United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

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Region 13

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Region 20

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Division of Advice

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SUBJECT: Nexeo Solutions, Inc.
Cases 13-CA-46694 and 20-CA-35519

Regions 13 and 20 submitted these cases for advice as to whether a *Burns* successor that entered into a purchase and sale agreement committing to offer employment to all of the seller's employees is a "perfectly clear" successor. We conclude that the Employer is a perfectly clear successor, and was therefore not free to unilaterally establish initial terms and conditions of employment, because the purchase and sale agreement legally obligated it to retain all Ashland employees, and because the Employer communicated its intent to offer employment to all Ashland employees under substantially identical terms and conditions.

FACTS

These cases involve the transition of operations pursuant to the asset sale of Ashland Distribution Company ("Ashland"), an oil distribution business with several locations in the United States and abroad, to TPG Accolade, LLC, a private investment firm with chemical, energy, and distribution sector experience. The Region 13 case involves the transition of operations at the Ashland facility in Willow Springs, Illinois; the Region 20 case involves Ashland's Fairfield, California facility. Although these cases arise in two locations, and there are some different facts regarding each location, they share the same employer, the same purchase and sale agreement, and significant commonality in the message communicated to employees at each location about the transition of operations.

A. Background

The International Brotherhood of Teamsters, Local 70 ("Local 70"), the Charging Party in the Region 20 case, has

long represented a bargaining unit of warehousemen and drivers at Ashland's Fairfield, California facility. The most recent collective-bargaining agreement between Local 70 and Ashland, covering a unit of approximately 20 employees, was for a term of December 1, 2008, through November 30, 2013.

The International Brotherhood of Teamsters, Local 705 ("Local 705"), the Charging Party in the Region 13 case, represents a bargaining unit of approximately 35 drivers at the Ashland facility in Willow Springs, Illinois. Local 705 and Ashland have been party to a series of collective-bargaining agreements covering the Willow Springs employees, the most recent having a term of November 1, 2006 to October 31, 2010. Ashland maintained the status quo after the expiration of that agreement.

On November 5, 2010, Ashland, Inc., a large oil company headquartered in Covington, Kentucky, agreed to sell its distribution business to TPG Accolade, LLC, which eventually changed its name to Nexeo Solutions, LLC ("Buyer" or "Employer"). Ashland's Fairfield and Willow Springs facilities, which were unionized, were among the assets sold. A Purchase and Sale Agreement ("Agreement") dated November 5 stated the terms of the sale. Relevant Sections of the Agreement provide:

- **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...

- **Section 7.5(f): Severance Obligations.**
Ashland and Buyer intend that the transactions contemplated by this Agreement shall not result in a severance of employment of any Employee prior to or upon the consummation of the transactions contemplated hereby and that the Employees will have continuous and uninterrupted employment immediately before and immediately after the Closing Date, and Ashland and Buyer shall comply with any requirements under applicable Law to ensure the same.

- **Section 7.5(n): Employee Consultations.**
Buyer or Buyer's Affiliates shall fully comply with all of its or their obligations (however arising) to inform and consult with, and in respect of, the Employees of the Business, whether the same arises under a Union Contract or applicable Law. To the extent such communications occur in writing, Buyer and Buyer's Affiliates will provide a copy to Ashland at the time such communications occur and will provide Ashland any written responses to said communications promptly after the time they are received.

- **Section 7.5(o): Union Contracts.**
From and after the Closing, Buyer shall, and shall cause the Buyer Corporations to... 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 or others not directly involved in the negotiation or approval of this

> Agreement, any Ancillary Agreement or the Contemplated Transactions shall be issued or made by any party without the prior consent of the other party (which consent shall not be unreasonably withheld, conditioned or delayed)... 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.

On November 8, Ashland and the Employer issued a press release announcing the sale, stating in part:

> [The Employer is] very excited to invest in Ashland Distribution, which Ashland has built into one of the leading global chemical distribution companies . . . We look forward to partnering with management and the talented employees to continue the company's growth.

Ashland and the Employer closed the sale and transferred operations to the Employer on April 1, 2011. On that date, the Employer implemented some new employment terms including, inter alia, its own health benefits plan and the substitution of its 401(k) plan for the Teamsters' defined benefit pension plan in which the Fairfield and Willow Springs bargaining unit employees participated. Between the date of the Agreement and the April 1, 2011 transfer of operations, management of both companies had communications with the Unions and employees regarding the impact of the transfer on employees.

