Kroger Limited Partnership I d/b/a Kroger Delta Division *and* United Food and Commercial Workers, Local 2008. Cases 15–CA–280676 and 15–CA–315052

July 23, 2026

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS PROUTY AND MAYER

On March 21, 2024, Administrative Law Judge Sarah Karpinen issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering 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, findings, and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Kroger Limited Partnership I, d/b/a Kroger Delta Division, Little Rock, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

(b) Refusing to bargain collectively with the Union by unreasonably delaying in furnishing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

---

[1] On August 14, 2024, the Respondent filed a notice of supplemental authority citing *Securities & Exchange Commission v. Jarkesy*, 603 U.S. 109 (2024). On August 27, 2024, the General Counsel filed a response.

[2] The judge applied *Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center*, 371 NLRB No. 160 (2022) (*Valley Hospital II*), enfd. 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.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to continue dues checkoff after the expiration of the collective-bargaining agreements, we do not rely on the judge's statements regarding the Respondent's subpoena-enforcement efforts and non-precedential memoranda from the Board's Division of Advice. We also do not rely on the judge's discussion of changes involving the law of dues checkoff and her assertion that the Respondent "cannot claim that it was unaware of any risk in taking unilateral action." Member Prouty would rely on the judge's discussion of changes involving the law of dues checkoff and her assertion regarding the Respondent's knowledge of risk.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unreasonably delaying in providing the Union with relevant requested information it requested on January 27, February 9, and March 10, 2023, pertaining to employees who had been or were experiencing payroll issues, we find that the Respondent had sufficient notice of the spreadsheet that the Union was requesting from the Union's January request. There was only one tracking spreadsheet document that the Respondent and the Union had been discussing that the Union would have been referencing. While some of the parties' communications used the term "summary," the Union's February 9 email used the term "spreadsheet" and clarified the kind of spreadsheet the Union was asking for: one with "all the employees listed that are having issues." To the extent that clarification after the January request was necessary, the February 9 email therefore underscored that the Union sought a particular spreadsheet.

We reject the Respondent's argument that the judge erred in rejecting R. Exh. 19 and deny its request for admission of that exhibit along with its related arguments. We also reject its assertion that the nature of the allegations here rendered the General Counsel's decision to issue a consolidated complaint improper.

[3] For the reasons stated in *Valley Hospital II*, 371 NLRB No. 160, slip op. at 17 fn. 59, we find no merit to the Respondent's exception to the judge's recommended remedy and note the remedy contains a provision against double recovery.

Member Prouty observes that the Respondent's contention that the make-whole remedy is punitive because it 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. This is fully consistent with established Board and court precedent. See *Kroger Texas L.P.*, 374 NLRB No. 113, slip op. at 2 fn. 2 (2026)(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.'") (quoting *Alamo Rent-A-Car*, 362 NLRB 1091, 1091 fn. 1 (2015) and *West Coast Cintas Corp*., 291 NLRB 152, 156 fn. 6 (1988)), enfd. 831 F.3d 534 (D.C. Cir. 2016)).

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.

We have modified the judge's recommended Order to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

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

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 the Respondent's unlawful conduct, as described in the remedy section of the judge's 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 record 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) Within 14 days after service by the Region, post at its Arkansas bargaining unit facilities copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 15, 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 are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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 July 16, 2021.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 15 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, D.C. July 23, 2026

James R. Murphy, Chairman

David M. Prouty, Member

Scott A. Mayer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally cease dues checkoff.

WE WILL NOT refuse to bargain collectively with the Union by unreasonably delaying in furnishing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

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 agreements for employees who executed checkoff authorizations prior to and during the period of our unlawful conduct, plus interest.

KROGER LIMITED PARTNERSHIP I D/B/A KROGER DELTA DIVISION

[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."

The Board's decision can be found at https://www.nlrb.gov/case/ 15-CA-280676 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

Greyson T. Hinojosa, Esq., for the General Counsel.
David L. Barron (Cozen & O'Connor, P.C.), for the Respondent.
John L. Burnett, Esq. (Lavey and Burnett), for the Charging Party.

DECISION

SARAH KARPINEN, Administrative Law Judge**.** This case involves two bedrock principles of collective bargaining: the prohibition on making unilateral changes to employees' terms and conditions of employment after a collective-bargaining agreement expires, and the obligation to provide information in a timely manner. The General Counsel alleges that Respondent Kroger unlawfully stopped deducting and remitting dues and fees to the Union representing its employees, UFCW Local 2008, after its collective-bargaining agreements with the Union expired, and that it unreasonably delayed in providing relevant information that the Union requested. Respondent defends its actions by arguing that its actions were lawful under Board law in place at the time, and that retroactive application of a subsequent Board decision is unjust. Respondent challenges the General Counsel's actions in prosecuting this case, and further argues that the unilateral change was justified by impasse and the language of the expired agreements. Finally, Respondent contends that its delay in providing information to the Union was reasonable. After carefully reviewing the record, the parties' briefs, and the relevant case law, I find that Respondent unlawfully stopped honoring the dues-checkoff provisions in the expired agreements and unreasonably delayed in providing information to the Union.

STATEMENT OF THE CASE

This case was tried before me via videoconferencing technology on November 6, 2023. The allegations in this case arise out of two unfair labor practice charges. The first charge was filed by UFCW Local 2008 (Union) in Case 15–CA–280676 on July 30, 2021. (GC Exh. 1(a)). Region 15 issued a complaint in that case on April 15, 2022, and Kroger Delta Division (Respondent) filed a timely answer on May 20, 2022. (GC Exh. 1(c), (e)). On May 26, 2022, the Region withdrew the Apri1 15 complaint. (GC Exh. 1(f)). On June 13, 2022, the NLRB's Office of the Executive Secretary issued a notice stating that considering the withdrawal of the complaint, Respondent's May 20 Motion to Dismiss, or, in the Alternative, for Summary Judgment was moot and would not be considered. (GC Exh. 1(h).)[1]

The Region issued another complaint in Case 15–CA–280676 on October 26, 2022, which Respondent timely answered. (GC Exh. 1(i), (k).) Respondent filed a motion to dismiss on December 12, 2022. (GC Exh. 1(1).) Respondent also filed a Motion for continuance on January 31, 2023. (GC Exh. 1(m).) The General Counsel opposed the Motion to Dismiss on February 1, 2023. (GC Exh. 1(n).)[2] Region 15 issued an Order rescheduling the hearing on February 9, 2023. (GC Exh. 1(o).) On March 29, 2023, the Charging Union filed the charge in Case 15–CA–315052. (GC Exh. 1(q)). The Region issued an Order postponing the hearing indefinitely on April 13, 2023. (GC Exh. 1(s)). The Region issued an Order consolidating cases, consolidated complaint, and notice of hearing in Cases 15–CA–280676 and 15–CA–315052 on June 27, 2023, and Respondent timely filed its Answer on July 11. (GC Exh. 1(u), (w).)

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following Findings of Fact and Conclusions of Law.[4]

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it is a limited partnership doing business as Kroger Limited Partnership I, and that KRGP, Inc. was a general partner until January 30, 2021, when it converted to KRGP LLC. Respondent further admits that it has an office and place of business in Little Rock, Arkansas, and operates grocery stores throughout the state of Arkansas generating annual gross revenue in excess of $500,000, and that it annually pur-

[1] Respondent's May 20 Motion to Dismiss or for Summary Judgment was not included in the formal papers in this case. However, there is no dispute that it was filed.

[2] At the hearing, I noted the absence of the Board's ruling on Respondent's December 12 Motion to Dismiss in the formal papers. The parties stated that they did not believe they received a ruling. (Tr. 8). After the hearing, I searched the Board's website and found a March 13, 2023 Order denying Respondent's Motion to Dismiss, so I am noting for the record that the Board denied this Motion, and its Order is available at www.nlrb.gov, under the Cases and Decisions, Unpublished Board Decisions, tab.

