. They reviewed the tentative agreements that were made during the earlier conference call. There was also some discussion of other provisions such as subcontracting and transfers. But Messino stated that because he still did not have the SPD for Nexeo's health insurance plan he really could not discuss how it compared to Local 705's plan. Hollinshead replied that he would get that document for Local 705 and indicated that Nexeo's main concern was the retirement plan and that Nexeo could look into Local 705's heath insurance plan and that he felt it was an issue that they could resolve. Hollinshead then announced that at midnight Nexeo was going to place the employees under its retirement and health insurance plans and remove them from Local 705's plans. Messino asked whether Nexeo felt that negotiations were at impasse and Hollinshead conceded that they were not, but asserted that Nexeo had the right to unilaterally set initial terms for the employees. Messino stated his disagreement and said that Local 705 still needed the plans documents from Nexeo.[9]

Nexeo admits that on April 1 it did not make contributions to Local 705's Health and Welfare fund but instead moved its employees to Nexeo's health insurance plan. Nexeo also admits that on April 1 it did not make contributions to the International Brotherhood of Teamsters Local 705 Pension Fund and moved employees to Nexeo's 401(k) plan. In addition, on April 1 Tony Kuk, Nexeo's plant manager, announced to the employees that they would no longer receive a daily guarantee of 8 hours pay for each workday and a weekly guarantee of 40 hours pay for each workweek. He also changed the existing overtime policy by telling employees that they would only receive overtime pay after working 40 hours per week instead of receiving overtime pay after working 8 hours per day. Finally, he told employees that they would no longer receive 50 hours pay for each vacation taken but would instead receive only 40 hours pay. Nexeo stipulated that it actually made the last two announced changes. As to the first, in March 2012, an employee was sent home early but apparently was not paid his 8 hours; this is the only time this issue has arisen since the April 1 announcement.

The parties were scheduled to resume bargaining on June 1. On May 25 Messino sent Hollinshead a message requesting "a copy of the 401(k) plan document." The next day Hollinshead replied, indicating that the "summary plan description document is still not finalized" and that "it might take a while for the SPD on the 401(k)." On June 2 Messino again requested a copy of "the 401(k) document" and Hollinshead replied that same day that:

> Fidelity is providing the draft SPD to [Nexeo] next week. Once legal and HR have reviewed and approved it, it should be ready in the next few weeks. I will provide as soon as it is available.

On June 4 Messino explained that Local 705 was requesting both the summary plan description of Nexeo's 401(k) plan and the 401(k) plan that Nexeo was required to have under Section 402(a)(1) of ERISA. Obviously, until that point Hollinshead felt that Local 705 had only been asking again for the SPD and not something new. On July 15 after it was finally completed and reviewed, Nexeo gave Local 705 a copy the summary plan description for Nexeo's 401(k) plan. On August 11 Nexeo gave Local 705 a copy of the ERISA plan document for the 401(k) plan. And it was not until October 19 that Nexeo gave Local 705 a copy the summary plan description for Nexeo's health insurance plan.

C. Fairfield, California The complaint alleges that Nexeo violated Section 8(a)(5) by:

- No longer providing coverage of the unit employees under Local 70's pension plan but instead placing them under Nexeo's retirement plan.
- No longer covering employees under the health plan provided by Ashland but instead placing them in Nexeo's health insurance plan.
- Abandoning the practice of using seniority to assign driving routes.
- Abandoning the practices of using seniority to allocate unpaid lay-off days.

[9] The foregoing facts are based on documentary evidence and a composite of the credible testimony of Messino and Hollinshead. To the extent that there were differences in their testimony, I have credited Messino's testimony; his demeanor was convincing, his recollection sharp, and overall he seemed in command of what happened during the meetings and conversations.

Local 70 has represented a unit of employees[10] at Ashland's distribution center located in Fairfield, California, for about 18 years; at the time of the hearing there were about 20 employees in this unit. Employees were covered by Local 70's Western Conference of Teamsters Pension Trust that provided employees with defined benefits upon retirement. In general, that plan allowed employees to retire at any age and receive full benefits when an employee's years of service added to the employee's age amounted to 80. This plan was funded entirely by employer contributions; employees made no contribution to the plan.

