

**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**

**REPLY BRIEF FOR PETITIONER**

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\* Authorities upon which we chiefly rely are marked with an asterisk.

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29 U.S.C. § 158(d) . . . . . *passim*

## GLOSSARY

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
Textron . . . . .	Textron Inc.
SA . . . . .	Supplemental Appendix
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



## SUMMARY OF ARGUMENT

The Board has not rebutted AlliedSignal's arguments against enforcement of its Order. In an attempt to evade the contract coverage doctrine and the sound arguable basis rule of construction, the Board repeatedly characterizes AlliedSignal's termination announcement as a "repudiation" of the Competitiveness Agreement, rather than an invocation of AlliedSignal's rights under the termination clause. The Board's rhetoric, however, cannot change the fact that its concession that the Competitiveness Agreement "covers" the circumstances under which AlliedSignal could close the plant unilaterally is fatal to its finding of an unfair labor practice.

Even if the Board's decision to construe the Competitiveness Agreement was supportable, its interpretation of that agreement was not, and cannot be upheld. The Board's brief lends no further support to the strained, unrealistic construction offered by the Board below.

Moreover, AlliedSignal's 1995 *announcement* of a decision to close the plant was not an unfair labor practice, because (as the Board itself observes) the announcement did not have any practical impact on the Unions' members. AlliedSignal ultimately operated the Stratford plant until after the Competitiveness Agreement had expired and the parties had engaged in decision bargaining over the closure. Accordingly, taking the Board's characterization of the

Competitiveness Agreement as a job-protection measure at face value mandates the conclusion that AlliedSignal honored its obligations under the Agreement and did not violate the Act.

Finally, as demonstrated in AlliedSignal's Opening Brief, the Board's restoration remedy is unduly burdensome and cannot be enforced.

## **ARGUMENT**

### **I. ALLIEDSIGNAL'S EXERCISE OF ITS CONTRACTUAL RIGHTS DID NOT CONSTITUTE AN UNFAIR LABOR PRACTICE.**

In order to dress up this breach-of-contract dispute as an unfair labor practice proceeding, the Board has been forced to adopt a strained and unrealistic position. The Board repeatedly asserts that AlliedSignal "repudiated" the Competitiveness Agreement and that this "repudiation" – which is somehow distinct from a mere "breach" of the agreement – constituted an unfair labor practice. But AlliedSignal did no more than invoke its rights *under* a specific clause of the Agreement expressly providing that it was entitled to "terminate" the Agreement under certain circumstances. Whether AlliedSignal was correct or incorrect in concluding that the contractual circumstances had been satisfied, it is just empty rhetoric to brand its action as "repudiating" the Agreement rather than invoking it. There was a proper forum for resolving the disagreement about

whether or not AlliedSignal was correct in concluding that the contractual predicate existed for terminating the Agreement: a federal lawsuit or a grievance arbitration proceeding. But this dispute is not an appropriate basis for an unfair labor practice ruling.

**A. The Board Admits That The Competitiveness Agreement “Covers” The Circumstances Under Which AlliedSignal Could Close the Plant Unilaterally.**

As AlliedSignal discussed in detail in its opening brief, the Competitiveness Agreement “covered” the circumstances under which the Stratford plant would remain in operation and the circumstances and manner in which it could be closed. Accordingly, pursuant to the principles articulated in *BP Amoco Corp. v. NLRB*, 217 F.3d 869 (D.C. Cir. 2000), and *Conoco, Inc. v. NLRB*, 91 F.3d 1523 (D.C. Cir. 1996), AlliedSignal’s subsequent refusal to bargain *further* over the decision to close the plant was not an unfair labor practice.

The Board contends that it is unnecessary to refute the “contract coverage” argument, because “the Board’s decision nowhere refers to this doctrine.” NLRB Br. 37. Although the Board failed to address this issue, it was before the Board. AlliedSignal relied on the “contract coverage” doctrine in its briefs, and indeed (as the Board notes) the doctrine was the basis for the ALJ’s ruling. The Board

cannot insulate itself from application of the controlling legal doctrine simply because the Board chose to ignore it.

The Board's only substantive response to the contract coverage doctrine is a curiously twisted argument. The Board declares that, because *its* interpretation of the Agreement differs from AlliedSignal's, the contract coverage doctrine either does not apply or commands deference to the Board's interpretation. This argument betrays a basic misunderstanding of the governing case law. See AlliedSignal's opening brief at 22-28.

The Board concedes that, properly construed, the Competitiveness Agreement did allow "unilateral" action allowing AlliedSignal to "terminate" it:

"Concededly, the CA 'covered' the subject of its own termination."  
NLRB Br. 37.