[3] The transcript should be corrected as follows: On pg. 15, line 10, "Florence" should be "Board's."

[4] I have included citations to the transcript and exhibits to aid the reader, but my findings and conclusions are drawn from the entire record including the stipulated facts, credible testimony, and other evidence presented, as well as any logical inferences that can be drawn from the record. I considered the testimony of all the witnesses in the context of their demeanor, the weight of the evidence, the facts, the probability that the testimony was true, and the reasonable inferences that could be drawn from their statements. See *Double D Construction Group*, 339 NLRB 303, 305 (2003), citing *Daikichi Sushi*, 335 NLRB 622, 623 (2001). I also followed the general principle that it is possible to disbelieve portions of a witness' testimony without discrediting all of it. *Daikichi Sushi*, supra, 335 NLRB at 622 (2001).

chases and receives products, goods and materials valued in excess of $5000 from points outside the State of Arkansas. Finally, Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Accordingly, I find that this dispute affects commerce, and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

The parties stipulate, and I find, that at all material times, Wes Pitt, Henry Taylor, Peggy Prescott, Ian Adams, Michelle Hardman, and Kristian Autry have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act. (Jt. Exh. 11.)

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that Respondent violated Sections 8(a)(1) and (5) of the Act by failing to deduct and remit initiation fees and dues to the Union pursuant to valid, unexpired, and unrevoked employee dues-check-off authorizations without giving the Union prior notice or an opportunity to bargain, and without first bargaining to an overall good-faith impasse for successor collective-bargaining agreements (Complaint Pars. 8, 10–11), and by failing to timely provide relevant information to the Union. (Complaint Paras. 9-11).

A. 2016 Collective-Bargaining Agreements

There are two expired collective-bargaining agreements at issue in this case, one covering meat department employees (2016 meat contract), and the other covering all other store employees, other than managers, guards, and supervisors (2016 grocery contract). The contracts were effective from June 26, 2016, until June 27, 2020 (Jt. Exhs. 1 and 2), and were extended by mutual agreement of the parties until June 24, 2021. (Jt. Exh. 11, par. 3.)

Article 2(B) of the 2016 meat contract contained the following dues-checkoff provision:

> The Employer will, for the term of this Collective Bargaining Agreement, deduct union initiation fees, dues, and uniform assessments at least weekly from employees who are members of the Union and who individually and voluntarily certify in writing their authorization for such deductions. When given, such authorization will be binding on the employee for the duration of this Collective Bargaining Agreement. The Employer will promptly remit monthly funds deducted in this manner to the Union. (Jt. Exh. 1.)

Section 4.01 of the grocery contract contained this dues-checkoff provision:

> The Employer will for the term of this Collective Bargaining Agreement deduct initiation fees, as authorized, and will deduct union dues from the weekly pay of employees who are members of the Union and who individually certify, in writing, authorization for such deductions. (The authorization for such deductions may be revoked on any anniversary date of this authorization or on the expiration date of any Collective Bargaining Agreement between the Employer and the Union by written notice to the Employer and the Union at least thirty (30) days and not more than forty-five (45) days prior to such anniversary date or such expiration date.) The Employer will promptly remit all sums deducted in this manner to the President of UFCW Local No. 2008. The Employer will deduct from its employees who have certified, in writing, authorization to do so, a uniform weekly political deduction and forward it to the President of UFCW Local No. 2008 by check separate from dues. (Jt. Exh. 2).

Negotiations for new agreements began in April or May 2020. (Tr. 38.) Steve Gelios was the president of the Charging Union and the primary spokesperson for the Union during the negotiations. (Tr. 30.) Senior Director of Labor Relations Peggy Prescott initially served as Respondent's lead negotiator. She was replaced by Director of Labor Relations Ian Adams in mid-February 2021. He continued in that role until August 2021. (Tr. 153.) The parties met several times between April or May 2020 and February 2021. They did not formally meet between February 2021 and July 2021, but continued to communicate informally during that time. (Tr. 39–40.) The parties never discussed the dues-checkoff provisions in the expired agreements during their informal or formal negotiations for a new contract. (Tr. 39.)

The main point of contention in bargaining was Respondent's proposal to transfer employee benefits from the South-Central Trust Fund (a Taft-Hartley plan) to a company-sponsored plan. Respondent made a last, best, and final offer to the Union in February 2021. (Tr. 86, 122.) The Union asked members to vote on whether to accept that offer, or to authorize a strike. (Tr. 87, R. Exh. 7.) The employees rejected the offer. (Tr. 123). Director Adams testified that he viewed the parties to be at impasse, and that the main sticking point in negotiations was healthcare. (Tr. 154–155.) On April 16, 2021, Adams sent a letter to Local 2008 President Gelios stating that the parties were deadlocked over healthcare and were at impasse. (Tr. 90, R. Exh. 1.) He sent another letter on May 28 stating that if the Union did not move on healthcare, additional negotiations would be futile. (Tr. 91–92, R. Exh. 2.)

On June 21, 2021, citing "deadlocked" negotiations, Director Adams notified the Union that Respondent was cancelling the extension agreement for both contracts. (Jt. Exh. 4, Tr. 42.) The Union discussed striking but did not call a labor stoppage. (Tr. 95–96, R. Exh. 8, R. Exh. 9.) Associate Relations Manager Wes Pitt testified that Respondent still prepared for a possible strike, which it believed might occur over the July 4th holiday weekend. (Tr. 124.) Director Adams testified that Respondent was also concerned about the Union coordinating with another bargaining unit in Memphis to call a wider strike over the Labor Day weekend. (Tr. 159.)

B. Respondent stops dues checkoff

Respondent continued to deduct and remit dues and fees for a few weeks after the collective-bargaining agreements expired. On July 16, 2021, Director Adams sent a letter to Local 2008 President Gelios stating that Respondent would stop honoring the dues-checkoff provisions beginning July 17. (42-43, 155.) The letter stated as follows:

> After the Little Rock contracts with UFCW Local 2008 expired, Kroger Limited Partnership I voluntarily continued to check off dues. This notice confirms that, effective with the pay period ending Saturday, July 17, 2020, the Company will no longer deduct or "check off" any dues or initiation fees for associates who have provided proper authorization. (Jt. Exh. 5.)

The parties stipulated that Respondent stopped deducting and remitting dues and fees effective with the pay period ending July 17. (Tr. 9.)

On July 17, Respondent's Vice President for Labor and Associate Relations, Jon McPherson, sent a letter to senior executives at Kroger (copying Director Adams and others in the Delta Division) stating that the termination of the deduction and remittance of dues "will start to place pressure on UFCW Local 2008 to get back to the bargaining table." (R. Exh. 6.) Director Adams testified that the decision to stop honoring the dues-checkoff provisions "was designed to try and generate . . . dialog and get them back to the table to bargaining." (Tr. 158.)

C. The parties reach agreement for new contracts

The parties continued to informally work toward an agreement after July 16, but did not resume formal negotiation sessions until the spring of 2022. (Tr. 44-45) After holding two or three formal negotiating sessions in late February or early March, the parties reached agreement for new contracts on March 21, 2022. (Jt. Exh. 11, para. 3, Tr. 45.) Both agreements are effective from June 28, 2020, through June 28, 2025. (Jt. Exh. 6, pp. 73–74, Jt. Exh. 7, pp. 60, 72.) Both contain dues-checkoff provisions that are identical to the provisions in the expired agreements. (Tr. 47–48, Jt. Exh. 6, Art. 4, Sec. 4.1; Jt. Exh. 7, Art. 2(B).) Respondent resumed deducting and remitting dues upon ratification of the new contracts. (Tr. 49.)

