

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

\_\_\_\_\_  
HONEYWELL INTERNATIONAL, INC.,  
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE  
& AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, LOCAL 376  
AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE  
& AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, LOCAL 1010,  
*Intervenors*

\_\_\_\_\_  
“AlliedSignal I”  
\_\_\_\_\_

**On Petition For Review Of An Order  
Of The National Labor Relations Board**

**FINAL BRIEF FOR PETITIONER**

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## GLOSSARY

1990 Act . . . . .	Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, as amended, note following 10 U.S.C. § 2687 (West 2000)
Act or NLRA . . . . .	National Labor Relations Act, 29 U.S.C. § 151 <i>et seq.</i> (West 2000)
Agreement . . . . .	Competitiveness Agreement
AlliedSignal . . . . .	AlliedSignal Inc.
ALJ . . . . .	Administrative Law Judge
Board or NLRB . . . . .	National Labor Relations Board
BRAC or Commission . . . . .	Base Realignment and Closure Commission
DoD . . . . .	Department of Defense
Honeywell . . . . .	Honeywell International, Inc.
JA . . . . .	Joint Appendix
SA . . . . .	Supplemental Appendix
Textron . . . . .	Textron Inc.
SAEP . . . . .	Stratford Army Engine Plant
Unions . . . . .	International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, Local 376 and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, Local 1010

## ORAL ARGUMENT: MAY 8, 2001

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### JURISDICTIONAL STATEMENT

The National Labor Relations Board's jurisdiction rested on 29 U.S.C. § 160(a). The Board issued its opinion and final order on April 12, 2000. Honeywell International, Inc. filed a timely Petition for Review on April 21, 2000, seeking review under 29 U.S.C. § 160(f).<sup>1</sup>

### STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the National Labor Relations Board err in holding that an employer had a *further* obligation under Section 8(a)(5) or Section 8(d) of the National Labor Relations Act to bargain over its decision to discontinue operations at an Army engine plant, following the Government's decision to close the plant and terminate funding production there, when the employer and the unions had negotiated a contract describing the circumstances under which the employer would continue its plant operations but allowing the employer to "terminate" the contract, if the Government ceased providing funding the employer considered "adequate" to support the "future" of the plant?

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<sup>1/</sup> Honeywell was formerly known as AlliedSignal, Inc. For consistency with the decisions below, we refer to it as "AlliedSignal."

2. Did the Board err in applying discredited “clear and unmistakable waiver” analysis rather than the controlling “contract coverage” and “sound arguable basis” standards applicable under *BP Amoco Corp. v. NLRB*, 217 F.3d 869 (D.C. Cir. 2000); *Conoco, Inc. v. NLRB*, 91 F.3d 1523 (D.C. Cir. 1996); and *NCR Corp.*, 271 NLRB 1212 (1984), in concluding that the employer committed an unfair labor practice by exercising what it reasonably construed as its rights under a contract covering termination of its plant operations?

3. Did the Board err in concluding (a) that the employer had breached the contract by not formally “applying” for millions of dollars in congressional appropriations to continue subsidizing a Government plant, after the Army had decided to cancel the only military product manufactured there (a tank engine), the Government had irrevocably decided to close the plant, and the employer had tried unsuccessfully to get the Government to reverse those decisions, and (b) that the alleged breach of contract constituted an unfair labor practice?

4. Did the Board act arbitrarily in ordering the employer (a) to restore terminated plant operations and (b) to return transferred work and equipment, even though production had ceased several years earlier, pursuant to a Government plant-closure decision, the Government-owned equipment had been transferred to other facilities, and the plant had been closed?

## **PERTINENT STATUTE**

A copy of relevant portions of the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, as amended, appears in an addendum attached *infra*.

## **STATEMENT OF THE CASE**

This case involves a dispute between AlliedSignal and labor unions representing employees at a Government-owned facility, the Stratford Army Engine Plant in Stratford, Connecticut. In 1995, after the Government withdrew funding from SAEP and recommended that it be closed, AlliedSignal decided to terminate its operations there as permitted under a “Competitiveness Agreement” the parties had previously negotiated. The unions filed unfair labor practice charges. An ALJ found that AlliedSignal’s interpretation of the Agreement had a “sound arguable basis” but that the Company had violated Section 8(a)(5) of the NLRA by refusing to bargain over the decision to exercise its prerogative to discontinue its operations. Both AlliedSignal and the unions excepted.

Two members of a three-member Board panel concluded that AlliedSignal had violated Sections 8(d) and 8(a)(5). Even though SAEP had been closed and its Government equipment moved out during the course of the proceedings, the Board ordered the plant reopened and the Agreement reinstated.

## STATEMENT OF FACTS

In 1994, AlliedSignal purchased Textron's Lycoming engine business. That business included the manufacturing operation at SAEP, a plant owned by the United States Army and operated by Textron under an agreement with the Army. JA 29. For many years, SAEP's primary products had been helicopter and other engines for the Armed Services. From the late 1970s through 1995, the plant's principal product was the AGT-1500, an engine used in Army tanks. JA 30. The Union's president testified that by mid-1994 the production mix was 70 percent military and 30 percent commercial. JA 34. AlliedSignal's purpose in acquiring the business was to acquire Textron's expertise and relationships with the Defense Department relating to military engines and to gain the ability to make a "common core" engine for mid-size civilian airliners. JA 63-66, 79, 369.

### **1. The Acquisition of SAEP Operations and Negotiation of the "Competitiveness Agreement."**

There were two United Auto Workers bargaining units at SAEP. UAW Local 1010 represented approximately 1,000 production and maintenance employees; UAW Local 376 represented approximately 100 technical and clerical support staff. JA 41. The Unions bargained in tandem. JA 52. From the first rumors about a possible acquisition, the Unions were concerned about AlliedSignal's plans for

SAEP. The Unions knew that Army orders for AGT-1500 tank engines were slowing and were worried about the plant's ongoing viability. Textron had recently laid off a substantial number of employees. JA 39. The Unions also knew that AlliedSignal had an existing engines business in Phoenix and feared the Company might move the operations there. JA 77. This concern intensified when the Unions intercepted an internal AlliedSignal planning document that identified closure as one strategic option for the plant. JA 49-50, 76, 245-47, 315-16, 582.

In early 1994, during the AlliedSignal/Textron negotiations, executives from the two companies discussed employee relations issues, focusing on SAEP. Since collective bargaining agreements with the two units were to expire in a few months, AlliedSignal made clear that execution of acceptable labor contracts was a condition of the purchase. In March 1994 AlliedSignal officials met with UAW national leadership in Detroit, expressing willingness to become the "successor" to Textron and to continue operating SAEP if, but only if, (1) the upcoming negotiations produced "competitive" labor contracts and (2) AlliedSignal received continuing funding for SAEP from the Department of Defense. JA 235, 236-40.

AlliedSignal expected that such funding would flow from renewed DoD support for the AGT-1500 tank engine, which was the engine used on the Army's main battle tank. Although procurement of tanks had declined, a DoD Blue Ribbon

Panel had recommended to Congress in early 1994 that it preserve tank engine capacity by spending at least \$51 million *annually* on a continuing AGT-1500 program at SAEP until the year 2000. JA 796,799; JA 874,861; JA 67-69,72-73,95,375-76. Although SAEP was a seventy-year old munitions plant sprawling over two million square feet, the panel recommended that “preservation of SAEP would likely be necessary” to retaining “the ability to produce new heavy tanks.” JA 874. Moreover, the Army needed to keep the plant “warm” — to retain the engineers, craftsmen and people who assembled the tank engine to service the present fleet of engines for the next twenty to thirty years and to update the engines’ systems as new technology became available. JA 66-69,83,379,384,799.<sup>2</sup>

Accordingly, all the participants — from both the Company and the Unions — assumed that multi-million dollar Government support for the AGT-1500 would continue on at least a standby basis until 2000 at the earliest. AlliedSignal’s Site Manager stated that the Blue Ribbon funding recommendation was

“paramount to our thinking on whether we had a viable plan in Stratford. The ownership of the Army, the support of the Army and the products

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<sup>2/</sup> The Undersecretary of the Army told AlliedSignal’s Site Manager that the Army “saw a future role” for the AGT-1500 “that required [the] level of support” identified in the Blue Ribbon Panel recommendation, “which was a level of support for the manufacturing, the logistics and the technical engineering base, and that that technological base needed to be there for years into the future . . . .” JA 373.

that the Army put into the facility were important to maintaining a viable cost base that would justify keeping the plant open versus shutting it down.” JA 374.

AlliedSignal was also hopeful that Textron’s LV-100 engine would become the engine for the “next generation” of Army tanks. JA 72-73.

During the spring and summer of 1994, Textron and AlliedSignal negotiated three agreements with the Unions: a basic collective bargaining agreement and two special side agreements. The two special agreements were an Effects Bargaining Agreement (before the Court in No. 00-1171), which defined the circumstances under which AlliedSignal would pay severance benefits to laid-off workers, and the “Competitiveness Agreement” at issue here. The Competitiveness Agreement defined the circumstances under which AlliedSignal would continue to operate SAEP and the circumstances and manner in which the plant could be closed. AlliedSignal made clear its goal was to preserve its flexibility to leave SAEP, if it was unable to make operations competitive and economically viable. JA 80-81,252-53,254-56,328. The Unions’ corresponding goal was to maximize severance benefits to cushion the effects of downsizing or closure. JA 241,243,291,292,327.

All parties understood that the prospects for maintaining SAEP as a viable, operating facility depended crucially on Congress’s continuing willingness to allocate multi-million dollar annual appropriations for the AGT-1500 tank engine program.

