

# Lawyer Insights

## DC Circ. Ruling Shows Slow-Rolled NLRB Compliance Is Risky

By Amber Rogers, Gary Enis and Lukas Moffett  
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The U.S. Court of Appeals for the D.C. Circuit recently adopted a report and recommendation<sup>1</sup> holding an employer, MasTec Advanced Technologies Inc., in contempt of court for failing to comply with its Sept. 16, 2016, judgment.

The basis of the 2016 judgment was MasTec's failure to comply with an order of the National Labor Relations Board issued in 2011. The D.C. Circuit's ruling<sup>2</sup> in *MasTec v. NLRB* is a reminder to employers that failure to comply with board orders may come at a steep cost.

The contempt proceedings are related to an NLRB order from a little over 10 years ago.<sup>3</sup>

In the originating case, the board concluded that MasTec violated the National Labor Relations Act when it terminated over 25 employees for complaining during a local news station interview about their pay. Their pay was docked if they could not convince customers to connect an installed receiver to a phone line.

In the board's 2011 order, MasTec was ordered to:

- Offer reinstatement to certain discharged employees;
- Remove from its files all references to MasTec's unlawful discharge of 26 named employees and notify the discriminatees of this expungement;
- Provide the board with requested records needed to analyze the amount of back pay owed by MasTec to the discriminatees;
- Notify its employees that it has rescinded unlawful rules from MasTec's employee handbook;
- Physically post and electronically distribute signed notices prepared by the board; and
- File with the board a sworn certification attesting to MasTec's compliance efforts.

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On September 16, 2016, the D.C. Circuit entered its judgment against MasTec, fully enforcing the board's 2011 order.

In November 2019, arguing that MasTec continued to fail to comply with the D.C. Circuit's 2016 order, the board petitioned for adjudication in civil contempt and other civil relief.

The board's petition alleged that MasTec failed to:

- Timely offer reinstatement to certain unlawfully discharged employees;
- Timely update personnel files to remove references to the unlawful discharges, and notify discharged employees of the changes to their personnel files;
- Timely revise its employee handbook to remove policies that were in violation of the National Labor Relations Act, and provide notice to employees of the handbook revisions;
- Preserve and provide records to the board to enable it to calculate the amount of back pay owed to the unlawfully discharged employees;
- Post physical copies of and electronically distribute board notices to employees signed by representatives of MasTec; and
- File a sworn certification with the board attesting to MasTec's compliance with the other components of the judgment.

In its petition, the board requested multiple forms of relief, including that MasTec be required to:

- Comply with the 2016 judgment to the extent it had not already done so;
- Provide the board with a number of outstanding records previously requested;
- Post copies of and electronically distribute the contempt adjudication and a notice stating that MasTec has been found in contempt of court for disobeying the 2016 judgment;
- Permit a board agent access to its premises to verify that all required notices have been posted; and
- Pay the board's costs and attorneys' fees at market rates.

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The petition also sought orders from the court that imposed prospective fines against MasTec of \$100,000 for future violations of the 2016 judgment or contempt order and \$2,500 per day for continuing violations; and

Additionally, it sought orders that imposed prospective fines against certain of MasTec's officers, agents, and representatives of \$1,000 for future violations of the 2016 judgment or contempt order and \$100 per day for continuing violations.

The special master appointed to the case issued a 49-page-long report and recommendation finding MasTec in contempt, stating that MasTec's violations "were not isolated or sporadic; they related to almost every one of the remedial affirmative acts in the NLRB order and continued for years — indeed, they continue still."

The special master granted the board's requests with a few modifications.

Regarding costs and attorneys' fees, the special master found them appropriate, but declined to make a final assessment as to the total amount, finding that the D.C. Circuit reserved such decisions for itself.

With respect to the \$100,000 per-violation fine, the special master found that it was inappropriately large, considering that the board provided no analogous precedent where such a hefty fine had been imposed. The special master slashed the fine amount in half to \$50,000.

Concerning fines requested against certain of MasTec's officers, agents, and representatives, the special master concluded that the board did not sufficiently define the circumstances under which the fines would be imposed against the individuals and failed to establish that the fines were necessary to coerce MasTec's compliance with the 2016 judgment or the contempt adjudication.

Largely, the special master's findings were well-supported by controlling law.<sup>4</sup> For example, the U.S. Supreme Court and the D.C. Circuit have recognized the appropriateness of requiring employers to post notices regarding violations of the act and contempt adjudications.<sup>5</sup>

Similarly, courts have routinely granted board agents access to employers' facilities to verify compliance with such posting requirements.<sup>6</sup> Further, the award of costs and attorneys' fees have been recognized as an appropriate remedy for successful board petitions to hold a party in civil contempt.<sup>7</sup>

However, while the special master's recommended reduction of the per-violation fine against MasTec is consistent with D.C. Circuit law, the recommended reduction still imposed a per-violation fine of \$50,000, which is notably larger than the per-violation fine amount typically imposed.<sup>8</sup> In support of the \$50,000 per-violation fine, the special master relied on a case from 1953 where the court awarded the board's request for a \$30,000 fine.<sup>9</sup>

However, the court in the case from 1953 contemplated a single fine, whereas the special master recommended a per-violation fine.