D. Information requests

In late 2022, Respondent implemented a new payroll and timekeeping system. Employees experienced issues with the system and contacted their Union about those issues, which included missing hours, missing paychecks, and errors with their holidays, vacation, personal days, and short-term disability. (Tr. 51, 56, 108.) The Union reached out to Respondent, but the issues continued to arise. (Tr. 52.) Associate Relations Manager Pitt testified that similar issues were arising "across the enterprise" and that Respondent worked with the Union to resolve them as they were brought to its attention. (Tr. 126.)

On November 30, 2022, one of the Union's business representatives, Mark Teakell, sent an email to Pitt with a list of employees who were having issues with the new system. (GC Exh. 6.) Pitt responded on December 1 and provided red-lined explanations for each employee. (GC Exh. 6, pp. 155–157.) In one explanation, he stated that the employee had been "added to payroll spreadsheet." (Tr. 145–146, GC Exh. 6, p. 157.) On January 3, Teakell sent an email to Managers Michael Williams and Kristian Autry, copying Pitt, with a list of issues that arose after his November 30 email. Respondent replied on January 4 with red-lined explanations, one of which stated that it added an employee's "missed pay to spreadsheet. . ." (GC Exh. 6, p. 158.)

Local 2008 President Gelios testified that he heard that Respondent was adding each employee's name to a spreadsheet to track issues with the new system. (Tr. 54.) At this time, the Union was aware of about 50–60 employees who had issues with the new system and was concerned that there were others. (Tr. 55.) Gelios testified that the Union wanted the spreadsheet so they could go directly to the employees and help them get the issues resolved. (Tr. 55.)

On January 27, 2023, Gelios sent an email to Pitt requesting the following:

> Please provide a complete list of all employees represented by UFCW Local 2008 whom have experienced payroll issues since Kroger's implementation of the new Oracle programs, My Time and My Info, regardless of whether the error has been corrected or not and regardless of whether the error was for one hour or multiple months.
>
> Please provide the list as soon as possible but no later than next Friday, February 3, 2023. (Jt. Exh. 8.)

Gelios testified that issues were continuing to occur at the time he sent his request. (Tr. 56.)

Respondent did not provide any information to the Union by February 3. (Tr. 57, 142.) The Union filed a grievance on that date protesting Respondent's failure to "compensate many employees for hours worked, vacation time, personal holidays, paid holidays, short-term disability, and/or other issues requiring compensation" and for making "unjustified deductions from many employee's paychecks." (GC Exh. 2, Tr. 58.) The Union also sent Respondent an information request asking, among other things, for "all notes or memos (including electronic documents) made by any Company manager relating to this case . . . " (GC Exh. 3, Tr. 60–61.)

On February 8, Pitt responded to Gelios' January 27 request to tell him that he was in receipt of the request and was working on the company's response. (GC Exh. 4, p. 152). On February 9, Gelios replied, asking:

> Any idea when you will provide the information? The reps have been told that you have a spreadsheet with all the employees listed that are having issues, should be easy to copy it and send on. Let me know.

(GC Exh. 4, p. 152.)

Pitt confirmed that Respondent had a "constantly evolving," spreadsheet (tracking spreadsheet) that it used to track concerns people raised, and that it was that used by human resources staff to input reported errors, not all of which were confirmed. (Tr. 133, 145–146.) Pitt testified that at the time he received the January 27 information request and Gelios' February 9 email, the tracking spreadsheet was the document he referenced in his discussions with the Union and was the only spreadsheet the Union would have known about. (Tr. 146, 148.) Pitt acknowledged that he had access to the spreadsheet when he received Gelios' February 9 email and had the ability to send it to the Union, but he did not do so. (Tr. 149.)

On February 21, Pitt sent a letter to Gelios stating that Respondent was "in receipt of the Union's February 3, 2023, request for information," and, subject to objections on numerous grounds, was providing the requested information including "copies of a summary showing the outstanding underpayments, refunds and a summary showing the payroll activity of each associate in the bargaining unit. . . " (GC Exh. 5.) Pitt testified that he viewed the January 27 and February 3 information requests as a single request. (Tr. 125, 143.)

Gelios testified that the Union received thousands of pages of payroll information but did not receive the tracking spreadsheet. (Tr. 67.) Respondent provided two spreadsheets (February spreadsheets), but Gelios testified that these were not what the Union requested and did not contain the information the Union wanted. (Tr. 107–109.) One of the February spreadsheets included employees' names, division, and work location, along with issues they experienced. (Tr. 130, R. Exh. 10(a).) The other February spreadsheet was a list of employees who were underpaid, showing hours paid and hours worked, which Pitt testified was "the confirmed list from our payroll department of payroll errors." (Tr. 131–132, R. Exh. 10(b).)

On March 10, 2023, Gelios sent an email to Pitt informing him that the Union received seven boxes of materials but was unable to locate a "summary of all the associates experiencing payroll issues, even though you state that a summary is enclosed," and asked that the summary be forwarded to him. (Jt. Exh. 9.) Gelios testified that he also reached out to Pitt either before or after sending the email about the missing information, and Pitt told him that the information Respondent provided was the "response from legal. That is your summary." Gelios explained that the information he received was useless to the Union and that he needed the tracking spreadsheet. Pitt again said that the information provided was the Union's summary. (Tr. 70–71.)

On March 29, 2023, the Union filed its Charge in Case 15–CA–315052, alleging that Respondent failed to provide the Union with the spreadsheet. (GC Exh. 1(q).) On May 1, Gelios retired, and former secretary-treasurer Karen Hill took over as the Union's president. (Tr. 71.) On May 11, 2023, Pitt sent a letter to Hill stating in part:

> The enclosed spreadsheet is provided as a follow up to the Company's previous response to your request for information. Although the Company has already provided the Union with the entirety of the information necessary to satisfy the Union's request, attached is a partial summary of MyInfo pay issues that have been reported to the Company by employees represented by UFCW Local 2008 during the relevant period covered by the Union's request. Providing a fully detailed relevant summary would require the creation of documentation that does not currently exist. (Jt. Exh. 10.)

The letter included the tracking spreadsheet. (Jt. Exh. 10.) The tracking spreadsheet contained information that was not included on the February spreadsheets, including employees' specific complaints, whether and when they were resolved, and whether the employees had information in MyInfo and MyTime. The tracking spreadsheet also included employees that were not listed on the February spreadsheets. For example, the first employee listed on the tracking spreadsheet, J. Johnson, is not listed on either of the February spreadsheets, even though their payroll issues were reported in early December 2022. (Jt. Exh. 10, p. 259, R. Exhs. 10(a) and (b).)

ANALYSIS

I. UNILATERAL TERMINATION OF DUES CHECKOFF

An employer's duty to bargain in good faith includes an obligation to refrain from making unilateral changes to employees' terms and conditions of employment after a collective-bargaining agreement expired without giving the Union notice and an opportunity to bargain or bargaining to an overall impasse for a successor agreement. See *NLRB v. Katz*, 369 U.S. 736, 742-743 (1962); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198–199 (1991).

Dues-checkoff provisions are a mandatory subject of bargaining. See *Tribune Publishing Co.*, 351 NLRB 196, 197 (2007), enfd. 564 F.3d 1330 (D.C. Cir. 2009). It is undisputed that Respondent informed the Union on July 16, 2021, that it would stop honoring the dues-checkoff provisions with the pay period ending July 17, and that it stopped deducting and remitting dues and fees on that date. Respondent has not claimed that its July 16 announcement constituted adequate notice, and Board case law is clear that notifying a union immediately before implementing a change does not meet the obligation to provide a meaningful opportunity to bargain the Act requires. See, e.g., *Harley-Davidson Motor Co.*, 366 NLRB No. 121, slip op. at 3 (2018). I find that Respondent failed to provide the Union with notice of the change and a meaningful opportunity to bargain over its decision to stop checking off dues and fees.