Only with such substantial annual appropriations could SAEP have a future: the plant was old, required substantial redesign, had unique and substantial maintenance and environmental costs, and had a declining military production output, but was too large to produce civilian engine models in competitive markets. JA 86,132,133,374,452, 1011. Those anticipated appropriations would cover most of the multi-million dollar “overhead” for operating the old, massive plant and subsidize the cost of developing some limited civilian operations there. AlliedSignal viewed continued AGT-1500 funding as crucial support for any future operations. JA 99, 375-77.

AlliedSignal committed to make realistic efforts to pursue adequate funding to support continued production of the AGT-1500. In return, it insisted on explicit contractual recognition that, if funding *it* considered “adequate” for the future was not going to be forthcoming, it would have the right to terminate the Agreement and close the facility without any further bargaining over that decision. Section 6 accordingly provided:

“Should AlliedSignal purchase [Textron’s] assets, AlliedSignal intends to make application to appropriate officials of the United States Government for financial arrangements ***in an amount considered by AlliedSignal to be adequate to support the future of the Stratford plant by AlliedSignal on a standby basis for the production of the AGT1500 engine***. If active procurement of that engine should cease, AlliedSignal and the Union shall exert their best efforts to work together and to coordinate actively in the efforts to obtain such ***adequate financial arrangements from either the federal government or some other***

*alternative governmental funding source*. AlliedSignal will share cost data and other backup information with the Union at least sufficient to provide an understanding of the calculation of the amount sought from the Government.” JA 1068 (emphasis added).

Section 6 immediately continued:

“After AlliedSignal makes such an application to the Government, if no provision to fund such financial arrangements in the amount sought by AlliedSignal shall be made in the federal budget as next thereafter enacted by the Congress of the United States, *then at any time after such next enactment of a federal budget, AlliedSignal may terminate this Competitiveness Agreement. Such termination shall be accomplished only upon notice given by AlliedSignal to the Union in writing no less than ninety (90) days before the intended effective date of such termination.*” JA 1068-69 (emphasis added).

Thus, the Agreement unequivocally assured that AlliedSignal would be able to “terminate” the Agreement and close SAEP operations, if it concluded that Congress was not going to make available funding “in an amount *considered by AlliedSignal to be adequate*” to support the “future” of the plant.

The Unions had attempted to negotiate (1) for limits on AlliedSignal’s ability to close the plant and transfer operations to Phoenix and (2) for a commitment that AlliedSignal would engage in “decision bargaining” over any determination whether to close SAEP operations. JA 883,891; JA 312,322. AlliedSignal refused. Instead, the Agreement required AlliedSignal only to engage in “*effects*” — not “decision” — bargaining. Section 4 provided solely that

“the Union retains the right to engage in collective bargaining with AlliedSignal with respect to the *effects* upon bargaining unit employees should Allied Signal decide in the future to close the Stratford plant . . . .” JA 1064-65.

That paragraph described the Union’s reserved right as extending only to making a “request by the Union for *impact* bargaining because of plant closure . . . .” *Id.* (Emphasis added).

Similarly, Section 5 specified that AlliedSignal could give the Unions 90 days’ notice of its “intention” to relocate work from SAEP and then

“The Union shall be entitled to request and thereafter engage in collective bargaining concerning the *effects* of the removal on members of the bargaining unit in the Stratford plant.” (Emphasis added). JA 1067.

Finally, driving home the unmistakable limits on AlliedSignal’s future bargaining obligations, the Unions agreed in Section 6 that, if AlliedSignal gave the 90-day “notice to terminate” the Agreement,

“the parties shall engage in discussions pursuant to Section 4 of this Agreement with respect of the *impact and effects* upon bargaining unit employees of the inability of the parties to secure adequate government arrangement for the ongoing operations of the Stratford plant by AlliedSignal. It is the intention of the parties that the Union shall request such *impact bargaining*, if desired, promptly upon receipt of any notice of termination of this Agreement from AlliedSignal.” (Emphasis added). JA 1069.

Thus, the Agreement explicitly assured AlliedSignal the right to make the *decision* whether to terminate SAEP operations and carefully limited any related

bargaining merely to “*effects*” bargaining. After this and the other two agreements had been executed, AlliedSignal acquired Textron’s engines business.

**2. The Army Terminates the AGT-1500 Program and the BRAC Commission Recommends Closing SAEP.**

AlliedSignal took over Textron’s operations in October 1994. Four months later, in February 1995, the Army decided that it no longer required the AGT-1500 engine produced at SAEP and that it was unnecessary to keep the plant “warm.” The Army had selected the Perkins diesel engine to power its tanks in place of the AGT-1500 gas turbine engine. This decision, which neither party had anticipated and which reversed the Blue Ribbon Panel’s recommendation, ultimately formed the predicate for the Government’s decision to close SAEP. Having decided not to support continued production of the AGT-1500, the Army’s Tank Command was publicly urging closure of SAEP, an Army-owned base. JA 88,126-27,431. By the end of that month, on February 28, 1995, the DoD announced that SAEP was on the list of bases recommended for closure by the Base Realignment and Closure Commission. JA 928. That Commission was a congressionally chartered body responsible for removing local politics and “pork barrelling” from military base closure decisions. Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, as amended.

AlliedSignal worked with the Unions from March through June 1995 attempting to persuade the Commission to remove SAEP from the closure list. JA 27,88-89,91,950. In late June, however, the Commission recommended to the President that SAEP be closed. As the NLRB found, “all interested parties understood at that time that the recommendation would be effectuated.” *AlliedSignal Inc.*, 330 NLRB No. 175 (“*AlliedSignal I*”), slip op. 3.

### **3. AlliedSignal Also Loses The Common Core Engine Business**

During the same period, AlliedSignal learned that the new commercial venture it had expected to pursue at SAEP would not be viable either. AlliedSignal had expected that the “common core” engine developed by Textron would allow it to enter — indeed, to dominate — the 50- to 90-passenger regional-jet civilian market. The Company had entered into discussions with British Aerospace regarding that engine. JA 64, 66, 78. AlliedSignal estimated that it would have had to spend between \$700 million and \$1 billion to develop this technology on its own; the acquisition of Textron’s SAEP operation and technology was intended to make its entry into the market faster and cheaper. However, the airlines decided to use a plane manufactured by Bombardier, a Canadian company, for this market; when AlliedSignal bid on the engine in May 1995, it lost to Pratt & Whitney Canada,

dashing its hopes for the development of the “common core” civilian business. JA 79.

Thus, the chance for substantial civilian manufacturing at SAEP evaporated just as the Army was abandoning the AGT-1500 tank engine and BRAC was proposing to close the plant as a subsidized military facility.

#### **4. AlliedSignal and the Unions Seek Alternative Support For The Plant.**

The Assistant Secretary of Defense stated that, as a result of the Commission’s decision, SAEP would receive no more federal money — including the \$47.5 million that Congress had already appropriated for fiscal 1995. JA 90. The Commanding General of Tank Command concurred, stating that the Army was reluctant to release the already-earmarked funds to SAEP, because it wanted to reallocate the money to peacekeeping missions. JA 431.

AlliedSignal and the Unions marshaled the assistance of the Connecticut congressional delegation, the City of Stratford and the State of Connecticut. JA 91,135,176-84,188-90,474. This coalition ultimately achieved release of the already appropriated FY 1995 funds, but it was obvious that the Government would not appropriate any additional funds for FY 1996 or thereafter. JA 90,126-27,431,438-39, 480.

Throughout the summer of 1995, the parties continued to seek alternative State funding to maintain the plant's viability. The Company and the Unions met repeatedly with the Connecticut congressional delegation, state officials, representatives of the township and of local utilities. JA 139-40,185-86,191,301, 451-52. Throughout that process, AlliedSignal made it clear both to the Unions and to these other potential sources of funding that the minimum subsidy required to keep SAEP open following the BRAC decision would be at least \$30 million per year. JA 129, 301-02, 353-54, 452-53, 454. The Unions acknowledged that \$30 million was an accurate figure. JA 363.

AlliedSignal informed the Unions that it would not make a final decision about the plant's fate until it had an opportunity to consider all potential sources of alternative funding. JA 192. However, the parties could secure only \$2.5 million per year in State loan guarantees. Even that minimal, grudging offer was contingent upon AlliedSignal's commitment to stay in Stratford for at least ten years, far longer than the traditional three-year cycle for negotiating labor contracts. JA 193,355,467-68. Thus, the coalition of AlliedSignal, the Unions and state and local officials did not locate any funding that remotely approached the \$30 million shortfall created by the Government decisions, the minimum sum that in AlliedSignal's judgment had to be generated to keep any Stratford operations viable. JA 161. The Unions, too, could

not find a way to bridge this enormous gap created by the Government's decision to cancel the \$51 million in Blue Ribbon funding and to shutter the Stratford plant. JA 160,167,196,303,352.

On July 13, 1995, President Clinton accepted the BRAC recommendation. On September 28, the time for Congress to disapprove the Commission's recommendation expired, and the decision to close SAEP became final. JA 136, 137. Despite tireless efforts undertaken jointly by AlliedSignal and the Unions to keep the plant open, the SAEP was ordered closed as a Government-supported facility. The Government also stopped negotiating with AlliedSignal for a "dual-use lease" at SAEP, thereby eliminating the possibility that the Company would be able to produce civilian engines at Stratford without bearing the entire overhead and enormous environmental compliance costs of a massive but under-utilized facility. JA 27,146, 196,383,429.

AlliedSignal concluded, therefore, that in the terms of Section 6, there were not going to be "adequate financial arrangements from either the federal government or some other alternative governmental funding source" that would be available "in an amount considered by AlliedSignal to be adequate to support the future of the Stratford plant . . . ." AlliedSignal ultimately decided to discontinue the remaining engines operations at Stratford and consolidate the remnants with its much larger

engines operations in Phoenix. JA 92. On September 29, 1995, the Company gave the Unions notice that it intended to “terminate” the Agreement under Section 6. Nevertheless, AlliedSignal maintained its operations there for another two years; no layoffs actually took place in 1995 or 1996, except those resulting from streamlining negotiated earlier in 1995 and from a decline in customer orders. JA 1059; JA 153,296,340; SA 1111.

