

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

OUTOKUMPU STAINLESS USA, LLC,
f/k/a THYSSENKRUPP STAINLESS USA,
LLC

Respondent.

Case Nos.: 17-15498,
18-10198

**RESPONDENT'S RESPONSE TO NATIONAL LABOR RELATIONS
BOARD'S PETITION FOR ADJUDICATION IN CIVIL CONTEMPT AND
FOR OTHER CIVIL RELIEF**

Gavin S. Appleby
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Suite 1200
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404.233.0330
Attorney for Respondent

CERTIFICATE OF INTERESTED PARTIES

Respondent Outokumpu Advanced Technologies, a division of Outokumpu, Inc. (“Respondent” or “Outokumpu”) certifies that the following persons or entities have or may have an interest in the outcome of this case:

1. Outokumpu Stainless USA, LLC, Respondent
2. Outokumpu Oyj, Parent Company of Respondent
3. Scheid, David, VP of HR for Respondent
4. Brewer-Cooper, Charlotte, Corporate Attorney for Respondent
5. Walker, Karrie, HR Professional for Respondent
6. Appleby, Gavin S., Counsel for Respondent
7. Littler Mendelson, P.C., Counsel for Respondent
8. Manzollillo, Brad, Organizing Counsel, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC
9. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC
10. Robb, Peter B., General Counsel, National Labor Relations Board
11. Warner, Debra, Compliance Officer, National Labor Relations Board
12. Thomas, Paul A., Acting Supervisory Attorney, National Labor Relations Board

13. Sykes, Molly G., Trial Attorney, National Labor Relations Board
14. Ring, John, Chairman, National Labor Relations Board
15. Kaplan, Marvin, Member, National Labor Relations Board
16. Emanuel, William, Member, National Labor Relations Board
17. McFerran, Lauren, Member, National Labor Relations Board
18. Wedekind, Jeffrey D., Administrative Law Judge, National Labor
Relations Board

Respondent, Outokumpu Advanced Technologies, a division of Outokumpu, Inc. (“Respondent” or “Outokumpu”) responds to Petitioner, National Labor Relations Board’s Petition for Adjudication in Civil Contempt and for Other Civil Relief, filed on October 6, 2020. Outokumpu in support states as follows:

I. A BRIEF HISTORY AND CONTEXT

A. The Union’s 2010 Representation Petition.

More than ten years ago, on May 17, 2010, the United Steelworkers Union filed a representation petition (“RC Petition”) seeking to represent certain of Petitioner’s predecessor’s production and maintenance employees. At the time that the Union filed its RC Petition, the Calvert, Alabama steel mill was under construction and struggling due to the existing recession. There were approximately 80 individuals employed at the Calvert Stainless Plant, which was a small percentage of the expected workforce when the mill was finally up and running. Of those 80 employees, approximately 25-30 workers would have to have signed cards with the Union to allow the Union to file its RC Petition. Of the 80 workers that could have signed or did sign cards to file the petition, only about 30 of the original employees are still employed at the Calvert Plant.

Despite the fact that the employee group was only a small part of the workforce to be developed, the Company did not seek a dismissal of the petition. That was in part due to Outokumpu’s predecessor, ThyssenKrupp’s, global code of

conduct, which essentially protected unionism. In addition, ThyssenKrupp assumed that the Union would move forward toward a timely election. Consequently, the Company withheld from raising an issue of the predicted growth in the composition of the bargaining unit. However, since that time the Union has used the charge-filing process to stretch the election process out for approximately ten years. There still has not been an election and it seems clear that the Union has no interest in actually having an election. Consequently, a question concerning representation exists as to whether the Union still has a sufficient showing of interest to proceed to a vote. However, that issue is currently before the Board and not this Court.