Respondent argues that its actions were lawful under *Valley Hospital Medical Center (Valley Hospital I)*, 368 NLRB No. 139 (2019), which was still in effect when it stopped deducting and remitting dues, and that the Board's subsequent reversal of that decision in *Valley Hospital Medical Center (Valley Hospital II)*, 371 NLRB No. 160 (2022), should not apply to its actions retroactively. Respondent also argues that the General Counsel violated its due process rights and the Administrative Procedure Act, and that laches should apply because the General Counsel delayed in prosecuting this manner, depriving Respondent of the opportunity to defend itself under *Valley Hospital I*. Finally, Respondent asserts that its actions were lawful because the parties were at impasse and because the language of the expired agreements privileged its actions. I have addressed each of these arguments in turn below.[5]

[5] As an Administrative Law Judge, I am bound to follow Board precedent and will not address Respondent's general challenges to the Board's decision to apply *Valley Hospital II* retroactively; however, I have addressed retroactivity arguments that are particular to the facts of this case. Respondent also raised additional defenses in its answer, including that the consolidated complaint is barred by Sec. 10(b), and that it is barred by the doctrine of waiver or estoppel because the Union agreed to the resumption of dues without arrears in its new contracts, but it did not address those defenses in its brief or at the hearing, so I have not considered them in writing this decision.

A. The Board's decisions in Valley Hospital I and II

The Board has recognized certain terms, including mandatory arbitration and no-strike/ no-lockout provisions, as exceptions to an employer's general obligation to maintain the status quo after a contract expires. Dues-checkoff provisions were once included with these terms. See *Bethlehem Steel*, 136 NLRB 1500, 1502 (1962), remanded on other grounds sub nom., *Shipbuilding v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). In 2012, the Board overruled *Bethlehem Steel* and found that dues-checkoff provisions must be maintained after a contract expires. See *WKYC-TV, Inc*., 359 NLRB 286, 293 (2022), invalidated on other grounds by *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

In 2015, the Board again held that the obligation to collect and remit union dues "continues after expiration of a collective-bargaining agreement that establishes such an arrangement." *Lincoln Lutheran of Racine*, 362 NLRB 1655, 1655 (2015). Four years later, the Board issued *Valley Hospital Medical Center (Valley Hospital I)*, 368 NLRB No. 139 (2019), reversing *Lincoln Lutheran* and finding that dues-checkoff provisions do not survive the expiration of the contract. After the union sought review, the Ninth Circuit found that the Board failed to explain "apparently contrary precedents," and remanded the case to the Board to do so. See *Local Joint Exec. Bd. of Las Vegas v. National Labor Relations Board*, 840 F. App'x 134, 137 (9th Cir. 2020). The Board accepted the remand on March 23, 2021. (Jt. Exh. 12, par. 4.)

On September 30, 2022, the Board issued its decision in *Valley Hospital Medical Center (Valley Hospital II)*, 371 NLRB No. 160 (2022), enfd. *Valley Hospital Medical Center, Inc. v. National Labor Relations Board*, 93 F.4th 1120, 2024 WL 678727 (9th Cir. 2024), reversing *Valley Hospital I* and finding that dues-checkoff provisions are subject to the general rule prohibiting unilateral changes after contract expiration. In explaining its ruling, the Board noted that an employer's decision to terminate dues checkoff undermines not only the union but also employee participation in the union by sending a clear message that "the employer is free to interfere with the financial lifeline between employees and the union they have chosen to represent them." Id., slip op. at 12, citing *Lincoln Lutheran*, supra, 362 NLRB at 1657.

The Board differentiated between dues-checkoff provisions and provisions that do not survive the expiration of the agreement such as no-strike clauses, noting that these provisions involve the waiver of a statutory right, while an agreement to deduct and remit dues does not, and instead simply facilitates the payment of dues between employees and the union, like other types of payroll deductions that have been found to survive contract expiration such as deduction of insurance policy premiums. Id., slip op. at 15–16. The Board found no rational basis to treat dues-checkoff provisions differently from other such financial arrangements or other agreements between union and employer that survive the contract, such as union access to the employer's property and time off for official business. Id., slip op. at 20.

1. Retroactivity of Valley Hospital II

The Board will apply a new rule retroactively if it determines that doing so would not create a "manifest injustice" after considering "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application." Id., slip op. at 21, citing *SNE Enterprises*, 329 NLRB 673, 673 (2005). The Board determined that its decision in *Valley Hospital II* applies retroactively to all cases pending at the time the decision issued. *Id*. When a decision is applied retroactively, it is applied to all cases that are pending with the agency at any stage. See *SNE Enterprises, Inc*. 344 NLRB 673, 673 (2005). Respondent argues that retroactive application of *Valley Hospital II* would cause manifest injustice because *Valley Hospital I* was in effect at the time it acted, and would cause particular injustice because it acted in response to a strike threat from the Union, and because a Division of Advice memorandum in another case recommended dismissal under similar facts to the ones presented here.

a. Respondent's reliance on Valley Hospital I

Respondent argues that it would be unjust to apply *Valley Hospital II* to this case because at the time it stopped deducting and remitting dues in July 2021, *Valley Hospital I* was still extant law. The Board already addressed this argument in *Valley Hospital II* and found that applying its decision "retroactively in all pending cases, including those where a respondent acted while *Valley Hospital I* was in effect, will not work a 'manifest injustice.'" *Valley Hospital II,* supra, 371 NLRB No. 160, slip op. at 23, citing *SNE Enterprises*, supra, 344 NLRB at 673. The Board found that "sustained judicial criticism" of Board decisions finding that dues-checkoff provisions expire with the contract created a "backdrop of legal uncertainty" around *Valley Hospital I* and rendered any interest in reliance on that ruling so weak that it could not justify a decision to apply *Valley Hospital II* prospectively only. Id. The facts of this case illustrate the Board's findings. Respondent stopped honoring the dues-checkoff provisions after the Ninth Circuit remanded *Valley Hospital I* and the Board accepted the remand. Therefore, it cannot claim that it was unaware of any risk in taking unilateral action.

Respondent argues that the Board's finding regarding employers who relied on *Valley Hospital I* is dicta because the employer in that case stopped deducting dues and fees when *Lincoln Lutheran* was the operative Board law. (R. Brief, p. 13.) This argument relies on an incorrect interpretation of the Board's decision. The Board first considered whether it was fair to order a remedy against Valley Hospital Medical Center under the facts of that case. After making that determination, it then turned to whether its ruling should be applied retroactively to all pending cases. Its analysis regarding employers who relied on *Valley Hospital I* was therefore not dicta, but a central part of its analysis of whether it would create a manifest injustice to apply its ruling retroactively to other employers, including employers like Respondent who stopped honoring dues-checkoff provisions when *Valley Hospital I* was still in place.

b. Particular injustice arguments

Respondent argues that applying *Valley Hospital II* retroactively would result in a particular injustice because it stopped deducting and remitting dues in reaction to a strike threat by the Union. Respondent also claims that a Division of Advice memo that advised against issuing complaint against a different employer in a "factually similar" case establishes that it would be unjust to apply *Valley Hospital II* to Respondent. (R. Brief, pp. 15–19.)

