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

15 UNITED STATES OF AMERICA

16 BEFORE THE NATIONAL LABOR RELATIONS BOARD

17 NEXEO SOLUTIONS, LLC,

18 and

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

24 and

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

No. 13-CA-46694; 13-CA-62072;
20-CA-35519

**TEAMSTERS UNION LOCAL 70's
BRIEF IN SUPPORT OF EXCEPTIONS**

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I. INTRODUCTION

Charging Party, Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70 of Alameda County (“Local 70”), joins in the Exceptions and Briefs in support of those exceptions filed by Counsel for the Acting General Counsel and Teamsters Local 705. The ALJ noted that this was a “close case.” We have taken exception to that characterization, because we do not believe this case is close. From the commencement of the transaction in question in November 2010, it was an absolute certainty and thus “perfectly clear” that every Ashland employee would be employed by TPG/Nexeo (“Nexeo”). The entire Agreement of Purchase and Sale (“APS”) (G.C. Ex. 6) and all the circumstances surrounding the APS required that Nexeo hire all of those employees. The APS was structured by both parties to assure continued employment as an essential element of the success of the transaction. In fact, Nexeo was so certain that it would be a perfectly clear successor that it agreed in the APS to recognize Local 70 as the incumbent union. Throughout the transaction, there was not even a hint of a suggestion that a single one of the represented employees would not continue employment with Nexeo. As a result, Nexeo was obligated to recognize Local 70 from the beginning and to bargain before implementing any changes in working conditions.

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II. ARGUMENT

A. LOCAL 70 JOINS IN THE ARGUMENTS MADE BY COUNSEL FOR THE ACTING GENERAL COUNSEL AND CHARGING PARTY LOCAL 705

Local 70 joins in the arguments made by Counsel for the Acting General Counsel and by Charging Party Local 705. It is time to overrule or limit the so called “*Spruce-Up* doctrine.” *Spruce-Up*, 209 NLRB 194 (1974), *enf’d* 529 F.2d 516 (4th Cir. 1975). Alternatively, even if the Board chooses not to overrule or limit *Spruce-Up*, that case simply does not apply to the facts present here. We make additional arguments below.

B. NEXEO KNEW ALL OF THE FAIRFIELD EMPLOYEES WOULD BE HIRED, AS THE APS GUARANTEED THEIR HIRE

Paul Fusco, who is now employed as a manager by Nexeo, conceded on cross-examination that he knew all the employees at the Fairfield location would continue in their employment at that location after the completion of the asset purchase:

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Q: And prior to that meeting had [you] learned from any source that there were any employees in Fairfield who did not intend to go with the new company? To continue their employment in Fairfield?

A: No.

Q: As of the end of the February, had you any information that suggest[ed] that any of the employees would not continue their employment at the Fairfield location?

A: No.

Transcript of Hearing (hereinafter “TR”) 1030:9-20.

Mr. Fusco admitted on behalf of Nexeo that Nexeo knew every employee in the Fairfield location would be continuing work at that location as part of the transaction. This alone is enough to establish a successor obligation arising at the time Nexeo knew all employees would be hired, which was the time the transaction was announced in November. Indeed, such knowledge—and the resulting successor obligation—existed *before* the February 16 meeting at which Nexeo announced new and different conditions of employment without previously having bargained with Local 70 about those changes.

Such an understanding is consistent with the structuring of the APS to ensure that all employees (less any potential normal attrition) in both the bargaining units and throughout the entire company would seamlessly transition to the new company. Indeed, the APS was structured by both Ashland and Nexeo to assure a seamless transition of employees. In light of the substantial economic benefit to both Ashland and Nexeo, Nexeo could not implement unilaterally new conditions of employment as a matter of law pursuant to the National Labor Relations Act (“NLRA” or “Act”). This is an important point. There were substantial economic benefits to ensuring continued employment, and both Ashland and Nexeo benefitted from that arrangement. This was their managerial decision. That should weigh heavily in finding, as a matter of federal labor law, that Nexeo, in exercising its business judgment to ensure a seamless transition, understood its role as a successor. It was effectively making a business judgment to assure a seamless transaction in all regards including employment.

1 *Spruce-Up* does not allow Nexeo to initiate different conditions without bargaining for
2 another reason. Nexeo and Ashland bargained most of the terms and conditions of employment
3 for the Ashland employees. Ashland and Nexeo bargained between themselves an agreement
4 requiring Nexeo to hire all of the employees. As noted below, Ashland and Nexeo established
5 (by the APS) the terms under which the employment of Local 70 employees would continue with
6 Nexeo. If Nexeo and Ashland can bargain such terms, there is no reason that Nexeo should not
7 have bargained with the Union¹ before changing those conditions.

