

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**TEAMSTERS “GENERAL” LOCAL UNION  
NO. 200, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND  
HELPERS OF AMERICA**

**and**

**JULIO F. MAYEN, An Individual**

**Case 18-CB-202802**

**COUNSEL FOR GENERAL COUNSEL’S ANSWERING BRIEF TO RESPONDENT’S  
EXCEPTIONS**

**I. Introduction**

On June 22, 2018, Teamsters “General” Local Union No. 200, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) filed exceptions to Administrative Law Judge Charles J. Muhl’s (ALJ) decision in this matter.<sup>1</sup> This case centers on Respondent causing Roundy’s Supermarkets, Inc. (Employer) to deduct and remit dues from Charging Party Julio Mayen’s wages after he quit and was later rehired without signing a new checkoff authorization. The ALJ found that Respondent’s continuation of deductions without a proper authorization violated Section 8(b)(1)(A) and (2) of the Act. The ALJ’s decision

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<sup>1</sup> JD-39-18 will be cited as “ALJD \_\_: \_\_” followed by the page and line number. All references to the Stipulated Record will be cited as “Stip. R. at \_\_” followed by the paragraph number(s).

was correctly based on the Board's decision *In re Kroger*, 334 NLRB 847 (2001), which squarely addresses the issues presented here. For this reason, Respondent's exceptions should be rejected in their entirety.

## II. LEGAL ARGUMENT

### A. Given the parallel fact pattern, the ALJ correctly concluded that the Board's holding in *Kroger* controls this matter.

The ALJ found that *Kroger* presented a "situation strikingly similar to this case" and that it was "controlling precedent" in this matter. (ALJD at 4:18; 5:42-43). In the present case, Charging Party Julio Mayen executed a checkoff authorization form upon his initial hire at the Employer on March 11, 2014. (Stip. R. at 11). On July 10, 2015, Mayen voluntarily resigned his employment from the Employer. (Stip. R. at 12). Over a month later, on August 31, 2015, Mayen was rehired by the Employer, but he did not sign a new checkoff authorization form. (Stip. R. at 13, 14). Despite this, the Employer deducted dues from Mayen's paycheck and remitted them to Respondent pursuant to the checkoff authorization he had executed prior to his separation from the Employer. (Stip. R. at 15). As found by the ALJ, Mayen's earlier checkoff authorization form "does not address in any manner what happens if an employee severs the employment relationship and is later rehired by [the Employer]." (ALJD at 5:13-15).

The relevant facts in *Kroger* mirror those here. In *Kroger*, grocery store employee Allan Partain signed a dues checkoff authorization for the employer to deduct and remit dues to the United Food and Commercial Workers Union, Local 455 upon his initial hire. 334 NLRB at 847-848. Like Mayen, Partain terminated his employment from the employer. *Id.* at 848. After several months of separation, Partain was rehired as a new hire at the same grocery store, but did not execute a new authorization form after his

rehire. Id. at 848. Just as here, the employer continued to deduct and remit dues to the union based on Partain's initial authorization card. Id. at 848.

In *Kroger*, the Board held that whether a checkoff authorization remains effective following the severance of the employment relationship is a matter of contract interpretation. Id. at 849. In determining whether the checkoff authorization survives a severance of employment, the Board will analyze the specific language on the authorization card. Id. The Board applies the "clear and unmistakable" standard in deciding whether the authorization can be revived after a separation of employment. Id. The Board reasoned that just as checkoff authorizations must contain "clear and unmistakable" language authorizing the continuation of checkoff even in the absence of union membership, language providing that the authorization will be effective after a separation and return to employment must similarly be "clear and unmistakable." Id.

The "clear and unmistakable" standard applied in *Kroger* was properly applied by the ALJ to the authorization card in this case. In *Kroger*, the employee's authorization contained the following language: "The Secretary-Treasurer of Local 455 is authorized to deposit this authorization with any Employer under contract with Local 455 and is further authorized to transfer this authorization to any other Employer under contract with Local 455 in the event that I should change employment." Id. at 848. The Board found that this language was *not* a "clear and unmistakable waiver" by the employee to have his dues deductions revived after separation and re-hire at the same employer. Id. at 849. The Board further noted that such a waiver would have required language that specifically addressed the situation therein—reemployment by the same employer. Id.

In this matter, the ALJ concluded that since Mayen's authorization card "does not address in any manner what happens if an employee severs the employment relationship and is later rehired by Roundy's" there could be no "clear and unmistakable waiver." (ALJD 5:13-18). As a result, Mayen's authorization did not survive a break in his employment and Respondent violated Section 8(b)(1)(A) and (2) by causing the Employer to deduct dues from Mayen without a valid authorization in place. (ALJD 5:13-18).

**B. Respondent's Arguments on Exception Must be Rejected.**

**1. The 10(b) argument Respondent makes in its Exceptions was already rejected by the Board in *Kroger*.**

Respondent contends that the Complaint is time-barred by Section 10(b) because Mayen filed the charge more than six-months after his return to employment at the Employer. In support of its argument, Respondent cites only to Chairman Hurtgen's comments in his concurrence in *Allied Production Workers Union Local 12, (Northern Engraving Corp.)*, 337 NLRB 16, 19 (2001). The ALJ rejected this defense based on the Board's decision in *Kroger*, which he noted remains the controlling precedent. (ALJD 5:38-43). In *Kroger*, the Board held that "each occurrence of the unlawful dues deduction at the Union's request constitutes a separate violation of the Act." 334 NLRB at 849, fn. 3. While the remedy is accordingly limited to the six months preceding the charge as discussed further below, *Kroger* requires that Respondent's 10(b) defense be rejected.