(1) Response to strike preparations

Respondent claims that taking away its right to put economic pressure on the Union by taking away dues checkoff in the face of a strike threat would be a particular injustice. (R. Br., p. 17). In *Valley Hospital II*, the Board considered the underlying policies of the Act when it found that allowing the unilateral termination of dues-checkoff arrangements "obstructs collective bargaining" by undermining the union and the employees' relationship with it. Id., slip op. at 12. Because the Board has already determined that it would undermine the principles of the Act to allow employers to use the power to unilaterally terminate dues-checkoff provisions as a bargaining chip, it is axiomatic that it is not unjust to deny Respondent the right to stop deducting dues in response to employees exercising their right to strike.[6]

(2) Advice memo

Respondent argues that the General Counsel's failure to follow a Division of Advice memo that recommended dismissal of similar allegations against another employer was unjust. The Division of Advice recommended dismissal because "the Employer's post-expiration cessation of union dues is not a violation of the Act under current Board law and the case presents no other meritorious allegations." *West Anaheim Medical Center,* 49 NLRB Advice Mem. Rep. 37, 2022 WL 1643951. This Advice Memo issued before the Board issued its ruling in *Valley Hospital II*. Respondent claims that the memo still applies, however, because the original complaint in this case issued in April 2022, before the Board decided *Valley Hospital II*. I find no merit to Respondent's argument. Advice Memos "have no precedential value or dispositive effect before the Board." *Longshoremen ILWU Local 12 (Southport Lumber Co.)*, 367 NLRB No. 16, slip op. at 1 fn. 1 (2018). And, even if this Memo could be used as precedent, the April 2022 Complaint was withdrawn. I am unable to rule on the sufficiency of allegations in a withdrawn complaint and am charged with assessing the adequacy of the allegations in the June 2023 Order Consolidating Cases, which issued after *Valley Hospital II*.

(3) Due process/laches

Respondent claims that it was denied due process and was subject to undue delay and arbitrary action when the General Counsel issued complaint on the initial charge while *Valley Hospital I* was still in effect, withdrew it, then issued a new complaint with the same allegations after the Board issued its decision in *Valley Hospital II*. Respondent alleges that the General Counsel further delayed the case to allow the investigation of the charge in Case 15–CA–31502, which Respondent alleges is not sufficiently related to the charge in Case 15–CA–280676, and that all these actions deprived it of its opportunity to defend itself under the Board's ruling in *Valley Hospital I*. (R. Brief, pp. 6–9.) Respondent also claims that the General Counsel's delay in prosecuting these cases supports a claim of laches. (R. Brief, p. 9–11.)

a. Due process and Administrative Procedure Act claims

The requirement of due process is met in Board proceedings "when a complaint gives a respondent fair notice of the acts alleged to constitute the unfair labor practice and when the conduct implicated in the alleged violation has been fairly and fully litigated." *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 134 (2d Cir. 1990). The Administrative Procedure Act "requires the same analysis regarding full and fair litigation." Id. at 134–135. I find that Respondent has failed to show that it has been denied due process or that the proceedings in this matter violated the Administrative Procedure Act.

Respondent does not claim that the General Counsel did not give it fair notice of the allegations in the Consolidated Complaint, or that it was not allowed to offer evidence and testimony in defense of those allegations. Instead, it claims that the original complaint in this matter failed to allege a violation of the Act, and that the General Counsel's subsequent actions were improper and intended to delay this case for the purpose of denying Respondent of the ability to defend its actions under *Valley Hospital I*.

Section 102.18 of the Board's Rules and Regulations gives the Regional Director prosecutorial discretion to withdraw a complaint at any time before the hearing opens, and this discretion is subject to review only by the General Counsel, not the Board or its Administrative Law Judges. See *NLRB v. UFCW Local 23*, 484 U.S. 112, 119 (1987); see also *United Natural Foods, Inc.*, 370 NLRB No. 127 (2021), rev. denied 66 F.4th 536 (5th Cir. 2023). Therefore, I am unable to review the General Counsel's decision to withdraw the April 2022 complaint or to issue the October 2022 complaint.

Respondent's argument that the General Counsel acted arbitrarily and denied it due process because it failed to follow agency guidance in Advice Memos or General Counsel Memorandum is also unavailing, as these documents are not binding on either the General Counsel or the Board. See *Longshoremen ILWU Local 12 (Southport Lumber Co.)*, supra, 367 NLRB No. 16, slip op. at 1 fn. 1; see also *Steel Workers (Cequent Towing Products)*, 357 NLRB 516, 518 (2011). In addition, Respondent's arguments all relate to the issuance of the April 2022 complaint, which was withdrawn and replaced with the Consolidated complaint.

Respondent also claims that the General Counsel acted improperly by keeping Case 15–CA–280676 open after withdrawing the April Complaint, and that it did so to take advantage of the Board's ruling in *Valley Hospital II*. However, Respondent provided no evidence that the delay was intentional or improperly motivated.[7] In addition, Respondent cannot show that the

[6] If Respondent is claiming that it is unjust to allow employees to strike after a contract expires while requiring employers to keep dues checkoff in place, the Board already addressed and rejected this argument when it differentiated between no-strike clauses, which require workers to give up their statutory right to withhold their labor, and dues checkoff provisions, which are an administrative convenience and do not require the surrender of any statutory rights. Id., slip op. at 14-15.

[7] Respondent asserts that it was unable to get this evidence because its request to subpoena information regarding these matters was rejected by the General Counsel. (R. Br., p. 9, R. Exhs. 16 and 17.) There is no evidence Respondent sought to enforce this subpoena, and the materials

delay prevented it from getting fair notice of the allegations in the Consolidated Complaint or defending itself at the hearing. Respondent was able to call witnesses, introduce evidence, and make vigorous arguments at the hearing and in its brief in support of its claims that *Valley Hospital I* should apply to its actions or that its actions should otherwise found to be lawful, so I find that it was not denied due process or subjected to arbitrary agency action in this matter.

Finally, with respect to Respondent's claim that the General Counsel improperly delayed prosecuting Case 15–CA–280676 to allow the Regional office to investigate Case 15–CA–31502, Section 102.33 of the Board's Rules grants the General Counsel the authority to consolidate or sever cases prior to the opening of the hearing, and affords her broad discretion in that regard, "subject to review only for arbitrary abuse of discretion." *Service Employees Local 87 (Cresleigh Management),* 324 NLRB 774, 774 (1997), citing *Teamsters (Overnite Transportation Co.),* 130 NLRB 1020, 1022 (1961). Board policy generally favors consolidation, and Respondent provided no evidence that its ability to defend itself was hindered by the time it took to investigate Case 15–CA–31502. In addition, there is no evidence that the new charge was used to delay the case to wait for a change in Board law, because the decision in *Valley Hospital II* issued before the Union filed its charge in Case 15–CA–280676.

b. Laches

Respondent claims that the General Counsel's claims are barred under the doctrine of laches. It is well-established that "the United States and its agencies are not subject to the defense of laches when enforcing a public right." *Entergy Mississippi v. NLRB*, 810 F.3d 287, 298 (5th Cir. 2015), citing *Nabors v. NLRB* , 323 F.2d 686, 688–689 (5th Cir. 1963). As the Respondent acknowledged in its brief, (R. Brief, p. 9), the Board generally finds that laches does not apply to itself or the General Counsel. See, e.g., *Newark Electric Corp*., 366 NLRB No. 145, slip op. at 2 fn. 2 (2018), enfd. 14 F.4th 152 (2d Cir. 2021). The Board has declined to apply the doctrine of laches in cases involving much more lengthy delays than this one. See, e.g., *Teamsters Local 75 (Schreiber Foods)*, 365 NLRB 541, 545 fn. 6 (2017) (9-year delay); *Midwest Terminals of Toledo*, 365 NLRB 1642, 1643 fn. 1 (2017) (denying laches when the complaint alleged a statement made by supervisor 4 years before, who was no longer available to testify); *United Electrical Contractors Association*, 347 NLRB 1, 2–3 (2006) (no laches despite "inordinate and inexcusable" delay of over 5 years).

