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Kroger Texas L.P. and United Food and Commercial Workers Local Union No. 455, AFL-CIO. Cases 15-CA-273905, 15-CA-273930, 16-CA-273805, 16-CA-273809, 16-CA-282153, and 16-CA-282206

May 20, 2026

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS PROUTY
AND MAYER

On July 21, 2023, Administrative Law Judge Sharon Levinson Steckler issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party Union each filed an answering brief, and the Respondent filed a reply brief.¹

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,

¹ On August 14, 2024, the Respondent filed a notice of supplemental authority citing *Securities & Exchange Commission v. Jarkesy*, 603 U.S. 109 (2024).

findings, and conclusions² and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board orders that the Respondent, Kroger Texas, L.P., Houston, Texas, Palestine, Texas, and Alexandria, Louisiana, its officers, agents,

² The judge applied *Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center*, 371 NLRB No. 160 (2022) (*Valley Hospital II*), enf.d. 100 F.4th 994 (9th Cir. 2024), to find that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally ceasing collecting dues and remitting them to the Union pursuant to contractual dues-checkoff provisions when the parties' collective-bargaining agreements containing those provisions expired. In the absence of a three-member majority to revisit *Valley Hospital II*, Chairman Murphy and Member Mayer apply that case as extant precedent. Consequently, Chairman Murphy expresses no opinion whether the specific remedial issues in that case, as further discussed by his colleagues below, were correctly decided.

We agree with the judge that the Respondent's contention that the delay of this proceeding warrants dismissal under the doctrine of laches is without merit. Even assuming that this doctrine is applicable to Board proceedings, the Respondent's laches defense inaccurately faults former General Counsel Abruzzo for the pause in litigation. As the judge observed, the record does not support the Respondent's contention that former General Counsel Abruzzo engaged in a calculated attempt to alter the pace of this proceeding; rather, the record indicates that the Respondent's request for postponement caused the delay. For the same reason, we also reject the Respondent's contention that former General Counsel Abruzzo unreasonably and intentionally delayed prosecution of the complaint until *Valley Hospital II* issued and the law changed in her favor, thereby infringing on the Respondent's due process rights.

Additionally, we reject the Respondent's argument that its unilateral changes did not violate the Act because the parties had reached impasse. Impasse privileges an employer to make unilateral changes where those changes were "reasonably comprehended within [its] proposals which preceded impasse." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *petition for review denied sub nom. American Federation of Television and Radio Artists v. NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968); see also *Comau, Inc. v. NLRB*, 671 F.3d 1232, 1237 (D.C. Cir. 2012). Here, however, the record does not establish that the Respondent proposed the elimination of dues deductions during the course of negotiations. Further, Respondent's argument that the judge improperly prevented the introduction of evidence of impasse is not relevant. The salient fact is not whether the parties were at impasse but rather, even assuming that they were, whether the Respondent had proposed the elimination of dues deductions during negotiations. The Respondent does not dispute the judge's finding that it presented its decision to stop dues checkoff as a "fait accompli" and "essentially gave little or no chance to bargain over its decision. . . ."

Finally, we reject the Respondent's contention that language in the Houston Division collective-bargaining agreements limiting dues deduction and remittance to the duration of the agreements privileged its unilateral cessation. Board precedent establishes that such general durational language is insufficient to constitute clear and unmistakable waiver of notice and bargaining obligations. See *Finley Hospital*, 362 NLRB 915, 916-918 (2015) (finding that general durational language such as "during the term of the agreement" does not constitute clear and unmistakable waiver), enf. denied 827 F.3d 720 (8th Cir. 2016). Chairman Murphy and Member Mayer did not participate in *Finley Hospital* and express no view on whether it was correctly decided; they apply it here for institutional reasons.

Member Prouty also observes that the Ninth Circuit has explained:

successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Within 14 days after service by the Region, post at its Houston and Louisiana bargaining unit facilities, and all other places where notices to employees are

The Board's precedent has plainly and consistently distinguished between language that states a particular provision applies "during" the contract term, and language that states the relevant benefit will "terminate" at the end of the contract term. Only where the provision states that the benefit will "terminate" has the Board found a clear and unmistakable waiver.

Local Joint Executive Board of Las Vegas v. NLRB, 540 F.3d 1072, 1080-1081 (9th Cir. 2008) (collecting cases).

Member Prouty further observes that the Respondent's contention that the make-whole remedy is punitive because the Respondent is prohibited from recouping dues from employees has no support in Board law. By precluding recoupment, the Board is not punishing the Respondent, but rather assigning responsibility to the wrongdoer to restore, as far as possible, a return to the status quo. Here, the Board is attempting to restore the Respondent's position vis-à-vis the Union and employees who have signed valid due checkoff authorizations that would have obtained absent the Respondent's unlawful conduct. Where the "loss of dues . . . has resulted from the Respondent's unfair labor practices," the "financial responsibility for making the Union whole for dues it would have received but for [r]espondent's unlawful conduct rests entirely on the [r]espondent and not the employees." *Alamo Rent-A-Car*, 362 NLRB 1091, 1091 fn. 1 (2015) (quoting *West Coast Cintas Corp.*, 291 NLRB 152, 156 fn. 6 (1988)), enf.d. 831 F.3d 534 (D.C. Cir. 2016). Contrary to the Respondent's contention, the remedy is not a windfall for employees but rather a reasonable choice as to which party bears the uncertain costs of the Respondent's unlawful conduct, and follows the Board's established practice and settled law by assessing them to the wrongdoer. See 371 NLRB No. 160, slip op. at 17, fn. 59; *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.").

Member Prouty also notes that the premise of the Respondent's argument that the remedy is improper under Sec. 8(a)(3) of the Act and Sec. 302(c)(4) of the Taft-Hartley Act—because dues-checkoff provisions require the existence of a current collective-bargaining agreement—was rejected by the Board in *Valley Hospital II*. See 371 NLRB No. 160, slip op. at 9-15. The Board likewise has rejected the Respondent's contention that the remedy we impose is impermissible under Sec. 302(c)(2) of the Taft-Hartley Act. *Id.*, slip op. at 17, fn. 59. See *Alamo Rent-A-Car*, 362 NLRB at 1091-1092 fn. 1 (2015).

Member Mayer acknowledges that the judge's recommended remedy is consistent with extant precedent and he applies it here for institutional reasons. The effect of that precedent is to require the Respondent to reimburse the Union, with interest, for dues it did not deduct even for periods of time prior to the issuance of *Valley Hospital II* when its actions were lawful under then-extant precedent. Although the dues-checkoff provision itself only requires the Respondent to remit dues after it is deducted from employees' pay, the Board's order also does not allow recoupment from employees. Taken together, these two aspects of the Board's remedy require the Respondent to pay a heavy price for actions that were authorized by extant precedent at the time they were taken. In a future appropriate case, Member Mayer would be open to considering whether requiring a respondent to pay such a price is consistent with basic standards of equity.

³ We have modified the judge's recommended Order to conform to the Board's standard remedial language.

customarily posted, copies of the attached notice marked “Appendix.”⁴ Copies of the notice, on forms provided by the Regional Director for Region 16, 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 notice is not altered, defaced, or covered by any other material. If 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 the pay period ending November 30, 2020.”

