

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

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

v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

HONEYWELL INTERNATIONAL, INC.,  
*Intervenor*

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**“AlliedSignal I”**

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

**FINAL BRIEF FOR INTERVENOR**

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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 or CA . . . . .	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
EBA . . . . .	Effects Bargaining Agreement
Honeywell . . . . .	Honeywell International, Inc.
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



**Brief for Honeywell International, Inc.  
as Intervenor in No. 00-1274, Consolidated With No. 00-1170**

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**QUESTION PRESENTED**

Did the National Labor Relations Board correctly rule, in accordance with *Hyatt Management Corp. of New York, Inc. v. National Labor Relations Board*, 817 F.2d 140 (D.C. Cir. 1987), that it would be improper to impose a “remedy” extending the term of a contract between an employer and two unions beyond its stated expiration date, when an extension would alter the substantive terms of the parties’ agreement?

**STATEMENT OF THE CASE**

1. This case has been consolidated with No. 00-1170, in which Intervenor Honeywell International, Inc. (formerly “AlliedSignal Inc.”) has filed a separate petition for review of the same NLRB decision seeking to have the decision set aside in its entirety. By contrast, the Union seeking review in this case argues that the Board did not go far enough in fashioning a “remedial” order.

2. The case involves a dispute between AlliedSignal and labor unions representing employees at a Government-owned facility, the Stratford Army

Engine Plant (“SAEP”) 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: AlliedSignal because it did not agree with the ALJ’s determination that it had violated Section 8(a)(5), and the Unions because the ALJ had rejected their argument that the Agreement should not only be reinstated, but should be *extended* by a period of twenty months (the period between the announced termination of the Agreement and its expiration date).

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.” The Board declined, however, to extend the term of the Agreement as the Union demanded:

it held that such an extension would force “an impermissible change in the substantive terms of the CA.”

3. AlliedSignal filed a Petition for Review in this Court (No. 00-1170) challenging both the Board’s finding of an unfair labor practice and its remedy. The Unions filed a separate Petition for Review in the Second Circuit contending that the Board’s “remedy” did not go far enough. After the Judicial Panel on Multi-District Litigation transferred that case to this Court, the Union’s petition was docketed as No. 00-1274 and consolidated with No. 00-1170. This brief, filed in AlliedSignal’s capacity as Intervenor, addresses only the petitioning Union’s argument that the period of the Competitiveness Agreement should be extended by twenty months.

### STATEMENT OF FACTS

A more complete Statement of Facts about the background of this dispute appears in AlliedSignal’s Brief for Petitioner in No. 00-1170 (“*AlliedSignal P*”). Most salient for this case are the following facts.

**1. *AlliedSignal’s Contingent Interest In Acquiring Stratford Operations.*** In 1994, AlliedSignal considered purchasing 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. Tr. 55. For many years, SAEP's primary products had been helicopter and vehicle engines for the Armed Services, including especially the AGT-1500 tank engine, the plant's principal product. Tr. 56. The Union's president testified that in mid-1994 the production mix was 70 percent military and 30 percent commercial. Tr. 60.

From the first rumors about a possible acquisition, the Unions were concerned about AlliedSignal's plans for SAEP. Orders for AGT-1500 tank engines were slowing, and the Unions were worried about the plant's ongoing viability. Tr. 66. The Unions knew that AlliedSignal had an existing engines business in Phoenix and feared that the Company might move operations there. Tr. 157.

Collective bargaining agreements with both UAW local unions were set to expire in a few months, and AlliedSignal explained to Textron management that the execution of acceptable labor contracts was a condition of any purchase. Moreover, AlliedSignal told the UAW's national leadership that it would become the "successor" to Textron and 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. Tr. 911, 913-17.

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. 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. RX7, RX10 p. 38, RX13; RX11, Tr. 140-42,145-46,193,1674-76. 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.

**2. *Negotiation Of Three Contracts With Unions, Including “Competitiveness Agreement.”*** 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 side 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 and in No. 00-1170.

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 that its goal was to preserve its flexibility to leave SAEP, if it was unable to make operations competitive and economically viable at the old, outdated plant. Tr. 169-70,936-37,942-44,1374. The Unions' corresponding goal was to maximize severance benefits to cushion the effects of downsizing or closure. Tr. 920,923,1161,1176,1372.