8 **C. THE STRUCTURE OF THE TRANSACTION GUARANTEED THE**
9 **EMPLOYMENT OF ALL BARGAINING UNIT EMPLOYEES AT FAIRFIELD**
10 **AND ESTABLISHED TERMS OF EMPLOYMENT BEFORE AND AFTER THE**
11 **CLOSURE DATE**

12 In general, asset purchase agreements between companies contain provisions regarding
13 the terms and conditions of the employees with respect to the purchaser or seller. This is the
14 meaning of an asset sale: it is the assets that are being transferred; the employees are left out of
15 the transaction. Indeed, employees are not viewed as assets. At most, an asset purchase
16 agreement might provide that the seller will terminate the employees as of the sale date, to be
17 clear that the purchaser is buying “assets” which exclude any employees. However, the seller and
18 buyer in this case, Ashland and Nexeo, went in a very different direction: they specified the
19 retention of the employees and their employment terms, both before and after the closure date.

20 First, the APS was structured in a way to guarantee that all of the employees in the entire
21 Ashland distribution division would continue to work for Nexeo (absent, of course, normal
22 attrition). That is a critical component of the transaction that the parties agreed upon as part of
23 their integrated agreement. They guaranteed successor employment for all employees,
24 bargaining-unit and otherwise, throughout the entire Ashland division. Thus, from the time that
25 the deal was signed—and even before it was announced to the employees and the public—it was
26 structured in a way to guarantee continuation of employment of all employees.

27 ¹ Where we refer to union we mean Local 70. We do not suggest that the same theories do not
28 apply to Local 705. Their counsel will ably argue their position.

1 Secondly, the APS effectively set the terms and conditions of the bargaining unit
2 employees both during the period from November 5, 2010 through March 31, 2011 and after
3 April 1, 2011, when Nexeo took over. First, Ashland could not change any of the conditions.
4 Second, Nexeo was restricted with respect to the terms of employment for the Ashland
5 employees. By setting many of the terms and conditions of employment, Nexeo and Ashland
6 circumscribed the ability of Local 70 to negotiate different terms with Nexeo or to negotiate the
7 effects of the sale with Ashland. For example, the APS prohibited Nexeo from agreeing to lower
8 compensation in return for better benefits or other improved conditions. (G.C. Ex. 6, at section
9 7.5(d).) Local 70 was also prohibited from negotiating severance pay with Ashland.

10 The fundamental principle here is that Nexeo and Ashland, as part of their APS, had
11 already negotiated most of the very important and central terms and conditions of employment. It
12 is this feature which especially distinguishes the parties' APS from other asset purchase
13 agreements and governs the parties' ensuing obligations. Still, both of these aspects of the APS—
14 continued employment of all former Ashland employees and establishment of the terms and
15 conditions of their employment—were critical and integral parts of the entire agreement.

16 Fundamentally, if Ashland and Nexeo could negotiate the terms of conditions of
17 employment through their APS before even announcing the sale in November of 2010, there
18 should be an equal requirement that Nexeo negotiate with Local 70 before making any changes.

19 Nexeo's argument is that it could negotiate significant provisions with respect to the terms
20 and conditions with Ashland but that it could not do so with Local 70 until after a majority of the
21 employees affirmatively had accepted employment. This is an essential contradiction: two
22 employers can set the terms and conditions of employees, and yet Nexeo is precluded from doing
23 so under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). The premise underlying *Burns*
24 is that a person (including a business entity) can purchase the assets of another entity and
25 restructure its labor relations by changing conditions for better or worse and by hiring new
26 employees. However, that right must necessarily take into account the Union's rights to
27 recognition and to bargain with both the predecessor and the successor.

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1 *Burns* also contemplates the right of the Union to take economic action. However, here
2 Local 70's right to take economic action against Nexeo was nonexistent until after April 1, 2011.
3 Indeed, Local 70 was prohibited from striking or taking economic action because of the no-strike
4 clause in its agreement with Ashland. Local 70 could not engage in any economic activity against
5 Nexeo directly, because Nexeo effectively did not exist, having neither a location nor any
6 employees prior to April 1, 2011. Plus, any strike action affecting Ashland would have either
7 violated the collective bargaining agreement or would have violated section 8(b)(4) or 8(b)(7) of
8 the Act if it had been directed at Nexeo. As such, there was no effective economic activity in
9 which Local 70 could have engaged, due to the nature of the transaction. Thus, a finding that
10 Nexeo had the right to announce new conditions of employment in February would be
11 inconsistent with *Burns*, since any economic action by the Union would have had to occur on or
12 after April 1.