Management met with Local 1010 on six occasions for the “effects” bargaining prescribed by Sections 4, 5 and 6 of the Agreement, but received no proposals. JA 166-67,304. The Unions declined to participate in “effects” bargaining, because the Company refused to bargain again over its underlying *decision* to close the plant. JA 169,170-71. The Unions then filed charges with the Board alleging that the Company’s refusal to bargain over the *decision* to close SAEP operations constituted an unfair labor practice.

The Board’s eventual decision sustaining the charge ignored the fact that AlliedSignal did not act upon the 1995 closure announcement. Instead, it continued to operate the plant until after the ALJ rendered his decision in 1997. The Competitiveness Agreement was scheduled to expire according to its terms (along with the collective bargaining agreement and the Effects Bargaining Agreement) in mid-1997. In early 1997, AlliedSignal offered to bargain about the *decision* actually

to terminate operations, and the parties bargained to impasse, failing to arrive at a replacement agreement. SAEP operations were finally closed in late 1997. *AlliedSignal Inc.*, 330 NLRB No. 176 (“*AlliedSignal II*”), slip. op 10.

## **5. The Board’s Decision.**

Focusing exclusively on the 1995 announcement of a decision to terminate operations — which AlliedSignal did not implement until after the Agreement expired and it bargained to impasse in 1997 — two members of a three-member NLRB panel ruled that AlliedSignal had violated Sections 8(d) and 8(a)(5) of the NLRA, 29 U.S.C. §§ 158(d), (a)(5), when it announced that it would terminate the Agreement.

The majority declined to apply the “sound arguable basis” rule of contract construction announced in *NCR Corp.*, 271 NLRB 1212 (1984), under which the Board does not decide a contract dispute so long as the employer has a “sound arguable basis” for its contract interpretation. Ignoring the “contract coverage” doctrine entirely, the majority reasoned that AlliedSignal had “repudiated” the entire contract instead of merely invoking one of its clauses — even though Section 6 expressly authorized AlliedSignal to “terminate” the Agreement under these circumstances. The majority then interpreted the Agreement as requiring AlliedSignal to make some kind of formal “application” for adequate congressional

appropriations for the plant, despite the Army's firm decision to switch to another manufacturer's tank engine and despite the Government's irrevocable decision to close SAEP.

In a remarkable assertion utterly divorced from the realities of the legislative process and the language of the Agreement — and indeed defying the anti-“pork barrel” objectives of the BRAC statute — the Board declared that AlliedSignal had not proved that it would have been “futile” to have made a formal “application” lobbying Congress to pour tens of millions of dollars annually into an outmoded, unneeded and doomed plant for tanks that the Army did not want. Having failed to go through that exercise, the majority held, AlliedSignal could not invoke the termination right embodied in the Agreement. The majority also concluded that, before exercising its termination right, AlliedSignal had not been precise enough in defining the amount of substitute government funding that it considered “adequate” to make the plant viable in the “future.”

Therefore, the majority held, AlliedSignal violated Section 8(d) of the NLRA by “unilaterally” terminating the Competitiveness Agreement in breach of its supposed requirements.

Member Hurtgen dissented. In his view, the “sound arguable basis” test should apply because the parties' dispute was one of contract interpretation: “if the employer

has a good-faith position on the contractual issue, [its] conduct is at most a contract breach.” *AlliedSignal I*, slip. op 7 [JA 9]. Member Hurtgen explained that, even if one interpreted the contract in the way the majority did, AlliedSignal had not breached it. AlliedSignal had sought to preserve the engine program and to change BRAC’s recommendation to close the facility but the closure decision had become final. Therefore,

“it would have been futile to seek the necessary funding [for 1996 or later years]. That is, it simply was not in the cards that Congress would appropriate funds ‘to support the future of the Stratford plant,’ in circumstances where it was clear that the Stratford plant was going to close.” *Id.* at 8 [JA 10].

The dissent further noted that AlliedSignal had clearly notified the Unions that the anticipated annual shortfall resulting from the withdrawal of government funding was *at least* \$30 million; this notification was sufficient to meet the Company’s contractual obligation to estimate the amount of alternate funding required. *Id.*

The majority ordered a remedy that was as disconnected from reality as their finding of an unfair labor practice. Apparently failing to take notice of the fact, reflected in their simultaneously issued *AlliedSignal II* opinion, that SAEP had been closed in late 1997, the majority ordered the standard remedy in a relocation case. They ordered AlliedSignal to *reopen* SAEP and resume work there, even though (1) the Army had cancelled AGT-1500 production, (2) the Army owned the plant and its manufacturing equipment, and (3) the Army had effectively shuttered SAEP three

years earlier pursuant to BRAC's order and had shipped its equipment to other facilities. See *AlliedSignal II*, slip op.10.

If this remedy rested on the Board's assumption that the plant ultimately was closed and its employees laid off without bargaining, the record in *AlliedSignal II* belied that assumption. As the *AlliedSignal II* opinion recognized, in April 1997 AlliedSignal "notified Local 1010 and Local 376 that it had reached a tentative decision to close the facility and invited decision bargaining. . . . Bargaining continued until June 13, 1997, when the Respondent declared impasse in decision bargaining." *Ibid.* As a practical matter, therefore, the Board's focus on AlliedSignal's 1995 mere *announcement* of a closure decision, which it did not implement before actually engaging in decision bargaining, should have been an academic exercise. But because the Board addressed the merits of the unfair labor practice charge and entered a broad remedial order based on that 1995 announcement, we shall address the reasons why the Board's decision cannot stand.

### **SUMMARY OF ARGUMENT**

The Board overstepped its statutory authority in several ways. Even if AlliedSignal had an obligation to bargain over the decision to close its operations, any such obligation was fully satisfied when AlliedSignal negotiated the Competitiveness Agreement itself. That contract specifically covered the

circumstances under which AlliedSignal could close the plant without any *further* “decision” bargaining, and AlliedSignal had a right to expect that it would receive the benefit of its bargain. The Board erred in construing the Competitiveness Agreement and concluding that, in its view, AlliedSignal had breached the Agreement. Because AlliedSignal indisputably had a “sound arguable basis” for its interpretation of that Agreement, the Board lacked the authority to reinterpret it differently. Moreover, the Board’s interpretation was so strained as to be utterly insupportable.

Finally, even if this Court upholds the Board’s finding of an unfair labor practice, it should refuse to enforce the remedy of reopening the SAEP. Under the circumstances, a *status quo ante* remedy is capricious, unrealistic, and punitive.

## ARGUMENT

### **I. ALLIEDSIGNAL’S DECISION TO EXERCISE ITS CONTRACTUAL RIGHT TO CLOSE ITS OPERATIONS IN THE ABSENCE OF ADEQUATE GOVERNMENT FUNDING WAS NEITHER A “REFUSAL TO BARGAIN” IN VIOLATION OF SECTION 8(a)(5) OF THE NLRA NOR A “UNILATERAL TERMINATION” OF A CONTRACT IN VIOLATION OF SECTION 8(d).**

This Court has repeatedly ruled that when parties enter into a collective bargaining agreement, they should receive the benefit of the terms they negotiated. When a contract “covers” a subject and the employer has a “sound arguable basis” for its interpretation of the relevant clause, its adherence to that interpretation cannot

constitute an unfair labor practice. Any dispute over that interpretation is properly handled through the grievance arbitration machinery or a breach-of-contract lawsuit.

Here, the Board erred by refusing to recognize (1) that the Competitiveness Agreement covered AlliedSignal's decision to close the Stratford plant, thus eliminating any further obligation to bargain over that decision, and (2) that, because AlliedSignal had — at the very least — a sound arguable basis for its belief that the agreement authorized its actions, those actions could not have constituted an unfair labor practice.

**A. The Competitiveness Agreement Actually “Covered” AlliedSignal’s Decision To Close SAEP Operations, Thus Satisfying Any Obligation To Bargain About That Subject.**

**1. The Proper Inquiry is “Contract Coverage,” Not “Clear and Unmistakable Waiver.”**

As we discuss below (see point I.C, *infra*), AlliedSignal's closure decision was not a mandatory subject of bargaining. Even assuming *arguendo* that it was, however, AlliedSignal had satisfied that duty by negotiating the Competitiveness Agreement, which defined the circumstances under which AlliedSignal could terminate those operations. In finding a Section 8(a)(5) violation, the ALJ framed this as an issue of “clear and unmistakable waiver” and considered whether the Unions “waived” their right to bargain over that decision. But as this Court has

repeatedly instructed the Board, the issue is properly one of “contract coverage.” The Unions and AlliedSignal actually had bargained over the circumstances under which AlliedSignal could close SAEP operations, and the Agreement directly addressed that issue.

The duty to bargain about a mandatory subject is satisfied when the parties enter into a contract that covers that subject, even where the contract authorizes the employer to take adverse action without *further* bargaining:

“[W]hen employer and union bargain about a subject and memorialize that bargain in a collective bargaining agreement, they create a set of rules governing their future relations. . . . [N]either the Board nor the courts may abrogate a lawful agreement merely because one of the bargaining parties is unhappy with a term of the contract and would prefer to negotiate a better arrangement. . . . [Q]uestions of ‘waiver’ normally do not come into play with respect to subjects already covered by a collective bargaining agreement.” *NLRB v. United States Postal Service*, 8 F.3d 832, 836-37 (D.C. Cir. 1993) (emphasis added) (citations omitted).