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 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 memorialized that aspect of the parties' agreement:

**"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.” JX3 p. 7 (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.” *Id.* at 7-8 (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 making available funding “in an amount *considered by AlliedSignal* to be adequate” to support the “future” of the plant.

**3. Limited Duration of Competitiveness Agreement.** The term of the Competitiveness Agreement, like that of the Effects Bargaining Agreement, was limited to three years. Unlike the parties’ general collective bargaining agreement, the “CA” was not self-renewing. Its termination provision provided:

“Unless earlier terminated under the provisions of Section 6, above, ***this Agreement shall be effective*** as of May 30, 1994, and shall remain in effect ***until the date of the expiration*** of the new 1994 collective bargaining agreement between [Textron] and the Union, but ***not thereafter unless renewed or extended in writing by the parties.***” *Id.* at 8.

The referenced 1994 collective bargaining agreement was to expire on June 6, 1997. The Unions have never contested the fact that the CA was only a three-year deal and was not to have any effect thereafter.

**4. *Government Decisions Dooming Stratford's Viability.*** After the union membership approved these three agreements, AlliedSignal proceeded to purchase Textron's operations in October 1994.

Four months later, however, in February 1995, the Army decided that it no longer required the AGT-1500 engine produced at SAEP *and* did not need to keep the plant "warm" for standby production or maintenance. It had selected the Perkins diesel engine to power its tanks instead. 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. Tr. 183, 384-85, 1745. 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. RX44 at 5.

Despite tireless lobbying efforts on the part of AlliedSignal, the Unions, and state and local officials, in June 1995 BRAC recommended to the President that

SAEP be closed. Tr. 39, 183-84, 186, RX49. 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 FY 1995. Tr. 185. AlliedSignal and the Unions marshaled the assistance of the Connecticut congressional delegation, the City of Stratford and the State of Connecticut. Tr. 186, 420, 741-46, 766-68, 1861. This coalition ultimately secured the release of the already-appropriated 1995 funds, but it was obvious that the Government would not appropriate any additional funds for FY 1996 or thereafter, and Congress never did so. Tr. 185, 384-85, 1745, 1752-53, 1878.

In July 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. Tr. 424-25. Despite the joint efforts of 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. Tr. 39, 527, 775, 1696, 1740.

**5. *Unsuccessful Search For Adequate Alternative Funding.*** Section 6 of the Agreement provided that, if Congress was not going to make “adequate” federal funding available, the parties were to use their “best efforts” to seek alternate funding to try to maintain the plant’s viability. Throughout the summer of 1995, AlliedSignal and the Unions sought alternative State funding. Tr. 427-28, 748-49, 769, 1219, 1774-75. AlliedSignal made it clear to the Unions and to state and local officials that the minimum subsidy required to keep SAEP open following the BRAC decision would be at least \$30 million per year, and that was the figure all parties used as the necessary target. Tr. 403, 1219-1220, 1521-22, 1775-76, 1780, RX56.

Ultimately, the parties were able to secure only about \$2 million per year in State loan guarantees. Even that minimal, grudging offer was contingent upon AlliedSignal’s commitment to stay in Stratford for ten years, far longer than the traditional three-year cycle for negotiating labor contracts defining wages and benefits. Tr. 772, 1526, 1831-32. Like AlliedSignal, the Unions themselves were unable to find or suggest a way to bridge the enormous gap created by the

Government's decision to cancel the \$51 million in Blue Ribbon funding and to shutter the Stratford plant. Tr. 627, 698, 775, 1221, 1505.

**6. *Announcement Of Intention To Discontinue Stratford Operations.***

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 support the future of the Stratford plant. . . .” AlliedSignal decided it should discontinue the remaining engines operations at Stratford and consolidate the remnants with its much larger and more modern engines operations in Phoenix. Tr. 187. On September 29, 1995, the Company gave the Unions notice that it *intended* to “terminate” the Agreement under Section 6.

Nevertheless, AlliedSignal did not implement that announced intention during the term of the Competitive Agreement. Instead, it 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. RX187; Tr. 619, 1195, 1487-88.

**7. *Unfair Labor Practice Charge.*** Immediately after AlliedSignal announced the proposed closure, the Unions 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 Unions asked that the Board "reinstate" the Competitiveness Agreement and extend its term by approximately twenty months, a period of time "equal to the period during which [AlliedSignal] disregarded its obligations under that agreement."