13 Moreover, Nexeo took full advantage of the no-strike obligation in the Local 70
14 agreement with Ashland, knowing that Local 70 members were foreclosed from doing anything—
15 including engaging in an unfair practice strike—other than accepting employment with Nexeo.
16 As of November 5, 2010, Nexeo knew it would hire all the employees, and it took advantage of
17 the no-strike obligation and the inability of Local 70 to take or threaten economic action in order
18 to preserve the employment conditions of its members. This aspect of the APS and the entire
19 transaction underscores the necessity of applying a successorship obligation on Nexeo.

20 Ashland and Nexeo prohibited Nexeo from recognizing any other union, even if the
21 employees chose to seek another union. (G.C. Ex. 6, at section 7.5(o).) This was a contractual
22 requirement that Nexeo recognize Local 70 in Fairfield and Local 705 in Willow Springs. Thus,
23 Nexeo was obligated from the date the APS was announced in November 2010 to recognize
24 Local 70. This mandated terms and conditions of employment in the most fundamental manner.
25 Such a provision could only have been agreed to if Nexeo knew with certainty that it would be a
26 perfectly clear successor.²

27 ² Arguably, this goes further than *Lamons Gasket Company*, 357 NLRB No. 72 (2011).
28 However, this is permissible, because it was certain Nexeo would be a successor under the
Burns doctrine.

1 In entering the APS, Ashland also precluded the possibility for good faith bargaining with
2 Local 70 or any other union which represented its employees. As part of the APS, Ashland
3 agreed it would not incur any severance liability or enter into any agreement with an incumbent
4 union, foreclosing any opportunity for meaningful bargaining on any issue surrounding the effects
5 of the sale. This limited the ability of Local 70 or any other union to effectively bargain over the
6 effects of the transaction.

7 Nexeo and Ashland agreed to all of these contractual provisions, because they provided
8 substantial economic benefit to both companies. (We discuss more of this below.) The
9 arrangement governing employment ensured a seamless transition with no disruption to the
10 business. As a critical part of the entrepreneurial decision-making process, this arrangement also
11 reduced the overall expenses of the transaction and increased the value of the transaction to both
12 parties. Thus, Nexeo and Ashland both took strategic economic advantage of an arrangement that
13 maintained complete continuity of employment for all employees, including the represented
14 employees.³ However, when it comes to the perfectly clear successor doctrine and the resulting
15 obligation to bargain with Local 70, Nexeo rejects the implications of the very arrangement the
16 parties negotiated. Essentially, while Nexeo and Ashland were perfectly willing to reap the
17 entrepreneurial benefits of the decision to retain all employees and to set employment conditions,
18 Nexeo sought to avoid the burden of bargaining with the Union.

19 Thus, labor costs and the effect of labor on the seamless nature of the transaction made
20 labor costs to both Ashland and Nexeo an important feature of the APS. It was an entrepreneurial
21 decision to ensure seamless transition of the employees. This falls well within the mandatory
22 nature of the bargain of the parties. *See, First National Maintenance v. NLRB*, 452 U.S. 666
23 (1981)(entrepreneurial decision to close facility not mandatory subject of bargaining unless labor
24 costs involved). That is, if Ashland and Nexeo bargain terms of employment both before and
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26 ³ There is no evidence that the requirement that the Ashland employees be retained was an act of
27 altruism on Ashland's or Nexeo's part. This element of the transaction increased the sales
28 price. And, as noted below, the ALJ improperly limited examination of witnesses and the scope
of a subpoena duces tecum which would have allowed Charging Party to prove all of this.

1 after the closure date, the obligation falls on both of them to negotiate those decisions with the
2 Union.

3 Although the transaction in question has been termed an “asset sale,” it is really the sale
4 of a business in its entirety. That is, Ashland sold its entire distribution operation to Nexeo. The
5 sole exclusions were Ashland’s stock, certain financial assets, and the collective bargaining
6 agreements. (G.C. Ex. 6, at section 2.4.) Otherwise, the whole line of business was bought and
7 sold, along with all other contractual obligations and all of the employees themselves. Thus, the
8 transaction more closely resembled a stock sale of a subsidiary than a true “asset sale” of selected
9 assets. In analogous circumstances, the Board has recognized that corporate form must be
10 disregarded or ignored altogether. In alter ego cases or section 8(b)(4) situations, where the union
11 pickets the entire corporation but not a division, the Board ignores exact corporate form. The
12 division is then treated as a separate corporation or entity.

13 The Board should do the same here, because—as the documents show—the entire
14 Ashland distribution division was sold to Nexeo.