B. Management Communications at the Fairfield Location

A few days prior to the November 8, 2010 announcement of the sale, Ashland's Senior Human Resources Business Partner ("Senior HR Representative") contacted the Local 70 Business Agent to advise him that Ashland was going to be sold to the Employer. Then on November 8, Ashland's President sent a letter to Ashland customers. In this letter Ashland's President stated that "Our goal is to ensure a seamless transition to Ashland Distribution operating as an independent distribution business. The same great people will provide the same great service." That same day, Ashland circulated to employees a document entitled "Questions and answers for employees." This document addressed a variety of anticipated concerns involving staffing and the details of the transaction itself, including:

> Q: Will Ashland Distribution's current management team remain with the business?
> A: Yes, the current management team will transfer with the business.
>
> Q: Does the newly independent company anticipate any layoffs as a result of the transaction?
> A: 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.
>
> Q: Does the newly independent company anticipate any changes to compensation and/or benefits?
> A: 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.

On November 10, the Local 70 Business Agent received a November 8-dated letter from Ashland's Senior HR Representative advising of Ashland's sale to the Employer. Along with this correspondence, the HR Representative included a copy of the letter sent to Ashland customers indicating that "[t]he same great people will provide the same great service."

On or about November 12, Ashland provided its Fairfield employees with a document entitled "Talking Points for Ashland Distribution Customers." The document explained what would not change with the transition of operations to the Employer and specified that "[a]ll current [Ashland] employees are staying with the business." Approximately three weeks later, in a document entitled "Update to Ashland Distribution Transaction Employee Q&A," Ashland advised its Fairfield employees that "[o]ver 2,000 employees have already been notified that they will transfer to the new company on the day after the sale closes," and that "managers are aware and continue to be part of the mutually agreed upon process to determine the methodology for transferring employees to the new distribution company."

In early February 2011, Ashland's Senior HR Representative called the Local 70 Business Agent to arrange a meeting to discuss the transition. On February 15, Local 70's President and Business Agent met with the Senior HR Representative, another Ashland HR Representative, and Ashland's attorney. The Ashland representatives told Local 70 about the nature of the Employer's purchase of Ashland and said that effective April 1, the successor entity would be called Nexeo Solutions. Ashland representatives also informed the Union that Ashland and the Employer wanted to ensure a smooth transition and did not want to highlight any changes for their customer base. The Ashland HR Representatives then indicated that the Employer had offered jobs to them and the rest of Ashland's management team. The HR Representatives also stated that the Employer would be offering jobs to all Ashland employees at the same rates of pay, and that the benefits would remain essentially the same, except for the employees' participation in the Union's defined benefit pension plan.

At this February 15 meeting, one of the Ashland HR Representatives provided Local 70 with a draft of the job offer letters that the Employer planned to send to the Ashland bargaining unit employees a few days later. The draft "Contingent Offer of Employment" letter included a statement that:

> 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 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.

This was the first instance that management of either company communicated to Local 70 a plan to change the employees' initial terms and conditions of employment.

The Ashland representatives at the February 15 meeting then advised the Union that after more than 50% of the Ashland bargaining unit employees accepted their job offers, the Employer would recognize and bargain with Local 70. In response to these communications, Local 70's

Business Agent informed the Ashland representatives that the Union objected to the contents of the letter and stated that the terms and conditions of employment - including the health and pension benefits - must be maintained until after the Employer bargained in good faith with the Union.

As promised, on February 17, the Employer sent offer of employment letters to the Fairfield employees. In late February, the Employer informed Local 70 that a majority of the bargaining unit employees had accepted employment. Local 70 and the Employer then engaged in pre-close negotiations on March 22, 23, and 29. The parties did not reach an agreement, nor were they at impasse, when on April 1 the Employer unilaterally implemented the initial terms of employment detailed in the offer of employment letters.

C. Management Communications at the Willow Springs Location

On November 8, Ashland's Senior HR Representative called Local 705's Union Representative to inform him that Ashland had been sold to the Employer. The Union Representative immediately asked how the sale would impact the bargaining unit employees. The Senior HR Representative replied that it was his understanding that all Ashland employees would be retained, but he would get more information.