On February 16 Nexeo met with Local 70. Present for Nexeo were Paul Fusco, Nexeo's human resources business partner and former Ashland human resources business partner, Jack Brewer, regional manager, and David Kadela, attorney. Present for Local 70 were Robert Aiello, business agent, and Dominic Chiovare, Local 70 president. During the meeting Nexeo stated it intent to offer all the unit employees employment at their current positions and at the same base salary. Nexeo then showed Local 70 a copy of a generic offer of employment letter that it intended to send the employees; it was identical to the offer letter that Nexeo had given to Local 705 a day earlier. Nexeo explained that after a majority of employees accepted the offer Nexeo would then recognize Local 70. Nexeo went on to explain that the employees would be covered by a Nexeo health plan and retirement plan instead of the Local 70 plans that they had under Ashland. The next day Nexeo sent all the unit employees the letter; the employees then accepted the offers and on February 26 Nexeo recognized Local 70.

The parties met for bargaining on March 22. Walt Penz, senior administrator for the Western Conference of Teamsters Pension Trust, joined Aiello and Chiovare for Local 70; Fusco and Brewer were present for Nexeo. Nexeo and Local 70 exchanged contract proposals; both used the old Local 70/Ashland contract as a template. Discussion quickly focused on the pension issue. Local 70 explained its Western Conference of Teamsters Pension Trust and Nexeo explained its 401(k) plan. Nexeo gave Local 70 its comparison of the plans and how it proposed to make up the difference to employees for the shortcomings of its plan. The parties met again the next day; Ernie Carrion, shop steward, replaced Benz for Local 70. They reached tentative agreements on some noneconomic issues.

Nexeo and Local 70 met again on March 29. They continued their review of noneconomic terms of the contract proposals. After that Local 70 gave Nexeo a revised economic proposal that included a health and welfare plan different from the one set forth in the latest Ashland contract. The parties discussed economics. Either at the bargaining session that day or via email the next day Nexeo made a wage proposal. At some point during the meeting Local 70 gave Nexeo a letter indicating that it believed Nexeo was a "perfectly clear successor' with attendant obligations. Nexeo expressed its disagreement. Nexeo announced that if there was no agreement reached by April 1 it would implement the changes set forth in the offer of employment letter. No party made any declaration of impasse.[11] Nexeo and Local 70 continued to exchange messages and information on March 30 and 31. On April 1 Nexeo began covering the unit employees under its 401(k) retirement plan and did not make payments to Local 70's Western Conference of Teamsters Pension Trust; it also began covering employees under its own health insurance plan and not under Local 70's health insurance fund.

On April 4[12] Nexeo assigned routes to drivers based on the same seniority-based systems that had been used by Ashland. More specifically, drivers were called in order of seniority and informed of the routes that were available the next day. The most senior driver selected his preferred route, then the next senior driver selected from the remaining routes and so on. This allowed the more senior drivers the flexibility of selecting routes with less heavy traffic and fewer stops; it also allowed those drivers to select longer routes in the hope of earning overtime and conversely to select a shorter route on a given day so as to get home earlier for personal reasons. Nexeo never informed Local 70 of its intent to change this practice. However, beginning on April 5, Nexeo no longer allowed the drivers to select their routes in order of seniority; rather Nexeo assigned employees to drive routes based on its own perceptions of efficiency. Discussions ensued between Nexeo and Local 70 concerning this change, and in mid-May Nexeo restored the seniority based route selection practice that had previously existed.

Under Ashland, if there was not enough driving work for the drivers then the least senior driver was given the option of performing warehouse work for the day. Driver Gary Robbins was advised that he would not work on April 21 because there was no route for him. He was not the least senior driver nor was he allowed to perform warehouse work. Similarly, driver Ernie Carrion was advised that he would not work on April 22 because there was no route for him; he was not given the option to work in the warehouse and was not paid for that day. Local 70 raised these changes with Nexeo as part of the discussions about the route assignment change described in the preceding paragraph. As with that issue, in mid-May restored the practice to what it had been under Ashland.