Where a collective bargaining agreement covers a particular right, it is an “obvious fallacy” to contend “that there is a statutory issue apart from the contractual issue. . . . In light of contractual waiver doctrine, there is no statutory issue to be decided” under such circumstances. *American Freight System, Inc. v. National Labor Relations Board*, 722 F.2d 828, 832 (D.C. Cir. 1983).

The Board’s insistence on showing “clear and unmistakable waiver” is “inapplicable” when the question is covered by a collective bargaining agreement:

“[T]o the extent that a bargain resolves any issue, it removes that issue pro tanto from the range of bargaining. Such issue resolutions are not waivers within the meaning of the doctrine.” *Connors v. Link Coal Co.*, 970 F.2d 902, 904 (D.C. Cir. 1992). See also *Internal Revenue Service v. Federal Labor Relations Auth.*, 963 F.2d 429 (D.C. Cir. 1992). “A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union *has exercised its bargaining right and the question of waiver is irrelevant.*” *Dep’t of Navy v. Federal Labor Relations Auth.*, 962 F.2d 48, 57 (D.C. Cir. 1992) (emphasis added). See also *Conoco*, 91 F.3d at 1528; *Local Union No. 47, Int’l B’hd of Elec. Workers v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991).

This Court frequently invokes this “contract coverage doctrine” in cases where the NLRB has insisted on applying a stringent “clear and unmistakable waiver” analysis in deciding whether a contract authorized an employer to take action without further bargaining. The Court has confirmed that an employer’s *exercise* of decision-making rights that it has bargained for and specifically reserved in a contract does not constitute an unfair labor practice. The most recent example is *BP Amoco Corp. v. National Labor Relations Board*, 217 F.3d 869 (D.C. Cir. 2000), where the employer and the union had entered into a contract in which the company reserved

its rights to “amend or terminate” benefit plans “at any time and for any reason.” *Id.* at 871-72. When the employer changed the terms of the benefit plan without further bargaining, the Board upheld a charge that the employer had engaged in an unfair labor practice in violation of § 8(a)(5) of the Act. *Id.* This Court, however, nullified the Board’s order, holding that the original contract “covered” the question whether the employer had the right to modify the terms of the benefit plan unilaterally:

“Below, as in past decisions, the Board incorrectly applied a ‘waiver analysis,’ concluding that the Union had not made a ‘clear and unmistakable waiver’ of its right to bargain over health benefits. . . . Because [the employer] was contractually authorized to amend the plan unilaterally, it committed no unfair labor practice by doing so.” *Id.* at 872-874.

This “contract coverage” principle is a broad, flexible and realistic one. Indeed, this Court has *rejected* the contention that “a matter is not ‘covered by’ a negotiated agreement unless the agreement specifically addresses the particular subject matter at issue.” *U.S. Postal Service*, 8 F.3d at 838 (citations omitted). Here, however, the carefully negotiated Competitiveness Agreement specifically “covered” the issue in dispute — AlliedSignal’s right to decide, without further decision bargaining, whether circumstances warranted terminating its SAEP operations.

**2. The Agreement “Covered” The Right to Discontinue Operations and the Scope of Bargaining Relating to That Decision.**

The Agreement was negotiated because the Unions were concerned that AlliedSignal would close SAEP operations after buying Textron's engine business, especially after they intercepted the internal AlliedSignal document identifying plant closure as one of the strategic options that the Company was considering. AlliedSignal wanted to preserve freedom to make prudent business decisions and knew that, in the absence of governmental support for the AGT-1500 engine program, the plant would not be economically viable. Crucial to forestalling closure was the continued availability of federal funding that AlliedSignal considered "adequate" to keep the plant viable into the "future." Thus:

- AlliedSignal agreed to maintain SAEP operations by pursuing funds it would consider "adequate" to sustain the AGT-1500 program into the "future," but retained the flexibility to terminate operations if continued federal funding for the plant proved insufficient to render the plant economically competitive. JA 1068.
- The Unions agreed that AlliedSignal had the right to decide to "terminate" the Agreement, close SAEP operations and move remaining work elsewhere, if AlliedSignal concluded that neither federal appropriations nor alternative funding sources would be "adequate" to support the "future" of the plant. JA 1068.
- The parties agreed that only "*effects*" or "*impact*" bargaining would be necessary following AlliedSignal's notice that it had decided that the conditions to further operations had failed and that it was exercising its termination rights. JA 1065,1067.

These contractual provisions make clear that the Agreement covered the subject of "terminating" the Agreement and closing SAEP operations without any

further “*decision*” bargaining. The Agreement made a condition to continued operations the receipt of federal funding in an “amount considered by AlliedSignal to be adequate to support the future of the Stratford plant.” Section 6 then expressly stated that if Congress did not appropriate amounts AlliedSignal considered “adequate” in any future budget, then

“at any time after such next enactment of a federal budget, AlliedSignal may terminate this Competitiveness Agreement.”

It is difficult to imagine a contract spelling out an employer’s right to make a decision more clearly than this provision does. Moreover, Section 6 also specified:

“Such termination shall be *accomplished* only upon notice given by AlliedSignal to the Union in writing no less than ninety days before the *intended effective date* of such termination.” (Emphasis added.)

This provision could not be clearer in signifying that the termination was “accomplished” upon the giving of notice at least ninety days before AlliedSignal “intended” to make the termination “effective.” Only the most fatuous interpretation of this text could suggest that the Agreement preserved a right to bargain about *whether* AlliedSignal should decide to terminate the Competitiveness Agreement.

Finally, the Agreement also “covered” the limited type of bargaining that would be necessary, if AlliedSignal decided that closure was warranted. Sections 4, 5 and 6 of the Agreement expressly provided for “effects” or “impact” bargaining — but only for such limited bargaining. An earlier Union draft of Section 4 would have

reserved the Union’s right to engage in *decision* bargaining under such circumstances. JA 894; JA 150-52. AlliedSignal rejected that provision and it was not incorporated in the final draft. The distinction between “decision” bargaining and “effects” bargaining is well-settled and well-understood. See *First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The presence of three clauses — one in the termination provision itself — simply preserving the opportunity for “effects” bargaining, if AlliedSignal decided to close the plant, leaves no fair room for doubt about the Agreement’s “coverage” of the *decision* whether to close Stratford operations. Therefore, Section 8(a)(5) of the NLRA did not block AlliedSignal from making that decision without *further* bargaining.

**B. Since AlliedSignal Had A Reasonable Basis For Interpreting The Competitiveness Agreement As Entitling It To Close SAEP Operations, The Board Erred In Applying Its Own Interpretation Of That Contract To Find A Violation Of Section 8(d).**

Moreover, under settled law, any reasonable doubt about the scope of the Agreement’s coverage of AlliedSignal’s rights barred the Board from finding an unfair labor practice. The “contract coverage” doctrine dovetails with a related principle: an arguably reasonable interpretation and application of a collective bargaining agreement cannot constitute an unfair labor practice.

In *NCR Corp.*, the Board acknowledged that the NLRA does not transform a breach of a collective bargaining agreement into an unfair labor practice. Because

“[t]he Board is not compelled to endorse either of . . . two equally plausible interpretations of the contract’s operation,”

“where ‘an employer has a *sound arguable basis* for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it,’ the Board will not enter the dispute to serve the function of arbitrator in determining which party’s interpretation is correct.” *Id.*, 271 NLRB at 1213 (emphasis added) (quoting *NLRB v. Vickers, Inc.*, 153 NLRB 561, 570 (1965)).

The Board has followed *NCR* as correctly stating its limited power to examine the terms of collective bargaining contracts. See, e.g., *Thermo Electron Corp.*, 287 NLRB 820 (1987).

Thus, the Board here overstepped its limits by transforming a contract dispute into an unfair labor practice. It lacked authority to premise a Section 8(d) violation on a contract interpretation that overrode AlliedSignal’s reasonable interpretation of its contractual obligations. As both the ALJ and dissenting Member Hurtgen recognized, AlliedSignal had — at the very least — a “sound arguable basis” for its interpretation of its rights and duties under the Competitiveness Agreement. Indeed, even the two Members in the majority did not find to the contrary. Rather, they simply undertook to interpret the contract differently, declaring that *in their view* the Competitiveness Agreement required AlliedSignal to make some kind of formal “application” for adequate Government funding for a plant the Government itself had doomed. This analysis deprived AlliedSignal of the benefit of its negotiated contract.

## 1. AlliedSignal's Interpretation of the Competitiveness Agreement Had a "Sound Arguable Basis."

The ALJ expressly declined to resolve the contract issue on the basis of the credibility of the parties' conflicting testimony about what they intended. Instead, he looked to the face of the Agreement. *AlliedSignal I*, slip op.12 [JA 14]. He found that AlliedSignal had at least the requisite "sound arguable basis" for concluding that it had done enough under the contract to warrant its business judgment that Congress would not allocate further funding which the Company would consider "adequate" to "support the future" of the plant. Member Hurtgen expressly agreed with this approach.

The Agreement furnished AlliedSignal with ample support for its position on the two critical issues: First, there had to be an "adequate" appropriation of federal funds for *each* year during the Agreement, not simply the *first* year. Second, AlliedSignal's failure to convince the Army to continue the AGT-1500 engine program and its failure (in conjunction with the Unions and the Connecticut congressional delegation) to get SAEP removed from the final base closure decision satisfied whatever obligation it had to "apply" for adequate future funding.

On the first question, both the purpose and the text of the Agreement showed that "competitive" viability into the "future" meant that amounts AlliedSignal regarded as "adequate" had to be appropriated for *each* year of continued operations.