On the following day, Ashland posted a memorandum at the Willow Springs property announcing a series of town hall meetings scheduled for November 10 and 11 for the purpose of providing employees with details about Ashland's sale. A Union steward and approximately 20 other individuals attended the November 11 morning session. At this session, Ashland's Regional Logistics Manager ("Logistics Manager") and its Willow Springs Plant Manager ("Plant Manager") discussed the nature of the sale. The Plant Manager advised that it would be "business as usual" and that the Employer was going to retain the employees. He further stated that aside from a new Employer name on the employees' paychecks and new signs on the trucks, things would remain the same. The Logistics Manager also stated that nothing should change related to employment. During a question and answer period at that session, the Logistics Manager said that the new company planned to retain all employees and things would remain status quo. The Plant Manager concurred with this response and closed the session by pledging to keep the employees updated on the transition to the Employer. Ashland's Logistics Manager and Plant Manager made similar representations at the afternoon session of the November 11 meeting, including the Logistics Manager's statement, after an employee asked him whether all of the employees would be hired, that "yes,

all should stay the same except for the name on your paycheck and the names on the doors of the trucks." There is no evidence that any Ashland or Employer representative made any contrary representations at the other sessions.[1]

Later that same day, one of the Union stewards privately spoke with Ashland's Logistics Manager and Plant Manager about whether the terms specified in the collective-bargaining agreement would remain the same after the sale. The Logistics Manager indicated that he understood the Employer was going to keep everything the same. The Union steward expressed his relief, explaining that he was about to complete his 25th year of vested employment under the Teamsters' defined benefit pension plan and he would soon be eligible for full pension benefits. The Logistics Manager indicated that he did not think there would be any issue and the Plant Manager concurred, stating that nothing was going to change.

On November 17, Local 705 and Ashland met for negotiations since the labor agreement they were operating under had expired. At the beginning of this bargaining session, Ashland's Senior HR Representative advised the Union that it was his understanding that the Employer had reviewed all of the labor agreements at the Ashland properties and that it did not want to significantly alter those contracts. The Union Representative then asked the Senior HR Representative for a copy of the Agreement between Ashland and the Employer because Local 705 wanted to see whether the Agreement specified that the Employer would maintain the current labor contract or a collective-bargaining agreement reached with Ashland prior to the closing. Ashland's Senior HR Representative indicated that he understood that was the case. The Union Representative also asked Ashland's Senior HR Representative whether the Employer planned to retain all of the bargaining unit employees. The Senior HR Representative indicated that "that's the plan."

On December 3, the Union Representative followed up with Ashland's Senior HR Representative to see if he was able to get a copy of the Agreement for Local 705's review.

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[1] There is also no evidence adduced thus far that the documents distributed to Fairview employees, such as the "Questions and answers for employees," the "Talking Points for Ashland Distribution Customers," and the "Update to Ashland Distribution Transaction Employee Q&A," were also distributed to the employees at the Willow Springs location. In preparation for trial, the Region should attempt to confirm whether or not those documents were distributed at Willow Springs.

The Senior HR Representative indicated that he was awaiting "his" legal department's approval.[2] Later that same day, the Union Representative again contacted the Senior HR Representative and stressed that Local 705 needed language in the Agreement stating that the Employer would assume Ashland's contracts and liabilities. The Senior HR Representative advised that although the Employer is reluctant to put this type of language in a purchase and sale agreement, after speaking with "his" legal department he understood that the language in the Agreement obligated the Employer to maintain the existing terms and conditions of employment.

The following week, Local 705's Union Representative reminded Ashland's Senior HR Representative that the Union had not yet received the Agreement and that if Ashland did not provide it by the end of the day the Union would file an unfair labor practice charge. The Senior HR Representative then e-mailed a copy of the Agreement to the Union Representative.

Throughout the month of December, Local 705 stewards regularly met with Ashland's Plant Manager to confirm that the terms and conditions of employment would remain the same after employees transferred to the Employer. The Plant Manager's representations during these conversations were consistent with his prior communications. Sometime in mid-December, during a telephone conversation with the Union Representative, Ashland's Senior HR Representative indicated that the Employer had hired him and that the Employer had also hired Ashland's Logistics Manager and Plant Manager onto its transition team.