Respondent cites two cases that it says left the door open to applying laches against the Board. (R. Brief at p. 10). In *Consolidated Casino Corp*., 266 NLRB 988, 992 (1983), the ALJ stated that he *might* have stricken a complaint paragraph *if* the evidence showed that the General Counsel purposely withheld information- which it did not. Putting aside the speculative nature of this ruling, this portion of the decision has no precedential value because the employer did not file exceptions, and the Board stated that its adoption of the decision "should not be construed as an endorsement. . . of all of the Administrative Law Judge's findings and conclusions." Id. at 988 fn. 1. In the other case cited by Respondent, *Pleasantview Nursing Home, Inc*. v. NLRB, 351 F.3d 747, 765 (6th Cir. 2003), the Sixth Circuit stated that laches *might* apply against the Board "[a]t some point," but declined to apply it absent a showing of prejudice or unfair advantage. I am unable to give any weight to this hypothetical finding in the face of strong and unequivocal precedent stating that laches does not apply against the Board.

Even if I could overlook the absence of any case law stating that laches applies against the General Counsel or Board, I would not find laches here. To support a claim of laches a party must show unreasonable delay in bringing a case, and a resulting prejudice to the defending party. See *Kansas v. Colorado*, 514 U.S. 673, 687 (1995). Respondent did not provide any evidence supporting its claim that the General Counsel's actions were improperly motivated or unreasonable, other than its claim that they ran contrary to agency guidance. And Respondent cannot assign all blame for the delays in this matter to the General Counsel, as Respondent itself filed a motion for continuance of the hearing date in this matter from March 8, 2023 to July 2023 or later based on a scheduling conflict for its counsel. (GC Exh. 1(m).)

More importantly, Respondent failed to show that it was prejudiced by the delay in its ability to call witnesses or offer other evidence or make legal arguments. As noted above, Respondent was able to introduce evidence and make arguments concerning both *Valley Hospital I* and *II*. Respondent's primary argument is that it was prejudiced by the General Counsel's withdrawal of the April 2022 Complaint because, had that Complaint not been withdrawn, the Board would have dismissed it, thereby ending this matter before *Valley Hospital II* could issue. This claim is speculative at best, as Respondent can't show when or how the Board would have acted on its Motion to Dismiss, and *Valley Hospital II* would still have applied if this case was open at any stage when the decision issued. Conclusory or speculative claims are insufficient to support a finding of laches. See, e.g., *U.S. v. Rodriguez-Aguirre*, 264 F.3d 1195, 1208 (10th Cir. 2001); *U.S. v. Administrative Enterprises, Inc*., 46 F.3d 670, 673–674 (7th Cir. 1995) (hypothetical scenario insufficient to establish prejudice).

B. Impasse and language of the agreements

Respondent argues that even if *Valley Hospital II* applies to this matter, its actions were lawful because the parties were at impasse, and because the language of the dues-checkoff provisions made the dues-checkoff provisions terminable with the expiration of the contracts.

1. Impasse

Respondent asserts that its actions were lawful because the parties were at impasse. The General Counsel argues that Respondent can't claim impasse because it failed to raise it as an affirmative defense. (GC Br., p. 15.) Respondent maintains that it does not have to raise impasse as an affirmative defense because the consolidated complaint alleges that Respondent ceased

requested appear to be decisional documents that would be shielded as work product or under attorney-client privilege.

deducting dues without bargaining to an "overall good-faith impasse" with the Union, and Respondent denied that allegation in its Answer, which placed the burden on the General Counsel to prove the absence of impasse. (R. Brief at p. 21).

Impasse is a defense to a unilateral change allegation, and it must be proved by the party asserting it. See *Serramonte Oldsmobile*, 318 NLRB 80, 97 (1995), enfd. in relevant part 86 F.3d 227 (D.C. Cir. 1996), citing *North Star Steel Co*., 305 NLRB 45 (1991), enfd. 974 F.2d 68 (8th Cir. 1992). Respondent did not raise impasse as an affirmative defense in its Answer or move to amend its Answer to include it at the hearing; however, it did raise the issue in its opening statement, prompting a discussion on the record about whether it was timely raised. Because only limited evidence was introduced regarding this claim, which the Union and General Counsel were able to address at the hearing, I have considered Respondent's claims.

Determining whether parties have reached an overall impasse in contract negotiations requires consideration of several factors, including the parties' bargaining history, whether they bargained in good faith, how long they engaged in bargaining, the importance of the issues on which they disagree, and the "contemporaneous understanding of the parties as to the state of negotiations." See *Hood River Distillers, Inc*., 372 NLRB No. 126 (2023), slip op. at 2, citing *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), rev. denied sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968) (internal quotation marks omitted).

Respondent claims that the Union's rejection of its "last, best, and final" offer in February and the letters it sent to the Union in April and May 2021 (R. Exhs. 1 and 2) establish that the parties were at impasse. Respondent's belief about the status of negotiations is relevant; however, the letters and testimony show that the parties believed that the parties were at impasse over a single issue: healthcare. Although overall impasse can occur on a single issue, the party seeking to prove impasse must show that the issue was so critical that it caused negotiations to break down to the point "there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved." *Richfield Hosp., Inc*., 369 NLRB No. 111, slip op. at 4 (2020) (citations omitted). Other than statements of subjective belief, there is no evidence the parties could not make any progress on other items.

Respondent also cites the lack of formal bargaining sessions between February and July 2021 as evidence of impasse. (R. br. at p. 19, citing Tr. 92, lines 20–23.) However, the Union's chief negotiator, Steve Gelios, testified that the parties continued to informally work toward an agreement during this time, and I credit his testimony. He testified in a straightforward manner, and none of Respondent's witnesses refuted him on this point. Director Adams testified that the parties were not making progress, but he did not deny that they were communicating. (Tr. 155.) And Respondent's April letter references recent "legally-permissive and voluntary efforts" to explore potential solutions, corroborating Gelios' testimony. (R. Exh. 1.) This demonstrates that the parties were still working toward a resolution. See Id., slip op. at 5 (parties' willingness to continue to meet and exchange proposals showed they were not at impasse).

Finally, Respondent's communications regarding the termination of the dues-checkoff provisions are further evidence that the parties were not at impasse. Respondent did not mention impasse in its July letter stating that it planned to stop honoring the dues-checkoff provisions, and its internal communications show that Respondent stopped deducting and remitting dues to bring economic pressure on the Union to return to the table. This contradicts Respondent's claim that it did not believe it could make further progress in negotiations.

Based on the above, I find that the parties were not at an overall impasse in July 2021. However, even if they were at impasse, it would not change the outcome of this case, because terminating the dues-checkoff provisions was not contemplated in Respondent's final offer. When parties reach impasse, an employer can only implement terms that are reasonably encompassed by its preimpasse proposal. See, e.g., *Wayron, LLC*, 364 NLRB 737, 744 (2016), citing *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 886 (D.C. Cir., 1997) and *Atlas Tack Corp.,* 226 NLRB 222, 227 (1976), enfd. mem. 559 F.2d 1201 (1st Cir. 1977). It is undisputed that the parties never bargained over dues checkoff, and Respondent did not put its final offer on the record or offer any evidence that this or any other offer contained a provision allowing it to stop deducting and remitting dues or fees. Therefore, Respondent could not have eliminated the dues-checkoff provisions even if the parties had reached impasse.