B. The Union's Unfair Labor Practice Charges and Dilatory Tactics.

Since filing the RC petition, the Union has chosen a strategy of filing dubious unfair labor practice charges as a means of avoiding having an election at the Calvert facility, presumably because the Union did not have enough employee support to win that election. On February 9, 2010, three months before the RC petition was filed, the Union filed three unfair labor practice charges against the Company raising thirty-three allegations of wrongdoing. While the Region was investigating these charges, the Union filed its RC Petition seeking to represent a unit of approximately 80 full time production and maintenance employees. With the Union having already filed the previous charges, the RC Petition was immediately blocked. Contrary to its purported interest in representing the Company's production and maintenance

employees, however, the Union did not file a Request to Proceed. Instead, it filed additional charges on May 25 and June 8, 2010, alleging more violations. In addition, just as it appeared that a hearing might be scheduled on the RC Petition in the summer of 2010, the Union filed two additional blocking charges on July 26 and August 7, 2010.

The Region investigated the Union's numerous claims, with full cooperation from the Company, resulting in the consolidation of the pending charges and the dismissal or withdrawal of most of the Union's baseless allegations. The Company has not been found to have violated the law in regard to the any of the actual charges. However, it did agree to settle the alleged violations that had not been dismissed in hopes of resolving the matters and securing a representational hearing and moving forward with the election. Pursuant to the parties' 2010 settlement, the Company agreed to post a Notice, as required by the National Labor Relations Board. However, the Union refused to participate in the settlement, thus delaying the process further by filing an appeal to the General Counsel's office. The General Counsel denied the Union's appeal in February 2011, and once the Settlement Agreement became effective in March 2011, the Company immediately posted the requisite Notice in compliance with the Agreement.

Despite the parties' agreement and the Company's compliance with the terms of the agreement and consistent with its continuing effort to delay the scheduling of

an election, the Union lodged several additional complaints alleging that the Company was non-compliant with the 2011 settlement posting requirement. Again, the Company cooperated with the Region's investigation and even took voluntary action regarding the posting to assuage the Union's newest complaints. That included voluntarily moving the Notice, relocating certain documents posted adjacent to the Notice on another occasion, confirming compliance with the electronic posting requirements, and voluntarily restarting the posting period in early May, which extended the posting period into early July 2011.

After the Region closed the applicable ULP case file in the summer of 2011, the Company contacted the Region regarding scheduling a representation hearing. The Region scheduled a unit hearing in September 2011, and on September 7, 2011, the Company and the Union entered into a stipulated election agreement that called for a vote in mid-December 2011. By that time, the Company's workforce had grown substantially, but still had not reached a stable, representative complement. Rather than assert that the election should be delayed due to a still expanding unit, however, the Company sought to give its employees what they had been requesting—a chance to vote.

Unfortunately, the Union denied the employees that opportunity. On December 7, 2011—one week before the scheduled vote—the Union filed a new blocking charge that included allegations spanning the previous six months. The

Company again fully cooperated with the Region, including providing access to witnesses, in an effort to seek an expedited resolution of the charge. While the Region was still investigating, the Union submitted yet another charge on January 24, 2012, with redundant allegations raised in the previous charge. On April 30, 2012, the Company, the Union, and the Region entered into a Settlement Agreement to resolve the pending unfair labor practice charges. The Settlement Agreement required the Company to provide notice of the agreement to Company employees. In addition to the notice posting requirement, the Settlement Agreement also required the Company to fulfill a number of affirmative obligations, including to: (1) repeal a rule prohibiting employee discussions about the Union on working time (although, in fact, there was no such rule); (2) rescind from two employees' personnel files discipline received regarding discussing the union during work time; (3) notify all affected employees that the discipline was removed from their personnel files; and (4) allow employees to discuss the Union during working hours. The Company fully complied with these affirmative obligations. However, the Union raised concerns regarding the Company's posted notice.

On May 7, 2012, the Company posted a side notice next to the time clocks at the Calvert facility to inform employees about its decision to settle the charges that had prevented the previously scheduled election. On that same day, the Company also sent an electronic copy of the side notice via email to all of its exempt and non-

exempt employees at the Calvert facility, including the employees covered by the now two-year-old Representation Petition. On May 9, 2012, the Region sent the Company the final approved Settlement Agreement and copies of a Remedial Notice to be posted at the facility. The following day, on May 10, 2012, the Union notified the Region that the Company had emailed its employees the side notice. However, despite being made aware, the Region did not raise an issue that the Company's side notice might constitute non-compliance with the Settlement Agreement. Rather, the Region allowed the Company to move forward with its posting of the Remedial Notice despite having full knowledge of the contents and means of dissemination of the side notice.