On December 19, Local 705 held a general membership meeting where the Union Representative discussed the Agreement and told employees that it stated that the Employer would retain employees, pay the same wages, and provide comparable benefits. One of the Union stewards showed employees a copy of the Agreement and explained that it stated that the Employer would retain the same terms and conditions of employment. Local 705 representatives later met with approximately 20-25 Ashland bargaining unit employees in the break room at the Willow Springs property to discuss the Agreement and the fact that it provided that the Employer would hire all bargaining unit employees with the same pay and comparable benefits.

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[2] It is unclear whether this was a reference to Ashland's legal department, the Employer's legal department, or a combination of both.

On January 10, 2011, one of the Union stewards contacted the Plant Manager to advise that some Ashland employees were concerned about the impact of the transition on their seniority. The Plant Manager again indicated that, after the transfer, everything was going to remain the same as it was with Ashland.

Nearly a month later, on February 7, another Ashland HR Representative contacted the Union Representative to say that he was instructed to set up a February 15 meeting between Local 705 and the Employer at the Willow Springs facility. Then on February 11, the HR Representative provided Local 705 with a "heads up" that the Employer would be providing Ashland employees with an offer of employment letter that detailed certain changes in the initial terms and conditions of employment. The HR Representative indicated that he did not want the Union Representative to be "blindsided" at the February 15 meeting. This was the first time that any management official gave any indication to the Union about potential changes to the Ashland employees' terms and conditions of employment. That same day, Local 705 stewards met with the Plant Manager to ask about the purpose of the February 15 meeting with the Employer. The Plant Manager advised the stewards that the meeting was for the Employer to introduce itself to Local 705. After one of the stewards asked the Plant Manager whether the bargaining unit employees would have to reapply for employment with the Employer, the Plant Manager said that the Employer was going to retain all Ashland employees.

On February 15, similar to the events that transpired the same day at the Fairfield location, the Employer's Labor Relations Consultant advised the Union that the Employer would offer employment to all bargaining unit employees at the Willow Springs location, but that the offer was subject to changes in certain terms and conditions of employment. The Employer's Labor Relations Consultant provided Local 705 with a copy of the draft letter[3] detailing the changes that would be mailed to employees on February 17 and also informed the Union that the Employer would not recognize any current or expired collective-bargaining agreement. The Labor Relations Consultant indicated that the Employer would like to replicate most of the labor agreement between Local 705 and Ashland and would bargain with the Union as soon as a majority of the unit employees accepted the Employer's offers of employment. The Labor Relations Consultant further informed the Union that the employees would

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[3] The content of the draft letter provided to Local 705 is the same as that provided to Local 70.

maintain their current positions and wages, but that the Employer would not participate in the Union's defined benefit pension plan and would instead implement an Employer-sponsored 401(k) plan. Local 705's Representative told the Labor Relations Consultant that the Union accepted the offer of employment on behalf of all bargaining unit employees, but stated that the Employer could not make unilateral changes in the employees' terms and conditions without engaging in good faith negotiations. The Employer's Labor Relations Consultant responded that it was the Employer's right to set the initial terms and conditions of employment. On February 17, the Employer mailed offer of employment letters to employees substantially similar to the draft provided to the Union two days earlier.

On March 23 and 31, after a majority of bargaining unit employees accepted employment with the Employer, Local 705 and the Employer engaged in pre-close negotiations for a potential labor agreement. The parties did not reach an agreement or impasse prior to the transition, and on April 1 the Employer unilaterally implemented initial terms of employment.