2. Language of agreement

Respondent also argues that the language of the checkoff provisions limits its obligation to deduct and remit dues to the life of the contracts. Respondent cites Member McFerran's dissent to *Valley Hospital I* as support for its claim, which states that after *Lincoln Lutheran*, parties entered into agreements "with the expectation that dues-checkoff provisions would continue after contract expiration, unless the agreement itself specified otherwise." (R. Br., p. 21, citing *Valley Hospital II*, supra, 371 NLRB No, 160, slip op. at 22 (citing *Valley Hospital I*, supra, 368 NLRB No. 139, slip op. at 13–14.) Respondent asserts that under *Valley Hospital II*, bargaining partners can agree that a dues-checkoff provision expires with the contract, and claims that the expired agreements show that the parties did that in this case.

The contractual language at issue states that Respondent will remit dues "for the term of this Collective Bargaining Agreement." Respondent's claim that this language relieves it of its postexpiration obligation to maintain the dues-checkoff provisions is not supported by *Valley Hospital II* or *Lincoln Lutheran*. In *Lincoln Lutheran*, the Board held that "a union may choose to waive its post expiration, statutory right to bargain over [dues checkoff]. Of course, for such a waiver to be valid, it must be 'clear and unmistakable.'" *Lincoln Lutheran*, supra, 362 NLRB 1655, 1662 fn. 28, quoting *Metropolitan Edison*, 460 U.S. 693, 708 (1983). The contractual language at issue in *Valley Hospital I and II* was, like the contractual language in this case, in place "for the term of the Agreement," but the Board did not adopt (in either *Valley Hospital I* or *II*) the ALJ's determination that this language was sufficient to find that the obligation to bargain terminated with the agreement. See *Valley Hospital II*, supra, 368 NLRB No. 139. slip op. at 4.

Further, the Board held that dues-checkoff provisions are not a "contract creation," but a term and condition of employment that is "covered by the statutory obligation to bargain." Id., slip op. at 13. When "a contract expires, the 'terms and conditions continue in effect by operation of the NLRB. They are no longer agreed-upon terms; they are terms imposed by law.'" *Nexstar Broadcasting, Inc*., 369 NLRB No. 61, slip op. at 4 (2020), enfd. 4 F.4th 801 (9th Cir. 2021), quoting *Litton*, supra, 501 U.S. at 26. Contractual waiver of a statutory right is an affirmative defense, and the party claiming it must show that the waiver is "explicitly stated, clear and unmistakable." *Allied Signal Aerospace*, 330 NLRB, 1216, 1228 (2000), rev. denied, *Honeywell International v. NLRB*, 253 F.3d 125 (2001), citing *Silver State Disposal Service, Inc*., 326 NLRB 84, 86 (1998) (additional citations omitted); see also *Metro Health, Inc*., 372 NLRB No. 149, slip op. at 4 (2023) ("[c]ontract coverage and waiver are affirmative defenses.")

Respondent did not plead waiver as an affirmative defense with respect to the provisions in the expired agreements and does not explicitly argue it in its brief, but its claims about the language of the agreements amount to a waiver claim. Respondent referenced the language of the agreements in its opening statement but did not allege that the Union waived its right to bargain or otherwise put the other parties on notice that waiver was at issue. I therefore reject this defense as untimely, as the Union and General Counsel did not have an opportunity to put on any evidence or make arguments regarding this claim. See *EF International Language Schools*, 363 NLRB 199, 199 fn. 2 (2015); In re *Paul Mueller Co.*, 337 NLRB 764, 764–765 (2002); *Springfield Manor*, 295 NLRB 17, 17 fn. 2 (1989).

Even if the defense were properly before me, I would not find waiver in this case. Not only is the operative contract language in the expired agreements the same as the language found to survive the agreement in *Valley Hospital II*, but the Board distinguishes between durational language that is in effect "during" the term of the contract, and language that says that a provision will "terminate" at the end of the contract, and finds waiver only where the parties express their clear intent by using words like "terminate." See, e.g., *PG Publishing Co., Inc*., 371 NLRB No. 141, slip op. at 6 (2022), enf. denied, *PG Publishing Co. v. NLRB* , 83 F.4th 200 (3d Cir. 2023);[8] *Loc. Joint Exec. Bd. of Las Vegas v. NLRB*, 540 F.3d 1072, 1080–1081 (9th Cir. 2008), and cases cited therein; *Wilkes-Barre Hospital Co. v. NLRB*, 857 F.3d 364, 377 (2017) (clause stating that raises would be provided during "term of the agreement" did not waive Union's statutory right to those raises after the contract expired); *AlliedSignal Aerospace*, supra, 330 NLRB at 1228–1229 (2000) (distinguishing general "duration language," which does not establish waiver, from contract provisions using the word "terminate," which does).

II. INFORMATION REQUEST

The General Counsel alleges that Respondent unreasonably delayed in providing the Union with information it requested on January 27, February 9, and March 10, 2023, regarding employees who experienced or were experiencing payroll issues. I find that the information requested is clearly relevant. It pertains to unit employees experiencing issues with their pay, which falls squarely within the Union's role as collective-bargaining representative. Even if some of the reported errors on the spreadsheet were unconfirmed, the Union requested information about errors whether they were corrected or not and was entitled to this information to pursue its grievance and to contact affected employees to find out what errors they reported and whether they were resolved.

When a union requests relevant information, Section 8(a)(5) of the Act requires the employer to make a "reasonable, good-faith effort to respond to the request as promptly as circumstances allow." *TDY Industries, LLC*, 369 NLRB No. 128, slip op. at 2 (2020). Failing to provide information in a timely manner "is as much a violation of Section 8(a)(5) as a refusal to furnish the information at all." Id., citing *Linwood Care Center*, 367 NLRB No. 14, slip op. at 4 (2018) (internal quotation marks omitted). To determine whether a response is timely, the Board looks at the totality of the circumstances, including but not limited to "the nature of the information sought, the difficulty in obtaining it, the amount of time the employer takes to provide it, the reasons for the delay, and whether the party contemporaneously communicates these reasons to the requesting party." Id. (citations omitted).

Respondent argues that its delay in responding to the Union's request was justified by a lack of clarity in the Union's request. However, even if the initial request was not clear, it became clear on February 9, when the Union told Respondent: "The reps have been told that you have a spreadsheet with all the employees listed that are having issues, should be easy to copy and send it on." (GC Exh. 4.) And if Respondent was still unsure about what the Union wanted, the Union notified it again in writing on March 10, and clarified the request verbally at around that time as well. (Tr. 70–71, Jt. Exh. 9.)

There is no need to determine whether Respondent's initial February response to the Union's request was untimely, or whether it can justify its failure to provide the tracking spreadsheet in February based on a misunderstanding of what the Union wanted, because Respondent failed to provide the tracking spreadsheet for 2 months after the Union's March 10 email explaining that the information the Employer provided in February was inadequate, and for over a month after the Union filed its Charge in Case 15–CA–315052 alleging an unlawful failure to provide the information.

Respondent did not provide the Union with any contemporaneous reason for its delay in providing the spreadsheet, and its claim that it did not understand the request is not supported by the facts. Pitt admitted that he had access to the spreadsheet as early as January 27, and could have sent it to the Union then. (Tr.

[8] In *PG Publishing*, the Board applied the "clear and unmistakable" standard to find that a contract provision that was effective "ending March 31, 2017," which was also the expiration date of the contract, survived the agreement. The Third Circuit Court of Appeals applied "ordinary contract principles" to find that the specific ending date in the provision showed that the clause did not survive the agreement, but distinguished between that clause and other clauses in the contract that applied "during the life…of the agreement." See *PG Publishing Co. v. NLRB*, supra, 83 F.4th at 218. As an ALJ, I am bound to follow Board law that has not been overturned by the Supreme Court, so the Third Circuit's decision is not binding on me in this case. However, I do note that the facts are distinguishable, as the dues checkoff provisions at issue here do not include a specific ending date.