That concession is fatal. AlliedSignal relied on a contract clause that indisputably covered – and authorized – "unilateral" termination. Since AlliedSignal's interpretation of the Agreement was (at the very least) supported by a reasonable basis, its adherence to that position cannot be termed an unfair labor practice. See, *e.g.*, *BP Amoco Corp*, 217 F.3d at 872-74. The Board erred by converting any dispute about whether AlliedSignal's interpretation was correct from a breach of contract claim into an unfair labor practice dispute.

**B. The “Sound Arguable Basis” Standard Dovetails With The Contract Coverage Doctrine To Preclude A Finding Of An Unfair Labor Practice.**

The Board contends that the “sound arguable basis” standard articulated in *NCR Corp.*, 271 NLRB 1212 (1984), (1) is a Board-created policy that is not mandated by statute or binding case law and (2) is inapplicable where a party “repudiates” an entire contract. Neither of these arguments presents a plausible basis for treating AlliedSignal’s reasonable interpretation of its contractual prerogatives as an unfair labor practice.

*NCR* and its progeny rest on principles that the Board cannot choose to follow or ignore depending on which course it finds more expedient. They reflect the limits on the Board’s proper function, which is *not* primarily to interpret collective bargaining agreements. Congress assigned to the federal courts (or to grievance arbitrators) – and not to the Board – the authority to decide which of two conflicting but reasonable interpretations of a labor contract is correct. See, *e.g.*, *Conoco*, 91 F.3d at 1525; *Local Union No. 1395, Int’l Bh’d of Elec. Workers v. NLRB*, 797 F.2d 1027, 1030 (D.C. Cir. 1986). The “sound arguable basis” principle is a corollary of the “contract coverage” doctrine. If (1) the contract covers a subject matter and (2) the employer’s interpretation of the

relevant term is reasonable (*i.e.*, if it has a sound arguable basis) then there is no unfair labor practice.

The Board insists that these principles are inapplicable, because AlliedSignal “repudiated” the Agreement. This is another attempt at rhetorical misdirection. If the contract clause negotiated between the parties allows one party to “cancel” or “terminate” a commitment under defined circumstances, the decision to invoke that right is not a “repudiation” of the contract, but an implementation of jointly agreed-upon contractual rights. Even though the result may be important, the analysis does not change. The exercise of a party’s contractual right to make a unilateral change to the relationship – even an important change – is simply not an unfair labor practice. See, *e.g.*, *BP Amoco*, 217 F.3d at 874 (“Because [the employer] was contractually authorized to amend the plan unilaterally, it committed no unfair labor practice by doing so.”); *Dep’t of Navy v. Federal Labor Relations Auth.*, 962 F.2d 48, 57 (D.C. Cir. 1992).<sup>1</sup>

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<sup>1/</sup> The Board creates another distinction without a difference when it argues that the limit on its authority to construe contracts only applies where “the continued existence of the contract is conceded and only the meaning of one or more of its provisions is in dispute.” NLRB Br. 39. AlliedSignal did not dispute the *existence* of the Competitiveness Agreement; it invoked its rights under Section 6.

The Board also suggests that applying the “sound arguable basis” test under these circumstances would not promote collective bargaining, which it says is the underpinning of *NCR*. This distinction does not hold up. As a potential acquirer of the business, AlliedSignal had no obligation to agree to any commitments regarding Stratford operations. In the interest of creating a cooperative labor/management climate, it negotiated a series of contracts, including the Competitiveness Agreement. That Agreement defined the limited circumstances under which AlliedSignal would attempt to operate the plant instead of shutting it down. Any newly crafted limit on *NCR* that constrains a party’s reasonable exercise of its rights under such contracts will inevitably discourage employers from engaging in negotiations on important topics, especially where they may not even be “mandatory” subjects of bargaining.

**C. AlliedSignal’s Plant Relocation Was Not A Mandatory Subject of Bargaining.**

In its Decision, the Board acknowledged that Sections 8(a)(5) and 8(d) only apply to contractual commitments on “mandatory bargaining subjects.” *AlliedSignal Inc.*, 330 NLRB No. 175 (“*AlliedSignal I*”), slip op. 3 [JA5]. In its opening brief, AlliedSignal explained why a decision (such as a plant closure

decision) involving “a change in the scope and direction of the enterprise . . . akin to the decision whether to be in business at all,” *First Nat’l Maintenance Corp. v.*

*NLRB*, 452 U.S. 666, 677 (1981), is not a mandatory subject of bargaining. Accordingly, even if the Competitiveness Agreement itself did not authorize AlliedSignal to close the plant (and we maintain that it did), AlliedSignal's decision to do so was not an unfair labor practice, because it involved matters that were not mandatory subjects of bargaining. See *Allied Chem. & Alkali Workers of Amer. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 183-86 (1971).