**2. The ALJ properly found that Respondent violated the Act, irrespective of Mayen’s union membership or dues obligation.**

Board law requires that checkoff be voluntarily opted-into by the employee—it is never compulsory, irrespective of any financial obligation an employee may have to the union. *Lincoln Lutheran*, 362 NLRB No. 188, slip op. at 7, fn. 24 (2015). This is true, even when an employee may be subject to a union-security agreement. *Id.* citing *Bluegrass Satellite, Inc.*, 349 NLRB 866, 867 (2007). Consistent with the voluntary nature of checkoff, the Board has found that a union violates the Act when it coerces employees into signing checkoff agreements or otherwise interferes with an employee’s right to revoke their authorizations, even if those employees owe dues to the union. See, e.g., *Steelworkers (American Screw Co.)*, 122 NLRB 485 (1958) (union unlawfully required employees to travel to another city to tender dues as only alternative to use of dues checkoff where union security clause in effect).

In light of this clear precedent, the ALJ rejected Respondent’s argument and concluded that “Mayen’s membership status has no bearing on the method he chooses to pay any dues owed to the Respondent.” (ALJD 5:32-33). Likewise, whether Mayen owed dues to Respondent during the period in question is irrelevant to the issues in this matter. Even assuming Mayen owes dues to Respondent or remained a member, as the ALJ correctly pointed out, “If the complaint were dismissed on non-effectuation grounds, dues checkoff would be rendered compulsory for Mayen during the applicable time period.” (ALJD 6:36-39). Any other result would only serve to nullify the legal requirement that checkoff be voluntary for employees.

The result in *Kroger* is consistent with Board law and the ALJ’s conclusions. In *Kroger*, Partain resigned his union membership and attempted to revoke his

authorization on December 10, 1998. 334 NLRB at 848. He filed a charge one month later, on January 11, 1999. *Id.* at 847. If the Board considered Partain's membership relevant, it would have limited the remedy to only those months immediately following his resignation of membership. It did not do so. Instead, the Board ordered that Partain be reimbursed for the 6-month period prior to the filing of the charge, which would include several months during which Partain was a union member. *Id.* at fn. 2. As in *Kroger*, Mayen's membership or financial obligations to the Union are irrelevant to this case.

**3. The length of Mayen's break in employment is irrelevant.**

On exception, Respondent attempts to distinguish this case from *Kroger* on the narrow basis that Mayen's separation was only six weeks, as opposed to the six month separation by the employee in *Kroger*. As the ALJ noted, "the length of hiatus had no bearing on the *Kroger* outcome." (ALJD 20-25). There is no analysis regarding the length of separation in *Kroger*, as it was irrelevant to the outcome in that case. Rather, the Board's decision in *Kroger* controls situations of checkoff in rehire situations whether the separation is six days or six years.

**4. The ALJ properly rejected Respondent's argument that no violation can be found because there is no evidence it was aware of Mayen's separation and rehire.**

The ALJ concluded that "Respondent knew or should have known that [the Employer] had not deducted dues for Mayen for a period of 6 weeks and then resumed doing so" and that Respondent had a responsibility to "obtain and deliver" a new authorization upon his rehire. (ALJD 6:20-25). Respondent argues that this places an unwarranted onus on Respondent. Respondent does not cite to a single case in support

of this argument. As already described above, the remedy period is appropriately limited to the six months preceding the charge, eliminating any undue burden on Respondent. Furthermore, it is fair to require Respondent to be responsible for maintaining proper records for purposes of dues checkoff, which must be voluntarily entered into by employees and comport with Section 302(c)(4) of the Labor Management Relations Act. There is no support in Board law that asserted ignorance constitutes a defense to checkoff violations. Instead, in *Kroger* the Board noted that it was “undisputed that Kroger neither saw nor verified the checkoff authorization cards, but relied solely on the Union’s representation contained on the computer diskette.” *Id.* at 848. The employer in *Kroger* did not know that the card at issue was invalid or predated the employee’s rehire. Despite this, the Board found that the employer violated the Act by withholding and remitting dues to the Union. *Id.* at 849. Respondent in this matter should be held to the same standard.

**5. The ALJ ordered the appropriate remedy in this case.**

Here too, the appropriate remedy in this matter should be guided by the controlling and most factually parallel case, *Kroger*. In *Kroger*, dues began being deducted from the employee outside of the six-month period prior to the filing of the charge. *Id.* at 849, at fn 3. While the Board rejected Respondent’s 10(b) defense and found it to be a continuing violation as already described above, the Board held, “we find that the remedy is limited by Section 10(b) to the 6-month period prior to the filing of the charge.” *Id.* at 849, fn. 3, citing *Teamsters Local 667 (American Freight)*, 302 NLRB 694 (1991); *Farmingdale Iron Works*, 249 NLRB 98 (1980), *enfd.* as modified 661 F.2d 910 (2d Cir. 1981). Similarly, in this matter, the ALJ properly found that Mayen should

be reimbursed, with interest, for dues that were unlawfully deducted for the six-month period prior to the filing of the initial charge in this matter. As already described above, Mayen's membership or financial obligations towards Respondent during that six-month period are irrelevant.

### **III. CONCLUSION**

As the ALJ found, "[w]ithout question, *Kroger* is controlling precedent here and the outcome of applying *Kroger* to these facts is obvious." (ALJD 5:43-44). While Respondent disagrees with the result in *Kroger*, that alone cannot justify disregarding controlling Board precedent. The ALJ's decision should be adopted in full and Respondent's exceptions should be rejected in their entirety.

Dated July 13, 2018.

/s/ Renée M. Medved

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**AFFIDAVIT OF SERVICE OF: COUNSEL FOR GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on July 13, 2018, I served the above-entitled document upon the following persons by the methods described below:

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July 13, 2018

Renée M. Medved, Designated Agent  
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Signature