Otherwise the Agreement made no sense. JA 356-57, 360. In referring to the right to close the plant if a congressionally enacted budget did not include adequate funding, Section 6 reserved AlliedSignal's right to give notice of termination "at any time after such next enactment of *a* federal budget." If AlliedSignal's termination right could be exercised only if the Company failed to obtain adequate funding in the FY 1995 budget, the Agreement would have so provided and not spoken, in open-ended terms, of enactment of "*a* federal budget" containing inadequate funding.

The Board majority dealt with the second issue by declaring that AlliedSignal had a contractual obligation to make some kind of formal "application" for federal funding and did not establish that formal "application" would have been "futile." As we explain in greater detail in Point II below, that distortion of the contract suffers from several fatal defects. The Board took the "make application" language out of context: the phrase refers to funding for the AGT-1500, an engine program that the Army had decided to discontinue. As the testimony established without contradiction, see JA 480, and as this Court knows, there is no formal "application" process for congressional appropriations. So when (1) the Army decided to discontinue the AGT-1500 engine program at Stratford and not to request further congressional appropriations for the program, (2) the BRAC closure decision became final, and (3) AlliedSignal (as well as the Unions and the Connecticut delegation)

failed in repeated efforts to convince the Army to change its mind about the AGT-1500 and to convince the Administration and Congress to save SAEP, AlliedSignal had made whatever “application” was called for.

Thus, any official or institution in Washington fairly appraising the situation would agree with Member Hurtgen that further efforts to secure continuing, massive appropriations for several years would get nowhere — and, indeed, should get nowhere in light of the anti-“pork barrel” purpose of the statutory base closure process. As Member Hurtgen vividly put it, once the Government finally decided to abandon the AGT-1500 and to close SAEP, despite AlliedSignal’s efforts, AlliedSignal was entitled to conclude that it simply was “not in the cards” that Congress would appropriate another \$30 million or more for several more years to support an engine or a plant that it no longer needed or wanted. *AlliedSignal I*, slip op.8. The \$51 million in annual funding that AlliedSignal had expected to make the plant viable simply was not going to be available, and AlliedSignal had the right to exercise its contractual option of closure based on that eminently practical conclusion.

In any event, AlliedSignal had at least a “sound arguable basis” for concluding that the Agreement required no more. The two-Member majority never suggested that AlliedSignal lacked even an *arguable* basis for its interpretation of its contractual

rights. Instead, they simply reached a different interpretation of what — in their view — the Competitiveness Agreement “really” meant. That approach overstepped the Board’s lawful authority.

**2. The Board’s Departure from its Own Precedent Constitutes an Abuse of Discretion.**

The Board’s failure to apply the “sound arguable basis” standard of review irreparably tainted its decision. “Divergence from agency precedent demands an explanation; where no reasonable explanation is provided, [this Court has] no choice but to vacate the decision under review.” *Internal Revenue Service*, 963 F.2d 429 at 434; see also, *e.g.*, *Dep’t of Navy*, 962 F.2d at 55.

The Board’s only explanation for its decision to interpret the contract *de novo* rather than to apply the *NCR* “sound arguable basis” standard was its view that “the issue of whether the Respondent could lawfully cancel the CA” was “situated at the threshold of matters going to the heart of the collective-bargaining relationship.” *AlliedSignal I*, slip. op 4 & n.7 [JA 6&n.7]. This is an irresponsibly spongy test for abandoning *NCR* and inserting the Board into the business of construing contracts to see whether they have been breached. Cf. *Detroit Typographical Union v. National Labor Relations Board*, 216 F.3d 109, 118 & n.4 (D.C. Cir. 2000) (criticizing Board for using vague and boilerplate language to justify its result: “[T]he Board throws in the phrase . . . that implementing [a] merit pay proposal after impasse was ‘inherently

destructive’ of collective bargaining. If that is meant to provide an alternative rationale for the holding it will not do.”).

Any conceivable contract dispute may be described as being on the “threshold of matters going to the heart of the relationship between the parties.” Certainly any contractual clause giving one party or the other the right to cancel the agreement under defined circumstances would fall into this category. But in Section 8(d) Congress only gave the Board the authority to decide whether a party “unilaterally” terminated or modified a contract *without* bargaining. Where the parties *have bargained* for a specific clause, such as a termination clause, *NCR* and numerous cases recognize that Congress left it to the courts, not the Board, to decide whether a party exceeded its *contractual* rights by invoking that clause or failed to satisfy all of the contractual “prerequisites” to exercising that right. The majority’s approach would eviscerate *NCR* and its progeny and permit the Board to convert any contract dispute into an unfair labor practice proceeding.

**C. AlliedSignal’s Closure Decision Was Not A Mandatory Subject of Bargaining.**

Finally, Sections 8(a)(5) and 8(d) only apply to unilateral decisions relating to mandatory subjects of bargaining. In *First Nat’l Maintenance*, however, the Supreme Court held that an employer has no duty to bargain with a union over the decision to shut a specific work site, when the decision involves “a change in the scope and

direction of the enterprise . . . akin to the decision whether to be in business at all.” *Id.*, 452 U.S. at 677. Such fundamental decisions are not primarily “about conditions of employment, though the effect of the decision may be necessarily to terminate employment.” *Id.* Accordingly, the Court carved out an area of management decision-making that is “free from the constraints of the bargaining process.” *Id.* at 678. See also *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 220 (1964) (Stewart, J. concurring); *Dubuque Packing Co., Inc.*, 303 NLRB 386 (1991), *aff’d sub nom United Food & Commercial Workers Local 150 v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), cert. granted, 511 S. Ct. 1016, cert. dismissed, 511 U.S. 1138 (1994).

Despite AlliedSignal’s reliance on this objection, the Board majority ducked the controlling inquiries. It simply asserted that the Competitiveness Agreement “was the product of collective bargaining on a mandatory subject.” *AlliedSignal I*, slip op. 4 [JA 6]. It dismissed the *Dubuque Packing* analysis in a footnote, declining to “evaluate whether the Respondent’s decision to relocate the remaining work to Phoenix was a mandatory bargaining subject.” *Id.* at 4 n.6 [JA 6]. Instead, the majority declared — in notably circular reasoning — that the Board only needed to decide whether the terms of the Competitiveness Agreement itself created a “mandatory” commitment “which effectively precluded the Respondent from consideration of such a decision during its term.” *Id.*

That analysis fundamentally distorted the coverage of the NLRA and overstepped the Board’s jurisdiction. As the majority acknowledged, a party can only violate Sections 8(a)(5) and 8(d) of the NLRA if it “unilaterally modifies or terminates contract provisions *which are mandatory bargaining subjects*” — the “terms and conditions of employment.” *Id.* at 3 [JA 5] (emphasis added). But if an employer and union elect to contract on other, non-mandatory subjects, a violation of their contractual obligations constitutes a breach of contract actionable in court but not a unfair labor practice within the Board’s purview. *Allied Chem. & Alkali Workers of Amer. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 183-86 (1971); *C & C Plywood Corp. v. National Labor Relations Board*, 385 U.S. 421, 427 & n.12 (1967).

Therefore, the Board had to consider more than whether there was a “contract” in question but whether the *subject* of the alleged obligation was a “mandatory subject of bargaining” within the meaning of the NLRA. Under the *Dubuque Packing* test for determining whether an employer is obligated to engage in “decision bargaining,” the initial burden is on the Board’s General Counsel, who must demonstrate that the employer’s decision is “unaccompanied by a basic change in the employer’s operation.” 303 NLRB at 391. As this Court has emphasized, however,

“the employer can defeat the complaint if it can prove that labor costs were not a factor in its decision or — and this is a crucial ‘or’ — that the

Union could or would not have made sufficient concessions to have altered the employer's decision." *Rock-Tenn Co. v. NLRB*, 101 F.3d 1441, 1443 (D.C. Cir. 1996) (citing *Dubuque Packing*, 1 F.3d at 30).

Here, the General Counsel failed to make out a *prima facie* case. AlliedSignal's decision to relocate remaining engine operations from Stratford to Phoenix resulted from *three* simultaneous and crucial changes in the nature of the Stratford operation: (1) the sudden loss of Government support for the SAEP's tank production business, (2) the impending closure of the Government facility itself, and (3) AlliedSignal's failure to secure the commercial common core engine business, which had been the primary source of AlliedSignal's hopes for commercial development of the plant. Under such circumstances, the decision to close SAEP operations cannot be deemed a mandatory subject of bargaining. See, e.g., *First Nat'l Maintenance*, 452 U.S. at 680, 688 (decision to "shut down part of a business" constitutes "a significant change in [the employer's] operations, a change not unlike opening a new line of business or going out of business entirely"). There was simply *no* evidence to support a finding that the Government's withdrawal of support from an *Army* engine program and a Government-subsidized plant did not effect a basic change in that plant's business.<sup>3</sup>

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<sup>3/</sup> The ALJ was myopically unrealistic in asserting that AlliedSignal's decision did "not involve any change in products, customers, or methods of production." *AlliedSignal I*, slip op.13 [JA 15]. SAEP's biggest customer — the

Moreover, even if the General Counsel had met his burden, AlliedSignal's evidence that SAEP labor costs were not a factor in its decision, *or* that, in any event, union concessions could not have been sufficient to change the decision, was more than adequate rebuttal. According to the record, in deciding to consolidate its engine operations in Phoenix, AlliedSignal did not consider labor savings. Instead, it focused on substantiated and reasonable *overhead* savings estimated to be \$30 million per year. Its figures were corroborated by the testimony of an independent financial analyst. JA 538. Neither the General Counsel nor the Unions put forth any evidence that any component of these savings involved a significant difference in *labor*-related costs between Phoenix and Stratford. See JA 149. Nor did they present their own financial expert to dispute AlliedSignal's figures. Uncontradicted testimony showed that labor expenses were so similar in Stratford and in Phoenix that labor savings could not have driven the relocation decision. See JA 94,149.