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On Oct. 19, 2021, the D.C. Circuit adopted the report and recommendation in its entirety, and provided the board 30 days to submit documentation establishing its costs, expenses, and attorneys' fees. The D.C. Circuit's decision serves as a reminder of the stiff sanctions that can be imposed from slow-rolling or otherwise ignoring the board and court's orders.

Employers should also be particularly watchful of compliance issues arising as NLRB General Counsel Jennifer Abruzzo has issued several memorandums regarding remedies, stating

Regions should request from the Board the full panoply of remedies available to ensure that victims of unlawful conduct are made whole for losses suffered as a result of unfair labor practices.

Indeed, in a tweet commenting on the D.C. Circuit's decision in this case, Abruzzo stated the "NLRB will continue using every tool at its disposal in this case to ensure that the National Labor Relations Act is enforced and that these workers obtain justice."<sup>10</sup>

As employers are likely to desire to pushback on the more unique remedies, they should remain mindful of the board's current makeup, proemployee bent, and ability to initiate contempt proceedings to enforce an employer's failure to comply with its order.

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## NOTES

1. <https://apps.nlr.gov/link/document.aspx/09031d4583481829>.

2. <https://apps.nlr.gov/link/document.aspx/09031d45835aaf05>.

3. *MasTec Advanced Technologies*, 357 NLRB 103 (2011).

4. With respect to the denial of the petitioned-for prospective fines for MasTec's individual officers, agents, and representatives, the Special Master relied on Second and Seventh Circuit law, as the D.C. Circuit has not meaningfully addressed the issue. Cf. *NLRB v. Intern. Broth. of Elec. Workers*, 471 F.3d 399, 406 (2d Cir. 2006) (declining to impose prospective fines against individuals pursuant to a consent order because sufficient relief could be obtained from fines imposed on the employing entity); *Blankenship & Associates, Inc. v. NLRB*, 54 F.3d 447, 449 (7th Cir. 1995) (Board's failure to adequately specify the circumstances under which the fines would be imposed was fatal to its request for prospective fines against individuals).

5. See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002) (requiring conspicuous posting of employee NLRA rights is a traditional remedy sufficient to further the purposes of the Act); *Fresh & Easy Neighborhood Mkt., Inc. v. NLRB*, 468 F. App'x. 1, 2 (D.C. Cir. 2012) (upholding Board's requirement that employer post remedial notices following employer's violation of the Act); *Oil, Chem. &*

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Atomic Workers Intern. Union v. NLRB , 547 F.2d 575, 597 (D.C. Cir. 1976) (requiring posted notice of contempt adjudication); Dallas Gen. Drivers, Warehousemen & Helpers v. NLRB , 500 F.2d 768, 771 (D.C. Cir. 1974) (requiring posted notice of contempt adjudication).

6. See, e.g., Gold v. State Plaza, Inc. , 481 F. Supp. 2d 43, 52 (D.D.C. 2006); NLRB v. U.S. Serv. Indus., Inc. , 96-1042, 1996 WL 472998, at \*2 (D.C. Cir. July 22, 1996).

7. See, e.g., Int'l Union of Elec., Radio & Mach. Workers v. NLRB , 502 F.2d 349, 358 n. 26 (D.C. Cir. 1974) (recognizing that the D.C. Circuit has granted the Board attorneys' fees and litigation expenses associated with successful petitions to hold a party in civil contempt); Dallas Gen. Drivers v. NLRB , 500 F.2d at 771 (requiring employer to pay NLRB's attorneys' fees and costs associated with prosecuting the civil contempt action); W. Tex. Utilities Co. v. NLRB , 206 F.2d 442, 448 (D.C. Cir. 1953) (requiring employer to pay the Board its costs and expenses for pursuing civil contempt proceeding); see also NLRB v. Bldg. Serv. Emp. Intern. Union , 376 F.2d 131, 136 (1st Cir. 1967) (remedy for contempt involved reimbursing the Board for costs, litigation expenses, employees' salaries).

8. Cf. Expert Elec., Inc. v. NLRB , MISC. 11-591, 2013 WL 589176, at \*10-11 (D.D.C. Feb. 8, 2013) (approving \$10,000 fine for each violation); NLRB v. Harris Teeter Supermarkets , 215 F.3d 32, 34 (D.C. Cir. 2000) (declining to vacate or modify consent decree containing a \$10,000 fine [\$16,000, adjusted for inflation] for each violation); NLRB v. Holsum Bakers of Puerto Rico, Inc. , 96-1065, 1998 WL 315599, at \*2 (D.C. Cir. Apr. 29, 1998) (approving \$10,000 fine [\$17,000, adjusted for inflation] for each violation of consent order).

9. See W. Tex. Utilities Co., 206 F.2d at 449 (threatening imposition of a one-time \$30,000 fine [\$308,000, adjusted for inflation] for employer's failure to comply with the court's order).

10. <https://twitter.com/NLRBGCC/status/1450846154510553095>.

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