A week later, on May 17, 2012, the Company posted the Remedial Notice on its main bulletin board and the Company's intranet. Per the terms of the Settlement Agreement, the Company was required to post the Notice for sixty (60) days. The Company complied with this requirement through the posting of the Notice from May 17 through July 18, 2012—a total of 62 days. Through the entire span of this two month period, the Region never raised an issue regarding the dissemination and/or contents of the side notice.

C. The Union's Continued Dilatory Tactics with Regard to the Notice Posting.

Just twelve days after the posting period, on July 30, 2012, eighty-one days after the Region became aware of the distribution of the side notice, the Union filed

yet another unfair labor practice charge against the Company alleging that the side notice “unlawfully misrepresented NLRB procedures thereby creating the impression that it can engage in unlawful conduct without penalty.” Instead of raising its issues in a timely manner, however, the Union chose to wait to file its charge at a time that would permit it to further delay the processing of the RC petition. The Region fully investigated the allegations and, as a matter of compliance, asked the Respondent Company to re-post the settlement notice. The Company informed the Region that it is unwilling to re-post the notice, not because the Company wished to spar with the Region, but because enough delay should finally be enough. Again, all the Company was trying to do was give its employees the chance to vote. As a result, the Company challenged the current alleged non-compliance.

Rather than raising the issue of potential non-compliance with the Company in order to amicably resolve the issue, the Region immediately commenced an investigation of the claims. On September 21, 2012, after a complete investigation by the Region, the Union decided to withdraw its charge. The Union’s withdrawal was approved by the Regional Director. Only then, 132 days after the Union notified the Region of the alleged side notice issue, after the Company successfully completed the notice-posting period and after the Union withdrew its charge, did the Region assert that the Company’s side-notice was non-compliant with the Settlement

Agreement. It took the Region another two months to advise the Company of its proposed remedial steps, which included the Company reposting the Notice for an additional sixty (60) days along with additional remedial language. Through its counsel, the Company informed the Region that it was unwilling to repost the notice. As a result, the Region reinstated the underlying, settled charges in Case Nos. 15-CA-070319 and 15-CA-070353. The Region and the parties litigated the notice posting matter for a number of years up to this Court, which upheld the Region's finding of judgment against the Company. Since the Eleventh Circuit issued its opinion in May 2019, little has happened.

The Company and the Region has had some contact, but not for some time. There has been no sign of an election to occur. The Union had filed fourteen unfair labor practice charges from 2010 to 2013, containing over 50 separate allegations of wrongdoing against Respondent, including three amendments to one of the charges. To each of the charges against it, however, the Company has fully responded and cooperated with the Board's agents, making managers available and timely submitting materials, as requested by the Board. Other than the side notice, there are no findings that the Company violated the law.

Importantly related to the NLRB's Petition for contempt, the parties did have some communications regarding the posting situation. At that point, the NLRB had assigned a Compliance Agent to the case. She had not been involved in the matter

prior to that time. On behalf of the NLRB, she asked Outokumpu to resolve the matter through another posting that would address the alleged non-compliance. However, the notice that was requested was the original notice addressing the early unfair labor practice charges, which were now approximately nine years old. The Company informed the Compliance Officer that it was willing to resolve the situation through further notices. However, it then raised a concern that the old notice would be outdated, awkward and misleading, while also stating that it would agree to post a notice regarding resolution of the current alleged lack of compliance.

On July 15, 2019, following a call where the proposed notice was discussed, Counsel for Outokumpu wrote the Board's Compliance Officer stating:

[T]o follow-up from our earlier call, I offered to provide some additional information related to the unusual compliance situation we have in this case. First, I want you to be aware that Outokumpu is not trying to avoid a compliance obligation. The Company is willing to work with you to resolve this matter and to meet its compliance requirements. However, there are a number of issues to consider in order to avoid significant confusion among the Company's workers.