The Board's response is tautological: it contends that once AlliedSignal actually entered into the Competitiveness Agreement, the subjects covered became "mandatory bargaining subjects" and, therefore, the termination of the Agreement formed the basis for finding an unfair labor practice. Pursuant to this analysis, it did not matter whether the decision to close Stratford operations and relocate the remaining work to Phoenix was otherwise a "mandatory bargaining subject." This Court, however, along with the Supreme Court and others, has recognized that certain major business changes allow the employer to respond with unilateral decisions to relocate work, and such unilateral decisions do not violate the NLRA. See, e.g., *United Food & Commercial Workers Local 150 v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), enforcing *Dubuque Packing Co., Inc.*, 303 NLRB 386 (1991), cert. granted, 511 U.S. 1016, cert. dismissed, 511 U.S. 1138 (1994). *Dubuque Packing* concluded that plant closure decisions could trigger a bargaining

obligation under special circumstances, where labor costs might be a crucial factor in the equation. There is no need to discuss the validity of that exception here. As AlliedSignal's opening brief explained, the Board refused even to apply the *Dubuque Packing* framework. Had it done so, it would have had to conclude that AlliedSignal's decision was not a mandatory bargaining subject.<sup>2</sup>

As explained in AlliedSignal's opening brief, management's decision to end its operations at a federally owned munitions plant, in the face of the Government's decision to withdraw all funding and order the plant closed as a military facility, satisfied the test for determining which decisions are not mandatory subjects of bargaining. The Board recognizes that AlliedSignal management told the Unions throughout negotiation of the Competitiveness Agreement that "military funding was essential to the viability of the plant." NLRB Br. 8. AlliedSignal decided that, in light of the Government's decision to withdraw from Stratford, it could not profitably maintain the oversized facility without substantial subsidies. When those subsidies proved impossible to obtain, AlliedSignal made the economically rational decision to move the remnants of

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<sup>2/</sup> In *Dorsey Trailers, Inc. v. NLRB*, Nos. 99-1390, 99-1561, \_\_\_ F.3d \_\_\_, 2000 WL 1769450 (4<sup>th</sup> Cir. Dec. 1, 2000), the Fourth Circuit recently held that an employer's decision to shut down one plant and relocate work to another plant is simply not a "term or condition of employment" subject to the mandatory bargaining obligations of the Act.

work left at Stratford to the more modern facility in Phoenix, which had excess capacity. This decision was one that lay “at the entrepreneurial heart of [the] enterprise.” See *First Nat’l Maintenance Corp.*, 452 U.S. at 676.

## **II. THE BOARD’S INTERPRETATION OF THE COMPETITIVENESS AGREEMENT IS UNSUPPORTABLE.**

Even if it were permissible as a general matter for the Board to substitute its own contract interpretation for that of management and to label the difference an unfair labor practice, the Board’s decision here could not be justified. Its interpretation of the Competitiveness Agreement is strained, unrealistic and unreasonable.

### **A. The Standard of Review is *De Novo*.**

The Board concedes that its interpretation of a labor contract “is not entitled to judicial deference.” NLRB Br. 23. This Court must review the Board’s interpretation of the Competitiveness Agreement *de novo*. See *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 202 (1991).

### **B. AlliedSignal Met The Contractual Prerequisites For Termination.**

The Board’s argument that AlliedSignal did not meet the Agreement’s prerequisites for invoking the termination clause is strained and unpersuasive. Relying on breach-of-contract analysis to find an unfair labor practice, the Board’s

brief identifies four contractual prerequisites to termination of the Competitiveness Agreement:

“(1) The Company had to determine a specific level of funding necessary to maintain the Stratford plant’s capability for production and maintenance of the AGT-1500 engines for the ensuing fiscal year; (2) the Company had to furnish information to the Unions in support of this amount; (3) the Company had to apply to ‘appropriate officials’ of the Federal government for funding in the amount determined; and (4) a budget, denying the Company’s request for funding in whole or in part, had to be enacted.” NLRB Br. 28.

The Board’s interpretation of AlliedSignal’s obligations pursuant to these requirements, which it concedes is “entitled to no deference,” cannot be supported.

AlliedSignal complied with each of the requirements.

**1. AlliedSignal Identified a Shortfall of \$30 Million And Notified The Unions of that Amount.**

At several points in its brief, the Board acknowledges that AlliedSignal identified \$30 million as the amount of Government funding necessary to keep the Stratford plant open. At page 14, the Board states that the Company

“advised the Unions that it was reviewing the question whether to keep any operations in Stratford and that it could save \$30,000,000 annually by moving all commercial production to Phoenix.”

Next, the Board observes that, after the BRAC decision was announced, AlliedSignal and the Unions

“sought alternative funding from state and local governments, but were unable to obtain funding in an amount approaching \$30,000,000, the amount the Company asserted was necessary to keep its operations in Stratford.” NLRB Br. 15.