ACTION

We conclude that the Employer is a "perfectly clear" successor. The purchase and sale agreement legally obligated the Employer to retain all Ashland employees under terms and conditions substantially similar in the aggregate. Also, throughout the transition period, the Employer communicated its intent to offer employment to all Ashland employees under substantially identical terms and conditions and was therefore not free to unilaterally establish initial terms and conditions of employment. Because the Employer unilaterally imposed initial terms and conditions without bargaining in good faith with the Unions, the Regions should issue a Section 8(a)(5) complaint, absent settlement.[4]

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[4] In light of our conclusion that the Employer is a perfectly clear successor, we need not reach the question of whether a *Burns* successor waives its right to unilaterally establish initial terms and conditions of employment by engaging in pre-takeover bargaining with a union. But we note *Burns* appears to contemplate pre-takeover bargaining without waiving the right to establish initial terms. *See NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 295 (1972) ("If the union had made a request to bargain after [the employer] completed its hiring and if [the employer] had negotiated in good faith and had made offers to the union which the union rejected, [the employer] could have unilaterally initiated

Under the Board's successorship doctrine, a successor employer normally has the freedom to set initial terms and conditions of employment for its newly-hired work force. However, in *Burns* the Supreme Court enunciated an exception to this rule, involving "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."[5]

A. The Employer is a perfectly clear successor because the Purchase and Sale Agreement legally obligated it to retain Ashland's employees.

Post-*Spruce Up*,[6] the Board has applied a perfectly clear successor analysis, and recognized a successor's obligation to bargain before changing the existing terms and conditions of employment, based on the terms of a contract with a third party.[7] In *Springfield Transit Management*, the successor employer was obligated to hire its predecessor's employees and maintain the terms and conditions of employment through its service contract with the transit authority.[8] There, the Board found that the successor employer's contractual commitment to hire the predecessor employees obligated it to negotiate the initial terms and conditions of employment with the employees' union.[9] Here, Section 7.5(b)(i) and 7.5(c) of the Agreement obligated the Employer to offer employment to the Ashland

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such proposals as the opening terms and conditions of employment . . . without committing an unfair labor practice").

[5] *Burns,* 406 U.S. at 294-95.

[6] *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enforced mem.*, 529 F.2d 516 (4th Cir. 1975) (employer was not a perfectly clear successor because representatives explicitly stated in initial meeting with the union that the pay rates would be different from those of the predecessor).

[7] *Springfield Transit Management*, 281 NLRB 72, 78 (1986). *See also, The Denham Co.*, 206 NLRB at 660 and 218 NLRB at 31 (in finding a perfectly clear successor bargaining obligation the Board relied, in part, on the successor's agreement with the predecessor to retain its employees for at least 30 days).

[8] *Springfield Transit Management*, 281 NLRB at 78.

[9] *Id.*

employees and, in fact, further obligated the Employer to provide the "transferred employees" with benefits that were "substantially similar in the aggregate."[10] The initial terms of employment imposed by Employer were not substantially similar in the aggregate, but instead provided a reduced level of benefits (e.g., the Employer's transition from a defined benefit pension plan to a 401(k) plan, its change to a health benefit plan with significantly higher employee out of pocket costs, and modifications to the rate of vacation pay and overtime eligibility).

The Employer's obligation is further evidenced by Section 7.5(o) of the Agreement, which obligated the Employer to recognize Locals 70 and 705 as the bargaining representatives of the employees at the Fairfield and Willow Springs locations. The commitment to recognize the Unions further evidences the Employer's obligation to hire at least a substantial majority of the Ashland employees, because otherwise the Employer would have potentially obligated itself to violate Section 8(a)(2) of the Act.[11] Moreover, based on the Employer's commitments in the Agreement with respect to the terms of employment for the "transferred" employees, there is no reasonable basis to conclude that the Fairfield and Willow Springs bargaining unit employees would not accept the offers of employment.[12]

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[10] *Compare Tenet-Metrowest Medical Center*, Case 1-CA-37535 Advice Memorandum dated February 23, 2000 (concluding that employer was a perfectly clear successor in light of employer's clear commitment to third party to honor predecessor's working conditions and hire existing workforce) with *Cambria Care Center*, Case 6-CA-36816, Advice Memorandum dated July 21, 2010 (where it was not clear from the amended purchase agreement that the employer was obligated to offer the employees the same terms and conditions of employment and the employer did not mislead employees, perfectly clear successor status not found).

[11] *Ladies Garment Workers (Bernard Altman Corp.) v. NLRB*, 366 U.S. 731 (1961) (employer violates Section 8(a)(2) and (1) and a union violates Section 8(b)(1)(A) of the Act, when the employer grants and the union accepts recognition at a time when the union does not represent a majority of the employees in an appropriate unit).