[10] That unit is:

> Warehouse leads, drivers, drivers/material handlers and material handlers employed by the Employer at its plant located at 2461 Crocker Circle and its leased warehouse space located at 2200 Huntington Road, Suite A in Fairfield, California; but excluding all other employees, including all sales personnel, office clerical employees, professional employees, technical employees, guards and supervisors, as defined in or under the National Labor Relations Act.

[11] In its brief Nexeo argues:

> 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 401(k) plan, while the Union insisted that it had to have the union-sponsored plan.

In doing so Nexeo relies on Fusco's testimony. However, I do not credit that testimony. As the record indicates it seemed that Fusco was blending in his subjective feelings with what actually occurred and his testimony was given in response to leading questions; his demeanor was not convincing.

[12] Nexeo informed the employees that they would have Friday, April 1, off with pay as it transitioned to operate the facility.

The parties continued to bargain after Nexeo made the changes to the working conditions of the employees. Nexeo's October 17 proposal was presented to union members for a vote and they unanimously rejected it.

D. Analysis

This case involves a close question of whether Nexeo is a perfectly clear successor to Ashland and thus was required to bargain first before setting initial terms of employment. In *Burns,* supra, the Supreme Court held that a successor employer may unilaterally set initial terms and conditions of employment even if the employees are represented by a union. The Court indicated, however:

> 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 case it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. Id., at 294–295.

The General Counsel's first argument is that Nexeo became a perfectly clear successor by virtue of the terms of the APS; I alert the reader that this argument largely ignores the Board's decision in *Spruce-Up Corp.,* 209 NLRB 194 (1974), enfd. 529 F.2d 516 (4th Cir. 1975). Rather, it largely focuses on the language used by the Supreme Court in *Burns* and not on the gloss put on that language by the Board in *Spruce Up.* I walk through this first argument and give my conclusions as I go. 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 indicated that Nexeo was to make offers of employment to "all" employees.

In *Burns* the Supreme Court continued:

> In other situations, however, it may not be clear until the successor has hired his full complement of employee 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. Id., at 294–295.

I conclude that this case does not involve such a situation. Nexeo was obligated not only to offer employment to all the unit employees; it also had to offer the employees employment in their same position, with the same base wages, and with a comparable benefit package. There was little doubt that a majority, if not all, of the employees, would under these conditions accept employment at Nexeo. This was what those provisions in the APS were designed to accomplish. This is what Nexeo understood would happen. This is what Local 705 and Local 70 understood would happen. And this is exactly what happened. Stated differently, Nexeo:

> [E]xpressed its clear intention to staff the 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 on unilaterally established employment terms.

Road & Rail Services., 348 NLRB 1160, 1160 (2006).

But Nexeo relies on, and the General Counsel ignores in his first argument, *Spruce Up.* In *Spruce Up* the Board held that the employer was free set initial terms of employment because it was not perfectly clear that it planned to hire all the predecessor's barbers. The Board described the critical fact pattern in that case as follows:

> Although, at the February meeting, Fowler expressed a general willingness to hire the barbers employed by the former employer, he at the same time indicated that he was going to be paying different commission rates. Fowler thereby made it clear from the outset that he intended to set his own initial terms, and that whether or not he would in fact retain the incumbent barbers would depend upon their willingness to accept those terms. 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.

Id. at 195. As the quoted passage indicates, it was unclear whether the barbers would accept employment under the different compensation scheme the employer was offering. I agree with Local 705's argument in its brief that the fact pattern in *Spruce Up* does not cover the fact pattern in this case. In this case Nexeo was offering employment in the same position, at the same base rate, and with comparable benefits. But the Board in *Spruce Up* went on to indicate in dicta that has since become a holding that the caveat in *Burns* 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 retain without change in their working conditions or at least in circumstances where the new employer failed to clearly announce its intent to establish a new set of working conditions prior to making the offer of employment. *Spruce Up* therefore makes it clear that we are not to rely on the language used by the Supreme Court in *Burns* alone; rather there must be at least a finding that a successor employer misled employees into believing their working conditions would remain the same. (This is, in fact, the General Counsel's second argument and I address it below.)