The problem here is that we're working with compliance obligations from 2019, but we're also working from a compliance-driven settlement agreement from 2012. The terms in that settlement agreement no longer apply in many circumstances and they will create confusion in other circumstances. As a result, we discussed on our call how to eliminate the confusion. Please note that the outdated settlement agreement also is affecting the Company's ability to file its compliance statements, as discussed below.

Here are some of the items of confusion:

1. Initially, the name of the Company on the 2012 settlement agreement is wrong. ThyssenKrupp Stainless USA, LLC has not operated the Calvert mill for years. Outokumpu took over this case years ago.
2. The remedial actions now required of Outokumpu were previously implemented at the time of the original settlement back in 2012. That includes removing documents from the personnel files of two employees (who are now former employees). It also includes notifying those employees of that fact. The Company also revised the Company's policy as part of the initial settlement. In fact, at the time of the 11th Circuit Court review of the case, the NLRB and Outokumpu agreed that all requirements of the settlement had been met by Outokumpu and the only issue was with the side notice that had been posted by the Company.
3. For similar reasons as above, the performance requirements on Outokumpu in the 2012 settlement agreement also were previously met.
4. Due to the passage of time, the stated allegations in the 2012 settlement agreement are now misleading and confusing. For example, the statement that "since on or about July 2011, and at all times thereafter, the Employer, through Manager Tom Brennan, unlawfully changed its workplace discussion policy and enforced it disparately" is now non-sensible. The statement implies that this violation occurs on a daily basis and has been occurring steadily for eight years, despite the fact the Mr. Brennan hasn't even been employed by the Company for most of those years. The same is true with other allegations. Outokumpu understands that the factual dispute is now over, but the language is misleading and will confuse the employees.

Outokumpu is willing to work with you to update the language and modify or eliminate the misleading language. The Company is ready to meet its posting obligations but the language needs to be updated and clarified so that the posting makes sense to those who receive it.

Thank you for your earlier call and for your assistance. I'm happy to discuss any of the above.

(See Correspondence from G. Appleby to D. Warner, July 15, 2019, attached hereto as Exhibit A).

Unfortunately, the NLRB did not agree to clarify the notice and thus no notice was modified to fit the circumstances. Outokumpu remains willing to post a notice that clarifies the situation. In fact, it is willing to post a remedial notice and attach the outdated 2012 notice with an explanation as to its relevance. The Company is not demanding that the applicable notice be eliminated. It simply wants to post a notice that makes sense, particularly since most of its employees have no knowledge whatsoever as to what occurred in 2012.

This matter can be resolved very easily. It is not a situation where contempt would apply. Outokumpu is not saying, and has not said “no way we’re posting a notice.” That is not the Company’s position. All it wants is a notice that makes sense. In addition, the Company is prepared to certify compliance in such circumstances. In all candor, this situation should be resolvable without seeking contempt and without time spent in the current proceedings.

In that regard, attached as Exhibit B is the response of the Compliance Officer to the email from Outokumpu’s counsel (Exhibit A), quoted above). According to the Compliance Officer, the only method by which to resolve the notice problem is to seek a decision by the 11th Circuit. Frankly, that does not make a lot of sense. This isn’t intended to be a fight – it’s intended to try to reach a reasonable path for

resolution. Further, since the Circuit Court is not a fact-finding court, it doesn't seem to be the only place this situation can be resolved. The 11th Circuit did not previously approve, revise, write or focus on the language of the notice. It merely upheld the Board's decision regarding a default judgment.

II. THE CURRENT STATE OF AFFAIRS

Despite the parties' long history with this matter and the Respondent's substantial compliance with the Region's orders, the Board's current Petition seeks to hold Respondent in contempt for failing to certify its compliance with the enforced Board Order and purported failure to post the required Notice at its facility and on its intranet as required. The Board now seeks new obligations and penalties against Outokumpu, including potential penalties into the future.