The Board concedes that AlliedSignal told the Unions (and any and all government officials who would listen) that the AGT-1500 cancellation and the BRAC closure decision created an annual shortfall of *at least* \$30 million. The Board also admits that diligent efforts by AlliedSignal and others never came close to garnering that amount of substitute annual funding from any source. Nevertheless, the Board contends that AlliedSignal failed to meet its obligation to identify a *specific* amount of required funding, because it did not precisely quantify how much *greater* than \$30 million the shortfall was.

The Board identifies two purposes for the requirement that AlliedSignal identify a figure: it “served the express purpose of enabling the Unions effectively to support the request for funding . . . and also ensured that the Company would not request an exorbitant amount and use Congress’ reduction of that amount as an excuse to terminate the CA.” NLRB Br. 31. Both of those purposes were clearly fulfilled by AlliedSignal’s repeated statement that the shortfall was at least \$30 million. The Unions were able to work – and did work – in tandem with AlliedSignal to lobby federal authorities to keep BRAC open. And, in light of the

final appropriation of \$47.5 million for SAEP in 1995 and the cancellation of \$51 million per year in Blue Ribbon-recommended funding, AlliedSignal's \$30 million estimate cannot possibly be described as "exorbitant." Indeed, the Unions never suggested that the real shortfall was even a dollar less than \$30 million.

The arithmetic is simple. The Company advised the Unions that it required \$30 million in subsidies to remain in Stratford. No party has ever suggested that Congress was willing to make up anything remotely approaching that amount with some other subsidy for the doomed plant, and vigorous efforts to line up alternative funding sources uncovered less than \$2 million in potential loans. The ensuing shortfall was at least \$28 million. Accordingly, AlliedSignal had the right to terminate the Agreement.<sup>3</sup>

**2. AlliedSignal Repeatedly "Applied" For Adequate Funding And The Government Decisively Rejected Those Applications.**

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<sup>3/</sup> The Union argues that AlliedSignal failed to provide *cost* information relating to the actual closure decision, but it does not explain the significance of this argument. Furthermore, as the Board acknowledges (NLRB Br. 16), the Company did furnish "most of the requested information" before actually terminating the Agreement and closing SAEP. The Board's decision, however, ignores the fact that AlliedSignal did not actually close the plant until *after* (1) it furnished the requested information, (2) it invited decision bargaining, and (3) the Competitiveness Agreement expired according to its terms.

The Board argues that AlliedSignal’s attempts to reverse the Government’s decision to cancel funding for the AGT-1500 program and to close SAEP were insufficient to meet AlliedSignal’s obligation under Section 6 of the Agreement to “make application to appropriate officials of the United States Government for financial arrangements.” In making this argument the Board is simply trying to blink away the various funding initiatives actually but unsuccessfully pursued. AlliedSignal’s vigorous efforts to convince DoD to continue funding the AGT-1500 program and to get DoD or the Congress to keep open SAEP *constituted* the “application” to “appropriate Government officials” for adequate funding.<sup>4</sup>

After the DoD announced its decision to discontinue procuring the AGT-1500 and SAEP was placed on the BRAC closure list, AlliedSignal tried to change

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<sup>4/</sup> The Board’s brief states in a footnote that “Company’s obligation to seek funding was coextensive with its need for funding – that is, if continuation of the CA was conditioned on the Company’s receiving new funding each year, it could not merely seek funds for fiscal 1995, but had to make a new request for each fiscal year.” NLRB Br. 28n.7.

Surely Board counsel is not suggesting that, even after the Congress failed to appropriate adequate funds for one year, AlliedSignal could not terminate the Agreement because it retained an obligation to reapply the following year, and each year thereafter, until the Agreement expired of its own force. The brief concedes that the Board itself made no such ruling. That interpretation would nullify the termination provision: AlliedSignal could never “terminate” the Agreement until it had failed each year to get “adequate” funding until the Agreement expired.

the Government's mind about both of those fateful decisions, which were directly linked to AlliedSignal's ability to secure adequate funding. The Board asserts that AlliedSignal only "ask[ed] BRAC to reject the closure of SAEP as a military facility" and "fail[ed] to make *any* request to *any* official of the Defense Department or Member of Congress for funding in *any* amount, as it had in the past." NLRB Br. 44. That assertion is false. AlliedSignal sought funding not only from BRAC but also from DoD policymakers, from the Army, and from Congress. AlliedSignal management spent the summer of 1995, while the FY 1996 Defense budget was being prepared, working with Congresswoman DeLauro, Senator Lieberman and Senator Dodd in order to accomplish *two* goals: "trying to get the BRAC Commission to agree [SAEP] couldn't be closed; and . . . trying to secure the release of funds already pledged for that fiscal year." JA 91. AlliedSignal attempted to bring pressure to bear on BRAC and the DoD both by working with Connecticut's congressional delegation and by lobbying those entities directly. JA 181-96; SA 1125; JA 947,950; JA 680. Congresswoman DeLauro's district director, Stephen Hudak, testified:

"We assembled a team consisting of the plant people from AlliedSignal, people from the union, people from different . . . local areas, in an attempt to convince the BRAC that they were wrong and the plant should stay open." JA 183.