Dated, Washington, D.C. May 20, 2026

James R. Murphy,	Chairman
David M. Prouty,	Member
Scott A. Mayer,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Megan Lemus, Esq. and *Julie St. John, Esq.*, for the General Counsel.

David Barron, Esq. and *Jason Cabrera, Esq.*, for the Respondent.

Patrick Flynn, Esq., for the Charging Party.

⁴ 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.”

¹ The sessions on March 9 and 10 were short, for the purpose of entry of additional joint exhibits. General Counsel’s complaints scheduled the hearing via Zoom and Respondent had no objections. Witness testimony was limited and witnesses were located in two different states. The matter here primarily deals with the legal issue and few credibility issues.

DECISION

STATEMENT OF THE CASE

SHARON LEVINSON STECKLER, Administrative Law Judge. This case was tried on March 8, 9, and 10, 2023, via videoconference/Zoom technology.¹ The case involves dues-checkoff provisions that Respondent Kroger Texas L.P. (Respondent) ceased collecting and remitting while the collective-bargaining agreements expired. As explained by the Fifth Circuit Court of Appeals, dues checkoff is not a union-security provision, but a provision in collective-bargaining agreements for administrative convenience in union-dues collection. *NLRB v. Atlanta Printing Specialties & Paper Products Union*, 523 F.2d 783, 786 (5th Cir. 1975).

The consolidated complaint alleges that Respondent unlawfully ceased collecting and remitting dues pursuant to dues checkoff to Charging Party United Food and Commercial Workers Local Union No. 455 (Union). As part of the remedy, General Counsel seeks to have Respondent pay the Union for the dues, initiation fees and other monies, with interest, it otherwise would have collected, without any requirement that the bargaining unit employees pay anything to the Union.

Respondent denies all wrongdoing. It contends it relied upon what was current case law at the time it ceased complying with the dues-checkoff provisions, which was *Valley Hospital Medical Center d/b/a Valley Hospital Medical Center*, 368 NLRB No. 139, slip op. (2019) (*Valley Hospital I*). General Counsel cites the more recent *Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center*, 371 NLRB No. 160 (2022) (*Valley Hospital II*). *Valley Hospital II* finds employers act unlawfully when they cease complying with dues-checkoff provisions after contract expiration. Id. Respondent contends that the retroactive application of more recent case law would be manifestly unjust for a number of reasons. Respondent offers other affirmative defenses, such as laches.

After careful observation of the witnesses, including demeanor, and review of the transcript,² exhibits, and the parties’ briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited partnership doing business as Kroger Texas L.P.,³ operates retail grocery stores with offices and places of business in Texas, including Palestine, Texas, and Louisiana, including Alexandria, Louisiana. In conducting its retail grocery stores, Respondent derived gross revenues in excess of \$500,000 and purchased and received at its Texas and Louisiana stores

² To correct certain errors noted in the transcript: early spellings of Scott Vinson’s name appear as “Vincent”; at Tr. 136, “Digital Counsel Brusos” should be General Counsel Abruzzo; at Tr. 137, L. 9–11; should read “aren’t deliberations related to a case not discoverable under the Freedom of Information Act . . .” instead of “not believable”; at Tr. 149, L. 2; “Boberg” should be Bloomberg; at Tr. 149, LL. 10–11, the sentence “The GC is our client in this case” is missing “not our client”.

³ KRGP, Inc., which became KRGP LLC on January 30, 2021, has been a general partner. (Joint Stipulations of Fact ¶2.)

products, goods and material valued in excess of \$5000 from outside the states of Texas and Louisiana. Respondent 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.

Respondent admits, and I find that the following are supervisors within the meaning of Section 2(11) and/or agents within the meaning of Section 2(13):

Henry Taylor	Senior Director of Labor Relations ⁴
Charles Golightly	Labor Relations Manager, Dallas unit
Michael Marino	Labor Relations Manager
Miles Bocock	Human Resources Division Manager

Respondent also admits, and I find, that the Union was a labor organization within the meaning of Section 2(5) of the Act.

The Union local's president is Brandon Hopkins. At the time, Scott Vinson was the International Union's Regional Director for the South

II. PROCEDURAL HISTORY

The Union filed a series of charges against Respondent in Region 16. Charge 16-CA-273809, alleging Respondent failed to maintain dues checkoff at the Palestine, Texas store, was filed on March 8, 2021. (GC Exh. 1(a).)⁵ Charge 16-CA-273805, similarly alleging Respondent failed to maintain the dues checkoff at the Houston and southeast Texas stores, was also filed on March 8, 2021. (GC Exh. 1(b).) Charge 16-CA-282206, regarding Respondent's Palestine, Texas store, was filed on August 30, 2021. (GC Exh. 1(q).) On August 30, 2021, the Union filed Charge 16-CA-282153, alleging that Respondent failed to deduct and remit initiation fees and political action committee contributions in spite of having valid checkoff authorizations. (GC Exh. 1(r).)

On September 2, 2021, General Counsel issued a consolidated complaint in Cases 16-CA-273805 and 16-CA-273809, which alleged Respondent failed to deduct and remit dues pursuant to valid, unexpired and unrevoked dues check-off authorizations. (GC Exh. 1(u).) Respondent filed a timely answer on September 16, 2021. On September 17, 2021, General Counsel ordered Case 16-CA-275286 consolidated with the previous complaint, this time adding in allegations that Respondent failed to provide information. (GC Exh. 1(x).) On October 1, 2021, Respondent filed an answer to the complaint, including an affirmative defense that additional charges were under investigation in Regions 15 and 16 with the same facts and circumstances, which would subject Respondent to duplicative litigation, impose an undue burden on Respondent and infringe upon its rights, including but not limited to its right of due process. (GC Exh. 1(z).)

On October 5, 2021, approximately 1 month after the initial

Region 16 consolidated complaint issued, Respondent requested a postponement so that all pending charges, including those pending in Region 15, could be investigated and potentially consolidated. Respondent maintained that due process mandated the postponement. Indeed, more than a handful of charges were before Regions 15 and 16. (Jt. Exh. 11.) Accordingly on October 7, 2021, the Regional Director for Region 16 granted the postponement; the hearing was postponed indefinitely. (GC Exhs. 1(aa), 1(bb)).

In the meantime, the Union also filed charges in Region 15. The initial charge and first amended charge in Case 15-CA-273905 for Respondent's Lake Charles and Sulphur, Louisiana stores were filed on March 9, 2021, and June 30, 2021, respectively. (GC Exh. 1(e), 1(m)). The initial charge and first amended charge in Case 15-CA-279330 for Respondent's Shreveport and Alexandria, Louisiana stores were filed on March 9, 2021 and July 1, 2021, respectively. (GC Exhs. 1(f), 1(o).) On October 27, 2022, Region 15 issued a consolidated complaint that maintained Respondent failed to deduct and remit dues and initiation fees pursuant to valid employee checkoffs. (GC Exh. 1(dd).) In its Answer to the Region 15 consolidated complaint Respondent's affirmative defenses included that the Region 15 cases should be consolidated with the Region 16 cases. (GC Exh. 1(hh).)