15 The significant portions of the APS are as follows:

16 (1) Section 7.5(a) prevented Ashland from engaging in any mass layoffs or reductions
17 in force. Thus, the agreement ensured that all the employees in the bargaining unit (as well as all
18 unrepresented employees) would be available for hire by Nexeo and effectively negates any limit
19 on Nexeo hiring all the employees.

20 (2) Section 7.13(d)(v) provided that Ashland may not “enter into any collective
21 bargaining agreement or other material contract with any labor organization.” This provision
22 prevented Ashland from negotiating the renewal of the agreement in Chicago, an arrangement on
23 which Nexeo insisted. It also left Nexeo in control of the negotiations and the collective
24 bargaining relationship through the APS, effectively making Nexeo a joint employer with
25 Ashland. As to Local 70, Ashland’s inability to lawfully enter binding agreements foreclosed the
26 possibility of negotiating any modification of the agreement or any severance agreement with the
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1 Union.⁴ Because the arrangement left no room for any bargaining—let alone meaningful
2 bargaining—with Local 70, it ran afoul of the duty to bargain with the Union.

3 Local 70 was also precluded from striking over any severance demand. Nexeo and
4 Ashland took advantage of this no-strike obligation to deprive Local 70 of the ability to negotiate
5 with Ashland. Also, because Nexeo did not exist except on paper until April 1, Local 70 could
6 not strike or take economic action over Nexeo’s February 16 announcement that it would change
7 conditions of employment as of the closure date.

8 (3) Section 7.5(g) required that service credits be granted for pension and similar
9 programs. That section also required that Nexeo “waive any pre-existing condition exclusion” or
10 other exclusions from its benefit plans. That Nexeo was required to waive exclusions and to grant
11 service credits further confirms that the company was required to hire all of the employees,
12 especially since service credits only apply to a particular defined benefit plan. Furthermore, this
13 prohibited Local 70 from negotiating different arrangements. The *Burns* rationale, that a
14 successor should not negotiate with the incumbent union until a majority of employees has been
15 hired, is not applicable where the predecessor (here, Ashland) and the successor (here, Nexeo)
16 negotiate those very terms which should have been negotiated with Local 70.

17 (4) Section 7.5(i) required the buyer to assume all vacation days and paid time off.
18 This provision clearly demonstrates Nexeo would continue the employment of the seller’s
19 employees. It also relieved Ashland of that responsibility. It also complied with California state
20 law. Cal. Lab. Code, § 227.3.

21 (5) In Section 7.5(f), the parties agreed that all “the Employees will have continuous
22 and uninterrupted employment immediately before and immediately after the Closing Date . . .
23 [.]” This section was intended to protect Ashland from any severance obligations.

24 (6) Through Section 7.5(n), the parties also agreed there would be no WARN Act
25 event.⁵ This reinforces the existence of a substantial economic motivation on the part of Nexeo

26 ⁴ Where Nexeo imposes conditions which are unacceptable to the Union, the Union should be in a
27 position to demand severance pay from Ashland, because the employees lost significant
28 benefits from the imposed conditions. The Union could not do so here, since Ashland agreed
with Nexeo not to pay any severance or other benefits as a result of the sale.

1 and Ashland to ensure that all employees are hired. Here, that economic incentive is to avoid any
2 WARN Act obligation on the part of Ashland as the seller or any successor liability on Nexeo as
3 the buyer. Moreover, the decision not to provide any WARN Act notice obligated Nexeo to
4 continue the employment of the employees after the closure date. Thus, Nexeo was required by
5 statute to retain everyone, and it knew this when the APS was announced.

6 (7) Section 7.5(b) required the buyer to “make offers of at-will (to the extent permitted
7 by applicable Law) employment in accordance with the provisions of Section 7.5 *to be effective*
8 *as of the Closing . . . [.]*” (Emphasis added.) It must be noted that the parties limited the scope of
9 the employment offers to “at will,” which was a substantial limitation on the nature of the offers.⁶
10 Moreover, this language, which plainly applies to all employees, required Nexeo to make
11 employment offers that would be effective *before* Nexeo actually took over—that is, “as of the
12 Closing.” This requirement existed as of November 5, 2010 the date of the APS.

13 Significantly, Nexeo was not permitted to pick and choose employees but had to make
14 offers of employment to everyone. Thus, every employee was ensured employment with Nexeo.

15 (8) Section 7.5(b) also provided that the offers of employment must be comparable
16 “and shall be made on terms and conditions sufficient to avoid statutory, contractual, or other
17 severance obligations, other than where such severance is automatic pursuant to applicable Law
18 or the terms of any Union Contract.” Again, this provision is central to the agreement, because it
19 forecloses any severance negotiations other than those required by a contract.