[12] *Cf. Road & Rail Services*, 348 NLRB 1160, 1162 at n.13 (2006) (Board recognized that the perfectly clear successor caveat inherently demands an inquiry into the "degree of likelihood that incumbents will work for the successor"), quoting *Machinists v. NLRB*, 595 F.2d 664, 673 at n.45 (D.C. Cir. 1978). There is no reason to believe that employees would refuse the Employer's offer of employment because the

Thus, the Employer had no basis to question whether the Unions would maintain their majority status.[13]

We therefore conclude that because the terms of the Agreement unambiguously state the Employer's obligation to offer employment to all of Ashland's employees, and the Employer committed itself to offer employment under terms and conditions substantially similar in the aggregate, the Employer was a perfectly clear successor based on the terms of the Agreement itself.

B. The Employer consistently communicated its intent to retain the Ashland employees without any statement of changes to terms and conditions of employment.

The Regions should also argue, in the alternative, that the Employer's communicated intent to retain the Ashland employees without changes to terms and conditions of employment rendered it a perfectly clear successor. The Board has generally found a "perfectly clear" exception when an employer's communications actively or implicitly misled employees into believing that they would be retained by the successor under the same terms and conditions, or failed to clearly state the employer's intent to establish new terms and conditions before inviting the predecessor's employees to accept employment.[14] This standard requires "both a manifestation of intent on the part of the employer to retain all or substantially all of its predecessor's employees and also a substantial likelihood that those offered employment will accept it."[15] In *Canteen Co.*,[16] the

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benefits would not be identical but rather "substantially similar in the aggregate." *Cf. Elf Atochem North America, Inc., Elf Atochem North America, Inc.*, 339 NLRB 796, 796, 808 (2003) (language such as "substantially equivalent" and "comparable" found "not specific enough to clearly inform employees of the nature of the changes which Respondent intended to institute in the future").

[13] *Compare Spruce Up Corp.*, 209 NLRB at 195 (no perfectly clear plan to retain predecessor's employees because successor announced that it would offer less favorable commission rates simultaneously with its expression of intent to retain the employees; Board found that there was a very real possibility that employees would refuse to work under the new rates, thereby jeopardizing the union's majority status).

[14] *Spruce Up Corp.*, 209 NLRB at 195.

[15] *DuPont Dow Elastomers, LLC*, 332 NLRB 1071, 1073 (2000), *enforced*, 296 F.3d 495 (6th Cir. 2002) (employer found to be perfectly clear successor where it had remained silent and

Board applied the perfectly clear exception to hold that the employer was not entitled to unilaterally establish new wage rates when the employer had previously expressed to the union its desire to have employees serve a probationary period. There, the Board relied on the fact that at the time the employer contacted both the union to say that it wanted employees to serve a probationary period, and the employees to say that it wanted them to apply for employment, it "did not mention in these discussions the possibility of any other changes in its initial terms and conditions of employment."[17] Thus, in finding that the employer was a perfectly clear successor, the Board scrutinized not only the successor's plans regarding the hiring of the predecessor's employees but also the clarity of the successor employer's communicated intentions concerning existing terms and conditions of employment when it initially indicated it would be hiring the predecessor's employees.[18]

Here, prior to the February 15 meetings with the Unions, the message consistently communicated to unit employees for more than three months after Ashland and the Employer executed the Agreement was that all Ashland employees would be retained by the Employer, without any statement of intent to change the terms and conditions of employment. For example, at the Fairfield location, Ashland's November 8, 2010 "Questions and answers for employees" document stated that the Employer's "intent [was] to retain Ashland employees" and that it was obligated to maintain in the aggregate the transferred employees' wages and benefits. And in a November 12, 2010

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withheld any notice of changes in preexisting terms and conditions until hiring and acceptance process was already underway).

[16] 317 NLRB 1052, 1053 (1995), *enforced*, 103 F.3d 1355 (7th Cir. 1997).

[17] *Id.* at 1052.