On November 3, 2022, Region 16 issued a third consolidated complaint for Cases 16-CA-273805, 16-CA-273809, 16-CA-282153, and 16-CA-282206, to which Respondent filed a timely answer. (GC Exhs. 1(ff), 1(jj).) On November 17, 2022, over a year after the Region 16 cases were postponed, Respondent filed a motion to postpone and consolidate the Region 16 cases with two Region 15 cases. (GC Exh. 1(ii).) On November 18, 2022, General Counsel consolidated the complaint in Cases 15-CA-273905 and 15-CA-273930 with the complaint in Cases 16-CA-27805, 16-CA-273809, 16-CA-282153, and 16-CA-282206. The hearing was set for March 8, 2023 via videoconference. (GC Exh. 1(kk).)

On December 19, 2022, Respondent filed a motion to the Board to dismiss the consolidated complaint. Respondent argued that it was denied due process and the Administrative Procedure Act otherwise required dismissal. Further, Respondent argued, for the first time that the General Counsel's "undue delay" gave General Counsel an unfair advantage and laches and dismissal were the appropriate actions to remedy these issues. (GC Exh. 1(mm)). On March 13, 2023, posthearing, the Board dismissed the motion in an unpublished order.

The parties filed timely briefs. On June 23, 2023, I issued an order for the parties to submit joint exhibits of the current collective-bargaining agreements, effective since 2020, which I subsequently ordered to be added to the official exhibits. The order also required the parties to brief a particular issue by July 14, 2023.

⁴ Taylor reports to John McPherson, Respondent's Vice President of Labor Relations. Taylor is responsible for labor relations in: the Houston Division; Dallas Division; the Dillon's Division operating in Kansas, Missouri and Nebraska, and the Kroger Division operating in Indiana, Illinois, Ohio, Michigan and Missouri. (Tr. 29-30.)

⁵ To aid review, I have included citations to the record in my findings. The citations are not necessarily exclusive or exhaustive. My findings

are based upon consideration of the entire record. The following abbreviations are used in this decision: Tr. for transcript; GC Exh. for General Counsel exhibit; R. Exh. for Respondent exhibit; GC Br. for General Counsel brief; GC Supp. Br. for General Counsel supplemental brief; R. Br. for Respondent brief; R. Supp. Br. for Respondent Supplemental Brief.

III. THE UNITS AND THE DUES-CHECKOFF PROVISIONS

The bargaining units are within the Houston Division and the Dallas Division, which was referred to throughout the hearing as the “Louisiana stores.”

A. *The Houston Units*

The Houston Division has two separate bargaining units: one for the clerks⁶ and another for meat clerks.⁷ (Jt. Exh. 9, stip. ¶3.) Taylor estimated that “roughly” less than 16,000 employees are covered in these units with approximately 89 stores. (Tr. 45.)

The parties reached new collective-bargaining agreements with effective dates April 12, 2020, through February 24, 2024, on April 5, 2022.

1. The Houston Clerks

The Houston clerks’ bargaining agreement, effective until April 11, 2020, and extended until August 15, 2020, contained the following language for dues checkoff:

Section 3.01 During the life of this agreement, the Employer shall deduct an amount equivalent to dues and initiation fees initiation fees and regular dues weekly from employees who individually and voluntarily certify in writing on the check-off authorization form for such deductions. Such authorization shall be binding on the employees for the duration of this Agreement unless the authorization is revoked in accordance with the provisions of the Taft-Hartley Act of 1947, as amended. No deductions shall be discontinued until the Employer has verified through the Union that the employee’s request for revocation is timely and proper. The Union shall certify in writing a list of its new members, together with signed authorization cards with an itemized list of such initiation fees and dues to be deducted from such members. The Employer shall promptly remit all sums deducted in this manner to the Union monthly. Timing for such deductions may be worked out locally between the Employer and the Union.

(Jt. Exh. 1.)

This agreement was mutually extended until August 15, 2020. (Jt. Exh 3; Jt. Exh. 9 stip ¶3.)

⁶ The Houston Division Clerks Unit: All employees employed by Kroger Texas L.P. in stores operating in the counties of Austin, Brazoria, Brazos, Chambers, Fort Bend, Galveston, Grimes, Harris, Jefferson, Liberty, Madison, Matagorda, Montgomery, Orange, Polk, San Jacinto, Walker, Waller, Washington, Wharton, and Store #990 and Stores #556, excluding all persons employed in the meat departments, store managers, co-managers, management trainees, professional employees, product demonstrators, guards and supervisors as defined in the LMRA, as amended.

⁷ The Houston Division Meat Clerks Unit: All employees in the Meat Department in all of the Employer’s retail stores located in the following counties: Arkansas, Austin, Bastrop, Brazoria, Brazos, Bell, Burleson, Calhoun, Chambers, Colorado, Fayette, Fort Bend, Galveston, Grimes, Hardin, Harris, Jackson, Jasper, Jefferson, Jim Wells, Kleberg, Lavaca, Lee, Liberty, Matagorda, Milam, Montgomery, Newton, Nueces, Orange, Polk, Refugio, San Jacinto, San Patricio, Travis, Trinity, Tyler, Victoria, Walker, Waller, Washington, Wharton, and Williamson.

2. The Houston Meat Clerks

The Houston meat clerks’ bargaining agreement was in effect from April 10, 2016, through April 11, 2020. The parties also reached an extension of this agreement, which expired on August 15, 2020. (Jt. Exh. 9 stip ¶3.)

This agreement contained a dues-checkoff provision in Article 2C:

The Employer shall, during the term of this contract, deduct an amount equivalent to dues and initiation fees and regular union dues weekly from employees who are members of the Union and who individually and voluntarily certify in writing authorization for such deductions. The Employer shall remit all sums deducted in this manner to Local Union No. 455 once a month.

The Employer will make the deductions from employees according to the signed Active Ballot Club check-off authorization card and the monies will be forwarded promptly by separate check to the President of the UFCW Local #455.

(Jt. Exh. 2.) At Article 20B, this agreement contains a zipper clause, which states the terms and conditions set forth cannot be added to, modified or deleted during the term of the agreement. Id.

On April 5, 2022, the parties reached a new Houston meat cutters unit collective-bargaining agreement for the, with effective dates of April 12, 2020, through February 24, 2024. (Jt. Exh. 9 stip ¶3.)

B. *Dallas Division with Units in Palestine, Texas and Shreveport, Alexandria, Lake Charles and Sulphur, Louisiana*

1. Lake Charles, Sulphur and Alexandria, Louisiana units

Respondent’s Lake Charles, Sulphur, and Alexandria, Louisiana stores (Case 15–CA–273905) have two separate bargaining units: One covering Clerks⁸ and the other covering Meat Clerks.⁹ (Jt. Exh. 9 stip ¶5.) Both bargaining units were parties to respective collective-bargaining agreements valid from July 24, 2017 to July 25, 2020 (Tr. 36; Jt. Exhs. 6 & 7), and extended by agreement of the parties until August 29, 2020. (Jt. Exh. 5.) On April 6, 2022, the parties entered into new collective-bargaining

⁸ Clerk unit for Lake Charles, Sulphur and Alexandria, Louisiana: All regular full-time and regular part-time employees employed in the Employer’s stores located in Rapides Parish, West Baton Rouge Parish, East Baton Rouge Parish and Calcasieu Parish, Louisiana (Alexandria and Opelousas, including meat department employees), excluding Managers, Co-Managers, Meat department employees, Management trainees, professional employees, guards and supervisors as defined in the LMRA, as amended. (Jt. Exh. 6.)