20 (9) Section 7.5(o) is labeled “Union Contracts.” It is phrased to require that Nexeo
21 “recognize any collective bargaining units representing the Transferred Employees that are
22 recognized as of immediately prior to the Closing.” This confirms that Nexeo was required to
23 hire all the employees of Ashland in the bargaining unit represented by Local 70, as well as any
24 other labor organization. In effect, Nexeo was agreeing to recognize Local 70 (and any other

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26 ⁵ The California equivalent of the WARN Act is somewhat more restrictive. *See* Cal. Lab. Code
§§ 1400-1408.

27 ⁶ Again, this is just another important term which Nexeo and Ashland set for the Local 70
28 represented employees. This foreclosed Ashland from bargaining anything different. This also
foreclosed Nexeo from offering any contract of employment for a term.

1 Local) through the very provisions of the sale agreement. This meant that, as of November 5,
2 2010, Nexeo knew that it had to bargain with Local 70 for the Fairfield employees. Because the
3 agreement expressly required Nexeo both to retain all employees—as Mr. Fusco conceded he was
4 aware—and to recognize the employees’ collective bargaining representatives, the suggestion that
5 Nexeo had to wait until it was clear that employees would accept employment before it
6 recognized the Union is entirely baseless. This also precluded a decision by the employees to
7 reject the Union.

8 This undermines the rationale of both *Spruce-Up* and *Burns*. First, Nexeo and Ashland
9 could not determine the date upon which Nexeo’s bargaining obligation would arise. Secondly,
10 they could not determine the representation status of the Union unless it was consistent with
11 *Burns*. Here, it was undoubtedly consistent with *Burns*, since both parties knew that all
12 employees would be retained. Thus, it was lawful only because the perfectly clear doctrine
13 applied.

14 (10) The APS also sets various employment standards, including the requirement that
15 Nexeo provide the transferred employees “a base salary or wages no less favorable than those
16 provided immediately prior to the Closing Date and . . . other employee benefits . . . that are
17 substantially comparable in the aggregate to those provided by Ashland.” (One benefit obviously
18 missing here is the defined benefit plan.)

19 That provision also requires that Nexeo continue such compensation and benefits “for a
20 period of eighteen (18) months immediately after closing date . . . or for such longer period as
21 required . . . pursuant to the terms of any applicable Union Contract. . . [.]” Because the Local 70
22 agreement was in effect through August 31, 2014, this required that Nexeo keep in place those
23 base salaries and wages and comparable benefits. Thus, in effect, Nexeo was required to keep in
24 place the terms of the Local 70 contract for at least 18 months, unless negotiations resulted in a
25 different agreement.⁷

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27 ⁷ We recognize that some provisions, such as union security and arbitration, may not have been in
28 effect absent an agreement.

1 It is apparent that such “freezing” of compensation and benefits would and did prevent the
2 Union from bargaining over employees’ terms and conditions of employment. For example,
3 Local 70 could not agree to lesser conditions of employment for wages in return for better
4 benefits, including better pension benefits. Any such option was foreclosed, because Ashland and
5 Nexeo had already entered into an agreement. The premise underlying *Burns* is that bargaining
6 between the successor and the union is a two-way street. (For further discussion of *Burns*, see
7 Subsection B, below.) However, here Ashland and Nexeo severely limited Local 70’s right to
8 negotiate wholly new conditions.

9 (11) In addition to these specific contractual provisions, the entire context and nature of
10 the sale demands application of the perfectly clear successor doctrine to this case. In analyzing
11 the doctrine, it is important to recognize that, to a large degree, these employers acted as a joint
12 employer in negotiating the substantial terms and conditions of employments under which the
13 employees would continue to work up until the date of closure and thereafter.

14 The agreement expressly required that Nexeo make an offer of employment to all the
15 Ashland employees. This is perhaps the strongest argument for the application of the perfectly
16 clear successor doctrine, because from the date that the agreement was signed and made public by
17 filing with the Securities and Exchange Commission, it was perfectly clear to everyone involved
18 that all employees would be hired by Nexeo. Indeed, more than simply offering employment was
19 required; Nexeo had to offer employment in such a way as to effectively guarantee that all
20 employees *would* be hired.

21 Also, Ashland and Nexeo crafted an arrangement whereby the entire distribution division
22 would be sold. Importantly, the detailed arrangements between Ashland and Nexeo effectively
23 established that from November 5, 2010, Nexeo and Ashland intended for Nexeo to hire all the
24 bargaining unit employees and to structure the transaction so as to effectively guarantee that all
25 employees would be hired in fact. In effect, the whole business was being sold to Nexeo,
26 employees and all, with the glaring exception of the employees’ Union contracts. Such a
27 transaction is inherently destructive of the Section 7 rights of the employees and forecloses any
28 meaningful bargaining between the Union and either Ashland or Nexeo.