149.) He also acknowledged that the May 11 spreadsheet was the only spreadsheet he and the Union had communicated about as of the Union's January 27 and February 9 requests. (Tr. 136, 146, 148.) Even if Respondent could show a sincere belief that the information it provided in February was fully responsive, it can't justify its continued failure to provide the May 11 spreadsheet for two months after receiving the Union's March 10 email.

Based on the above, I find that Respondent's delay was unreasonable. See *Linwood Care Center*, supra, 367 NLRB No. 14, slip op. at 4–5 (6-week delay in providing information was unreasonable when information was readily accessible and employer failed to explain delay); compare *TDY Industries, LLC*, supra, 369 NLRB No. 128, supra, slip op. at 3 (delay reasonable when employer raised confidentiality concerns in its initial response and remained in contact with union until it was able to provide the information).

Conclusions of Law

1. Respondent Kroger Limited Partnership I, d/b/a Kroger Delta Division, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Local 2008 is a labor organization within the meaning of Section 2(5) of the Act.

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

Peggy Prescott	Senior Director, Labor Relations
Henry Taylor	Senior Director, Labor Relations
Ian Adams	Director, Labor Relations
Wes Pitt	Associate Relations Manager
Michelle Hardman	Manager
Kristian Autry	Manager

4. At all material times, the Union has been recognized by Respondent as the designated bargaining representative of Respondent's employees in the following appropriate units:

> Little Rock Clerks: all full-time and part-time employees in the towns presently covered by this Collective Bargaining Agreement at its execution and in towns where stores may be operated by the Delta Division of Kroger in the state of Arkansas, including Delicatessen Departments not already covered by another Collective Bargaining Agreement within the jurisdiction of UFCW Local No. 2008, excluding Store Managers, Co-Managers, meat department employees, guards, and supervisors as defined in the Labor-Management Relations Act (LMRA) of 1947, as amended.
>
> Little Rock Meat: All employees working the Meat department of the stores of the Employer operated by the Delta Division.

5. From about July 17, 2021, to about March 21, 2022, Respondent failed and refused to deduct and remit to the Union initiation fees and dues pursuant to valid, unexpired, and unrevoked employee dues-checkoff authorizations, in violation of Sections 8(a)(1) and (5) of the Act.

6. From about January 27, 2023, to about May 11, 2023, Respondent unreasonably delayed in furnishing the Union with relevant information that the Union requested on January 27, February 9, and March 10, 2023, pertaining to employees who experienced or were experiencing payroll issues, in violation of Sections 8(a)(1) and (5) of the Act.

7. The unfair labor practices described above affect commerce within the meaning of Sections 2(6) and (7) of the Act.

Remedy

Having found that Respondent engaged in certain unfair labor practices, Respondent is ordered to cease and desist and to take certain affirmative action designed to effectuate the Act.

Specifically, having found that Respondent violated Section 8(a)(5) of the Act 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 or fees it would have received but for Respondent's failure to comply with its obligation to provide the Union with notice and an opportunity to bargain or to bargain to an overall impasse for a successor agreement before changing employees' terms and conditions of employment. This order requires only that the 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). See *Valley Hospital II*, supra, 371 NLRB No. 160, slip op. at 24, and cases cited therein.

To prevent double recovery by the Union, payment by the Respondent to the Union shall be offset by any dues or fees the Union collected during the relevant period on behalf of employees covered by the payment order. See Id., slip op. at 24, fn. 59. It is further ordered that Respondent is prohibited from seeking to recoup from the employees any dues or fees Respondent is required to reimburse to the Union. See Id. and cases cited therein.[9]

[9] Respondent argues that this remedy is punitive, exceeds the Board's remedial powers, gives employees a windfall, is unfair because the Union could have collected dues and fees directly from employees, and violates Section 302 of the Labor Management Relations Act. (R. Br., pp. 23–25.) The Board considered and rejected these arguments in *Valley Hospital II*, so I will not consider them further here. See *Id*., slip op. at 24, fn. 59. Respondent also argues that it should not be held to the same standard as the employer in *Valley Hospital II*, because it acted when *Valley Hospital I* was in effect. The Board has already determined that its decision in *Valley Hospital II* applies retroactively to employers who stopped deducting and remitting dues when *Valley Hospital I* was in place. Id. at 23. Although the Board did acknowledge when determining appropriate remedies that the employer *Valley Hospital* stopped deducting dues when the law prohibited it from doing so, that does not provide a basis for me to apply a different remedy to Respondent. Respondent acted after *Valley Hospital I* was remanded, creating a "backdrop of legal uncertainty," and the Board was clear in its discussion of the appropriate remedy in *Valley Hospital II* that the wrongdoer in an unfair labor practice case should bear the costs of any uncertainty created by that wrongdoing. Id., slip op. at 24, fn. 59. In addition, the Board found that the gravamen of this violation is that it interferes with "the financial lifeline between employees and the union they have chosen to represent them. .

Respondent is further ordered, to the extent it has not already done so, to furnish to the Union in a timely manner the information requested by the Union on January 27, February 9, and March 10, 2023, pertaining to employees who experienced or were experiencing payroll issues.[10]

Respondent shall post a Notice to Employees, as described in the attached Appendix, in its bargaining unit facilities. Copies of the Notice, on forms provided by the Regional Director for Region 15, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt 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. Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other materials. If Respondent has gone out of business or closed any of the facilities involved in these proceedings Respondent shall, at its own expense, duplicate and mail a copy of the notice to all current and former employees employed by the Respondent at the facilities involved in these proceedings at any time since July 16, 2021. When the Notice is issued to the Employer, it shall sign it or otherwise notify Region 15 what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER[12]

Kroger Limited Partnership I, d/b/a Kroger Delta Division, and its officers, agents, successors, and assigns shall:

1. Cease and desist from

(a) Unilaterally ending dues checkoff without first giving the Union notice and an opportunity to bargain or bargaining to impasse.

(b) Unreasonably delaying in providing the Union with information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

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

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 agreement for employees who executed checkoff authorizations prior to and during the period of the 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) To the extent it has not already done so, furnish to the Union in a timely manner information that it requested on January 27, February 9, and March 10, 2023, pertaining to employees who experienced or were experiencing payroll issues.

(d) Post at its bargaining unit facilities copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt 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 any of the facilities 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 July 16, 2021.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., March 21, 2024

APPENDIX

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

. " Id., slip op. at 12, and was clear that when fashioning a remedy, employees who have already been burdened by unlawful conduct should not be burdened further by the remedy for that conduct. Id., slip op. at 24, fn. 59.

[10] Respondent argues that I cannot impose a remedy for this violation because the General Counsel failed to ask for one in the Consolidated Complaint. (R. Brief, p. 33). The General Counsel did request "all other relief that may be just and proper," and, while the General Counsel has jurisdiction over whether to issue complaint, the Board bears the responsibility for determining an appropriate remedy. See *Kaumagraph Corp*., 313 NLRB 624, 625 (1993).

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

[12] 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 instead read, "Posted Pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

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

THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO

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 do anything that interferes with these rights.

WE WILL NOT unilaterally cease dues checkoff.

WE WILL NOT unreasonably delay in providing the Union with information that is relevant and necessary to its functions as your collective-bargaining representative.

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

WE WILL 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 our unlawful conduct, plus interest.

WE WILL, to the extent we have not already done so, provide to the Union in a timely manner information the Union requested on January 27, February 9, and March 10, 2023, pertaining to employees who experienced or were experiencing payroll issues.

KROGER LIMITED PARTNERSHIP I, D/B/A KROGER DELTA DIVISION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/ 15-CA-280676 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.