To be sure, as the General Counsel and Local 705 point out, the Board has not consistently applied *Spruce Up* in the literal fashion that its language suggests. For example, in *Springfield Transit Management,* 281 NLRB 72, 78 (1986), the respondent was required to adopt the collective-bargaining agreement that

its predecessor had with a union and hire all of the predecessor's employees. The successor instead made what the judge described as a:

> [C]onditional offer-"we'll hire you if you will work on our terms"-is precisely the kind of ambivalence in which it was not free to engage. Having said, and been required to say, that it would hire the SSRC office staff, it was then obligated to negotiate their initial wages, hours, and terms and conditions of employment with the Union.

Id. Neither the Board nor the judge mentions *Spruce Up* and the case does not fit comfortably with the holding in *Spruce Up* that, absent some deception, successor employers may unilaterally set initial terms of employment of the predecessor's employees. Rather, they seemed to apply a common sense meaning to the words used by the Supreme Court in *Burns.* The General Counsel also cites *The Denham Co.,* 218 NLRB 30, 31 (1975), and 206 NLRB 659, 660 (1973). In that case the respondent was obligated to and informed its predecessor's employees that it would retain all of them for at least 30 days. Before hiring them the respondent unilaterally announced a reduction in pay and benefits as it set initial terms of employment for the employees. The Board simply applied the unvarnished language from *Burns*, considered the totality of the circumstances, and found that the respondent was a perfectly clear successor who could not unilaterally set initial terms of employment. Again, the decision did not turn on evidence of deception on the part of the respondent.

At the end of the day, however, these cases must be assessed against the longer list of cases, cited by Nexeo in its brief, where the Board more literally applied the gloss it placed upon the *Burns* "perfectly clear" language and instead allowed employers to unilaterally set initial terms absent some evidence of deception concerning those initial terms. The 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. On February 15 and 16 Nexeo announced those details. I conclude that the General Counsel's first theory does not support a finding that Nexeo was obligated to bargain first concerning initial terms. Rather, it is for the Board to decide if it wishes to modify *Spruce Up* in light of the facts in this case, or whether to revisit that case entirely. I have attempted to make the necessary findings if it chooses to do so.

The General Counsel's second theory is that there was a:

> [C]onsistent message streaming that served for several months to allay employees' concerns by misleading them into believing that Ashland employees would be retained with essentially no change in their terms and conditions of employment.

Therefore, the argument goes, under *Spruce Up* it became a perfectly clear successor. I reject this theory. I have concluded above that there was no misleading of employees by Nexeo or by Ashland. The totality of the messages that were conveyed to the employees and to Local 70 and Local 705, and by Local 70 and Local 705 to its members, were consistent with the terms of the APS and advised employees that details of the employment offers would follow. On February 15 and 16 Nexeo gave Local 70 and Local 705 the promised details in the form of the extremely detailed letters fully described above. These facts serve to distinguish this case from *DuPont Dow Elastomers, LLC,* 332 NLRB 1071 (2000), enfd. 296 F.3d 495 (6th Cir. 2002), and similar cases cited by the General Counsel. In *DuPont Dow* the respondent indicated that it would retain all the employees with the same terms and conditions of employment; it only announced changes after it had made those promises and had begun the hiring process. The General Counsel is correct that had Nexeo told employees that they would receive benefits that were "substantially equivalent" or "comparable" without a more detailed explanation, it could have been a perfectly clear successor because it would not have sufficiently advised employees of the details of their initial terms. *Elf Atochem North America,* 339 NLRB 796, 796, 808 (2003). But here Nexeo did, in a timely fashion, provide the employees with specific details concerning the initial terms.