A. The Side Notice and Certification to the Board.

The Board's Petition focuses solely upon three issues: (1) Respondent's purported "fail[ure] and refus[al] to certify its compliance with the enforced Board Order; and (2) Respondent's purported "fail[ure] and refus[al] to post the Notice at its facility;" and (3) Respondent's purported "fail[ure] and refus[al] to post the Notice on its intranet." The Board asserts that Outokumpu should be punished for not reposting the Notice at its facility or on its intranet despite previously doing so, and for failing to certify the completion to the Board. However, the NLRB is ignoring the communication provided above. It also ignores the Company's stated

willingness to clarify the notice so it at least makes sense.

Obviously the parties to this case disagree over an important number of the facts related primarily to the wording of the notice and potential confusion as to why a 2012 notice is re-posted for a third time. Outokumpu also recognizes that this Court is not a place where facts are to be determined. Given the facts that are at issue, this Court may wish to consider sending this matter to a District Court for clarification of the facts. Otherwise, the Circuit Court will be left to make a determination of contempt with considerable uncertainty of the actual/disputed facts. Outokumpu would like to seek a resolution of this case, but it also would want this Court to be making a resolution of the Board's Petition based on accurate facts rather than allegations and assumptions and with the reality that Outokumpu is still willing to reach an agreement with the Board.

B. The Problem of Resolving this Matter before the 11th Circuit.

Outokumpu is aware of why the NLRB has filed this Petition before the 11th Circuit, since it upheld the NLRB's decision regarding the now eight-year-old side notice. However, the aged awkwardness of the prior notice creates factual problems and significant confusion. Just to mention a few of the factual disputes that exist, the Board asserts that Outokumpu did not properly post Notices in its work location and on the Company intranet. However, the Notice was properly posted, but the Board is now disputing whether the posting was sufficient. In addition, notices are

meant to educate those who read them, and the 2102 notice will not do that for employees (including most of the workforce that were hired after 2012) in 2020. However, a workable, agreed upon notice would provide understandable information by addressing the applicable facts.

Obviously the parties to this case disagree over an important number of the facts. As stated above and given the facts that are at issue, this Court may wish to consider sending this matter to a District Court for clarification of the facts. Otherwise, the Circuit Court will be left to make a determination of contempt with considerable uncertainty of the actual/disputed facts. Further, Outokumpu would like to obtain a resolution of this case, which could occur through a settlement conference before a Magistrate Judge. Even if that doesn't occur, Outokumpu would want this Court to be making a resolution of the Board's Petition based on accurate information.

C. Analysis Of The Alleged Penalties.

The Board concludes its Petition by seeking penalties against Outokumpu. Outokumpu contends that there also is no basis for this Court to award fees to the Board. Given that the Board is a government entity, an award of fees is not normally applicable. Nor should the Court establish a future penalty of \$10,000 for each and every future violation or provide any of the other future penalties suggested by the Board. As noted above, Outokumpu would prefer to resolve this matter and it has

sought to do so.

More importantly, while the parties clearly dispute factual aspects of what occurred in this case, Outokumpu has not acted in a manner that justifies fees or any other penalty. Moreover, this is not a case in which an employer is fighting with the NLRB in an unjustified and inappropriate manner. Outokumpu has offered to meet and seek a settlement of this matter. The Board has failed to agree to do so. Instead, the Board asserts that only the 11th Circuit can modify the notice, despite the fact that the notice in question was written in 2012 and was never evaluated by the 11th Circuit (which focused its decision on the side notice and a default judgment due to default language in the prior settlement between the Board and Outokumpu. Unfortunately, the Board now seems more focused on punishing Outokumpu rather than resolving this case. Outokumpu, however, remains welcoming to mediation, settlement conferences or in person meetings, as it has suggested.

III. CONCLUSION

This case has been quite complicated. Outokumpu's goal remains to resolve the matter. The NLRB obviously asserts that Outokumpu has not done all the NLRB wanted it to do. Unfortunately, however, the parties disagree on the facts and the clarity of the posting, but a settlement should not be difficult to obtain. For all these reasons, Outokumpu respectfully asks the Court to deny the NLRB's Petition.