In any event, the Unions could not have made labor-cost concessions that would have nullified the \$30 million saving in overhead that AlliedSignal projected from consolidating the remaining engine business with its Phoenix operations.

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federal Government — was no longer willing to buy or support the AGT-1500, the plant's principal product, and decided to close the plant and cut off its \$51 million annual federal subsidy. Cf. *Holmes & Narver*, 309 NLRB 146, 147 (1993) (cessation of contractual relationship with a major customer is hallmark of “change in the scope and direction of the enterprise”).

AlliedSignal never suggested that labor cost reductions or other contract changes could bridge the gap. JA 194; JA 455-56,457,459-63,486,500-13,514-16,537-38; SA 1129. As a matter of logic and economics, the Unions would not have been able to make the concessions necessary to keep the plant open. The parties stipulated that annual labor costs for both Unions at SAEP totaled \$61 million. In order to make up the estimated savings, the Unions would have had to agree to a 50% reduction in wages and benefits. No Union witness suggested that the Unions were prepared to discuss such an improbable proposal.

In *Dubuque Packing*, the Board illustrated this defense by positing a case in which an employer “would not remain at the present plant because the costs for modernization of equipment or environmental controls were greater than the value of any labor cost concessions the union could offer.” 1 F.3d at 31, quoting 303 NLRB at 391. See also *Kaumagraph Corp.*, 316 NLRB 793 (1995) (futility defense satisfied because union would have had to make unrealistic concessions in order to change employer’s mind). The facts of this case fit those of the Board’s examples to a “T.”

**II. THE BOARD ERRED IN CONCLUDING THAT ALLIEDSIGNAL WAS CONTRACTUALLY BOUND TO MAKE FURTHER “APPLICATIONS” FOR FUNDING FOR A DOOMED FACILITY.**

When AlliedSignal exercised its right to terminate the Competitiveness Agreement in accordance with Section 6 of that contract, it did not “modify” or “repudiate” the Competitiveness Agreement. It merely exercised its rights according to the express terms of the Agreement and thus was *enforcing* a right the Agreement articulated. Good-faith interpretation of a cancellation clause is not a unilateral “termination or modification” of the contract within the meaning of Section 8(d). Even if it were appropriate in a Board proceeding to inquire whether AlliedSignal “breached” its contract, the answer would be that it did not.

**A. The Court Must Review *De Novo* The Board’s Interpretation Of The Agreement.**

The Board’s interpretation of the Competitiveness Agreement must be reviewed *de novo*; no deference is granted to the Board’s interpretation of a contract. *Conoco Inc.*, 91 F.3d at 1525. The rationale for this policy “is not simply that contract interpretation simpliciter has traditionally been thought to be peculiarly within the expertise of the judiciary,” *Local Union No. 1395, Int’l Bh’d of Elec. Workers v. NLRB*, 797 F.2d 1027, 1030 (D.C. Cir. 1986):

“Congress has authorized the courts independently to entertain suits brought to enforce collective bargaining agreements under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (1982), and has directed them to formulate the principles of federal contract law to be applied in these suits. If deference were afforded the Board’s interpretation of collective bargaining agreements, the Board would be free to apply different (if sufficiently reasonable) standards of interpretation than those applied by the courts in

Section 301 suits. That result would surely undermine the voluntary collective bargaining process that lies at the heart of federal labor policy.” *Id.*

*De novo* review is particularly appropriate here, because the ALJ disclaimed any attempt to resolve the contract interpretation issue on the basis of the credibility of the witnesses. Even the two-Member majority of the Board reversing the ALJ’s conclusion on the contract interpretation did not purport to make any “credibility” findings on the cold record.

**B. AlliedSignal Satisfied Its Contractual Obligation To “Apply” For Funding When It Sought To Overturn The Army’s Termination Of The Tank Engine Program And The Proposal To Close SAEP.**

The Board’s conclusion that AlliedSignal breached its obligations under the Competitiveness Agreement cannot stand and thus cannot provide the predicate for treating a contract breach as creating an unfair labor practice.

**1. The Board’s Construction of Section 6’s Prerequisites To Termination Is Irrational And Unsupported.**

The Board rested its decision on its view that AlliedSignal “was not privileged to terminate the Competitiveness Agreement when it did because it had not satisfied certain provisions of section 6 of that agreement which were a prerequisite to early termination.” The Board found that AlliedSignal failed to satisfy those provisions by:

(a) failing to make a formal “application” to the federal government for fiscal 1996

funding; and (b) failing to identify a financial amount that it considered “adequate” from the federal government. Neither of those conclusions is justified.

The Agreement had two prerequisites for termination. It required AlliedSignal to apply for federal funding adequate *to support the AGT-1500*; if “active procurement of that engine should cease” — as it did in February 1995 — AlliedSignal was required to work with the Union to obtain “adequate financial arrangements from either the federal government or some other alternative governmental source.” JA 1068. AlliedSignal satisfied the first obligation by lobbying the federal government to continue production of the AGT-1500 and remove SAEP from the BRAC list. It satisfied the second obligation by identifying a \$30 million shortfall and working with the Unions and local authorities to secure adequate funding from alternative state and local sources. Only after *both* of these efforts failed did AlliedSignal announce its intention to terminate the Agreement and close SAEP.

- a. AlliedSignal satisfied the “application” requirement when it lobbied the Government to continue the AGT-1500 engine program and remove SAEP from the base closure list.**

In concluding that AlliedSignal had improperly terminated the Agreement, the Board majority faulted AlliedSignal for not making a formal “application” for

adequate, future funding pursuant to Section 6. That conclusion, however, rested on a plain misinterpretation of the requirement and an equally plain disregard for AlliedSignal's actions.

(i) ***AlliedSignal “applied” for funding to support the AGT-1500 engine.***

The majority inexcusably misconstrued the “make application” requirement by misquoting the Agreement. Section 6 actually provided:

“Should AlliedSignal purchase [Textron’s] assets, AlliedSignal intends to make application to appropriate officials of the United States Government for financial arrangements in an amount considered by AlliedSignal to be adequate ***to support the future of the Stratford Plant by AlliedSignal on a standby basis for the production of the AGT-1500 engine, if active procurement of that engine should cease.***” JA 1068 (emphasis added).

The Board, however, described AlliedSignal’s undertaking as if it were a sweeping, open-ended commitment, paraphrasing the actual text and substituting ellipses for the crucial limitation highlighted above:

“Thus, the Respondent was required ‘to make application to appropriate officials of the United States Government for financial arrangements in an amount considered by AlliedSignal to be adequate . . . .’” Slip op.4-5 [JA 6-7].

This revision of the parties’ actual Agreement diverted the Board’s focus from the limited nature of AlliedSignal’s commitment: to pursue adequate funding *for the AGT-1500 engine*, at least in an amount “adequate” to keep the plant viable on a standby basis, as the Army’s Blue Ribbon Panel had recommended in 1994.

But in February 1995 the Army decided to discontinue procurement of the AGT-1500 engine and *not* to provide any standby funding. It also proposed closing SAEP entirely rather than keeping it “warm.” AlliedSignal responded by doing what it had committed to do in Section 6: “applying” to the “appropriate” Government officials to make adequate funding available for the AGT-1500 program, the key to SAEP’s economic viability.

For example, as soon as DoD recommended to BRAC in early 1995 that SAEP be closed, DoD wanted to block actual expenditure of the \$47.5 million that Congress had *previously* appropriated for fiscal 1995 for the engine program. AlliedSignal’s representatives spent the summer of 1995 working with the Unions and with local and federal government officials successfully securing release of those appropriated funds. AlliedSignal also persisted — unsuccessfully — with efforts to persuade the Government that it needed the AGT-1500 and to get SAEP off the closure list, and thus to retain the foundation for future funding. JA 27; JA 88-89,91,443-48,489,490-91,950. These efforts to persuade the Army to reinstate the AGT-1500 engine program *constituted* the requisite “application” for funding specified in the Agreement.

The Board simply asserted that AlliedSignal did not “apply” for FY 1996 funding. But the Agreement did not specify any formal “application” process. As the

Court knows, there is no formal “application” process by which a private party seeks congressional appropriations for federal subsidies. What AlliedSignal actually did before exercising its termination rights satisfied any reasonable construction of the Agreement. It repeatedly sought the funding it had agreed to pursue. Those “applications” simply failed.

**(ii) *Any further “application” for additional funding for the doomed plant would have been pointless.***

After AlliedSignal tried but failed to persuade the Government to support the AGT-1500 and to remove SAEP from the closure list, it became clear that substantial *future* funding for a discontinued engine program at a doomed plant would not be forthcoming. Assistant Secretary of Defense Durant stated publicly that, as a result of BRAC’s decision, SAEP would receive no more funding. JA 90,126-27

“This is pure pork . . . . I do not support going forward with any future monies on this basis because you guys are on BRAC.” JA 438-39; see also JA 473.

Both AlliedSignal and the Unions testified that the Army referred to any further appropriations for SAEP as “pork.” JA 88,127. General Adams of Tank Command stated that the Army even wanted to reallocate *previously* appropriated SAEP funds to other programs. JA 431. Although the parties eventually secured release of those *previously* earmarked appropriations, AlliedSignal’s site manager explained why seeking additional, future funding was aimless:

“We felt from the discussions that we had through the Department of Defense officials, Department of Army officials, the program officer and the actual Commander of the United States Tank Command, that they were all in agreement and falling in lines [sic] with the recommendations of the DoD Comptroller that they would not support the release of — not support the inclusion of future funds in the budget.” JA 517.

Similarly, the president of AlliedSignal Engines testified:

“There were a number of activities going on with both the military and the Congress to try to . . . continue to get funding . . . . [W]e continued to try. It became patently clear that it was an unacceptable position with the Army, so at some point, we gave up.” JA 480. See also JA 490-91.