⁹ Clerk/Meat unit for Lake Charles and Sulphur, Louisiana: The Union will be the sole and exclusive bargaining agent for all employees working the Meat department of the Employer’s stores located in Sulphur and Lake Charles, Louisiana. The meat department for the purposes of this Agreement is defined as the area occupied by the meat coolers, meat preparation rooms and the service and/or self-service cases where fresh, frozen, cooked and smoked meats, poultry, and seafood are offered for sale. (Jt. Exh. 7.)

agreements with effective dates of July 26, 2020, through July 27, 2024.

The Clerks Unit agreement for Lake Charles and Sulphur contains its dues-checkoff provision under Article 3, Shop Condition:

Section 3.01 The Employer shall deduct Union initiation fees, as authorized and shall deduct an amount equivalent to dues and initiation fees Union dues weekly from the pay of employees who are members of the Union, and who individually and voluntarily certify in writing authorization for such deduction. The Employer shall promptly remit all sums deducted in this manner to the Union.

(Jt. Exh. 6.)

The Meat Clerks agreement for Lake Charles and Sulphur contains its dues-checkoff provision under Article 3B, Shop Condition:

The Employer shall deduct Union initiation fees, as authorized and shall deduct an amount equivalent to dues and initiation fees Union dues weekly from the pay of employees who are members of the Union, and who individually and voluntarily certify in writing authorization for such deduction. The Employer shall promptly remit all sums deducted in this manner to the Union.

(Jt. Exh. 7.)

2. Shreveport, Louisiana and Palestine, Texas clerks and meat clerks

The Dallas Division includes the Shreveport, Louisiana and Palestine, Texas clerks and meat clerks in a single unit.¹⁰ (Jt. Exh. 9 stip. ¶4; Cases 16-CA-273809 and 16-CA-282206.) Approximately 10 or 11 stores are in this unit. (Tr. 45.) The collective-bargaining agreement was effective July 24, 2017 to July 25, 2020 (Jt. Exh. 4), and extended by agreement of the parties until August 29, 2020. (Jt. Exh. 5; Jt. Exh. 9 stip. ¶4.)

The Shreveport/Palestine collective-bargaining agreement contained the following dues-checkoff provision:

Section 3.01 The Employer shall deduct Union initiation fees, as authorized, and shall deduct an amount equivalent to dues and initiation fees weekly from employees who individually and voluntarily certify in writing on the check-off authorization form for such deductions. The Employer shall promptly remit all sums deducted in this manner to the Local Union No. 455.

If requested to do so by the Union, the Employer will deduct Union dues on a weekly basis.

(Jt. Exh. 4.) This agreement's expiration clause provided an

¹⁰ The Shreveport Clerks and Meat Clerks Unit: All full-time and part-time employees in stores operated by Kroger Texas L.P. in Caddo and Bossier Parishes, Louisiana, and the city of Palestine, Texas, excluding managers, co-managers, one(1) grocery manager, guards and supervisors as defined in the LMRA of 1947, as amended.

¹¹ The bargaining unit is described in Section 2 of the collective-bargaining agreement: [A]ll regular full-time and regular part-time employees employed in the Employer's stores located in Rapides Parish, West

evergreen clause but no zipper clause. (Jt. Exh. 4 at Sec. 22.01.) The parties extended the Shreveport stores' agreement from July 25, 2020, to August 29, 2020. (Jt. Exh. 5.)

On April 6, 2022 the parties reached a new Shreveport clerks and meat clerks collective-bargaining agreement with effective dates July 25, 2020, through July 27, 2024. (Jt. Exh. 9 stip. ¶4.)

3. Alexandria unit

Respondent's Alexandria, Louisiana (Case 15-CA-273930) store has a single bargaining unit that covers both clerks and meat clerks. (Joint Exh. 9 stip ¶9.) That store had collective-bargaining agreement valid from July 24, 2016, to July 25, 2020 (Jt. Exhs. 6 and 7) and extended by agreement of the parties until August 29, 2020. (Jt. Exh. 5.) On April 6, 2022, the parties reached a new collective-bargaining agreement with effective dates of July 26, 2020, through July 27, 2024, on April 6, 2022.

The agreement for the other employees and the Alexandria meat clerks¹¹ contains a dues-checkoff provision at Section 3.01:

The Employer shall deduct Union initiation fees, as authorized and shall deduct an amount equivalent to dues and initiation fees Union dues weekly from the pay of employees who are members of the Union, and who individually and voluntarily certify in writing authorization for such deduction. The Employer shall promptly remit all sums deducted in this manner to the Union.

(Jt. Exh. 7.)

IV. RESPONDENT STOPS COLLECTING DUES AND FEES AND REINSTATES WHEN THE PARTIES ENTER THE NEW AGREEMENTS

The parties negotiated the Houston units first. Some of the negotiations were conducted in committees, and Hopkins did not attend all committee meetings. In about July 2020, Vinson assisted with some of the bargaining sessions for the Houston units.¹² (Tr. 116-117.)

On September 8, 2020, Respondent notified Hopkins that it intended to implement "specific parts" of its last, best and final offer affecting the clerks, which would be implemented on that day. None of the implemented provisions dealt with dues-checkoff provisions. (Tr. 129-130; R. Exh. 13.) On September 17, 2020, Taylor notified Hopkins of additional portions of the last, best and final offer for the Houston clerks, to be implemented that day. Those portions covered expanding vendor services, changing daily overtime, increasing the minimum guaranteed hours, relaxing work assignments to improve operations and improving the personal holiday schedule. Otherwise Respondent left in place other provisions as stated in the "status quo subject to Kroger's rights and obligations under federal labor law." (Tr. 131; R. Exh. 14.)

In early December 2020 the parties were engaged in contract

Baton Rouge Parish, East Baton Rouge Parish, and Calcasieu Parish, Louisiana (Alexandria and Opelousas, including meat department employees) excluding Managers, Co-Managers, meat department employees, Management trainees, professional employees, guards and supervisors as defined in the LMRA, as amended. (Jt. Exh. 7.)

¹² Vinson was not involved in the negotiations for the Louisiana unit but received regular updates. (Tr. 116.)

negotiations for the Houston units. They had not started negotiations for the Dallas/Louisiana units. (Tr. 41–42.) Dues deductions were not discussed during the negotiations for the successor agreements. (Tr. 86–87.) Respondent caught wind of Union discussions with employees about the possibility of a strike. (R. Exh. 10A, 10B.)

On December 1, 2020, the parties were engaged in a negotiation session for the Houston units. Taylor and Hopkins, with Vinson present, had a short discussion about dues deduction and remission away from the bargaining table, in the hallway. Taylor said the Union had not accepted Respondent’s last, best and final offer. Giving a deadline of December 3, 2020, Taylor stated Respondent would stop collecting dues for the Houston stores. (Tr. 88, 119.) Hopkins said the Union could not mobilize by that deadline. Taylor confirmed that Respondent would cease dues deduction on December 3rd if the Union did not comply. (Tr. 89.) Hopkins advised the Union bargaining committee what Taylor said. The parties were at lunch and then resumed negotiations. The matter was not discussed in the rest of that day’s negotiations. (Tr. 90.) Taylor mentioned nothing about ceasing dues for the Louisiana units. (Tr. 91.)^{13, 14}

On December 3, 2020, Taylor sent to Union President Hopkins and Regional Director Vinson an email in which Taylor notified the Union that Kroger was ceasing dues-checkoff collection for the Houston units as of the pay period ending November 28, 2020. (Tr. 39, 92–93; Jt. Exh. 8.)