**8. *NLRB Decisions.*** Focusing exclusively on the 1995 *announcement* of a decision to terminate operations, 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 stated that it intended to terminate the Agreement in accordance with what AlliedSignal understood was its contractual right.

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, 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 tank engines 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. 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 did 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 Inc.*, 330 NLRB No. 175 (2000)

(“*AlliedSignal I*”), slip op. 7. Moreover, 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, yet 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.

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 relocation cases. 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 Inc.*, 330 NLRB No. 176 (2000) (“*AlliedSignal II*”), slip op. 10.

The Board refused, however, to accede to the Unions' most far-reaching demand that the Board's remedy "extend" the term of the Competitiveness Agreement by twenty months. The majority observed that "such an extraordinary remedy would constitute an impermissible change in the substantive terms of the [Competitiveness Agreement]."

**9. *Actual Closure After Competitiveness Agreement Expired.*** The Board's eventual decision in 2000 sustaining the Unions' charge and most of their proposed "remedy" ignored the fact that AlliedSignal did not act upon the 1995 closure announcement. Instead, the Company continued to operate the plant until *after* the ALJ rendered his decision in April 1997 and until *after* the Competitiveness Agreement expired by its terms in June 1997.

The Competitiveness Agreement was scheduled to expire according to its terms (along with the general collective bargaining agreement and the Effects Bargaining Agreement) in June 1997. As reflected in the record of a parallel case involving the Effects Bargaining Agreement (before the Court in No. 00-1071), in early 1997 AlliedSignal offered to bargain about the *decision* actually to terminate operations; the parties then engaged in bargaining but failed to arrive at a replacement agreement. AlliedSignal did not discontinue its operations at SAEP until late 1997. *AlliedSignal II*, slip op. 10.

## SUMMARY OF ARGUMENT

If the Court agrees with AlliedSignal's arguments in No. 00-1170, the Board's finding of an unfair labor practice will have to be set aside. That ruling will moot the Union's contention in this case that the Board's remedy did not go far enough.

If the Court reaches the question posed by the Union here, the answer to that question is easy. The law of this Circuit bars the Union's demand for *extending* the term of the Competitiveness Agreement. The Board is simply not empowered to force parties to submit to contractual terms to which they have not agreed, and this principle prohibits the Board from extending the term of a collective bargaining agreement beyond the agreement's expiration date. *Hyatt Management Corp. of New York, Inc. v. National Labor Relations Board*, 817 F.2d 140 (D.C. Cir. 1987).

Moreover, as the Board recognized, such a "remedy" would be particularly inappropriate and unnecessary here. AlliedSignal actually continued to operate the plant until after the Competitiveness Agreement expired. Thus, the Unions's

members have already received the “work protection” benefits of the Agreement for its full term.

## **ARGUMENT**

### **I. THE COURT NEED NOT ADDRESS THE UNION’S PETITION, IF THE COURT SUSTAINS THE CHALLENGE TO THE BOARD’S DECISION FINDING AN UNFAIR LABOR PRACTICE.**

In its Brief for Petitioner in No. 00-1170 (“*AlliedSignal I*”), AlliedSignal explains why the Court should set aside the Board’s ruling that AlliedSignal committed an unfair labor practice. In sum, the Board erred (1) in holding that AlliedSignal had a *further* obligation to bargain over its decision to discontinue operations at SAEP after the Government decided to close the plant, even though the Competitiveness Agreement negotiated by the parties specifically allowed the employer to “terminate” the contract, if the Government ceased to provide funding that AlliedSignal considered “adequate” to support the “future” of the plant; (2) in applying discredited “clear and unmistakable waiver” analysis rather than the controlling “contract coverage” and “sound arguable basis” standards; (3) in applying its own erroneous interpretation of the Agreement and holding that the alleged breach of contract constituted an unfair labor practice; and (4) in arbitrarily ordering AlliedSignal to restore terminated plant operations and to

return transferred work and equipment, even though production had ceased several years earlier.