[18] *Id.* at 1054. *See also Elf Atochem North America, Inc.*, 339 NLRB at 796, 808 (employer informed employees that they would be offered employment, that their seniority would be recognized, and that they would receive equivalent salaries and comparable benefits); *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976), *enforcement denied in relevant part sub. nom., Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977) (employer told the union that it intended to hire all of the predecessor's lay teachers, but did not mention any changes in terms and conditions of employment).

document provided to employees entitled "Talking Points for Ashland Distribution Customers," Ashland stated that "[a]ll current [Ashland] employees are staying with the business." The December 6, 2010 "Update to Ashland Distribution Transaction Employee Q&A" document that Ashland gave to employees also indicated that "[o]ver 2,000 employees have already been notified that they will transfer to the new company on the day after the sale closes," and that "managers are aware and continue to be part of the mutually agreed upon process to determine the methodology for transferring employees to the new distribution company."

Managers at the Willow Springs location were even more actively engaged in communicating with Local 705 and the employees about the consequences of the sale than were their Fairfield counterparts. For instance, Willow Springs supervisors held town hall meetings with the employees, where they told employees that the Employer planned to retain all employees and things would remain status quo, and managers repeatedly told Local 705 representatives that the Employer would retain all Ashland employees with no change in their terms and conditions of employment. These representations were consistent with the message conveyed to the Fairfield employees, and only changed in mid-February with the Employer's offer of employment letters, more than two months after Ashland's supervisors and managers began assuring employees that the Employer intended to keep everything the same.

We attribute to the Employer this constant refrain of assurances to the employees, even though the communications emanated from Ashland managers. First, we note that there is some indication that some of the Ashland managers who gave assurances to the Union of the Employer's intent to retain all employees had themselves been given offers of employment with the Employer at the time they gave the assurances.[19] The Board has attributed to a successor the

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[19] The Regions should further investigate the status of the Ashland managers. The Employer represented that Ashland managers were not offered employment until February 17, 2011, and did not become its employees until April 1. In contrast, the December 6, 2010 "Update to Ashland Distribution Transaction Employee Q&A" document specifically acknowledged that "[o]ver 2,000 employees have already been notified that they will transfer to the new company on the day after the sale closes," and that "managers are aware and continue to be part of the mutually agreed upon process to determine the methodology for transferring employees to the new distribution company." Moreover, in early December 2010, an Ashland HR Representative informed a Local 705 representative that he

statements made by a predecessor's manager when those statements were made after the predecessor's manager received an offer of employment from the successor.[20]

Moreover, even if these managers did not receive employment offers prior to their statements, we conclude that the entirety of the evidence demonstrates that the Employer authorized the Ashland managers' statements to employees. The Board has long recognized that individuals unaffiliated with an employer may be acting as agents of that employer when the employer has knowledge of their activity, reaps the benefits of the activity, and fails to disavow the activity.[21] In this regard, the Board recognizes that the ratification of the act of another "can be inferred from a failure to repudiate" the action and is then "given effect as if originally authorized."[22]

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and other high level managers had been offered positions with the Employer.

[20] *Lemay Caring Center*, 280 NLRB 60, 65-67 (1986), *affd. mem.* 815 F.2d 711 (8th Cir. 1986) (statements of predecessor's manager were attributable to the successor employer because, before the statements were made, manager was offered employment by successor and asked to contact employees on its behalf).

[21] *Dean Industries*, 162 NLRB 1078, 1092-93 (1967) (even though employer did not formally authorize activities undertaken by individuals in the employer's interest, the Board found such activities were performed by agents of the employer because it cooperated with and accepted the benefits of their activities); *Southern Pride Catfish*, 331 NLRB 618, 619 (2000) (pastor who approached employer about speaking to employees who were his parishioners, and subsequently gave anti-union speeches on company premises, deemed employer's agent where the employer was in a "cooperative effort" to oppose the union and failed to disavow pastor's message). *See also Henry I. Siegal Co.*, 172 NLRB 825, 839 (1968), *enforced*, 417 F.2d 1206 (6th Cir. 1969), *cert. denied*, 398 U.S. 959 (1970) (Board recognized that "even under technical common law rules, agency through ratification, knowledgeable acceptance or retention of the fruits of the alleged agent's act, or through failure to disavow are firmly recognized"). *Compare Raytheon Co.*, 179 NLRB 678 (1968)(radio station not agent of employer where newscast cited "informed sources" for proposition that plant would shut down if unionized, despite employer's failure to disavow, where no evidence of employer cooperation or participation).