Working with this coalition, AlliedSignal was able to get the 1995 funds released. However, throughout the Company's discussions with "Department of Defense officials, Department of Army officials, the program officer and the actual Commander of the United States Tank Command," it became clear "that they were all in agreement and falling in lines [sic] with the recommendations of the DoD Comptroller that they would not support . . . the inclusion of future funds in the [FY 1996] budget." JA 517. See also JA 480 (the president of AlliedSignal's Engines division testified that "[t]here 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 490-91. Indeed, the Assistant Secretary of Defense stated publicly that SAEP would receive no more funding, characterizing any such appropriations as "pure pork." JA 90,126-27.

The Board concedes that there is no "formal application process" for Government funding. NLRB Br. 44 n.14. The Board interprets the Agreement as imposing an obligation "to request the desired level of funding from Defense Department officials who could recommend it or to lobby Congress directly for funding." NLRB Br. 19-20. The Board catalogues, as a list of "appropriate

Government officials” from whom funding could be sought: “Defense Department officials,” “Connecticut’s Congressional delegation,” and “members of the Senate Appropriations Defense Subcommittee.” NLRB Br. 45.

But these are the very officials whom AlliedSignal lobbied to keep the plant open and continue the AGT-1500 program. They are the very officials who informed AlliedSignal that the appropriations faucet had been shut off and that no further funds would be forthcoming. Thus, by the Board’s own concession, AlliedSignal did “make application” to “appropriate” Government officials to seek adequate funding. These entreaties – “applications” – simply failed.

Against this backdrop, the Board persists in arguing that AlliedSignal’s broad-based and extensive lobbying of *precisely those entities* to reverse the decision to close the plant, which was the only way in which future funding would ever become a possibility, did not constitute an “application” for funding. The Board contends that AlliedSignal was required to continue lobbying for future appropriations (thereby destroying its own credibility and antagonizing its major customer for other defense products) even after the Government had made clear in no uncertain terms that the plant would be closed and that no future appropriations would be forthcoming. A federal administrative agency cannot responsibly premise an unfair labor practice and a punitive “reopening” remedy

on that kind of analysis. Nothing in the NLRA, the case law, or common sense justifies the Board's decision.

The Board characterizes AlliedSignal's position as a "futility" claim and argues that the Board "properly rejected" it. This characterization is yet another example of the Board's erroneous application of contract-law principles to find an unfair labor practice. AlliedSignal did not argue (either below or before this Court) that it was "futile" under contract law principles to apply for funding after SAEP appeared on the BRAC list (although the facts would justify that conclusion). Instead, AlliedSignal has shown that, by lobbying for continued procurement of the AGT-1500 and continued support for SAEP, AlliedSignal *did* apply for 1996 funding. When those efforts failed, it was entitled to conclude that it had done what it committed to do and was entitled to invoke its termination right.<sup>5</sup>

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<sup>5/</sup> The Union contends that AlliedSignal's interpretation of the Agreement would allow the Company "to cancel the CA almost at will" if "it deemed the political climate sufficiently inhospitable to its request." Union Br. 27. But the Company did not just invent the notion that adequate funding would be unavailable, nor did it reach that judgment without any factual basis. Rather, the many Government officials who were in a position to decide the plant's fate clearly, consistently and definitively expressed the position that the plant would be closed and that no further funding would be forthcoming.

In any case, AlliedSignal was not required to show “futility” in the traditional contract-law sense. The Competitiveness Agreement was a “best efforts” contract. See JA 1062. The “best efforts” standard is a flexible one; compliance “turns on whether [the party] made a good faith effort to produce an operational program, not on whether those efforts proved successful.” *United States v. TDC Management Corp., Inc.*, 24 F.3d 292, 295-96 (D.C. Cir. 1994). AlliedSignal was required only to make a good-faith effort to secure funding and to keep the plant competitive, and it did so.<sup>6</sup>

### **3. The Company Did Not Close SAEP Until 1997, Long After Enactment of the 1996 Budget.**

The Board’s final breach-of-contract theory is that AlliedSignal breached the Competitiveness Agreement because it “terminated” the Agreement in September 1995, even though the DoD’s 1996 budget was not enacted until November 1995. According to the Board, this violated the Agreement’s requirement that “termination follow, rather than precede the enactment of a

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<sup>6/</sup> The Union argues that AlliedSignal “planned from the beginning to close the Plant,” Union Br. 11, but the record did not support that argument and the Board rejected it. As the Board recognized, some of AlliedSignal’s early analyses predating the 1994 Agreement listed closure as one possibility, but they did not establish that AlliedSignal acted in bad faith in making specific decisions during the period 1995-1997. The Board also acknowledges that the BRAC decision came as a “complete surprise to both the Company and the Unions.” NLRB Br. 8, 33.

budget.” NLRB Br. 42. The Board has the sequence of events wrong: the Company never actually terminated the Agreement, and it did not close SAEP until 1997, long after the 1996 federal budget was enacted.