On December 16, 2020, the Union and Respondent again met for negotiations. Hopkins raised that the Union received the December 3 email and he and the Union bargaining committee had discussed the matter. Taylor reaffirmed Respondent’s position about dues collection and remission. (Tr. 94–95.) At no time did Respondent raise the Union’s potential strike threat when discussing dues checkoff. (Tr. 97.)¹⁵

In early 2021 the parties began negotiating the Louisiana contracts. (Tr. 96.) The Louisiana agreements, according to Respondent, are considered “me too agreements,” which would follow any newly negotiated Houston agreements.

After the December 16 negotiation session, the Union discovered that Respondent ceased dues deduction from the Louisiana units from the Union’s bookkeeper. (Tr. 94.) Although the email and the conversations did not mention the Louisiana units, Respondent also ceased dues deduction at the same time for the Louisiana units as it did for the Houston units. (Tr. 40, 92–93, 95.) The Union filed unfair labor practice charge 16–CA–265972 against Respondent regarding Respondent’s alleged bad-faith bargaining and implementation of portions of the last, best and final contract offers in the Houston Division units. On January 28, 2022, the Regional Director for Region 16 dismissed the charge. (R. Exh. 2.) On March 4, 2022, the Union appealed the

dismissed charge. (GC Exh. 3.)

While the bad-faith bargaining charge was on appeal, the parties reached collective-bargaining agreements in April 2022. The Union withdrew that charge. (R. Exh. 3.) The parties signed side letters that required the Union to withdraw 25 unfair labor practice charges in Region 16 and 17 unfair labor practice charges in Region 15. (R. Exh. 11, 12.) The side letters, reached on April 2 and 6, 2022, specifically excluded the disputed dues-checkoff charges. (R. Exhs. 11, 12; R. supp. Br. at 2 fn. 1.) When the parties entered into their new agreements, as per the side letters, Respondent re-started deducting dues from employee paychecks and remitting it to the Union. (Tr. 42, 97; R. Exhs. 11, 12.)

On December 10, 2020 the Ninth Circuit remanded *Valley I*, instructing the Board to address “the reasonableness” of its decision-making. *SEIU Local 1107 v. NLRB*, 832 Fed. Appx. 514 (unpub.) (9th Cir. 2020). The court did not vacate the rule in *Valley I* while the case was pending and retained further jurisdiction. *Id.*

Although the parties have reached new agreements, they have not finalized the agreements into the comprehensive collective-bargaining agreements. The documents reflect the changes in the terms and conditions for the new agreements. Nothing in those documents reflects any changes in the language of the dues checkoff provisions. (Tr. 170; Jt. Exhs. 13–17.) Should the General Counsel be successful in this matter, the estimated back dues owed to the Union is over \$6 million. (Tr. 73.)

Analysis

As explained in the Labor Management Relations Act of 1947, an employer may deduct from the wages of employees in payment of membership dues in a labor organization so long as the employer received from “each employee a written assignment which shall not be irrevocable for a period of a more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner . . .” NLRA § 302(c)(4), 29 USC § 186(c)(4). The facts in this matter do not dispute that Respondent held valid dues-checkoff cards from bargaining unit employees, but instead presents a different question: Whether Respondent is liable for stopping dues checkoff under the shift in Board law back to *Valley Hospital II* or if Respondent sufficiently proves application would be manifestly unjust. The parties agree that *Valley Hospital I*, issued in 2019, was in effect when Respondent to stop dues checkoff after a collective-bargaining agreement’s expiration. Respondent readily admits it did not collect and remit dues, initiation fees and other monies while *Valley Hospital I* changed the law back to permitting it not to do so and restarted when it agreed to the current collective-bargaining agreements.¹⁶

did not present any proposals regarding dues deductions during negotiations. (Tr. 122.)

¹⁶ Respondent also cites *Betterroads Asphalt LLC*, 369 NLRB No. 114 (2020). Charges in this summary judgment case were filed in 2015 and 2017, alleging, inter alia, that the employer failed to remit union dues pursuant to valid, unexpired, unrevoked dues-checkoff authorizations. *Id.*, slip op. at 1. Although the agreement expired, the employer deducted the dues but failed to remit those dues to the union. The Board found the employer violated Sec. 8(a)(1) because it placed an economic burden

¹³ Taylor had little specific recall of this conversation with Vinson and Hopkins except that a conversation sometime took place in which he mentioned ceasing dues deduction and the Louisiana units were not discussed. (Tr. 48–50.) As a result, I credit Hopkins’ detailed version.

¹⁴ Vinson testified that he understood that Respondent had been deducted dues for the Louisiana units until this time as well. (Tr. 120.)

¹⁵ Vinson testified that, a few weeks before these events, he and Taylor discussed the possibility of a strike. He further testified that Respondent

The facts, for the most part, are not in dispute and the legal issue is what requires the most attention. For this analysis, I begin with a brief history of the dues-checkoff conundrum, particularly whether application of the law causes an undue hardship, or manifest injustice. Respondent raises issues as defenses that ultimately affect the determination of whether applying *Valley Hospital II* retroactively creates an undue hardship for Respondent.

A. Shifts in Case Law Regarding Dues Checkoff After Contract Expiration

For many years, the Board relied upon case law that permitted an employer to cease dues-checkoff collections and remissions to the Union when a contract expired. *Bethlehem Steel*, 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Shipbuilding v. NLRB*, 430 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). Then the Board and the Ninth Circuit dealt with cases involving the Hacienda Hotel's dues-checkoff provision.¹⁷ These cases spanned a period of two decades and are summarized in the Board majority decision in *Valley Hospital II*, 371 NLRB No. 160, slip op. at 6–7.

While the *Hacienda* cases were going back and forth between the Board and Ninth Circuit, the Board overruled *Bethlehem Steel* and found dues deduction survived contract expiration. *WKYC-TV*, 359 NLRB 296 (2012). However the Board in *WKYC* included two members who did not meet the constitutional requirements to serve. In 2015, the Board renewed its position from *WKYC-TV* and again found that dues deductions and checkoff survived contract expiration. *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015). The rule stated that “following contract expiration, an employer must continue to honor a dues-checkoff arrangement established in the parties’ contract until the parties have either reached a successor collective-bargaining agreement or a valid overall bargaining impasse permits unilateral action by the employer.” *Id.* at 1663. In *Lincoln Lutheran*, the Board announced that it would not retroactively apply its decision because the case shifted away from long-term precedent, thereby causing manifest injustice: Any case before the date of the decision was not subject to the newly stated rule. *Id.* at 1663.