[22] *Dentech Corp.*, 294 NLRB 924, 925-26 (1989) (finding that the employer's cooperation with, and failure to repudiate,

The evidence here shows that the Employer must have known of the statements by Ashland and its managers regarding the impending sale. In Section 11.7 of the Agreement, Ashland and the Employer explicitly agreed that there would be "[n]o communication, release or announcement to the public or to employees or others not directly involved in the negotiation or approval of [the] Agreement . . . without the prior consent of the other party." Thus, the Agreement requires Ashland and the Employer to collaborate in, coordinate, and mutually consent to any messages communicated to Ashland employees and the public regarding the sale and the transition of operations to the Employer. Moreover, Ashland's statements were consistent with the Employer's obligations under the Agreement. Sections 7.5(b)(i) and 7.5(c) of the Agreement obligated the Employer to offer employment to all Ashland employees and maintain substantially identical terms and conditions of employment. Section 7.5(d) of the Agreement committed the Employer to provide the employees transferring from Ashland with "wages no less favorable" and "benefits, variable pay, incentive or bonus opportunities under plans, programs and arrangements that are substantially comparable in the aggregate to those provided by Ashland." With the provisions governing Ashland's and the Employer's communications regarding the sale and obligations to employees, it is reasonable to conclude that the Employer had knowledge of, and approved in advance, all formal statements made by Ashland managers to its employees.[23]

In addition, Ashland's communications to employees were consistent with these contractual obligations and benefitted the Employer by facilitating the Employer's stated interest of a seamless transition in operations. The message repeatedly communicated to employees in Q&As for employees, information intended for customers, and town hall meetings for more than three months after Ashland and the Employer entered into the Agreement was an unequivocal assurance that the Employer would retain the Ashland employees, without any statement of intent to change their terms and conditions of employment. Therefore, in light of

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employee's solicitation of support for petition renouncing support for the union constituted ratification of employee's actions), *quoting Service Employees Local 87 (West Bay)*, 291 NLRB 82, 83 (1988).

[23] This arrangement was essentially confirmed by Ashland's statement in the December 6 "Update to Ashland Distribution Transaction Employee Q&A" document where Ashland represented that the Employer and Ashland had a "mutually agreed upon process" for the transfer of employees.

the obligations contained in the Agreement, and the consistency of the message communicated to employees regardless of medium or location, we conclude that the Employer and Ashland cooperated in their messaging to help facilitate their mutually desired benefit of a seamless transition in operations, thereby creating an agency relationship.

And, the Employer did not disavow or repudiate any of Ashland's statements until mid-February 2011 - over three months after Ashland began communicating the Employer's intent. The Employer's failure to repudiate these communications effectively ratified and authorized them, such that they can be attributed to the Employer as misleading statements that it would retain Ashland employees under the same working conditions.

We therefore conclude that the Employer became a perfectly clear successor long before the Employer first communicated its intent in mid-February 2011 to unilaterally impose initial terms of employment and was obligated to bargain with Locals 70 and 705 before setting different initial terms and conditions of employment.[24]

Accordingly, the Regions should issue complaint, absent settlement, alleging that the Employer violated

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[24] *See, e.g., Canteen Co.*, 317 NLRB at 1054. The Regions should also argue that the Employer's intent to retain all of the Ashland employees is evident from the Employer's lack of a formal hiring process, based on the Agreement's reference to employees as "transferees;" the stated intent of the parties to avoid severance obligations; the Employer providing all employees with offers of employment; and the lack of a hiatus in operations. *See, The Denham Co.*, 206 NLRB 659, 660 (1973) and 218 NLRB 30, 31 (1975) (Board considered the "totality of the circumstances" to determine whether the successor employer intended to retain the predecessor's employees; found the successor employer intended to retain the incumbent employees based on the lack of a hiatus in operations, the employer's failure to interview employees or other applicants, the fact that the sales agreement required the successor to retain the incumbent employees for 30 days, the employer's retention of those employees on the payroll without any interruption, employer communications to employees that they would be regarded as "already hired employees with indefinite tenure," and the lack of any evidence of a conditional offer of employment).

Section 8(a)(5) by unilaterally implementing initial terms and conditions of employment for Ashland's former employees who transferred to the Employer on April 1, 2011.

B.J.K.

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ROF(s) - 3 (R13 - 2 Files; R20 - 1 File)