Local 705 and the General Counsel argue that Nexeo "misled" employees and the Union into believing that they would receive a benefit package that would be comparable in the aggregate but then were offered initial terms that were not comparable in the aggregate. But they rely only on the differences in the retirement and health insurance plans. The record does not allow me to make any assessment as to whether the benefit packages, in their entirety, were comparable in the aggregate. Nor could I comfortably make such an assessment even if the record was fully developed and substitute my judgment for that of Nexeo or Ashland, the parties who made that agreement.

I conclude that the General Counsel has not established that Nexeo was obligated to first bargain with Local 705 or Local 70 before it offered employment upon terms it set forth in the offer of employment letters. It follows that I dismiss the allegations in the complaint that Nexeo unlawfully moved the employees from the existing retirement and health insurance plans to its plans.

The remaining issues may be resolved in a more summary manner. Nexeo admits that it is a successor employer to Ashland and that it had an obligation to recognize and bargain with Local 70 and Local 705 after a majority of unit employees accepted employment. Concerning the Willow Springs facility the complaint alleges that Nexeo eliminated the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked, and reduced employees' vacation pay from 50 hours to 40 hours for each week of vacation taken. I have concluded above that Nexeo did so, and did so without first giving notice to Local 705 so as to allow it an opportunity to bargain over those matters. This is unlawful. *NLRB v. Katz,* 369 U.S. 736 (1962). Nexeo does not offer a defense to this conduct in its brief. I note that these changes were not contained in the offer of employment letters and therefore were not part of lawful action taken by Nexeo in setting the initial terms of employment. By unilaterally eliminating the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked, and by reducing employees' vacation pay from 50 hours to 40 hours for each week of vacation taken, Nexeo violated Section 8(a)(5) and (1). At the Fairfield, California facility Nexeo abandoned the practice of using seniority to assign driving routes and

abandoned the practices of using seniority to allocate unpaid lay-off days. This was done without first giving Local 70 notice and an opportunity to bargain about the changes. By unilaterally abandoning the practice of using seniority to assign driving routes and abandoning the practice of using seniority to allocate unpaid layoff days, Nexeo violated Section 8(a)(5) and (1). Finally, there are the allegations concerning the information requests made by Local 705. An employer must supply a union with requested information that is relevant and useful for the union to fulfill its obligations to represent the unit employees. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967). An employer violates the Act when it unreasonably delays providing a union with such information. *Consolidated Coal Co.,* 307 NLRB 69 (1992). Three items of information are at issue. First, on February 15 Local 705 requested a copy of the summary plan document for Nexeo's 401(k) plan and it repeated its request periodically thereafter. Nexeo did not provide the information until July 15. However, the evidence shows that during that time Nexeo was in the process of creating that document. Nexeo explained to Local 705 that it was having difficulty creating the document because it was attempting to match the benefits as best as it could to those of under Local 705's pension plan. And there is no evidence that Nexeo dragged its feet in preparing that document in order to delay giving it to Local 705. I dismiss this allegation of the complaint. Next, on February 15 Local 705 requested a copy of the summary plan document for Nexeo's health insurance plan. Nexeo did not give this to Local 705 until October 19, 2011. Nexeo argues that it was not required to give this document to Local 705 until April 1, but it promised to recognize Local 705 at the February 15 meeting and did so shortly thereafter. Nexeo tries coming at it from the other end, arguing that because Local 705 decided to suspend bargaining after June 1, Nexeo's obligation to provide the document was likewise suspended. But Local 705 remained the bargain representative of the employees and the information is the type that is clearly relevant to allow it to function in its representative capacity whether or not there are ongoing negotiations. In other words there is no excuse for such a lengthy delay. By unreasonably delaying providing Local 705 with a copy of the summary plan document describing its health insurance plan, Nexeo violated Section 8(a)(5) and (1). Finally, on May 25 Local 705 requested a copy of the plan document required by ERISA for its 401(k) plan; Nexeo did not give this document to Local 705 until August 11. In this case there was some understandable confusion initially that Local 705 was requesting something other than the summary plan document. But after a week or so this should have become clear to Nexeo. By unreasonably delaying providing Local 705 with a copy of the plan document for its 401(k) plan, Nexeo again violated Section 8(a)(5) and (1).