1 The Section 7.5 provisions discussed above are only one part of the entire APS.
2 Consistent with Section 7.5, the rest of the agreement was also designed to ensure a completely
3 seamless transition with no changes in the business model.⁸ Customers were advised the
4 transition would be seamless. The transition of the employees was part of an overall business
5 transaction which was intended to change nothing, except the ownership of the business.
6 However, if the transaction was represented to be seamless, this should have included employee
7 relations and the complement of employees. It is inconsistent, even as a matter of business
8 decision, to allow Nexeo to significantly alter employee matters as of November 5 *only as to*
9 *represented employees to whom a bargaining obligation attaches*, while allowing all other
10 matters to remain unchanged. This is particularly true, given that employee matters were an
11 integral and critical aspect of effecting a smooth and seamless transfer and transition in all other
12 regards.

13 **D. FEDERAL AND STATE WARN ACTS REQUIRED NEXEO TO HIRE ALL THE**
14 **EMPLOYEES OF ASHLAND**

15 The Board recently reaffirmed its obligation to harmonize the National Labor Relations
16 Act with other relevant federal laws. *See, e.g., Mezonos Maven Bakery, Inc.*, 357 NLRB No. 47
17 (2011). One relevant federal law is the Worker Adjustment and Retraining Notification Act or
18 “WARN” Act, 29 USC § 2101, *et seq.*, which imposes a legal obligation on Nexeo to hire all the
19 employees, because Nexeo and Ashland failed to provide any WARN Act notice.

20 The WARN Act defines specific responsibilities in the context of a sale, including the
21 requirement of providing at least sixty days’ notice of any impending employment loss, such as a
22 plant closure or lay off. Under § 2101(b)(1), prior to the sale date or effective date of sale, the
23 seller has to provide notice. After that date, it is the purchaser who has to provide such a notice.
24 *See IATSE v. Compact Video Services, Inc.*, 50 F.3d 1464 (9th Cir. 1985). Courts have ruled that
25 where there is a technical termination of employment, as here, there is no employment loss

26 ⁸ As noted below the ALJ improperly refused to allow cross examination of other matters
27 showing that Nexeo and Ashland negotiated the APS with the intention of assuring a
28 completely seamless agreement and transition on all matters. Nothing was excepted from this
purpose.

1 triggering the WARN Act. *See Headrick v. Rockwell International*, 24 F.3d 1272 (10th Cir.
2 1994) (noting that the case involved only a “technical” termination and, thus, no employment
3 loss).

4 Here, the WARN Act would have otherwise imposed an obligation on at least the
5 purchaser to provide the WARN Act notice, if the purchaser did not intend to hire the employees.
6 However, the APS was structured to avoid any obligation to provide any WARN Act liability or
7 obligation, and the parties complied with federal law by Nexeo hiring all the employees. Had too
8 few of them been employed, it would have triggered the WARN Act liability on either Ashland as
9 the seller or potentially Nexeo as the buyer. Moreover, the WARN Act effectively compelled
10 Nexeo to hire all the employees in Fairfield, because Nexeo knew from the time the APA was
11 finalized that it would employ all the employees—consistent with testimony of Mr. Fusco—and
12 because the transaction was structured to avoid giving any WARN Act notice.⁹

13 The Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621, and its
14 amendment (the Older Workers Benefit Protect Act) are also relevant. If workers had been laid
15 off, those laws would have required Ashland and Nexeo to go through a complicated and time-
16 consuming procedure of seeking any necessary releases or waivers. 29 U.S.C. § 626(f). Instead,
17 all of these issues and liabilities were resolved by requiring Nexeo to simply hire everyone.

18 In sum, the application of these coordinated federal laws and state laws enacted to protect
19 employees from being terminated without notice compels a finding that Nexeo intended, as of
20 November 2010, to hire all the employees and thus had an obligation to recognize and bargain
21 with Local 70 from the beginning. Moreover, since the WARN Act required Nexeo to retain the
22 employees, the perfectly clear successor doctrine applies.

23 **E. THE ADMINISTRATIVE LAW JUDGE MADE SEVERAL CRITICAL**
24 **EVIDENTIARY AND OTHER RULINGS WHICH FORECLOSED THE MAKING**
25 **OF A COMPLETE RECORD AND PREJUDICED THE CASE.**

26 It is essential to note that the ALJ improperly limited the examination in this case
27 effectively to terms and conditions of employment for unit employees, rather than allowing a

28 ⁹ The same result is compelled by the more restrictive California equivalent of the WARN Act.
See Cal. Lab. Code §§ 1400-1408.