In *Valley Hospital I*, the Board returned to the rule in *Bethlehem Steel*, supra, and applied it retroactively. The retroactive application meant that, although the case had been pending at a time when *Lincoln Lutheran* was the law, the employer in *Valley Hospital I* was not liable for back dues it withheld after contract expiration. On December 30, 2020, the Ninth Circuit granted review of *Valley Hospital I* and remanded the case to the Board for an explanation. *Local Joint Executive Board of Las Vegas v.*

upon employees who believed their dues were going to support the union and the employees had not made alternative arrangements to maintain their membership in good standing. *Id.*, slip op. at 1–2. These facts are not on point with the present case.

¹⁷ *Hacienda Hotel Inc. Gaming Corp. d/b/a Hacienda Resort Hotel & Casino*, 331 NLRB 665 (2000) (*Hacienda I*), rev. granted and case remanded sub nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 309 F.3d 578 (9th Cir. 2002) (*LJEB I*), supplemented on remand by 351 NLRB 504 (2007) (*Hacienda II*), rev. granted and decision vacated by *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008) (*LJEB II*) supplemented on remand by 355 NLRB 742 (2010)

NLRB, 840 Fed. Appx. 134, 138 (9th Cir. 2020).

On March 23, 2021, the Board accepted the remand from the Ninth Circuit. On September 30, 2022, the Board issued *Valley Hospital II*, supra, resuming the rule in *Lincoln Lutheran*, supra, and applying the rule retroactively. Shortly thereafter, Valley Hospital Medical Center petitioned the Ninth Circuit for review, with the Board filing a cross-petition for enforcement in early December 2022. To date, the Ninth Circuit has not ruled on these petitions.

B. Valley Hospital II Directs the Outcome

Respondent admits it did not collect dues for the period beginning November 30, 2020, and continuing until the parties reached agreements for the bargaining units in 2022, at which times dues deduction and remission occurred. Respondent maintains that it relied upon the law as it existed at the time, which was *Valley Hospital I*.

The Board retroactively applies new policies to pending cases unless manifestly unjust. The Board identified why retroactive application of *Valley Hospital II* was not manifestly unjust.¹⁸ The Board followed three factors: (1) Reliance of the parties upon pre-existing law; (2) the effect of retroactivity on accomplishing the Act's purposes; and (3) any particular injustice arising from retroactive application. *SNE Enterprises*, 344 NLRB 673, 673 (2005), enfd. 257 Fed. Appx. 642 (unpub.) (4th Cir. 2007).

In *Valley Hospital II*, the Board addressed the three prongs about retroactive application to all pending cases. For the first factor, the law has been in flux for many years, as the *Hacienda* litany and above cases describe. *Valley Hospital II*, 371 NLRB No. 160, slip op. at 12.¹⁹ Retroactivity accomplished the purposes of the Act by avoiding inconsistency and promoting stabilization of labor relations. *Valley Hospital II*, 371 NLRB No. 160, slip op. at 16–17.

Respondent could not have “settled expectations” that *Valley Hospital I* would continue. Respondent could not rely upon the *Bethlehem Steel* standard or the law from *Valley Hospital I* due to fluctuations in the law. *Valley Hospital II*, supra, slip op. at 12. The Board already found the Act's purposes are supported in retroactive application. Because the Board finds no manifest injustice in retroactively applying *Valley Hospital II*, Respondent unlawfully ceased the union dues collection from employee paychecks and did not remit to the Union for a period of months,

(*Hacienda III*), rev. granted and remanded by *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865 (9th Cir. 2011) (*LJEB III*), supplemented on remand 363 NLRB 47 (2015) (*Hacienda IV*), motion for reconsideration denied (2016), review granted and order vacated by *Local Joint Executive Board of Las Vegas v. NLRB*, 883 F.3d 1129 (9th Cir. 2018) (*LJEB IV*), supplemented on remand by 367 NLRB No. 101 (2019) (*Hacienda V*).

¹⁸ Also see GC Supp. Br. at 3–4.

¹⁹ Compare *Loomis Armored US, Inc.*, 364 NLRB 144, 150 (2016) (change in law not retroactive where parties in that and pending cases relied upon 30 years of long-standing precedent).

in violation of Section 8(a)(5) and (1) of the Act.²⁰ Respondent contends that its actions were in response to a potential strike around Thanksgiving, so it could employ cutting off dues in response to the threatened strike---in other words, an economic reason (R. Br. at 16.) Yet Respondent's timing does not support a finding that it responded to a threat to a Thanksgiving strike as it did not raise the issue to the Union until December 1 days after Thanksgiving.

Respondent had a number of affirmative defenses to the application of *Valley Hospital II*. Respondent's affirmative defenses include whether General Counsel delayed so significantly in prosecution, during which time the law about dues deduction shifted. This shift, according to Respondent, denied it of due process. Respondent also contends that the parties were at a valid impasse in negotiations and therefore had a right to stop dues deductions.²¹ It also contends that the Union waived its rights and should have instead requested grievance/arbitration application once the new collective-bargaining agreements were in effect.

Respondent argues that the complaint should be dismissed because General Counsel intentionally delayed in prosecuting the case, which denied it of due process and its rights actions against "arbitrary and capricious government action." (R. Br. at 6.) According to Respondent, this delay prejudiced Respondent and gave General Counsel an unfair advantage. (R. Br. at 10.) Respondent concludes that the appropriate remedy for the intentional delay and prejudice is laches. (R. Br. at 11.)

To warrant laches, Respondent has the burden of proof to demonstrate two factors: (1) an unreasonable delay in asserting one's rights; and (2) resulting prejudice to the defending party. *3750 Orange Place, L.P. v. NLRB*, 333 F.3d 636, 665 (6th Cir. 2003), enfg. 335 NLRB 38 (2001). Respondent explores each of these factors.

Respondent recounts the history of the charges and complaints to demonstrate what it considers excessive delay:

In Case Nos. 16-CA-273805 & 16-CA-273809, the charges were filed on March 8, 2021. In Case Nos. 15-CA-273905 & 15-CA-273930, the charges were filed on March 9, 2021. On August 30, 2021, two additional charges were filed in Case Nos. 16-CA-282153 and 16-CA-282206. After a complaint was issued on only some of these charges in September 2021, Kroger moved to postpone those proceedings so that all of the pending charges raising similar issues could be adjudicated together. In October 2021, the Regional Director for Region 16 postponed indefinitely the hearing in Case Nos. 16-CA-273805 & 16-CA-273809 on October 7, 2021.

More than nineteen (19) months after the charges were filed for Case Nos. 15-CA-273905 & 15-CA-273930 and within one (1) month after *Valley Hospital II* was issued, the General

Counsel issued a new consolidated complaint in October 2022 alleging that Kroger failed to deduct union dues during the period of time when the CBA was expired. In November 2022, the General Counsel issued yet another consolidated complaint for Case Nos. 16-CA-273805, 16-CA-273809, 16-CA-282153, & 16-CA-282206. These Complaints were thereafter consolidated into this action.

(R. Br. at 6-7.)

In examining the factor of delay, Respondent requested the postponement in the first instance, which it admits in its recitation. The first Region 16 complaint issued over a year before *Valley Hospital II* was decided, putting Respondent on notice that General Counsel sought a change in Board law. Respondent presents no evidence that it requested to resume the litigation schedule. Respondent did not present any evidence of protesting the delays until it filed its Motion to Dismiss with the Board, which occurred in December 2022. Nor is the delay inordinate. See, e.g., *Carnival Carting, Inc. v. NLRB*, 455 Fed. Appx. 20, 24 (2d Cir. 2012) (in compliance case, the Board did not delay unnecessarily between 1996 and 2008), enfg. 355 NLRB 297 (2010).