CONCLUSIONS OF LAW

Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act by

1. Eliminating the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked, and by reducing employees' vacation pay from 50 hours to 40 hours for each week of vacation taken without first giving notice to Local 705 and allowing it an opportunity to bargain over those matters.

2. Abandoning the practice of using seniority to assign driving routes and abandoning the practice of using seniority to allocate unpaid lay-off days without first giving notice to Local 70 and allowing it an opportunity to bargain over those matters.

3. By unreasonably delaying providing Local 705 with copies of the summary plan document describing it health insurance plan and the plan document for its 401(k) plan.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I shall require Respondent at its Willow Springs, Illinois facility to restore the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked, and resume giving employees vacation pay of 50 hours for each week of vacation taken. I shall require Respondent at its Fairfield, California facility to restore the practice of using seniority to assign driving routes and to restore the practice of using seniority to allocate unpaid lay-off days, to the extent that it has not already done so.

I shall require that Respondent make employees whole for any losses suffered as a result of its unlawful conduct. Backpay shall be computed with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

3On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Nexeo Solutions, LLC, Willow Springs, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Eliminating the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked, and by reducing employees' vacation pay from 50 to 40 hours for each week of vacation taken without first giving notice to Local 705 and allowing it an opportunity to bargain over those matters.

(b) Unreasonably delaying providing Local 705 with copies of the summary plan document describing it health insurance plan and the plan document for its 401(k) plan.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

The Respondent, Nexeo Solutions, LLC, Fairfield, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Abandoning the practice of using seniority to assign driving routes and abandoning the practice of using seniority to allocate unpaid lay-off days without first giving notice to Local 70 and allowing it an opportunity to bargain over those matters.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. The Respondent shall take the following affirmative action necessary to effectuate the policies of the Act.

(a) At its Willow Springs, Illinois facility, restore the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked, and resume giving employees vacation pay of 50 hours for each week of vacation taken.

(b) At its Fairfield, California facility, restore the practice of using seniority to assign driving routes and to restore the practice of using seniority to allocate unpaid lay-off days, to the extent that it has not already done so.

(c) Make employees whole for any loss of earnings and other benefits suffered as a result of the unlawful conduct in the manner set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e)Within 14 days after service by the Region, post at its facility in Willow Springs, Illinois, copies of the attached notice marked "Appendix A" and post at its facility in Fairfield, California, copies of the attached notice marked "Appendix B"[14] Copies of the notices, on forms provided by the Regional Director after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2011, pertaining to Appendix A, and since April 5, 2011, pertaining to Appendix B.

(f)Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 30, 2012

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT eliminate the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked, and reduce employees' vacation pay from 50 hours to 40 hours for each week of vacation taken without first giving notice to the Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union, Local No. 705, an affiliate of the International Brotherhood of Teamsters and allowing it an opportunity to bargain over those matters..

WE WILL NOT unreasonably delay providing Local 705 with requested information that is relevant and necessary for Local 705 to perform it functions are the bargaining agent for the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked, and resume giving employees vacation pay of 50 hours for each week of vacation taken.

WE WILL make employees whole for any loss of earnings and other benefits resulting from our unlawful conduct plus interest compounded daily.

NEXEO SOLUTIONS, LLC

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX B

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT abandon the practice of using seniority to assign driving routes and abandon the practice of using seniority to allocate unpaid lay-off days without first giving notice to the Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70 of Alameda County, affiliated with the International Brotherhood of Teamsters and allowing it an opportunity to bargain over those matters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore the practice of using seniority to assign driving routes and to restore the practice of using seniority to allocate unpaid lay-off days, to the extent that we have not already done so.

WE WILL make employees whole for any loss of earnings and other benefits resulting from our unlawful conduct plus interest compounded daily.

NEXEO SOLUTIONS, LLC