Section 6 of the Agreement did contemplate that AlliedSignal could “terminate [the] Competitiveness Agreement” after Congress failed to appropriate adequate funds. JA 1076-77. Significantly, the Agreement also provided that the actual termination was to be *preceded* by a notice period of at least “ninety (90) days before the *intended* effective date of such termination.” *Ibid.* AlliedSignal fully complied with this permissible sequence. The Company *announced* the proposed termination in September 1995, when the fateful handwriting was most certainly on the wall. But as discussed in Point III *infra*, AlliedSignal did not “terminate” the Agreement and close its SAEP operations until 1997, long after the enactment of the 1996 budget in November 1995. Nothing in the Agreement prevented it from giving notice of the “intended effective date” of a termination to follow enactment of what promised to be a deficient budget. The Board does not point to anything suggesting that the budgetary outcome would have been different if AlliedSignal had delayed its notice by two months.<sup>7</sup>

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<sup>7</sup> The Union’s brief reiterates an argument that it presented unsuccessfully below: it contends that Section 6 of the Agreement only contemplated one lump-sum appropriation, rather than annual appropriations, “in an amount considered by

**C. The Board’s Interpretation Of The Agreement Mischaracterizes The Bargaining History And Reads AlliedSignal’s Termination Right Out Of The Contract.**

The Board’s stringently unrealistic interpretation of the Competitiveness Agreement rests on characterizing it as a “work protection” agreement. As the Board acknowledges (NLRB Br. 29-30), however, the Agreement was proposed *by AlliedSignal*. The Company sought to protect its flexibility to close Stratford, if the plant could not be operated competitively, while *also* recognizing the Unions’ interest in job security. After intense negotiations, the parties arrived at a compromise: AlliedSignal committed to stay in Stratford and employ the Unions’ members for three years, but *if and only if* it was able to secure governmental funding “in an amount considered by AlliedSignal to be adequate to support the future of the Stratford plant . . . for the production of the AGT1500

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AlliedSignal to be adequate . . . .” Union Br. 24-25. The ALJ, however, concluded that the Competitiveness Agreement “left vague” the question whether Section 6 required annual federal appropriations. Indeed, that was why the ALJ applied the “sound arguable basis” standard. The Board’s brief further undermines the Union’s argument: it recognizes that there were “two plausible interpretations” of the CA and assumes that, based upon the language of the Agreement, AlliedSignal’s termination right was triggered when “*a budget, denying the Company’s request for funding in whole or in part, [was] enacted.*” Board Br. 28 & n.7 (emphasis added). In any case, because AlliedSignal’s interpretation of the Agreement as requiring *annual* appropriations had (at the very least) a sound arguable basis, that interpretation did not constitute an unfair labor practice.

engine.” JA 1076. This termination right was the *only* benefit – its “consideration” – AlliedSignal received under the Competitiveness Agreement. Neither the bargaining history recited by the Board nor the text of the Agreement allows the Board to expunge AlliedSignal’s termination right from the contract.

The Board’s recital of the bargaining history omits another critical point: the Agreement was negotiated *before* AlliedSignal committed to buy Textron’s engines business. If the parties had been unable to reach agreement on terms acceptable to AlliedSignal – terms that preserved the Company’s ability to shut the plant, if it could not be operated competitively – AlliedSignal could simply have walked away from the deal. The Agreement was called the “Competitiveness Agreement” because it addressed the parties’ joint effort to make the plant *competitive* – that is, economically viable. It is unrealistic to construe the Agreement as if it had been imposed upon an existing employer held hostage by the threat of labor unrest.

The Board’s brief argues that the Agreement was a “requirements contract” that required AlliedSignal to continue producing the six named engines at Stratford, no matter how unprofitable it was to do so. NLRB Br. 30 & n.9. That characterization glosses over the crucial contingency also identified in the brief:

“as long as the Company received adequate funding for its AGT-1500 program to continue on a standby basis.” *Ibid.*

Thus, AlliedSignal’s obligation to produce the other five engines was expressly subject to the Section 6 right to terminate *all* commitments if the Company was unable to secure “adequate” AGT-1500 funding or alternative funding. AlliedSignal did *not* in fact receive such funding, despite tireless attempts to secure it. The other factors discussed in AlliedSignal’s opening brief (the facility’s age, size and inefficiency) were relevant to the eventual decision to end operations there, because they explain why SAEP was not viable without Government funding. But the bottom line is that when the Government ceased procuring the AGT-1500 and declined to provide any funding for that engine on either an active or a stand-by basis, any “requirement” to continue making the other, far less significant engines evaporated.