Thus, as explained in No. 00-1170, the Board's ruling that AlliedSignal committed an unfair labor practice is unsustainable. Moreover, the remedy ordered by the Board — the reopening of a military base from which the Government has withdrawn funding — is so arbitrary, punitive, and inconsistent with the reasonable objectives of Congress and the Department of Defense that it cannot be enforced. See *Southern S.S. Co. v. National Labor Relations Board*, 316 U.S. 31, 47 (1942), and *Capital Cleaning Contractors, Inc. v. National Labor Relations Board*, 147 F.3d 999, 1009 (D.C. Cir. 1998) (holding that Board order must be purely remedial, not punitive). See also *Dorsey Trailers, Inc. v. National Labor Relations Board*, Nos. 99-1390, 99-1561, \_\_\_ F.3d \_\_\_, 2000 WL 1769450 (4<sup>th</sup> Cir. Dec. 1, 2000) (“Restoration orders to reopen a facility are presumptively suspect given the substantial cost in both human and monetary terms.”); *Coronet Foods, Inc. v. National Labor Relations Board*, 158 F.3d 782, 794-96 (4<sup>th</sup> Cir. 1998) (same).

If the Court finds those arguments persuasive, it will set aside the Board's decision. That will remove the predicate for any “remedy” at all. Thus, the petitioning Union's demand for further affirmative directives will become moot.

If the Court does reach the Union's petition, though, the demand for an extension of the Competitiveness Agreement's term must be rejected.

**II. THE BOARD CORRECTLY UNDERSTOOD THAT IT IS NOT AUTHORIZED TO CHANGE THE SUBSTANTIVE TERMS OF THE COMPETITIVENESS AGREEMENT BY EXTENDING THE AGREEMENT BEYOND ITS STATED EXPIRATION DATE.**

As the Board recognized, extending the term of the Competitiveness Agreement as requested by the Unions would constitute an impermissible change in the Agreement's substantive terms. The Supreme Court held in 1970 that the Board's remedial authority does not allow it to order a party to accept a contractual term to which it has not agreed. *H.K. Porter Co. v. National Labor Relations Board*, 397 U.S. 99, 102, 107-109 (1970).

In *Hyatt Management Corp. of New York, Inc. v. National Labor Relations Board*, 817 F.2d 140, 143 (D.C. Cir. 1987), this Court held that the principle enunciated in *H.K. Porter* bars the extension of the term of a contract past its expiration date:

“The Act does not authorize the Board to compel a party to agree to a particular contract term, and an agreement's expiration date is certainly a ‘contract term.’”

In *Hyatt*, the union and the employer had reached final accord on the terms of a three-year collective bargaining agreement and had agreed that the company

would prepare a final draft for the union's signature. When the company did so, however, the union refused to sign it, instead proposing several substantive changes. The employer filed unfair labor practice charges. 817 F.2d at 141. The terms of the agreement were not implemented pending the resolution of the charges. *Ibid.* The Board found that the union had violated Section 8(b)(3) of the Act by refusing to execute the agreed-upon contract, and ordered the union to sign the agreement. *Ibid.*

By the time the Board issued its order, however, two and a half years had elapsed since the date of the agreement. Accordingly, the collective bargaining agreement had only six months left in its term. The employer argued that the agreement's term should be extended by two and a half years in order "to give the employer the benefit of a full three-year agreement." *Id.* at 142. But the Board refused to order that the agreement be extended to run for three years from the date of belated execution. It held that such a remedy "would give the parties contractual terms for which they never bargained, for it would apply particular wages, terms, and conditions of employment for a period of time different from that during which the parties intended those wages, terms, and conditions to apply." *Ibid.* (citation and quotation marks omitted). Because the remedy would "compel the Union to abide by a contract term to which it had never agreed — that

is, a ‘1989’ expiration date — [it] was therefore foreclosed by the Supreme Court’s holding in *H.K. Porter Co.*” *Ibid.*

This Court agreed and denied the employer’s petition for review. As Chief Judge Edwards explained:

“It is an elementary principle of law under the NLRA that the Board has no power to issue an order imposing a substantive contract term not actually agreed upon. In the instant case, the Board found that the unexecuted contract specified that the Agreement would commence on January 1, 1984, and expire on December 31, 1986. That is, by its express terms the contract was to run for the period of time between those two dates, and not for an unspecified three-year period commencing on the date of execution. . . . Whether the parties would have agreed to such conditions for the new period — a period with economic conditions and outlooks different from those existing during the original period — is something we cannot say. . . . The Act does not authorize the Board to compel a party to agree to a particular contract term, and an agreement’s expiration date is clearly a ‘contract term.’ Thus, the Board in this case could hold the Union only to the exact terms of the exact contract to which the Union had agreed.” *Id.* at 143 (citations and quotation marks omitted).