Significantly, the Board majority never explained what sort of “application” they thought the Agreement required *beyond* the efforts AlliedSignal had made to save the AGT-1500 program and to remove the plant from the closure list.

Common sense shows that *additional* efforts by AlliedSignal to “apply” for substantial appropriations for fiscal 1996 and later years were pointless and hardly a matter of contractual obligation. The BRAC report to the President explained why it made sense to shut down the SAEP. It described the community reaction to the Army’s proposal but concluded that there was no continuing need for the AGT-1500 or for federal subsidies for SAEP. BASE CLOSURE AND REALIGNMENT REPORT, March 1995, at 52. Connecticut’s congressional delegation had lobbied heavily both for removing the SAEP from the BRAC list and for allocating 1996 funding, but they failed. JA 91,135,474.

Moreover, even if AlliedSignal had been able to get some funding for fiscal 1996, that would not have sufficed. The Agreement expressly depended on Government funding that AlliedSignal considered “adequate” to sustain the “*future*” economic viability of Stratford *for production of the AGT-1500*. The whole purpose of the BRAC process, however, was to avoid politically driven expenditures for facilities and programs that did not serve the Nation’s defense needs. Indeed, neither the Unions nor the Board pointed to any evidence, or to anything in the public record, suggesting that *any other facility ever* placed on the base closing list had received multi-million dollar appropriations for new contracts or operations. Therefore, it was entirely realistic for AlliedSignal management to conclude that “adequate” funding for fiscal 1996 or later years for AGT-1500 was “not in the cards,” as Member Hurtgen put it, when Congress was deciding to allow the Army to shutter SAEP.

Without explaining where a “futility” standard came from, the Board majority speculated that it might not necessarily have been “futile” for AlliedSignal to have continued to seek further funding for SAEP. The majority noted that, despite the initial resistance of DoD, AlliedSignal ultimately did secure the *release* of funds *already appropriated* for 1995. They also observed that the Defense Science Board had, in 1994, recommended that the AGT-1500 program at SAEP be supported on a standby basis. *AlliedSignal I*, slip op.1,5 [JA 3,7]. But as Member Hurtgen’s dissent

recognized, (1) the release of already appropriated funds is distinct from an attempt to secure new, continuing appropriations for a facility already marked for closure and for an engine program that Congress was allowing the Army to switch to another model and manufacturer; and (2) the 1994 recommendation of the Defense Science Board was mooted by the Army's subsequent decision to switch to a different type of tank engine and by Presidential approval of BRAC' recommendation to close the plant.

As the reaction of the Army illustrated, the decision to place a facility on the closure list rendered further programmatic funding virtually impossible. The structure of the 1990 BRAC process shows why. The entire base closing process was designed with efficiency and finality in mind. See H.R. Conf. Rep. No. 923, 101<sup>st</sup> Cong., 2d Sess. 706 (1990), 1990 U.S.C.C.A.N. 3258 (new process intended to expedite closures).<sup>4</sup> The President's decision to accept the Commission's recommendations effectively meant that SAEP would be closed and the appropriations faucet was being shut off.

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<sup>4/</sup> One of the Act's architects explained: a "huge advantage to this base closing procedure is that it allows a base closing decision to be made with some finality. . . . Under this procedure, . . . all the communities affected [have] a chance to thoroughly make a case for their base. Now, this time of deliberation will come to an end and the decision will be made. At this point communities can roll up their sleeves, pull together, and find the best way to adjust to the base closure." 137 Cong. Rec. H6008 (daily ed. July 30, 1991).

The Board majority also argued that, because the base closing process is not instantaneous, AlliedSignal should have sought some kind of continuing funding for SAEP so AlliedSignal could work on converting the plant to civilian use. *AlliedSignal I*, slip op. 3 [JA 5]. Of course, that kind of initiative was way outside anything Section 6 required.

Moreover, although the statutory timetable governing base closures provided for as much as a six-year *transition* period, Member Hurtgen explained that a delay in actual closure could not have had any relevant effect in preserving “adequate” funding for “business as usual” at SAEP. *Id.* at 8 [JA 10]. The *transitional* provisions of the 1990 Act simply did not authorize funding on a level that would even have approached the scale needed, in AlliedSignal’s contractually controlling judgment, to maintain operations at Stratford. The Act did not contemplate that Congress would continue to appropriate substantial funds over several years to maintain a high level of activity at facilities that are being closed down and to support programs that have been canceled. Nothing in the Act authorized DoD to subsidize a contractor’s civilian commercial operations to enable it to compete effectively with other manufacturers. Rather, the Act only authorized minimal transitional funding to wind down the targeted facilities as promptly as possible. See §§ 2905(a)(1), (b), 2906. Indeed, the 1990 Act did not even provide the DoD with *additional* funding

to carry out this limited function, and Congress forbade the use of other DoD funds to facilitate base closures. See §§2906(a)(2)(A), (B), (C), 2909(b).

A community affected by a base closing or realignment could seek funding from the DoD for assistance in transitional planning and facility redevelopment. Within the DoD, for example, the Office of Economic Adjustment provided monetary grants of up to *a maximum* of \$1 million a year for five years, in order to facilitate local community planning. See 10 U.S.C. § 2391. Generally, however, the nature of federal, state and local assistance depended on the redevelopment plans initiated by the affected community.

Thus, the funding and assistance available from governmental sources during the transitional period of base closure would not have approached the magnitude necessary to sustain SAEP as a commercially viable economic operation for the indefinite future. There was no genuine possibility that an “application” by AlliedSignal for continued funding would have reached the level AlliedSignal viewed as the minimum level of annual funding “adequate” to keep the plant afloat — \$30 million. Any speculation to the contrary was utterly arbitrary and unfounded.

Finally, the majority’s speculation on this subject deserves no deference. Congress did not assign the Board any role in supervising base closure decisions. The record does not reveal that the Board has any experience with the federal fiscal

consequences of BRAC closures or with any congressional willingness to continue massive subsidies for facilities being closed as unwarranted drains on the federal Treasury. Nor were the two Members of the Board in a better position than AlliedSignal's management to assess whether further efforts to secure congressional funding were likely to yield "adequate" appropriations for several years more. AlliedSignal's government marketing and government relations professionals were deeply enmeshed in the fray. They made a reasoned and reasonable judgment that the game was over, even if time had not completely run out. And under Section 6 of the Agreement, it was AlliedSignal's judgment that was to control.

**b. AlliedSignal notified the Unions that the anticipated *annual* shortfall was at least \$30 million and worked with the Unions to seek alternative funding.**

Nor did AlliedSignal breach the Agreement by failing to tell the unions how much money was needed from other sources to keep SAEP viable. AlliedSignal told the Unions that an annual subsidy of at least \$30 million would be required to keep SAEP open after the BRAC decision, and the Unions acknowledged that amount. JA 129,301-02,353-54,452-53,464-65. Local 1010's president, Dave Kelly, testified that, after the BRAC Commission's decision was announced, AlliedSignal's Site Manager stated at a meeting of all SAEP employees that the government's decision

created “a \$30 million hole” and “unless they could find a way to make up the \$30 million, this was what was driving the company’s decision.” JA 129.

Testimony that the shortfall might have been *greater* than this amount, see JA 461-62, does not negate the crucial fact that AlliedSignal notified the unions that there was an identifiable, substantial shortfall and no realistic chance of bridging it. See JA 472. As described in detail *supra*, management spent the summer of 1995 working with the Unions, Connecticut’s congressional delegation, and local officials in an exhaustive search for financial support. JA 91,135,139-40,179-84,185-86,188-90, 301,451-52,474. But the parties’ efforts to generate alternative funding never uncovered more than \$2.5 million in conditional loans. Indeed, the Board itself recognized that the Unions and local officials had failed to identify “alternative government funding at the state and local level to cover the \$30 million [annual] shortfall” that AlliedSignal had determined. *AlliedSignal I*, slip op.3 [JA 5].

Therefore, there was no basis to conclude that AlliedSignal had failed to perform its secondary obligation under the Agreement to give the Unions fair notice of the shortfall that had to be made up, lest AlliedSignal have the right to terminate SAEP operations.

**2. Government Decisions Triggered AlliedSignal’s Right Under the Competitiveness Agreement To Make Economically Rational Choices About Future SAEP Operations.**

The Board's statement that "[t]he essential design of the CA was the protection of unit work," *AlliedSignal I*, slip op.3 [JA 5], missed the point. Section 6 of the Agreement stated that "best efforts" were to be used to obtain funding "in an amount considered by AlliedSignal to be adequate" to support the future of the Stratford plant. The Agreement recognized AlliedSignal's right to terminate its commitments regarding "unit work," if the Government decided not to continue funding the engine program at a level AlliedSignal in its discretion considered "adequate" for the "future." From the outset, AlliedSignal's goal was to make a success of the plant but to refrain from guaranteeing any particular level of employment and to reserve the option of terminating SAEP operations, if the plant proved unprofitable. JA 80-81,252-53,254-56,328.

After the Agreement was executed, the Army decided to switch to a different type of tank engine made by a different company. The Army insisted that it would not request any future appropriations for the AGT-1500 made at SAEP and stated that the \$51 million in annual funding previously recommended by the Blue Ribbon Panel would not be forthcoming. Then the BRAC Commission, the President and the Congress decided to close SAEP. AlliedSignal tried to get those decisions changed and to keep adequate funds flowing to SAEP. It failed. The Government agencies

with control over the funds remained intransigent about the future of the tank engine and the plant.

AlliedSignal, therefore, was well within its rights under the Agreement to determine that there was no realistic possibility that Congress would “adequately” fund future production of the AGT-1500, an engine the Army did not want, and thus maintain SAEP’s economic viability.