Finally, the Board notes this Court’s observation that “parties ought not to be presumed to have included in their agreement a meaningless provision.” NLRB Br. 32 (quoting *Conoco*, 91 F.3d at 1526). The Board’s emphasis on this principle is ironic, since the Board’s single-minded preoccupation with the Unions’ contractual interests effectively eviscerates AlliedSignal’s explicit right to terminate the Agreement absent “adequate” continuing funding.

**III. SINCE ALLIEDSIGNAL CONTINUED TO OPERATE THE PLANT UNTIL AFTER THE COMPETITIVENESS AGREEMENT EXPIRED, MERE ANNOUNCEMENT OF THE INTENT TO DISCONTINUE OPERATIONS DID NOT CONSTITUTE AN UNFAIR LABOR PRACTICE.**

Taking the Board’s characterization of the Competitiveness Agreement as a “job protection agreement” at face value would mandate the conclusion that this entire proceeding should be treated as an unwarranted academic exercise, because AlliedSignal did not close the plant or lay off any workers until after the Competitiveness Agreement had expired and the parties had bargained over the closure decision. Indeed, referring to the “job protection” feature of the Agreement, the Board’s brief acknowledges that the employees “have already received such benefits [because] the Stratford plant remained open until after the original expiration date of the CA.” NLRB Br. 53.

Sections 8(a)(5) and 8(d) only prohibit *actual* unilateral repudiation or alteration of collective bargaining agreements, not the mere *announcement* of the intent to do so.<sup>8</sup> As the Board stated in its Decision:

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<sup>8/</sup> Specifically, Section 8(d) declares that the duty under Section 8(a)(5) to “bargain collectively with the representative of his employees” means that, “where there is in effect a collective-bargaining contract,” “no party to such contract shall *terminate or modify* such contract” without going through the prescribed procedures. 29 U.S.C. §§ 158 (a)(5), (d) (emphasis added).

“A party to a collective bargaining agreement contravenes Section 8(d) and violates Section 8(a)(5), when, at mid term of the agreement, it unilaterally *modifies* or *terminates* contract provisions which are mandatory bargaining subjects.” (*AlliedSignal I*, slip op. 3 [JA 5]) (citing cases) (emphasis added).

See also *Kurdziel Iron of Wauseon, Inc. v. NLRB*, 327 NLRB No. 44, slip op. at 3 (1998) (Member Hurtgen dissenting) (employer’s *announcement* of unilateral change in terms and conditions of employment, if not implemented, does not constitute violation of Section 8(a)(5)), enf’d without op., 208 F.3d 214 (6<sup>th</sup> Cir. 2000).<sup>9</sup>

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<sup>9</sup> The majority in *Kurdziel* held that the employer’s *announcement* of a unilateral change in working conditions could constitute an unfair labor practice if

the damage to the collective bargaining relationship was accomplished. This occurred ‘simply by the message to the employees that the Respondent was taking it on itself’ to set an important term and condition of employment, *thereby suggesting the irrelevance of the employees’ collective-bargaining representative.*” *Id.*, slip op. at 2 (emphasis added) (quoting *ABC Automotive Prods. Corp.*, 307 NLRB 248, 250 (1992)).

That rationale has no application here. AlliedSignal’s termination of the Competitiveness Agreement triggered the Unions’ right to engage in effects bargaining; indeed, in the notice of termination AlliedSignal expressly *invited* the Unions to engage in such bargaining. Moreover, before implementing the termination decision in 1997, AlliedSignal engaged in decision bargaining with the Unions. Accordingly, AlliedSignal’s announcement of its decision to invoke its rights under Section 6 of the Agreement in no way “emphasize[d] to the employees that there [was] no necessity for a collective bargaining agent.” See *ABC Automotive Prods.*, 307 NLRB at 250 (citation and quotation marks omitted). The announcement had the opposite effect.

Here, there was no “modification” or “termination” of the Competitiveness Agreement while it was “in effect.” The crucial facts are not disputed. In September 1995, after the BRAC decision to close SAEP as a military-supported facility became final, AlliedSignal invoked Section 6 of the Agreement, which provided that, after adequate Government funding fell through:

“then at any time . . . 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 1076-77 (emphasis added).

That notice of *intent* to terminate *at least* three months later triggered the Agreement’s provisions for “effects bargaining.”