Dated: November 16, 2020

Respectfully submitted,

By: /s/ Gavin S. Appleby

Gavin S. Appleby, Bar No. 020825

gappleby@littler.com

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Attorneys for Respondent Outokumpu
Advanced Technologies, a division of
Outokumpu, Inc.

CERTIFICATE OF COMPLIANCE

This document complies with the word volume limit of Fed. R. App. P. 32(a)(7)(B) because this document contains 4,007 words, excluding parts of the document exempted by Fed. R. App. P. 32(f).

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Gavin S. Appleby _____

Gavin S. Appleby

Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2020, I filed the foregoing
**RESPONDENT'S RESPONSE TO THE NATIONAL LABOR RELATIONS
BOARD'S PETITION FOR ADJUDICATION IN CIVIL CONTEMPT** using
the Court's CM/ECF filing system on registered parties:

William G. Mascioli
Bill.Mascioli@nlrb.gov

Paul A. Thomas
Paul.Thomas@nlrb.gov

Molly G. Sykes
Molly.Sykes@nlrb.gov

National Labor Relations Board
1015 Half Street, SE, Fourth Floor
Washington, DC 20003

/s/ Gavin S. Appleby _____
Gavin S. Appleby
Attorney for Respondent

EXHIBIT A

**(Respondent's Response to National Labor Relations Board's Petition
For Adjudication in Civil Contempt And For Other Civil Relief)**

From: [Appleby, Gavin](#)
To: [Warner, Debra](#)
Subject: FW: Call to discuss Outokumpu
Date: Monday, July 15, 2019 10:20:07 AM
Attachments: [image001.png](#)
[image002.png](#)

Debra, to follow-up from our earlier call, I offered to provide some additional information related to the unusual compliance situation we have in this case. First, I want you to be aware that Outokumpu is not trying to avoid a compliance obligation. The Company is willing to work with you to resolve this matter and to meet its compliance requirements. However, there are a number of issues to consider in order to avoid significant confusion among the Company's workers.

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Thank you for your earlier call and for your assistance. I'm happy to discuss any of the above.

Gavin Appleby

Shareholder

404.760.3935 direct, 770.356.3896 mobile, 404.759.2372 fax

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EXHIBIT B

**(Respondent's Response to National Labor Relations Board's Petition
For Adjudication in Civil Contempt And For Other Civil Relief)**

From: Warner, Debra
To: [Appleby, Gavin](#)
Cc: [Dormon, Rebecca A.](#)
Subject: RE: Call to discuss Outokumpu
Date: Tuesday, August 6, 2019 7:14:52 PM
Attachments: [image001.png](#)
[image002.png](#)
[Board's Authority to Modify Enforced Order or Deal away elements.docx](#)
[Smoke House Restaurant-- Board cannot modify CJ.pdf](#)

[EXTERNAL E-MAIL]

Mr. Appleby:

I reviewed your request with our Compliance Unit in Washington, D.C. and confirmed we are unable to revise a notice after an appellate court has issued a judgment. I am attaching two documents which set forth this policy; 1) language from the Administrative Law Judge Desk Book; and 2) a Board decision in *Smoke House Restaurant*, which also sets forth this policy.

The only option still available to you is to petition the 11th Circuit to request any revisions in the Notice. Please keep me informed of your decision to take any further action as I will be expected to pursue compliance in accordance with the current Judgment.

Sincerely,

Debra Warner
Compliance Officer
NLRB – Region 15
F. Edward Hebert Federal Building
600 South Maestri Place – 7th Floor
New Orleans, LA 70130-3408
(504)321-9476 (Office)
(202)679-4109 (Cell)
(504)589-4069 (Fax)
debra.warner@nrlb.gov

From: Appleby, Gavin <GAppleby@littler.com>
Sent: Monday, July 15, 2019 9:20 AM
To: Warner, Debra <Debra.Warner@nrlb.gov>
Subject: FW: Call to discuss Outokumpu

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