1 much broader inquiry into the structure of the APS and how it was implemented jointly by
2 Ashland and Nexeo. We believe the foregoing discussion demonstrates that this was far too
3 narrow a ruling on evidentiary issues.

4 The same is true of the ALJ's limitation of the Subpoena Duces Tecum. (Local 70 Ex.
5 CP-SF-1.) The Subpoena was properly served on Nexeo, and Nexeo failed to file a Motion to
6 Quash. Neither Nexeo nor the ALJ ever cited any authority for the proposition that the ALJ has
7 the power to limit—here, *severely*—the production of documents required by a Subpoena where
8 the Responding Party has not filed a Motion to Quash. The Subpoena was intended to seek
9 information regarding the underlying transaction—not simply what occurred to Teamster-
10 represented employees in Fairfield. After discussion on the record, the ALJ recognized that
11 Nexeo had failed to file a Petition to Revoke or Quash the Subpoena. (TR. 935.) At that point,
12 the ALJ appeared to rule that Nexeo had to respond to the entire Subpoena. Inexplicably, the ALJ
13 then drastically *narrowed* the Subpoena:

14 JUDGE KOCOL: All right. But I – this is what I'm going to do
15 on this one as I'm thinking about it. I'm going to narrow the scope
16 of the subpoena requests to those documents and each of these
17 paragraphs that relate to the terms and conditions of employment of
18 Unit employees, and I'm going to request that you make the keeper
19 of records available for Mr. Rosenfeld to talk to and answer
20 questions, not on the record but off the record, and you make your
21 own arrangements. And then I'm going to keep the record open
22 until I get something from Mr. Rosenfeld or from you, one of you
23 tell me I've got everything I want or we think we've given
24 everything, and I will then decide whether to –how to handle it.

25 But, Mr. Rosenfeld, I've narrowed the subpoena, but I want to
26 make sure that there's not anything else out there that you're
27 entitled to that you haven't gotten. So we'll do it that way.

28 MR. ROSENFELD: Well, Your Honor, I - - just so the record is
clear, I understand what you've done. I don't think that – I disagree
for reasons that I think I stated.

TR. 937:5-23.

25 The ALJ erroneously and repeatedly sustained objections raised by Nexeo's counsel to
26 any question which went beyond the extremely narrow concept of “terms and conditions of unit
27 employees.” However, a transaction of this nature obviously involves far more than what
28 happens to employees in the Local 70-represented bargaining unit. There are clerical employees,

1 supervisors, and managers employed at the Fairfield location who fall outside of the unit. How
2 their employment is treated and how arrangements were made to transition them to Nexeo is
3 plainly relevant to the concept of how employees were being treated.¹⁰

4 Clearly, the ALJ's limitation on both the Subpoena and the questioning prevented Local
5 70 from obtaining relevant and essential information. For example, there were obviously a
6 number of other issues which both the Separation Committee and the Transition Committee, set
7 up by Nexeo and Ashland as part of the transition, would have had to resolve beginning in
8 November 2010 and continuing up to and beyond April 1, 2011. Many of those issues directly or
9 indirectly related to the employment of employees. Certainly, Nexeo would have had to be
10 concerned about performing due diligence and ensuring compliance with Occupational Safety and
11 Health Act issues, workers compensation obligations, health and welfare obligations, providing
12 for any other welfare benefit plans maintained by Ashland, application of any injury or illness
13 prevention act under the California Labor Code, ensuring adequate sexual harassment training,
14 and a whole host of other labor and employment laws which would affect the transition and,
15 ultimately, whether Nexeo would even complete the asset purchase. The ALJ refused to allow
16 examination on these matters.

17 In addition to these matters which ultimately impact bargaining unit employees, there
18 were a number of other operational issues which had to be secured as part of the seamless
19 transition intended by the parties. These include leases of equipment, real property leases,
20 maintaining insurance arrangements, maintaining contracts with vendors and suppliers, service
21 agreements, maintaining both sales contracts entered into before April 1 and those to be
22 completed before April 1, continuing and maintaining relationships with customers, and arranging
23 with suppliers and customers for credit.

24 The Subpoena was directed at getting documents reflecting or relating to the arrangements
25 between Nexeo and Ashland to ensure a smooth transition, which related directly and indirectly to

27 ¹⁰ Indeed, if these employees were treated better or differently, this would establish a
28 discriminatory motive or establish that the treatment of the bargaining unit employees was
inherently destructive.