However, after giving notice of intent to terminate, the Company never *implemented* the decision to terminate the Agreement during its term by closing the plant, laying off the employees, and moving residual work to Phoenix. Instead, AlliedSignal continued to operate SAEP until after the Agreement (and the other collective bargaining agreements in place at the plant) expired in June 1997. The 1995 termination announcement did not herald any actual loss of employment during the term of the Agreement: 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 1053; JA 153,296,340; SA 1111. The Board concedes this point in its brief:

“The Board found [in *AlliedSignal II*] that the *closure occurred after June 6, 1997 (the expiration date of the CA)*, but made no finding as to the exact date. The record does not indicate the exact date of closure, but shows that at least some employees, including the president of Local 1010, continued to work until the end of July **1998.**” NLRB Br. 48-49 n.16 (emphasis added).

Thus, any changes in working conditions took place after the Agreement was no longer “in effect.” As the Board recognizes:

“the Company agreed in the CA to maintain production in Stratford for a specific 3-year period ending in June 1997, not for an unknown period continuing until some time in the indefinite future.” NLRB Br. 54.

The Board also observes that the Competitiveness Agreement was not self-renewing; it was to expire automatically unless the parties specifically agreed otherwise. NLRB Br. 9. *AlliedSignal honored* any contractual obligation to maintain production in Stratford for the contractually designated three-year period and did not unilaterally change that commitment before it expired.

#### **IV. THE BOARD'S REMEDY, WHICH WOULD REQUIRE ALLIEDSIGNAL TO REOPEN THE PLANT, IS ARBITRARY AND CAPRICIOUS.**

##### **A. Restoration Is Inappropriate Because The Unions Received The Benefit Of Job Protection.**

Even if the Board's finding of an unfair labor practice were supportable, the restoration of work in Stratford is neither an appropriate nor an authorized "remedy." As the Board notes, it has no power to extend the term of the Agreement, because that would impose substantive terms upon the parties that they did not negotiate. Moreover, as discussed in Point I *supra*, the Board cannot order that the plant be reopened, because AlliedSignal had the right to close it after the Competitiveness Agreement expired.

AlliedSignal would never have entered into the Competitiveness Agreement in 1994 if there had been any prospect that it would be bound to maintain operations at Stratford into the 21<sup>st</sup> century. Rather, the Competitiveness Agreement was, as the Unions conceded, a three-year deal, designed (according to the Board's own characterizations and subject to explicit conditions) to "protect work" for three years, until June 1997. The Unions and their members received the full job-protection benefit of that agreement.

Thus, whether AlliedSignal breached the Competitiveness Agreement during its term (as the Unions contend) or complied with its terms (as we contend), it did *not* commit a Section 8(d) violation when it actually implemented the closure decision in 1997. There was no unilateral “repudiation” of the Agreement warranting any remedy after June 1997, because as of that date (1) the employees had received three years of job protection and (2) the Competitiveness Agreement permitted an unrestricted decision about the future of the plant thereafter.

**B. Restoration Is A Presumptively Invalid Remedy And Would Be Unduly Burdensome.**

In *Dorsey Trailers*, the Fourth Circuit recently noted that “[r]estoration orders to reopen a facility are presumptively suspect given the substantial cost in both human and monetary terms.” 2000 WL 1969450, at \*11. Even though anti-union animus motivated the closure in that case – something that the Board did *not* find motivated AlliedSignal’s decision to shutter SAEP – the court held that “the unfair labor practices that have been upheld come nowhere close to allowing the Board to order such a draconian remedy.” *Ibid.* See also *Coronet Foods, Inc. v. National Labor Relations Board*, 158 F.3d 782, 794-96 (4<sup>th</sup> Cir. 1998) (although

employer's closure of facility violated Section 8(a)(3), restoration order was unduly burdensome and therefore invalid).

Restoration orders “trench closely upon otherwise legitimate employer prerogatives. When a company must expend significant funds or make new capital investments to restore operations, the order will be unduly burdensome given its economic costs.” *Dorsey Trailers*, 2000 WL 1769450, at \*11. Here, AlliedSignal would be forced to *reopen* an enormous, outmoded, environmentally disastrous plant that was not viable back in 1997. Even if a lease from the Government were available, and there is no indication that that is the case, the Company would be forced to invest untold tens of millions of dollars in rent, compliance costs, and the acquisition of equipment, all to restore an unprofitable plant. Clearly, the remedy ordered by the Board is unduly burdensome and beyond its power.

In summary, the Board's brief has failed to rebut AlliedSignal's arguments against enforcement of its Order. The Board has not responded to AlliedSignal's argument that its reasonable exercise of its contractual rights could not have constituted an unfair labor practice. Even if the Board's decision to construe the agreement was appropriate, its interpretation is so strained and unrealistic that it

cannot be upheld, and the Board's brief offers no further support for that interpretation. Moreover, because AlliedSignal ultimately continued to operate the plant until after the Competitiveness Agreement expired and the parties had engaged in decision bargaining over the closure, the Company's 1995 *announcement* of an intent to terminate the Agreement was not an unfair labor practice. Finally, the Board's restoration remedy is clearly unduly burdensome and cannot be enforced.

## 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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Dated: February 2, 2001