**C. It Was Arbitrary And Capricious For The Board To Find That AlliedSignal Committed An Unfair Labor Practice By Declining To Pursue Substantial Additional Congressional Appropriations To Support A Facility That The Government Had Made A Final Decision To Close As Unnecessary And Inefficient.**

The 1990 BRAC Act was designed to protect the public fisc against pork-barrel expenditures. It established an orderly procedure by which the Government could close facilities that did not serve national defense policy. See Pub. L. No. 101-510, § 2901(b), 104 Stat. 1808 (1990). The Department of Defense had published the criteria for closure when the decision was made to close SAEP. 59 Fed. Reg. 63769. Those criteria required the Commission to evaluate the military significance of a facility, its cost effectiveness, and the community impact of closure.

Therefore, when the DoD made its decision to propose closing SAEP, DoD made the reasoned decision that the plant was inefficient and unnecessary and that the savings to be achieved by closure *outweighed* any negative impact on the community.

Cf. *Specter v. Garrett*, 971 F.2d 936, 943 (3d Cir.) (1990 Act reflects “Congress’ sensitivity to the impact of a base closing on the employees of the base and the community in which they live”), vacated on other grounds, 506 U.S. 969 (1992). Here, Union president Kelly testified that the Unions and the community were given ample opportunity to testify before the Commission before its SAEP decision became final. JA 111. In approving the DoD’s recommendation, the Commission, the President, and the Congress all concurred that it was not in the national interest to spend public funds to maintain the facility.

The Board’s decision in this case offends the BRAC statutory policy. But the Supreme Court has cautioned the Board against enforcing the labor laws without regard to the impact of its decisions on other statutory policies:

“[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.”

*Southern S.S. Co. v. National Labor Relations Board*, 316 U.S. 31, 47 (1942). This Court similarly has insisted that, when a federal agency chooses to place the objectives of its organic statute above those of another federal statute, it must explain how it arrived at that result:

“The [agency] must adequately explain not only why its interpretation is consistent with [its own statute], but also why it accomplishes the accommodation required (or, alternatively, why no accommodation is possible), and why any alternative, more accommodating interpretations were rejected.” *New York Shipping Ass’n, Inc. v. Federal Maritime Comm’n*, 854 F.2d 1338, 1365 (D.C. Cir. 1988).

Moreover, the conclusions reached by the agency in performing this analysis are entitled to no deference from the reviewing court:

“In order to [conduct this analysis], the [agency] must identify the relevant . . . policies that are to be accommodated, a task quite clearly beyond [its] claim of expertise and outside *Chevron’s* rationale for deferential review. Hence, we give no special deference to its interpretation and identification of those policies.” *Ibid.*

Here, of course, the Board conducted no such analysis. It failed to give the policy objectives of the 1990 Act any consideration at all. Since Congress assigned the NLRB no role in supervising the implementation of the Base Closure Act, the Board’s effort to superimpose labor-protective provisions deserves no judicial deference. It was arbitrary and capricious for the Board to construe what was, at worst, an ambiguous labor contract to force an employer to persist in lobbying Congress to pour good money after bad and thus to undercut the federal policy embodied in the 1990 Act.

The Board’s strained effort to find fault with AlliedSignal’s reasonable response to the economically driven decision of the National Government unmistakably undermines the strong federal policy established by the 1990 Act. That

is precisely the effect of finding that AlliedSignal committed an unfair labor practice by abandoning further efforts to lobby Congress to spend tens of millions of dollars to bail out what DoD regarded as a wasteful and superfluous military facility.

### **III. THE BOARD'S "REMEDIAL" ORDER SHOULD NOT BE ENFORCED.**

For all of the foregoing reasons, it should be unnecessary to consider the question of "remedy." But the remedy the Board majority ordered underscores their other-worldly approach to this dispute. Under any circumstance, the Court should deny enforcement of those portions of the Board's order that would require AlliedSignal to reopen SAEP and restore work there.

Specifically, paragraph 2(b) of the Board's order requires that AlliedSignal take the following "affirmative action":

**"In the event that bargaining unit work has been transferred or subcontracted, or equipment necessary for such bargaining unit work has been transferred or relocated, to the Respondent's Phoenix, Arizona facility or to other locations, as a consequence of the Respondent's premature termination of the competitiveness agreement, *return such work and/or such equipment to the Respondent's Stratford, Connecticut facility.*" *AlliedSignal I*, slip op.7 [JA 9] (emphasis added).**

Paragraph 2(c) requires the Company to reinstate employees to their former positions or "substantially equivalent" positions. *Ibid.*

The Board made no apparent effort to consider whether this remedial order was practical or appropriate. The Board acknowledged that DoD, pursuant to President

Clinton's approval of the BRAC recommendation, was required to initiate the process of closing the Stratford plant by mid-July 1997 at the latest, and was required to complete that process by mid-July 2001. *AlliedSignal I*, slip op.3 [JA 5]. Indeed, the Board acknowledged in the companion decision *AlliedSignal II* that the Stratford plant had, in fact, been closed several years before its decisions. Slip op.2,10. Indeed, BRAC reported to Congress that in fiscal 1998 it "ceased production and operations, and close[d] the facility." DEPARTMENT OF DEFENSE, BASE REALIGNMENT AND CLOSURE, JUSTIFICATION DATA SUBMITTED TO CONGRESS FEBRUARY 2000, available at <http://www.asafm.army.mil/budget/fy01/brac.pdf>, at 13. Nevertheless, the majority never analyzed the feasibility or reasonableness of an order to AlliedSignal to reopen the plant and reinstate operations there.

The Government owns the Stratford plant, not AlliedSignal. The plant has already been closed in accordance with the BRAC mandate. The manufacturing equipment there was owned by the Government, and the Government dispersed it to other federal facilities. The Board acknowledged these crucial facts at the beginning of its decision, but then proceeded to ignore them:

"The plant property is owned by the United States Government; it is, at least technically, a military base." *AlliedSignal I*, slip. op 1 [JA 3].

Thus, the Stratford plant is not AlliedSignal's to reopen and it cannot "return" the work or the equipment that the Government chose to remove. AlliedSignal cannot

be expected to comply with paragraphs 2(b) and (c) of the Board's order. Surely, the Board does not believe it is empowered to override the BRAC mandate to close the Stratford plant or to force the Army to retrieve its equipment from other bases and reinstall it in Stratford.

In addressing the Board's choice of remedy, the Court bears the "responsibility to examine carefully both the Board's findings and its reasoning, to assure that the Board has considered the factors which are relevant to its choice of remedy, selected a course which is remedial rather than punitive, and chosen a remedy which can fairly be said to effectuate the purposes of the Act." *Capital Cleaning Contractors, Inc. v. National Labor Relations Board*, 147 F.3d 999, 1009 (D.C. Cir. 1998) (quoting *Peoples Gas Sys., Inc. v. National Labor Relations Board*, 629 F.2d 35, 42 (D.C. Cir. 1980)). The Board's discretion to fashion an appropriate remedy "has its limits": it is not permitted to order a remedy that contravenes the purpose of other federal statutes, as discussed *supra*, and it is expected to consider the practical effects of the remedy it orders. *Southern S.S. Co.*, 316 U.S. at 46.

Therefore, under any circumstances, those portions of the order that would require AlliedSignal to reopen SAEP and return work and equipment must be stricken. At the very least, the order should be modified to acknowledge AlliedSignal's right to an additional evidentiary hearing during compliance

proceedings before the Board, in which the Company may introduce evidence showing that reopening the Stratford facility would be financially impractical as well as legally impossible. In that hearing, the Company also should be permitted to introduce evidence, not currently in this record, showing that AlliedSignal did not implement its 1995 termination announcement, which is the subject of the case, and instead engaged in good-faith bargaining in 1997 about the closure decision before it actually terminated operations at SAEP later in 1997. That bargaining, which led to an impasse, constrains whatever remedy might otherwise be available to address AlliedSignal's initial announcement in 1995 that it *intended* to terminate those operations.

An evidentiary hearing is mandated by the Board's decision in *Lear Siegler, Inc.*, 295 NLRB 857 (1989). There the Board reaffirmed that a restoration and reinstatement order will not be enforced, if it is shown to be "unduly burdensome," and clarified that an employer is entitled to present evidence on that issue in the Board's compliance proceedings. *Id.* at 861-62. Normally, in cases of this type, the Board acknowledges the respondent's right to an evidentiary hearing under *Lear Siegler*. See, e.g., *id.* at 863 n. 35. The Board's order in this case, however, does not expressly acknowledge this right. The order simply requires AlliedSignal to return any work or equipment transferred, subcontracted, or relocated from SAEP. See

*AlliedSignal I*, slip op.7 [JA 9]. Consequently, if the Court were to enforce the Board's order without modification, the Board could theoretically initiate contempt proceedings without affording AlliedSignal the opportunity to introduce evidence attacking the appropriateness of the order. A modification of the Board's order is, therefore, necessary in order to ensure that the *Lear Siegler* approach is followed.

\* \* \* \*

The Board majority's failure even to acknowledge these patent flaws vividly underscores the underlying errors it committed in finding an unfair labor practice. The Board simply disregarded the text of the governing Competitiveness Agreement, applied a "clear and unmistakable waiver" standard that this Court has repeatedly struck down when the labor contract "covers" the subject, misconstrued the contractual terms the parties had negotiated, and demanded unrealistic lobbying intended to frustrate another statutory regime. Fortunately, Congress entrusted this Court with ample power to review and reject these errors.

## CONCLUSION

AlliedSignal's petition for review should be granted and the Board's order vacated or substantially modified. The cross-application for enforcement should be denied.

Respectfully submitted.

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