Respondent contends that General Counsel failed to provide any reasons for the delay and refused to provide such information through its subpoena to General Counsel. Regarding the subpoena, Respondent impliedly seeks decisional documents that, at first blush, are protected as work product and attorney-client privilege. Additionally, the documents likely could not be disclosed due to the Freedom of Information Act, as decisional documents in an open case. To the extent the Respondent's claims touch on the General Counsel's prosecutorial decisions, Section 3(d) of the Act insulates such decisions from the Board's review. See generally *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112 (1987).²²

Respondent argues that intentional delay is a possible avenue to find laches. *Consolidated Casino Corp.*, 266 NLRB 988, 992 (1983). There respondent employer contended that General Counsel failed or negligently omitted notifying it about the terminal illness of an alleged discriminatee who was not included in the earlier stages of the proceedings. Respondent contended the failure deprived it of due process. The judge said if the evidence demonstrated that General Counsel purposefully withheld the allegation until after alleged discriminatee's death, he would have struck the applicable complaint paragraph. The judge then stated that laches would not lie against General Counsel for negligent delay and instead dealt with the merits of the case. *Id.* The Board, in adopting the judge's rulings, finding and conclusions, stated that the respondent filed no exceptions and the Board's actions could not be seen "as an endorsement by the Board of all of the Administrative Law Judge's findings and conclusions." *Id.* at 988 n. 1. As a result, *Consolidated Casino Corp.* has no

recommended that it should be consolidated with the Region 15 complaint, which did occur.

²² I permitted Respondent to enter evidence allegedly showing General Counsel's intent to challenge *Valley Hospital I* so that the evidence would be preserved for any future exceptions or appeals.

²⁰ General Counsel also points out that an administrative law judge must apply established Board precedent, which here is the retroactive application of *Valley Hospital II*. (GC Br. at 9-10.)

²¹ Respondent also had additional affirmative defenses, such as failure to state a claim upon which relief may be granted, 10(b), waiver and/or estoppel. Its answer to Region 16's third consolidated complaint also

precedential value regarding laches.

Respondent also does not demonstrate prejudice due to the delay. In one example, laches did not apply despite General Counsel delaying almost 5½ years after complaint issued to amend in employer-members of an association and the added respondents did not suffer any prejudice in the presentation of its defense. *United Elec. Contractors Assn.*, 347 NLRB 1, 2–3 (2006), enfd. 259 Fed. Appx. 335 (D.C. Cir. 2007).²³ The only prejudice is that Respondent relied upon prior case law and now may be liable for an amount it does not wish to pay; its ability to mount a defense was not affected.

Ultimately, the Board and courts have long held that the doctrine of laches does not apply to an agency of the government “in proceedings which are an exercise of its public or government function.” In re *Standard Oil Co. of California*, 61 NLRB 1251, 1254–1255 (1945).²⁴ There charges of employer domination of a company association had been filed as early as 1937. Under the circumstances presented by the “investigatory burden,” the delay was not prejudicial. In addition, laches did not apply because it did not apply to a governmental agency. *Id.* Respondent here did not demonstrate that the General Counsel was acting outside of its public or governmental functions in prosecuting this matter.

Respondent contends that the parties were at a lawful impasse, which permitted it to stop dues checkoff. The evidence supporting this claim is based upon General Counsel dismissing the Union’s charge alleging an unlawful declaration of impasse and bad-faith bargaining. However, General Counsel’s dismissal of a charge has no preclusive effect in subsequent litigation. *Thryv, Inc.*, 20–CA–250250, at 1 fn. 1, unpub. Board order issued March 8, 2023 (2023 NLRB LEXIS 109) (Regional Director’s dismissal of a charge alleging that employer unlawfully implemented its last, best, and final offer did not prove there was an impasse or lawful implementation), citing: *UFCW Local 576 v. NLRB*, 675 F.2d 346, 352 fn. 7 (D.C. Cir. 1982) (“Although the General Counsel’s decision to dismiss represents an estimate of the merits of the charge and operates to foreclose Board consideration of that charge, it is not a decision on the merits with res judicata effect.”); and *Aircraft & Engine Maintenance Employees, Local 290 v. E. I. Schilling Co.*, 340 F.2d 286, 289 (5th Cir. 1965) (“Surely, the mere refusal by the general counsel to issue a complaint is not res judicata and cannot constitute a collateral estoppel. The failure of the general counsel to issue a complaint is not necessarily based on the evidence or the merits of a case.”), cert. denied 382 U.S. 972 (1966).²⁵ Respondent’s reliance upon a dismissal of a charge does not prove that parties were at impasse and therefore cannot be used to find that Respondent was privileged to stop its obligations of dues checkoff.²⁶

Respondent also contends that the side letters signed when the

parties agreed to the new agreements provides it should resume dues deductions, also covers its obligations to pay dues. However, nothing in the side letters or the hearing record provides that the Union agreed to waive its rights to the dues Respondent stopped deducting. Respondent admits that the Union reserved the right to pursue the charges for stopping the dues deduction and remission. (See, e.g., R. Supp. Br at 2 fn. 1.) As any implication that the Union agreed to Respondent’s actions is unsupported, that defense is rejected.

Respondent also argues that the Union waived its rights to the retroactive dues because the grievance/arbitration provisions would control the matter. (R. Supp. Br. at 2–3.) Respondent does not cite to any case law but states: “The prior and successor CBAs contain a grievance and arbitration provision that obligates the Union to present any grievance alleging Kroger’s failure to abide by the terms of the CBA through a multi-step process ending in arbitration. There is no evidence in the record that the Union filed any such grievances or pursued them through the grievance process—either after the deductions stopped or once the tentative agreements were reached and a successor CBA ratified.” *Id.*

In essence, Respondent argues that, as an alternative, the matter should have been deferred to the grievance/arbitration procedures. Deferral is an affirmative defense that must be timely raised in the answer to the complaint or at trial. See generally *Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC*, 368 NLRB No. 44, slip op. at 2 fn. 4 and 33 (2019), and cases cited therein. First, Respondent did not raise deferral in its answers or at trial. Secondly, Respondent would have been responsible to prove its affirmative defense.

I also can find no waiver when Respondent essentially gave little or no chance to bargain over its intended actions. For the Houston units, Respondent notified the Union verbally on December 1, 2020, that it intended to stop dues checkoff 2 days later. Despite the Union advising it could not mobilize in such a short time, Respondent proceeded with its actions, retroactive to the pay period ending the previous November 28. Respondent gave no notice for the Louisiana units. Respondent’s actions are more of a *fait accompli*, not a union waiver.

Respondent also argues that the dues-checkoff language in at least two of the agreements limits the deductions to the “life of the agreement.” It additionally adduced evidence that the no strike clauses in the agreement were in effect only while an agreement was in place; upon expiration the Union was free to strike. (Tr. 100–101.) Respondent contended that it was not advocating for a change in the law regarding when a union could strike but was only making a comparison to what some of the prior Board decisions held. (Tr. 101.) This issue prompted me to request the parties to provide additional briefing regarding the

²³ Also see *Armour & Co.*, 280 NLRB 824, 830 n.20 (charge filed in January 1981 and hearing held March 1983 insufficient to support respondent’s claim it suffered substantial prejudice by delay).