Other courts have reached similar conclusions. See, e.g., *Clearwater Finishing Co. v. National Labor Relations Board*, 670 F.2d 464, 468 (4<sup>th</sup> Cir. 1982) (Board had no authority to order employer to grant a wage increase retroactively, because it could not dictate terms of collective bargaining agreement); *East Bay Chevrolet v. National Labor Relations Board*, 659 F.2d 1006, 1009 (9<sup>th</sup> Cir. 1981) (NLRB had no authority to “prescribe[] a substantive

provision, the effective date of the contract, in a collective bargaining agreement”); *Trustees of Boston University*, 228 NLRB 1009 (1977) (Board had no power to grant retroactivity of certain contract terms, because it could not establish the effective date of the contract), *enfd*, 575 F.2d 301 (1<sup>st</sup> Cir. 1978), vacated on other grounds, 445 U.S. 912 (1980).<sup>1</sup>

This Court’s ruling in *Hyatt* controls this case. AlliedSignal and the Unions negotiated a Competitiveness Agreement with a three-year term, which ran from June 1994 until June 1997. That specific and limited period was a matter of great importance and must be viewed as a “substantive” term of the agreement. The Competitiveness Agreement was only to govern the parties’ relationship for a maximum of three years during the transitional period following AlliedSignal’s proposed acquisition of the Stratford facility. If the Board were to resurrect a contract the parties agreed to have expire in 1997 and instead to impose it on them

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<sup>1/</sup> Before the Board, the local Unions argued that an extension of the Competitiveness Agreement’s term was authorized by *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785 (1962). The petitioning Union has dropped this argument before this Court, evidently recognizing that it is not persuasive. *Mar-Jac* holds that, where an employer refuses to bargain with a newly constituted union during the first year of its certification (in violation of the rule that a valid certification must be honored for one year), the Board will grant the union a new one-year certification period from the date on which bargaining begins. Subsequent cases have held that the rule announced in *Mar-Jac* relates *only* to the certification period. See, e.g., *Air-Vac Indus.*, 282 NLRB 703, 712 (1987).

well into the new millennium, it would be an extraordinary usurpation of the parties' right to negotiate contract terms and would thwart their expressed intent. The Board, therefore, rightly refused to extend the period of that Agreement.

The underlying rationale for the *Hyatt* rule applies with special force here. In *Hyatt's* words, the "economic conditions and outlooks" prevailing at the time of the Board's decision — on April 12, 2000 — were vastly different from those in place when the parties negotiated the Competitiveness Agreement six years earlier and fixed three years as the outer limit on the Agreement. In 1994, Stratford was a functioning military facility busily engaged in manufacturing and servicing the AGT-1500 tank engine as its principal product. The plant was receiving tens of millions of dollars a year from the Government. Those funds effectively subsidized the sprawling plant's massive overhead and made it conceivable that the plant also could produce civilian engines on a competitive basis.

Years ago, however, the Government pulled the plug on this vital support, abandoning the AGT-1500 engine, refusing to provide any annual subsidy to maintain the plant in a "standby" mode, and actually ordering it closed as a military facility. The Government implemented that closure decision years ago and treats the closure as final and complete. See 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 (reporting that the closure of SAEP has been completed).

Nothing in the Agreement suggested that AlliedSignal was committing to stay in Stratford for an indefinite period beyond June 1997, regardless of intervening developments. Indeed, the explicit purpose of the Competitiveness Agreement was to preserve AlliedSignal's flexibility to leave Stratford, if the company concluded that the plant could not be operated on a competitive, economically viable basis — and to do so even *during* the three-year term of the Agreement, if the plant no longer received “adequate” government support. Against this backdrop, any attempt by the NLRB to “extend” the term of the Competitiveness Agreement into 2002 or 2003 would have unlawfully imposed on AlliedSignal a contractual obligation to which it never agreed — and to which it never would have agreed.

When the Board is unable to “ascertain with even approximate accuracy . . . what the parties ‘would have agreed to’ if they had bargained in good faith,” it cannot impose a remedy based upon its view of “what the parties ‘should have agreed to.’” *Tiidee Products, Inc.*, 194 NLRB 1234, 1235 (1972) (citation omitted), *aff'd* in relevant part, 502 F.2d 349, 360 (D.C. Cir. 1974). Here, the

record provides no support for concluding that AlliedSignal would have agreed to an extension of the Competitiveness Agreement into 2002, as requested by the Unions. Indeed, the record shows the opposite. Accordingly, the Board lacked the power to impose a contractual term on AlliedSignal that the Company did not negotiate and would not have accepted. The Board properly declined to exceed its authority.