1 both employment and operational issues. Such documents go to the heart of the contested issues
2 in this case. First, they would demonstrate that it was plain from the beginning that there would
3 be a seamless transition without any lack of continuity on any issue, including employment
4 relationships. This would, of course, include the bargaining unit employees. For example the
5 arrangements for workers compensation coverage would certainly demonstrate that there would
6 be no change in the workforce.

7 Also, such documents relate to the question of agency. To the extent those documents
8 reflect that, from November 5 on, employees of Ashland were acting on behalf of Nexeo in all
9 areas as part of the parties' seamless transition, this would necessarily demonstrate their agency
10 relationship with respect to both their employment and matters beyond their employment. Their
11 agency status would be demonstrated by their actions to assist Nexeo as Nexeo's agents with
12 respect to issues beyond employment issues. There is no doctrine that says that Nexeo can have
13 Ashland employees acting to ensure a seamless transition and yet somehow carve out their
14 dealings with Local 70 or other represented employees. In acting to ensure a seamless transition
15 in all areas, the Ashland employees were agents of Nexeo for all purposes, including
16 employment-related issues.

17 Third, such documents would prove that all aspects of the transaction were intended to
18 cause as little change as possible in the business and that a central part of this business model was
19 bringing all employees into the new company. The continuation of the employment relationships
20 was a core component of the APS.

21 In light of these considerations, it is evident that the ALJ erroneously limited both the
22 Subpoena and the questioning.

23 Finally, it must be noted that the Charging Party sought to reopen the record in order to
24 examine the custodian of records regarding the results of the meet-and-confer process directed by
25 the ALJ. That process had been unsuccessful. Without comment, the ALJ summarily rejected
26 that request. (See Order of July 9, 2012.) Such a ruling, without explanation, was clearly
27 erroneous. Having directed the parties to engage in a meet-and-confer process off the record, the
28 ALJ was faced with a request to reopen for purposes of examining the custodian of records on the

1 record. That request was consistent with the ALJ's own direction. Furthermore, the request was
2 consistent with Charging Party's right to make a complete record regarding compliance with the
3 Subpoena, both to establish the existence of other documents the ALJ would find relevant and to
4 provide the ALJ an opportunity to direct that such documents be turned over. The unexplained
5 denial of the motion to reopen the record was a complete reversal of the ALJ's initial direction to
6 the parties to meet and confer. The failure of the parties to resolve all such issues inherently
7 resulted in Charging Party's right to examine Nexeo's Custodian of Records. The ALJ's refusal
8 to allow that process was plainly erroneous.

9 The ALJ also severely limited the examination of Paul Fusco, a former employee of
10 Ashland who was hired directly by Nexeo. For example, the ALJ limited the examination of Mr.
11 Fusco only to matters involving wages and working conditions and refused to allow examination
12 regarding the entire asset purchase transaction. TR. 896, 904-905, 912-916, 922. This was an
13 improper restriction on examination of a critical witness. The APS was an integrated document.
14 Indeed, the whole transaction was seamless and integrated. The ALJ incorrectly separated out
15 matters related solely related to wages, hours, and working conditions, because the remainder of
16 the transaction reflected the parties' emphasis on ensuring there were no changes whatsoever to
17 any matters affecting Nexeo. Indeed, this seamless transition between the two entities was the
18 most critical element of the transaction.

19 To establish, for example, that workers' compensation insurance, truck maintenance,
20 leases, and so on were to be maintained without change reflects that Nexeo and Ashland
21 structured this agreement to ensure that all the employees would continue employment. This
22 reflects directly upon the perfectly clear successorship and other issues in this case, including the
23 agency issue explained above.

24 In summary, this matter should be remanded to the ALJ to reopen the record, to fully
25 enforce the Subpoena Duces Tecum, to allow adequate direct and cross-examination of witnesses,
26 and to allow Charging Party to prove its case based on a complete record.

1 represented employees, the company must not be allowed to then subvert the rights of both the
2 employees and their bargaining representative.

3
4 Dated: October 18, 2012

WEINBERG, ROGER & ROSENFELD
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5
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13 TEAMSTERS

1 **CERTIFICATE OF SERVICE**

2
3 I am a citizen of the United States and an employee in the County of Alameda, State of
4 California. I am over the age of eighteen years and not a party to the withing action; my business
5 address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501. I certify that on
6 October 18, 2012, the TEAMSTERS UNION LOCAL 70'S BRIEF IN SUPPORT OF
7 EXCEPTIONS was e-filed on the NLRB's E-filing system and served a copy of on all parties
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22
23
24 I certify under penalty of perjury that the above is true and correct. Executed at Alameda,
25 California, on October 18, 2012

26 /s/ Katrina Shaw
27 Katrina Shaw