²⁴ Also see *W.C. Nabors*, 134 NLRB 1078 fn.2 (1961), enfd. 323 F.2d 686 (5th Cir. 1963) (compliance proceedings in which respondent refused to comply with Board’s order until Board sought contempt proceedings at the circuit court).

²⁵ The Fifth Circuit recently reinforced that the General Counsel has final authority for prosecution of the complaint before the Board. *United*

Nat. Foods v. NLRB, 66 F.4th 546, 544 (5th Cir. 2023), citing 29 U.S.C. § 153(d) and *NLRB v. United Food & Commercial Workers, Local 23*, 484 U.S. 112 (1987).

²⁶ General Counsel also contends that any evidence of impasse should have been precluded at hearing because Respondent failed to raise it as an affirmative defense in its Answers. (GC Br. at 13.) At this point, any evidence that was adduced is dealt with.

application of the effective date to the dues-checkoff provision. General Counsel and Respondent agree that it has no bearing on this discussion, and I will not pursue the matter further.

In conclusion, I find that Respondent failed to withhold and remit dues pursuant to employees' valid dues checkoffs.

CONCLUSIONS OF LAW

1. Respondent Kroger Texas L.P. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Union United Food and Commercial Workers Local No. 455 is a collective-bargaining agent within the meaning of Section 2(5) of the Act.

3. The following are supervisors within the meaning of Section 2(11) and agents within the meaning of Section 2(13) of the Act:

Henry Taylor	Senior Director of Labor Relations
Charles Golightly	Labor Relations Manager, Dallas Unit
Michael Marino	Labor Relations Manager
Miles Bocock	Human Resources Division Manager

4. At all material times, the Union has been the designated bargaining representative of Kroger Texas L.P.'s employees in the following appropriate units:

a. Houston Clerks:

All employees employed by Kroger Texas L.P. in stores operating in the counties of Austin, Brazoria, Brazos, Chambers, Fort Bend, Galveston, Grimes, Harris, Jefferson, Liberty, Madison, Matagorda, Montgomery, Orange, Polk, San Jacinto, Walker, Waller, Washington, Wharton and Store #990 and Stores #556, excluding all persons employed in the meat departments, store managers, co-managers, management trainees, professional employees, product demonstrators, guards and supervisors as defined in the LMRA, as amended.

b. Houston Meat Clerks:

All employees in the Meat Department in all of the Employer's retail stores located in the following counties: Arkansas, Austin, Bastrop, Brazoria, Brazos, Bell, Burleson, Calhoun, Chambers, Colorado, Fayette, Fort Bend, Galveston, Grimes, Hardin, Harris, Jackson, Jasper, Jefferson, Jim Wells, Kleberg, Lavaca, Lee, Liberty, Matagorda, Milam, Montgomery, Newton, Nueces, Orange, Polk, Refugio, San Jacinto, San Patricio, Travis, Trinity, Tyler, Victoria, Walker, Waller, Washington, Wharton and Williamson.

c. Lake Charles and Sulphur, Louisiana Clerks and Alexandria Clerk and Meat Clerk unit:

All regular full-time and regular part-time employees employed in the Employer's stores located in Rapides Parish, West Baton Rouge Parish, East Baton Rouge Parish, and Calcasieu Parish, Louisiana (Alexandria and Opelousas, including meat department employees) excluding Manager, Co-Managers, meat department employees, Management trainees, professional employees, guards and supervisors as defined in the LMRA, as amended.

d. Shreveport, Louisiana and Palestine, Texas Clerks and Meat Clerks:

All full-time and part-time employees in stores operated by Kroger Texas L.P. in Caddo and Bossier Parishes, Louisiana, and the city of Palestine, Texas, excluding managers, co-managers, one(1) grocery manager, guards and supervisors as defined in the LMRA of 1947, as amended.

5. Since the pay period ending November 30, 2020, Respondent violated Section 8(a)(5) by unilaterally ceasing dues checkoff after the expiration of the parties' collective-bargaining agreements in the above appropriate units.

6. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found Respondent Kroger Texas L.P. engaged in certain unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that Respondent violated Section 8(a)(5) by unilaterally ceasing dues checkoff after the expiration of the parties' collective-bargaining agreements, Respondent is ordered to make the Union whole for any dues it would have received but for Respondent's failure to comply with its obligation to provide an opportunity to bargaining before changing terms and conditions of employment. This order requires only that Respondent make the Union whole for dues it would have received from employees who have individually signed dues-checkoff authorizations. The make-whole remedy shall be remitted to the Union 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). *Valley Hospital II*, 371 NLRB 160, slip op. at 17–18 and cases cited therein.²⁷

To prevent double recovery by the Union, Respondent's payment to the Union shall be offset by any dues the Union collected during the relevant period on behalf of employees covered by the dues payment order. Respondent is prohibited from seeking to recoup from the employees any dues amounts Respondent is required to reimburse to the Union. *Id.*, slip op. at 17 fn. 59.²⁸

as a windfall to employees. It also contends that it should be able to recoup the monies from the employees. (R. Br. at 23–24; R. Exh. 8A.) Respondent also differentiates that, in *Valley Hospital II*, the employer violated what was the current standard in *Lincoln Lutheran*. The remedy in *Valley Hospital II* is clear as it is applied retroactively.

²⁷ Also see *Coreslab Structures (Tulsa) Inc.*, 372 NLRB No. 31, slip op. at 1, fn. 3 (2022) (Respondent must restore *status quo ante* of Respondent's obligations).

²⁸ Respondent raises the Union's promise to pay the dues to employees who were employed and members of the Union as of December 2020

ORDER²⁹

Respondent Kroger Texas L.P., its officers, agent, successors and assigns, shall

1. Cease and desist from

(a) Unilaterally ceasing dues checkoff without first bargaining to impasse.

(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) Remit to the Union, at no cost to employees, dues payments required by the parties' collective-bargaining agreements for employees who executed checkoff authorizations prior to and during the period of Respondent's unlawful conduct, as described in the Remedy section of this decision.

(b) 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 amounts due under the terms of this Order.

(c) Post at its Houston and Louisiana bargaining unit facilities copies of the attached notices marked "Appendix" copies of the notices, on forms provided by the Regional Director for Region 16, after being signed by Respondent's authorized representatives, shall be posted by 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 Respondent customarily communicates with its employees by such means. Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall, at its own expense, duplicate the notice and mail copies to all current and former employees employed by Respondent at any time since the pay period ending November 30, 2020.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to

the steps that Respondent has taken to comply.

Dated, Washington, DC July 21, 2023

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 unilaterally cease dues checkoff for the Houston and Louisiana bargaining units.

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 remit to the Union, at no cost to employees, dues payments required by the parties' collective-bargaining agreement for employees who executed checkoff authorizations prior to and during the period of our unlawful conduct, plus interest.

KROGER TEXAS L.P.

The Board's decision can be found at www.nlr.gov/case/16-CA-273805 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., or by calling (202) 273-1940.



²⁹ 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."