**III. THE UNION MEMBERS RECEIVED THE BENEFIT OF THREE YEARS OF JOB PROTECTION, BECAUSE ALLIEDSIGNAL CONTINUED TO OPERATE THE STRATFORD PLANT UNTIL AFTER THE JUNE 1997 EXPIRATION OF THE COMPETITIVENESS AGREEMENT.**

Under the unequivocal case law set forth in Point II *supra*, the petitioning Union's complaint that it somehow did not receive "the benefit of its bargain" is irrelevant. It is also unfounded. The Unions *actually* obtained the central benefit provided to them in the Competitiveness Agreement and thus lack even a plausible basis for asking that it be "extended." This compelling fact makes it especially unsound to try to evade *Hyatt* in this case.

What the Union ignores is that, despite AlliedSignal's announcement in September 1995 that it *intended* to close Stratford, AlliedSignal *did* operate the plant for the balance of the Agreement's three-year term. Therefore, even if the Board were authorized to extend the term of the Agreement — which it clearly is

not — such a remedy would be particularly inappropriate and unnecessary here.

The Board has characterized the Competitiveness Agreement as a “job protection” agreement intended to secure jobs at the Stratford facility during its three-year term. *AlliedSignal I*, slip op. 1. Even accepting that narrow focus *arguendo*, though, the Stratford employees actually received that protection. As the Board states in its brief, the Union’s members have not been deprived of the benefits of that contractual arrangement:

“They have already received such benefits to the extent that the Stratford plant remained open until after the original expiration date of the CA.” NLRB Br. at 53.

The Union tries to shift the focus, arguing that employees lost the opportunity to try to improve the plant’s productivity. But that opportunity, too, was preserved during the term of the Competitiveness Agreement. The plant was still in operation throughout the term of the Agreement. The Union points to no initiatives that were realistic but frustrated simply because of AlliedSignal *announced* in September 1995 that the federal government’s decisions made closure virtually inevitable. Thus, the petitioning Union’s contention that the “essence of the CA was a 3-year cooperative effort to save the SAEP” misses the point. During that period, the parties did whatever they could to try to save the

plant — by trying to land substantial financial support for its operations — but they failed.

The Union argues that, if AlliedSignal had not announced the proposed termination of the Agreement before its expiration, the parties might have been able to make the plant profitable, and AlliedSignal might therefore have extended the term of the Agreement of its own volition. They make the wild claim that “[t]he record shows that the parties’ joint efforts to improve productivity and competitiveness were bearing fruit” and that “[i]t is not possible to determine with any precision how many more jobs could have been saved had the Employer not . . . canceled the Agreement calling for this cooperative effort.” Union Br. at 15. That theory is not merely speculative; it is flatly contradicted by the historical record. AlliedSignal continued to operate SAEP until June 1997, when the Competitiveness Agreement and the other labor agreements in place at SAEP expired. The Unions *had* the chance to work at improving productivity until June 1997. And of course AlliedSignal had every incentive to pursue any feasible improvements in productivity as long as it was continuing to operate the plant.

But, as the Agreement itself had anticipated, the plant was not economically viable without the substantial government support that both sides failed to secure. The Competitiveness Agreement made manifest the common

understanding that — apart from any feasible increases in worker productivity — massive government subsidies were essential to any effort to make the plant a viable manufacturing site for the long term. And it also recognized that, if the federal government turned off the federal faucet, similarly massive support from state or local governments would be necessary. JX3 p. 7-8. Throughout its brief, however, the Union simply ignores this crucial element of the Agreement: the explicit recognition that multi-million dollar governmental support was required to make the plant viable. That support irrevocably evaporated in 1995.

In sum, as the Board inevitably had to find, the Union’s members already have received the full benefit of the “work protection” aspect of the Competitiveness Agreement. There is no basis in fact, any more than there is in law, for “extending” its term.

Nor could any “extension” now cure the insuperable financial problems that emerged during the term of the Agreement. When the parties failed in their actual and intensive efforts to secure “adequate” government subsidies for the Stratford operation, the plant was doomed. “Extending” the Competitiveness Agreement to deal with a ghost plant would be a quixotic exercise in futility, not just a gross excess of administrative power.

## CONCLUSION

The Union's Petition for Review should be denied.

Respectfully submitted.

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